"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

TRANSFERRED CASE (C) NO. 150 OF 2006

Madras Bar Association …Petitioner(s)

versus

Union of India and another …Respondents

WITH

CIVIL APPEAL NO. 3850 OF 2006

CIVIL APPEAL NO. 3862 OF 2006

CIVIL APPEAL NO. 3881 OF 2006

CIVIL APPEAL NO. 3882 OF 2006

CIVIL APPEAL NO. 4051 OF 2006

CIVIL APPEAL NO. 4052 OF 2006

WRIT PETITION (C) NO.621 OF 2007

TRANSFERRED CASE (C) NO.116 OF 2006

TRANSFERRED CASE (C) NO.117 OF 2006

TRANSFERRED CASE (C) NO.118 OF 2006

WRIT PETITION (C) NO.697 OF 2007

J U D G M E N T

Jagdish Singh Khehar, J.

The Controversy:

1. All the above cases are being disposed of by this common judgment. The issue which arises for consideration before us, in the present bunch of cases,

pertains to the constitutional validity of the National Tax Tribunal Act, 2005 (hereinafter referred to as, the NTT Act). Simultaneously, the constitutional validity of the Constitution (Forty-second Amendment) Act, 1976 has been assailed, by asserting, that the same violates the basic structure of the Constitution of India (hereinafter referred to as, the Constitution), by impinging on the power of "judicial review" vested in the High Court. In the event of this Court not acceding to the aforementioned prayers, a challenge in the alternative, has been raised to various provisions of the NTT Act, which has led to the constitution of the National Tax Tribunal (hereinafter referred to as, the NTT). The NTT, according to the learned counsel for the petitioners, is styled as a quasi-judicial appellate tribunal. It has been vested with the power of adjudicating appeals arising from orders passed by Appellate Tribunals (constituted under the Income Tax Act, the Customs Act, 1962, and the Central Excise Act, 1944). Hitherto before, the instant jurisdiction was vested with High Courts. The pointed issue canvassed in this behalf is, that High Courts which discharge judicial functions, cannot be substituted by an extra-judicial body. Additionally, it is maintained that the NTT in the manner of its constitution undermines a process of independence and fairness, which are *sine qua non* of an adjudicatory authority.

The Historical Perspective:

The Income Tax Legislation, in India:

2(i). Law relating to income tax dates back to 1860, when legislation pertaining to levy of tax on income, was introduced in India for the first time. The original

enactment was replaced by subsequent legislations, enacted in 1865, 1886, 1918 and 1922. The Indian Income Tax Act, 1922 (hereinafter referred to as, the 1922 Act) was brought about, as a result of the recommendations of the All India Tax Committee. The 1922 Act can be described as a milestone in the evolution of direct tax laws in India. Detailed reference needs to be made to the provisions of the 1922 Act.

(ii) After the procedure provided for assessment of tax had run its course, and tax had been assessed, an executive-appellate remedy was provided for, before the Appellate Assistant Commissioner of Income Tax (under Section 30 of the 1922 Act). A further quasi-judicial appellate remedy, from decisions rendered by the first appellate authority, lay before an appellate tribunal (hereinafter referred to as the Appellate Tribunal). Section 33A was inserted by the Indian Income Tax (Amendment) Act, 1941. It provided for a remedy by way of revision before a Commissioner of Income Tax.

(iii) The remedy before the Appellate Tribunal (provided under Section 5A of the 1922 Act, by Section 85 of the Indian Income Tax (Amendment) Act, 1939), was required to be exercised by a bench comprising of one Judicial Member and one Accountant Member. It was permissible for the President of the Appellate Tribunal or any other Member thereof, to dispose of appeals, sitting singly (subject to the condition, that the total income of the assessee, as computed by the assessing officer, did not exceed Rs.15,000/-). It was also open to the President of the Appellate Tribunal to constitute larger benches of three

Members (subject to the condition, that the larger bench would comprise of at least one Judicial Member and one Accountant Member).

(iv) Section 5A of the 1922 Act, laid down the conditions of eligibility for appointment as a Judicial Member - a person who had served on a civil judicial post for 10 years was eligible, additionally an Advocate who had been practicing before a High Court for a period of 10 years, was also eligible. Under the 1922 Act, a person who had practiced in accountancy as a Chartered Accountant (under the Chartered Accountants Act, 1949) for a period of 10 years, or was a Registered Accountant (or partly a Registered Accountant, and partly a Chartered Accountant) for a period of 10 years (under any law formerly enforced), was eligible for appointment as an Accountant Member. Only a Judicial Member could be appointed as the President of the Appellate Tribunal.

(v) Section 67 of the 1922 Act, barred suits in civil courts pertaining to income tax related issues. Additionally, any prosecution suit or other proceedings could not be filed, against an officer of the Government, for an act or omission, in furtherance of anything done in good faith or intended to be done under the 1922 Act.

(vi) The 1922 Act, did not provide for an appellate remedy, before the jurisdictional High Court. The only involvement of the jurisdictional High Court, was under Section 66 of the 1922 Act. Under Section 66, either the assessee or the Commissioner of Income Tax, could move an application to the Appellate Tribunal, requiring it to refer a question of law (arising out of an assessment order) to the jurisdictional High Court. In case of refusal to make such a

reference, the aggrieved assessee or the Commissioner of Income Tax, could assail the refusal by the Appellate Tribunal, before the jurisdictional High Court. A case referred to the High Court under Section 66, was to be heard by a bench of not less than two judges of the High Court (Section 66A of the 1922 Act – inserted by the Indian Income Tax (Amendment) Act, 1926). Section 66 of the 1922 Act, was amended by the Indian Income Tax (Amendment) Act, 1939, whereby the power to make a reference became determinable by the Commissioner of Income Tax (in place of the Appellate Tribunal).

(vii) In exercise of the reference jurisdiction, a question of law, which had arisen in an appeal pending before the Appellate Tribunal, had to be determined by the High Court. After the jurisdictional High Court had answered the reference, the Appellate Tribunal would dispose of the pending appeal in consonance with the legal position declared by the High Court.

3(i) The 1922 Act was repealed by the Income Tax Act, 1961 (hereinafter referred to as, the Income Tax Act). As in the repealed enactment, so also under the Income Tax Act, an order passed by an assessing officer, was assailable through an executive-appellate remedy. The instant appellate remedy, was vested with the Deputy Commissioner (Appeals)/Commissioner (Appeals). The orders appealable before the Deputy Commissioner (Appeals) were distinctly mentioned (in Section 246 of the Income Tax Act). Likewise, the orders appealable before the Commissioner (Appeals) were expressly enumerated (in Section 246A of the Income Tax Act).

(ii) As against the order passed by the executive-appellate authority, a further appellate remedy was provided before a quasi-judicial appellate tribunal (hereinafter referred to as, the Appellate Tribunal, under Section 252 of the Income Tax Act). Section 255(6) of the Income Tax Act provides as under:-

> "6. The Appellate Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the income-tax authorities referred to in section 131, and any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898)."

By a deeming fiction of law, therefore, the Appellate Tribunal was considered as a civil court , dealing with "judicial proceedings".

(iii) To be eligible for appointment as the President of the ITAT, the incumbent had to be a sitting or retired judge of a High Court, with not less than 7 years of service as a judge. Alternatively, the Central Government could appoint a Senior Vice President or a Vice President of the Appellate Tribunal, as its President. It is, therefore apparent, that the Appellate Tribunal was to be comprised of a President, Senior Vice President(s), Vice President(s) and Members.

(iv) The benches of the Appellate Tribunal, under the Income Tax Act (was similar to the one under the 1922 Act), were to be comprised of at least one Judicial Member and one Accountant Member. The authority to constitute benches of the Appellate Tribunal was vested with the President. The composition of the benches under the Income Tax Act, was similar to that postulated under the 1922 Act. When authorized by the Central Government, it

was open to the Appellate Tribunal, to dispose of appeals sitting singly (subject to the condition, that the appeal pertained to a dispute, wherein the concerned assessee's total income was assessed as not exceeding Rs.5 lakhs). The President of the Appellate Tribunal, had the authority to constitute special benches, comprising of three or more Members (one of whom had to be a Judicial Member, and one, an Accountant Member). In case of difference of opinion, the matter was deemed to have been decided in terms of the opinion expressed by the majority.

(v) An assessee or the Commissioner, could move an application before the Appellate Tribunal, under Section 256 of the Income Tax Act, requiring it to make a reference to the High Court on a question of law (arising in an appeal pending before the Appellate Tribunal). In case the prayer made in the application was declined by the Appellate Tribunal, the order (declining the prayer) was assailable before the High Court.

(vi) Section 257 of the Income Tax Act provided for a reference directly to the Supreme Court. The instant reference could be made by the Appellate Tribunal, if it was of the opinion, that the question of law which had arisen before it, had been interpreted differently, by two or more jurisdictional High Courts.

(vii) Section 260A was inserted in the Income Tax Act by the Finance (No. 2) Act, 1998, with effect from 1.10.1998. Under Section 260A, an appellate remedy was provided for, to raise a challenge to orders passed by the Appellate Tribunal. The instant appellate remedy, would lie before the jurisdictional High Court. In terms of the mandate contained in Section 260B of the Income Tax Act, an

appeal before the High Court was to be heard by a bench of not less than two judges. The opinion of the majority, would constitute the decision of the High Court. Where there was no majority, on the point(s) of difference, the opinion of one or more judges of the High Court, was to be sought. Thereupon, the majority opinion of the judges (including the judges who had originally heard the case) would constitute the decision of the High Court.

(viii) A further appellate remedy was available as against a decision rendered by the jurisdictional High Court. The instant appellate remedy was vested with the Supreme Court under Section 261 of the Income Tax Act.

The Customs Legislation, in India:

4(i). The Customs Act, 1962 (hereinafter referred to as, the Customs Act) was enacted to consolidate and amend the law relating to customs. The Customs Act vested the power of assessment of customs duty, with the Deputy Collector of Customs or the Collector of Customs. An executive-appellate remedy was provided under Section 128 of the Customs Act, before a Collector of Customs (where the impugned order had been passed by an officer, lower in rank to the Collector of Customs), and before the Central Board of Excise and Customs (constituted under the Central Boards of Revenue Act, 1963), where the impugned order had been passed by a Collector of Customs. The Board had also been conferred with executive revisional powers (under Section 130 of the Customs Act), to *suo moto,* or on an application of an aggrieved person, examine the record of any proceeding, pertaining to a decision or order under the provisions of the Customs Act. Revisional powers, besides those expressly

vested in the Board (under Section 130 of the Customs Act), were also vested with the Central Government (under Section 131 of the Customs Act).

(ii) By the Finance (No. 2) Act, 1980, Sections 128 to 131 of the original Act were substituted. The power to entertain the first executive-appellate remedy, was now vested with the Collector (Appeals), under Sections 128 and 128A of the Customs Act. On exhaustion of the above remedy, a further quasi-judicial appellate remedy was provided for, under Sections 129 and 129A before the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as, the CEGAT/Appellate Tribunal). CEGAT was also the appellate authority, against orders passed by the Board. With introduction of Service Tax, under Chapter V of the Finance Act, 1994, CEGAT was conferred the jurisdiction to hear appeals in cases pertaining to service tax disputes as well. The Appellate Tribunal is now known as the Customs, Excise and Service Tax Appellate Tribunal – the CESTAT. By Act 22 of 2003, the expression "Gold (Control)" was substituted with "Service Tax" in the definition of the "Appellate Tribunal" (w.e.f. 14.5.2003).

(iii) Section 129 of the Customs Act delineated the constitution of the CEGAT. It was to comprise of as many Judicial and Technical Members, as the Central Government thought fit. The instant provision, also laid down the conditions of eligibility for appointment of Judicial/Technical Members. A Judicial Member could be chosen out of persons, who had held a civil judicial post for at least 10 years, or out of persons who had been in practice as an Advocate for at least 10 years, as also, from out of Members of the Central Legal Service (not below

Grade-I), who had held such post for at least 3 years. A Technical Member could be appointed out of persons, who had been members of the Indian Customs and Central Excise Service (Group A), subject to the condition, that such persons had held the post of Collector of Customs or Central Excise (Level I), or equivalent or higher post, for at least 3 years. The Finance (No.2) Act, 1996 amended Section 129(3) of the Customs Act, whereby it enabled the Central Government to appoint a person to be the President of the Appellate Tribunal. The Central Government could make such appointment, subject to the condition, that the person concerned had been a judge of the High Court, or was one of the Members of the Appellate Tribunal. Likewise, it was open to the Central Government to appoint one or more Members of the Appellate Tribunal to be its Vice President(s).

(iv) Powers and functions of the Appellate Tribunal were to be exercised through benches constituted by its President, from amongst Members of the Appellate Tribunal (in terms of Section 129C of the Customs Act). Each bench was required to be comprised of at least one Judicial Member and one Technical Member. It was open to the President to constitute a special bench of not less than three Members (comprising of at least one Judicial and one Technical Member). The composition of the bench, was modified by an amendment which provided, that a special bench of the Appellate Tribunal was to consist of not less than two Members (instead of three). It was also open to the President and/or Members (as authorized by the President of the Appellate Tribunal) to dispose of appeals, sitting singly, subject to the condition, that the value of goods

confiscated, or the difference in duty involved, or duty involved, or the amount of fine or penalty involved, did not exceed Rs.10,000/- -- the limit was first revised to Rs.50,000/-, then to Rs.1 lakh, later to Rs.10 lakhs, and at present, the same is Rs.50 lakhs. A case involving a dispute where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is the sole or one of the points in issue, must however be heard by a bench comprising of a Judicial and a Technical Member [Section 129C(4)(b)]. In case of difference of opinion on any point(s), the opinion of the majority was to constitute the decision of the Appellate Tribunal. If Members were equally divided, the appeal was to be referred by the President, for hearing on such point(s), by one or more other Members of the Appellate Tribunal. Whereupon, the majority opinion was to be considered as the decision of the Appellate Tribunal. Sub-sections (7) and (8) of Section 129C provided as under:-

> "(7) The Appellate Tribunal shall, for the purposes of discharging its functions, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:-
>
> (a) discovery and inspection;
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> (b) enforcing the attendance of any person and examining him on oath;
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> (c) compelling the production of books of account and other documents; and
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> (d) issuing commissions.
>
> (8) <u>Any proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding</u> within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code 945 of 1860) and the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

It is apparent from the above provision, that by a fiction of law, proceedings before the Appellate Tribunal are treated as judicial proceedings.

(v) The Customs and Excise Revenues Appellate Tribunal Act, 1986 came into force with effect from 23.12.1986. Section 26 of the instant enactment, excluded the jurisdiction of courts except the Supreme Court. Section 28 thereof provided as under:-

> "28. Proceedings before the Appellate Tribunal to be judicial proceedings – All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code (45 of 1860)."

A perusal of the above amendment reveals, that by a fiction of law, the Appellate Tribunal was deemed to be discharging "judicial proceedings". Therefore, the position prevailing prior to the amendment, was maintained, so far as the instant aspect was concerned.

(vi) Just as in the case of the 1922 Act, which did not provide for an appellate remedy, but allowed a reference to be made to a jurisdictional High Court, under Section 66, likewise, Section 130 of the Customs Act provided for a reference on a question of law, to the High Court. A reference could be made, on an application by the Collector of Customs or the person on whom customs duty has been levied, to the Appellate Tribunal. If the Appellate Tribunal refused to make a reference, the aggrieved party could assail the determination of the Appellate Tribunal, before the jurisdictional High Court. Where a reference on a question of law was entertained, it had to be heard by a bench of not less than two judges of the High Court. In case of difference of opinion on any point(s), the opinion

expressed by the majority, was to be treated as the decision of the High Court. Where the opinion was equally divided, on the point(s) of difference, the matter was to be heard by one or more other judges of the High Court. Thereupon, the majority opinion of the judges (including the judges who had originally heard the case) would constitute the decision of the High Court. A decision of the High Court, would then be applied by the Appellate Tribunal, for the disposal of the appeal wherefrom the reference had arisen.

(vii) The Appellate Tribunal was also authorized to make a reference directly to the Supreme Court (under Section 130A of the Customs Act). This could be done, in case the Appellate Tribunal was of the view, that there was a conflict of decisions of High Courts in respect of a question of law pending before it for decision. The decision of the Supreme Court, would then be applied by the Appellate Tribunal, for the disposal of the appeal out of which the reference had arisen.

(viii) The Finance (No. 32) Act, 2003 introduced a new Section 130. The remedy of a reference to the jurisdictional High Court, was substituted by a remedy of an appeal to the High Court. The amended Section 130 of the Customs Act provided, that an appeal would lie to the High Court from every order passed by the Appellate Tribunal (on or after 1.7.2003), subject to the condition, that the High Court was satisfied, that the case involved a substantial question of law. In such an eventuality, the High Court would formulate the substantial question(s) of law. It was open to the High Court in exercise of its instant appellate jurisdiction, also to determine any issue which had not been

decided by the Appellate Tribunal, or had been wrongly decided by the Appellate Tribunal. The appeal preferred before the High Court, could be heard by a bench of not less than two judges.

(ix) After amendment to Section 130, Section 130E was also amended. The latter amended provision, provided for an appeal to the Supreme Court, from a judgment of the High Court, delivered on an appeal filed under Section 130, or on a reference made under Section 130 by the Appellate Tribunal (before 1.7.2003), or on a reference made under Section 130A.

(x) The NTT Act omitted Sections 130, 130A, 130B, 130C and 130D of the Customs Act. The instant enactment provided for an appeal from every order passed by the Appellate Tribunal to the NTT, subject to the condition, that the NTT arrived at the satisfaction, that the case involved a substantial question of law. On admission of an appeal, the NTT would formulate the substantial question of law for hearing the appeal. Section 23 of the NTT Act provided, that on and from the date, to be notified by the Central Government, all matters and proceedings including appeals and references, pertaining to direct/indirect taxes, pending before the High Court, would stand transferred to the NTT. Section 24 of the NTT Act provides for an appeal from an order passed by the NTT, directly to the Supreme Court.

<u>The Central Excise Legislation, in India:</u>

5(i). The Central Excise and Salt Act, 1944 (hereinafter referred to as, the Excise Act) was enacted to consolidate and amend, the law related to central duties on excise, and goods manufactured and produced in India, and to salt.

Under the said enactment, the power to assess the duty, was vested with the Assistant Collectors of Central Excise, and Collectors of Central Excise. An executive-appellate remedy was provided for under Section 35 before the Commissioner (Appeals).

(ii) The Board was vested with revisional jurisdiction. Revisional jurisdiction was additionally vested with the Central Government. In 1972, the Board was empowered under Section 35A of the Excise Act, to exercise the power of revision, from a decision/order/rule made/passed, under the Excise Act, subject to the condition, that no revision would lie under the instant provision, as against an appellate order passed under Section 35 of the Excise Act, by the Commissioner (Appeals). The Central Government was vested with revisional jurisdiction against appellate orders passed by the Commissioner (Appeals) under Section 35. In 1978, the revisional jurisdiction which hitherto before lay with the Board, was vested with the Collector of Central Excise.

(iii) On the exhaustion of the first executive-appellate remedy, a further quasi-judicial appellate remedy was provided for, under Section 35B of the Excise Act, to an Appellate Tribunal. The remedy of appeal before the Appellate Tribunal, could be availed of (a) against a decision or order passed by the Collector of Central Excise as an adjudicating authority, (b) against an order passed by the Collector (Appeals) under Section 35A of the Excise Act (as substituted by the Finance (No. 2) Act, 1980), (c) against an order passed by the Board or the Appellate Collector of Central Excise under Section 35 (as it stood before

21.8.1980), and (d) against an order passed by the Board or the Collector of Central Excise under Section 35A (as it stood before 21.8.1980).

(iv) The Appellate Tribunal was to be comprised of such number of Judicial/Technical Members as the Central Government would think fit. Appointment of Judicial Members could only be made from amongst persons who had held a judicial office in India for at least 10 years, or who had been practicing as an Advocate for at least 10 years, or who had been a member of the Indian Legal Service (having held a post in Grade I of the said service, or any equivalent or higher post) for at least 3 years. Only such persons could be appointed as Technical Members who had been, members of the Indian Customs and Central Excise Service, Group A, and had held the post of Collector of Customs or Central Excise (or any equivalent or higher post) for at least 3 years. The Central Government had the power to appoint a person, who was or had been a judge of a High Court, or who was one of the Members of the Appellate Tribunal, as the President of the Appellate Tribunal. The functions of the Appellate Tribunal were to be discharged through benches constituted by its President. The Central Government also had the authority to appoint one or more Members of the Appellate Tribunal as Vice-President(s). Each bench was to consist of at least one Judicial Member and one Technical Member. In case of difference of opinion on any point(s), the opinion of the majority would constitute the decision of the Appellate Tribunal. If the Members of the bench were equally divided, the President was required to refer the disputed opinion for hearing, on the point(s) of difference, by one or more other Members of the Appellate

Tribunal. The majority opinion after such reference, would be the decision of the Appellate Tribunal. It was also permissible for the President, and the Members (authorized by the President) of the Appellate Tribunal, to hear and dispose of appeals, sitting singly (subject to the condition, that the difference in duty or the duty involved, or the amount of fine or penalty involved, did not exceed Rs.10,000/- -- the limit was first revised to Rs.50,000/-, then to Rs.1 lakh, later to Rs.10 lakhs, and at present, the same is Rs.50 lakhs). Similar provision (as in respect of appeals to the Appellate Tribunal under Customs Act) with regard to matters to be heard by a division bench, is enjoined in Section 35D(3)(a) of the Excise Act.

(v) The Customs and Excise Revenues Appellate Tribunals Act, 1986, came into force on 23.12.1986. Section 26 of the instant enactment excluded the jurisdiction of courts except the Supreme Court. Section 14, provided for jurisdiction, powers and authority of the Appellate Tribunal. Section 28 provided as under:-

> "28. Proceedings before the Appellate Tribunal to be judicial proceedings – All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code (45 of 1860)."

A perusal of the above amendment reveals, that by a fiction of law, the Appellate Tribunal was deemed to be discharging "judicial proceedings".

(vi) Section 35G provided for a reference on any question of law, by the Appellate Tribunal, to the High Court. The aforesaid remedy could be availed of by filing an application before the Appellate Tribunal. Such an application could be filed by either the Collector of Central Excise, or the person on whom the

excise duty was levied. A reference, on a question of law, made by the Appellate Tribunal, to the High Court, would be heard by a bench of not less than two judges. On the Appellate Tribunal's refusal to refer a question of law, the aggrieved party could assail the decision of the Appellate Tribunal (declining to make a reference), before the High Court. The jurisdictional High Court, on the acceptance of a reference, would render its decision, on the question of law. In case of difference of opinion, the opinion expressed by the majority would constitute the decision of the High Court. If the opinion by the bench was equally divided, the point(s) of difference were to be heard by one or more other judges of the High Court, whereafter, the opinion expressed by the majority would be treated as the decision of the High Court. The Appellate Tribunal would thereupon, decide the pending appeal, in consonance with the decision rendered by the High Court.

(vii) Section 35H of the Excise Act provided for a reference, by the Appellate Tribunal, directly to the Supreme Court. The instant reference by the Appellate Tribunal, could be made after the Appellate Tribunal had arrived at the conclusion, that the question of law arising for adjudication in an appeal pending before it, was differently interpreted by two or more jurisdictional High Courts. The decision of the Supreme Court, would then be applied by the Appellate Tribunal, to decide the pending appeal. Section 35L provided for appeal to the Supreme Court against the judgment rendered by the High Court (upon a reference made to the High Court by the Appellate Tribunal). The decision of the

Supreme Court would then be applied by the Appellate Tribunal, in the disposal of the appeal pending before it.

(viii) The Finance (No. 32) Act, 2003 substituted Section 35G of the Excise Act and in place of the remedy of reference, the amended provision provided for a direct appeal to the jurisdictional High Court (after the cut-off date, i.e., 1.7.2003). The jurisdictional High Court was to entertain an appeal from an order passed by the Appellate Tribunal, on its being satisfied, that the appeal raised a substantial question of law. In such an eventuality, the High Court would formulate the substantial question(s) of law. It was open to the High Court in exercise of its instant appellate jurisdiction, also to determine any issue which had not been decided by the Appellate Tribunal, or had wrongly been decided by the Appellate Tribunal. The appeal preferred before the High Court, would be heard by a bench of not less than two judges. Section 35L of the Excise Act was also amended. The amended provision provided for an appeal from any judgment of the High Court (in exercise of its appellate jurisdiction under Section 35G of the Excise Act, or on a reference made under Section 35G by the Appellate Tribunal before 1.7.2003, or on a reference made under Section 35H), to the Supreme Court.

(ix) The NTT Act omitted Sections 35G, 35H, 35I and 35J of the Excise Act. The instant enactment provided for an appeal from every order passed by the Appellate Tribunal to the NTT, subject to the condition, that the NTT was satisfied, that the case involved a substantial question of law. On admission of an appeal, the NTT would formulate the substantial question of law, for hearing

the appeal. Section 23 of the NTT Act provided, that on and from the date to be notified by the Central Government, all matters and proceedings including appeals and references, pertaining to direct/indirect taxes, pending before the jurisdictional High Courts, would stand transferred to the NTT. Section 24 of the NTT Act provided for an appeal from an order passed by the NTT, to the Supreme Court.

Facts leading to the promulgation of the NTT Act:

6. The first Law Commission of independent India was established in 1955 for a three year term under the chairmanship of Mr. M.C. Setalvad, who was also the first Attorney General for India. The idea of constituting a "National Tax Court" was mooted by the first Law Commission in its 12th Report, suggesting the abolition of the existing appellate tribunal, under the framework of the Income Tax Act. It recommended a direct appeal to the High Courts, from orders passed by appellate Commissioners. This recommendation was not accepted.

7. A Direct Taxes Enquiry Committee was set up by the Government of India in 1970, with Mr. K.N. Wanchoo a retired Chief Justice of the Supreme Court of India, as its Chairman. The Enquiry Committee was assigned the following objectives: (1) to recommend ways to check avoidance of tax, through various legal lacunae; (2) to examine the exemptions allowed by tax laws, and evaluate scope of their reduction; and (3) to suggest methods for better tax assessment, and improvements in tax administration. The Wanchoo Committee recommended creation of a "National Court", which would be comprised of

judges with special knowledge of tax laws. The recommendation made by the Wanchoo Committee, was for creation of permanent "Tax Benches" in High Courts, and appointment of retired judges to such benches, under Article 224A of the Constitution. The suggestion was aimed at clearing the backlog of tax cases. The Wanchoo Committee did not suggest the establishment of any separate tax courts as that, according to the Committee, would involve an amendment to the provisions of the Constitution, besides other statutory and procedural changes.

8. Another Direct Tax Laws Committee was constituted in 1977, under the chairmanship of Mr. N.K. Palkhivala, an eminent jurist. The Committee was later headed by Mr. G.C. Choksi. The Committee was constituted, to examine and suggest legal and administrative measures, for simplification and rationalization of direct tax laws. The Choksi Committee recommended the establishment of a "Central Tax Court" with an all-India jurisdiction. It was suggested, that such a court be constituted under a separate statute. Just like the recommendations of the Wanchoo Committee, the recommendations of the Choksi Committee also necessitated amendments in the provisions of the Constitution. As an interim measure to the above recommendation, the Choksi Committee suggested, the desirability of constituting "Special Tax Benches" in High Courts, to deal with the large number of pending tax cases, by continuous sitting throughout the year. It was also suggested, that judges who sit on the "Special Tax Benches", should be selected from those who had special knowledge, to deal with matters relating to direct tax laws. The Choksi Committee recommended, that the judges selected for the "Special Tax Benches" would be transferred to the "Central Tax Court", as

and when the same was constituted. It is, therefore apparent, that according to the recommendations of the Choksi Committee, the "Central Tax Court" was to comprise of judges of High Courts, or persons qualified to be appointed as High Court Judges. The recommendations of the Choksi Committee reveal, that the suggested "Central Tax Court" would be a special kind of High Court, to deal with issues pertaining to direct tax laws. This was sought to be clarified in paragraph 6.22 of the Choksi Committee's Report.

9. None of the recommendations referred to hereinabove were implemented, till a similar recommendation was again mooted in the early 1990s. After deliberating on the issue for a few years, the Union of India promulgated the National Tax Tribunal Ordinance, 2003. The Ordinance inter alia provided, for the transfer of appellate jurisdiction (under direct tax laws) vested in High Courts, to the NTT. After the Ordinance lapsed, the National Tax Tribunal Bill, 2004 was introduced. The said Bill was referred to a Select Committee of the Parliament. The Select Committee granted a personal hearing to a variety of stakeholders, including the representatives of the Madras Bar Association (i.e., the petitioner before this Court in Transferred Case (C) no. 150 of 2006). The Committee presented its report on 2.8.2005. In its report, it suggested serious reservations on the setting up of the NTT. The above Bill was presented before the Lok Sabha in 2005. The Bill expressed four main reasons for setting up the NTT: (1) to reduce pendency of huge arrears, that had mounted in High Courts all over the country, (2) huge tax recovery was statedly held up, in tax litigation before various High Courts, which directly impacted implementation of national

projects/welfare schemes of the Government of India, (3) to have a uniformity in the interpretation of tax laws. In this behalf it was suggested, that different opinions were expressed by different High Courts on identical tax issues, resulting in the litigation process being tied up in higher Courts, and (4) the existing judges dealing with tax cases, were from civil courts, and therefore, were not well-versed to decide complicated tax issues.

The issues canvassed on behalf of the petitioners:

10. The submissions advanced on behalf of the petitioners, for purposes of convenience, deserve to be examined from a series of distinct and separate perspectives. Each perspective is truly an independent submission. It is, therefore necessary, in the first instance, to clearly describe the different submissions, advanced at the hands of the learned counsel for the petitioners. The same are accordingly being delineated hereunder:-

The first contention: That the reasons for setting up the NTT, were fallacious and non-existent. Since the foundational basis is untrue, the structure erected thereupon, cannot be accepted as valid and justified. And therefore, the same is liable to be struck down.

The second contention: It is impermissible for the legislature to abrogate/divest the core judicial appellate functions, specially the functions traditionally vested with the High Court. Furthermore, the transfer of such functions to a quasi-judicial authority, devoid of essential ingredients of the superior court, sought to be replaced was constitutionally impermissible, and was liable to be set aside. Besides the appellate jurisdiction, the power of judicial review vested in High

Courts under Articles 226 and 227 of the Constitution, has also been negated by the NTT Act. And therefore, the same be set aside.

The third contention: Separation of powers, the rule of law, and judicial review, constitute amongst others, the basic structure of the Constitution. Article 323B inserted by the Constitution (Forty-second Amendment) Act, 1976, to the extent it is violative of the above mentioned components of the basic structure of the Constitution, is liable to be declared *ultra vires* the Constitution.

The fourth contention: A number of provisions including Sections 5, 6, 7, 8 and 13 of the NTT Act, undermine the independence of the adjudicatory process vested in the NTT, and as such, are liable to be set aside in their present format.

11. We shall now narrate each of the above contentions advanced by the learned counsel for the petitioners, in the manner submissions were advanced before us.

<u>The first contention:</u>

12. As regards arrears of tax related cases before High Courts is concerned, it was submitted, that the figures indicated by the Department were incorrect. In this behalf it was asserted, that the stance adopted at the behest of the Revenue, that there were about 80,000 cases pending in different courts, was untrue. It was the emphatic contention of the learned counsel for the petitioners, that as of October, 2003 (when the National Tax Tribunal Ordinance, was promulgated), the arrears were approximately 29,000. Of the total pendency, a substantial number was only before a few High Courts, including the High Court of Bombay and the High Court of Delhi. In the petition filed by the Madras Bar Association, it

was asserted, that in the Madras High Court, the pending appeals under Section 260A of the Income Tax Act, were less than 2,000. It was also sought to be asserted, that the pendency of similar appeals in most southern States was even lesser. It was pointed out, that the pendency of such appeals in the High Court of Karnataka and the High Court of Kerala, was even lesser than 2,000.

13. In respect of the Revenue's assertion, that huge tax recovery was held up, in tax litigation, before High Courts, it was submitted, that the figures projected at the behest of the Department were incorrect. It was pointed out, that according to the Revenue, the pending cases in the High Courts involved an amount of approximately Rs.80,000 crores (relatable to direct tax cases). It was submitted, that the figures projected by the Department, included not only the basic tax, but interest and penalty imposed thereon, as well. It was pointed out, that interest could be as high as 40% per annum, under tax statutes, besides penal interest. It was accordingly sought to be canvassed, that if the main appeals were set aside by the High Court, there would hardly be any dues payable to the Government at all. Additionally, it was sought to be asserted, that many tax appeals pending before the High Courts, were filed by assessees, and accordingly, in the event of the assessees succeeding, the amount could not be considered as having been held up, but may have to be refunded. It was further asserted, that in most cases, the Revenue was able to recover a substantial amount from the assessees, by the time the matter reached the High Court (on account of pre-deposits). It was, therefore sought to be submitted, that the

figures indicated by the Revenue, with reference to the amount of tax held up in pending cases, before High Courts was wholly flawed and deceptive.

14. It was also the contention of the learned counsel for the petitioners, that the mere establishment and creation of the NTT, would not result in uniformity of decisions pertaining to tax laws. In this behalf it was sought to be asserted, that just as in the manner two High Courts could differ with one another, so also, could two tax benches, of the NTT. On the factual front, it was pointed out, that divergence of opinion in High Courts was very rare. It was, as a matter of approximation, suggested, that in most cases (approximately 99%), one High Court would follow the view taken by another High Court. Learned counsel, however pointed out, that in High Courts an age-old mechanism, to resolve conflicts of views, by either placing such matters before larger benches, or before a higher court, was in place. Pointing out illustratively to the ITAT and the CESTAT, it was asserted, that there had been many cases of divergence of opinion, which were resolved by larger benches. It was, therefore sought to be canvassed, that the instant basis for constituting the NTT, was also not based on a prudent or sensible rationale.

15. On the subject of High Court Judges being not well-versed to determine complicated interpretation of tax-law related issues, it was submitted, that the very mention of the above as a basis, for creating the NTT, was extremely unfortunate. It was submitted, that well before the independence of this country, and even thereafter, High Courts have been interpreting and construing tax related disputes, in a legitimate, tenable and lawful manner. The fairness and

rationale of tax related issues, according to learned counsel, was apparent from the faith reposed in High Courts both by the Revenue, as well as, by the assessees. Furthermore, the veracity and truthfulness, of the instant assertion, according to the learned counsel, could be gauged from the fact, that interference by the Supreme Court, in the orders passed by the High Courts on tax matters, has been minimal.

16. During the course of hearing, our attention was also invited to the fact, that the legislations of the instant nature would have a lopsided effect. In this behalf it was sought to be pointed out, that while jurisdiction vested in High Courts was being excluded, the burden was being transferred to the Supreme Court of India. This assertion was sought to be substantiated by the learned counsel for the petitioners, by inviting our attention to the legislations, wherein the power of judicial review traditionally vested in the High Courts, has been excluded, and a remedy of appeal has been provided from the tribunals constituted directly to the Supreme Court. In this behalf, reference may illustratively be made to the following provisions:-

(i) The Electricity Act, 2003

125. Appeal to Supreme Court - Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

(ii) The National Green Tribunal Act, 2010

Section 22. Appeal to Supreme Court – Any person aggrieved by any award, decision or order of the tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908)

Provided that the Supreme Court may, entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal.

(iii) The Telecom Regulatory Authority of India Act, 1997

Section 18. Appeal to Supreme Court – (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that code.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(iv) The Securities and Exchange Board of India Act, 1992

Section 15Z. Appeal to Supreme Court. – Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out to such order:

Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

(v) Companies Act, 1956

Section 10GF. Appeal to Supreme Court. – Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

17. It was also pointed out, that the enactment of the NTT Act *per se* lacks bonafides. In this behalf the contention of the learned counsel for the petitioner was, that there is a Parliamentary convention that if a Select Committee rejects a Bill, it is normally not passed by the Parliament. At the very least, the reservations expressed by the Select Committee are taken into account, and the Bill in question is appropriately modified. It was submitted, that the bill under reference was presented before the Lok Sabha on 29.11.2005, and the same was passed without making a single amendment.

18. It was, therefore, the vehement contention of the learned counsel for the petitioners, that the foundational facts being incorrect, and the manner in which the bill was passed, being devoid of bonafides, the legislation itself i.e., the NTT Act, deserved to be set aside.

<u>The second contention:</u>

19. It was the emphatic contention of the learned counsel for the petitioners, that it was impermissible for the legislature to abrogate/divest the core judicial appellate functions traditionally vested with the High Court, and to confer/vest the same, with an independent quasi-judicial authority, which did not even have the basic ingredients of a superior Court, like the High Court (whose jurisdiction is sought to be transferred). In conjunction with the instant contention, it was also the submission of the learned counsel, that the jurisdiction vested in the High Courts under Articles 226 and 227 of the Constitution, is not only in respect of the rightful implementation of statutory provisions, but also of supervisory jurisdiction, over courts and tribunals, cannot be curtailed under any circumstances.

20. In order to supplement the instant contention, learned counsel also placed reliance on Article 225 of the Constitution which is being extracted hereunder:-

> "225. Jurisdiction of existing High Courts - Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:
>
> Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

Inviting the Court's attention to the proviso to Article 225 of the Constitution it was submitted, that the original jurisdiction of High Courts on matters pertaining to revenue or the collection thereof, even if considered as barred, the said bar was ordered to be expressly done away with, by the proviso to Article 225 of the Constitution. In the present context, learned counsel for the petitioners invited our attention to Section 226(1) of the Government of India Act, 1935. The said Section is reproduced hereunder:-

> "226(1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original Jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It was submitted, that under the above statutory provision, a High Court could not issue a writ in the nature of mandamus, to call upon a Revenue authority to discharge its statutory obligations, in respect of the assessment of tax. Likewise,

it was not open to the High Court, to issue a writ in the nature of certiorari or certiorarified mandamus, in order to set aside or modify an order of assessment, passed in violation of or in contravention of any statutory provision(s). It was submitted, that the proviso to Article 225 of the Constitution, as has been extracted hereinabove, was omitted by the Constitution (Forty-second Amendment) Act, 1976 (with effect from 1.2.1977). It was, however pointed out, that the Parliament having realized its mistake, restored the proviso to Article 225 of the Constitution, as was originally enacted by the Constitution (Forty-fourth Amendment) Act, 1978 (with effect from 20.6.1979). Thus viewed, according to the learned counsel for the petitioners, under the provisions of the Constitution, prevailing at the present juncture, the original jurisdiction of the High Court (i.e., the jurisdiction under Articles 226 and 227 of the Constitution), as also, the law administered by a High Court at the time of enactment of the Constitution, cannot be restricted. Accordingly, it was asserted, that on matters pertaining to revenue or the collection thereof, the adjudication authority of High Courts, could not be curtailed.

21. Articles 226 and 227 of the Constitution, on which emphatic reliance has been placed by the learned counsel, are being reproduced hereunder:-

> "226. Power of High Courts to issue certain writs –
> (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without –

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

227. Power of superintendence over all courts by the High Court –

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may -

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

> (4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

It was submitted, that the above original jurisdiction vested in the High Court to issue prerogative writs, has been shown to have been consciously preserved, for matters pertaining to levy and collection of tax. It was also submitted, that the enactment of the NTT Act has the clear and explicit effect, of excluding the jurisdiction of the High Courts. This was sought to be explained by indicating, that the jurisdiction to adjudicate appeals, traditionally determined by jurisdictional High Courts, from orders passed by Appellate Tribunals under the Income Tax Act, the Customs Act and the Excise Act (all taxing legislations) have been taken out of the purview of the High Courts, and have been vested with the NTT, by the NTT Act. It was further submitted, that even the jurisdiction vested in High Courts under Articles 226 and 227 of the Constitution, has been practically done away with. In this behalf the explanation was, that by providing for an appellate remedy against an order passed by the NTT, directly to the Supreme Court, the above original jurisdiction of the High Courts, had practically been frustrated and effectively neutralized. It is pointed out, that the curtailment of the jurisdiction of the High Courts under Articles 226 and 227 of the Constitution, must be viewed as submission, distinct and separate from the one emerging out of the substitution of, the jurisdiction of the High Courts under Section 260A of the Income Tax Act, 1961, Section 130 of the Customs Act, and Section 35G of the Excise Act. Whilst the former contention is based on a clear constitutional right, the submission based on the provisions of the taxing statutes,

emerges from a well accepted constitutional convention, coupled with the clear intent expressed in the proviso to Article 225 of the Constitution.

22. In order to support the second contention advanced by the petitioners, the following decisions were relied upon:

(i) Reliance was first of all, placed on the decision of the Privy Council in Hinds v. The Queen Director of Public Prosecutions v. Jackson Attorney General of Jamaica (Intervener), 1976 All ER Vol. (1) 353. The factual/legal position which arose for determination in the cited case pertained to the Gun Court Act, 1974, enacted by the Parliament of Jamaica. The aforesaid enactment was made, without following the special procedure prescribed by Section 49 of the Constitution of Jamaica (to alter the provisions of the Constitution of Jamaica). The Gun Court Act, 1974, had the effect of creating a new Court – "the Gun Court", to sit in three different kinds of divisions: A Resident Magistrate's Division, a Full Court Division and a Circuit Court Division. One or the other of these divisions, was conferred with the jurisdiction to try, different categories of offenders of criminal offences. Prior to the passing of the Act, and at the date of coming into force of the Constitution, these offences were cognizable only before a Resident Magistrate's Court, or before the Circuit Court of the Supreme Court of Jamaica. The Gun Court Act, 1974, also laid down the procedure to be followed (in each of the divisions). For certain specified offences relating to unauthorized possession, acquisition or disposal of firearms and ammunition, "the Gun Court" was required to mandatorily impose a sentence of detention on hard labour. A detenue could only be discharged, at the direction of the

Governor-General, acting in accordance with the advice of the Review Board. The Review Board was a non-judicial body under the Gun Court Act, 1974.

Lord Diplock while recording the majority view in Hinds case (supra), observed as under:-

> "…..In seeking to apply to the interpretation of the Constitution of Jamaica what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is nonetheless a necessary implication from the subject-matter and structure of the constitution and the circumstances in which it had been made. Such caution is particularly necessary in cases dealing with a federal constitution in which the question immediately in issue may have depended in part on the separation of the judicial power from the legislative or executive power of the federation or of one of its component states and in part upon the division of judicial power between the federation and a component state.
>
> Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.

Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and a judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition on the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading - particularly those applicable to taxing statutes as to which it is a well-established principle that express words are needed to impose a charge on the subject.

In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as 'the Westminster model.'

Before turning to those express provisions of the Constitution of Jamaica upon which the appellants rely in these appeals, their Lordships will make some general observations about the interpretation of constitutions which follow the Westminster model.

All Constitutions on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature. The Chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the Constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new Constitution came into force; but the legislature, in the exercise of its power to make laws for the 'peace, order and good government' of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is implicit in

the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution (Liyanage v. R. [1966] 1 All ER 650 at 658, [1967] A.C. 259 at 287, 288).

The more recent constitutions on the Westminster model, unlike their earlier prototypes, include a Chapter dealing with fundamental rights and freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the Constitution for this purpose, impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers. The remaining Chapters of the Constitutions are primarily concerned not with the legislature, the executive and the judicature as abstractions, but with the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers - their qualifications for legislative, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred on a class of persons acting collectively and the majorities required for the exercise of those powers. Thus, where a constitution on the Westminster model speaks of a particular 'court' already in existence when the Constitution comes into force it uses this expression as a collective description of all those individual judges who, whether sitting alone or with other judges or with a jury, are entitled to exercise the jurisdiction exercised by that court before the Constitution came into force. Any express provision in the constitution for the appointment or security of tenure of judges of that court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the 'court' in which they sit (Attorney-General for Ontario v. Attorney-General for Canada) [1925] A.C. 750.

Where, under a constitution on the Westminster model, a law is made by the Parliament which purports to confer jurisdiction on a court described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of the judicial power does not depend upon the label (in the instant case 'The Gun Court') which the Parliament attaches to the judges when exercising the jurisdiction conferred on them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Does the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature? (Attorney-General for

Australia v. R. and Boilermakers' Society of Australia, [1957] A.C. 288, 309-310).

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…..So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision."

The question examined by the Privy Council in the background of the factual/legal position expressed above, was recorded in the following words:-

"The attack on the constitutionality of the Full Court Division of the Gun Court may be based on two grounds. The first is that the Gun Court Act 1974 purports to confer on a court consisting of persons qualified and appointed as resident magistrates a jurisdiction which under the provisions of Chapter VII of the Constitution is exercisable only by a person qualified and appointed as a judge of the Supreme Court. The second ground is much less fundamental. It need only be mentioned briefly, for it arises only if the first ground fails. It is that even if the conferment of jurisdiction on a Full Court Division consisting of three resident magistrates is valid, section 112 of the Constitution requires that any assignment of a resident magistrate to sit in that division should be made by the Governor-General acting on the recommendation of the Judicial Service Commission and not by the Chief Justice as the 1974 Act provides."

The question was dealt with, by opining as under:-

"Chapter VII of the Constitution, 'The Judicature,' was in their Lordships' view intended to deal with the appointment and security of tenure of all persons holding any salaried office by virtue of which they are entitled to exercise civil or criminal jurisdiction in Jamaica. For this purpose they are divided into two categories: (i) a higher judiciary, consisting of judges of the Supreme Court and judges of the Court of Appeal, and (ii) a lower judiciary, consisting of those described in section 112 (2) , viz.:

'... Resident magistrate, judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and such other offices connected with the courts of Jamaica as, subject to the provisions of this Constitution, may be prescribed by Parliament.'

Apart from the offices of judge and registrar of the Court of Appeal which were new, these two categories embraced all salaried members of

the judiciary who exercised civil or criminal jurisdiction in Jamaica at the date when the Constitution came into force. A minor jurisdiction, particularly in relation to juveniles, was exercised by justices of the peace but, as in England, they sat part-time only, were unpaid and were not required to possess any professional qualification.

Common to both categories, with the exception of the Chief Justice of the Supreme Court and the President of the Court of Appeal, is the requirement under the Constitution that they should be appointed by the Governor-General on the recommendation of the Judicial Service Commission - a body established under section 111 whose composition is different from that of the Public Service Commission and consists of persons likely to be qualified to assess the fitness of a candidate for judicial office.

The distinction between the higher judiciary and the lower judiciary is that the former are given a greater degree of security of tenure than the latter. There is nothing in the Constitution to protect the lower judiciary against Parliament passing ordinary laws (a) abolishing their office (b) reducing their salaries while they are in office or (c) providing that their appointments to judicial office shall be only for a short fixed term of years. Their independence of the good-will of the political party which commands a bare majority in the Parliament is thus not fully assured. The only protection that is assured to them by section 112 is that they cannot be removed or disciplined except on the recommendation of the Judicial Service Commission with a right of appeal to the Privy Council. This last is a local body established under section 82 of the Constitution whose members are appointed by the Governor-General after consultation with the Prime Minister and hold office for a period not exceeding three years.

In contrast to this, judges of the Supreme Court and of the Court of Appeal are given a more firmly rooted security of tenure. They are protected by entrenched provisions of the Constitution against Parliament passing ordinary laws (a) abolishing their office (b) reducing their salaries while in office or (c) providing that their tenure of office shall end before they attain the age of 65 years. They are not subject to any disciplinary control while in office. They can only be removed from office on the advice of the Judicial Committee of Her Majesty's Privy Council in the United Kingdom given on a reference made on the recommendation of a tribunal of inquiry consisting of persons who hold or have held high judicial office in some part of the Commonwealth.

The manifest intention of these provisions is that all those who hold any salaried judicial office in Jamaica shall be appointed on the recommendation of the Judicial Service Commission and that their independence from political pressure by Parliament or by the Executive in the exercise of their judicial functions shall be assured by granting to them such degree of security of tenure in their office as is justified by the importance of the jurisdiction that they exercise. A clear distinction is

drawn between the security of tenure appropriate to those judges who exercise the jurisdiction of the higher judiciary and that appropriate to those judges who exercise the jurisdiction of the lower judiciary.

Their Lordships accept that there is nothing in the Constitution to prohibit Parliament from establishing by an ordinary law a court under a new name, such as the "Revenue Court," to exercise part of the jurisdiction that was being exercised by members of the higher judiciary or by members of the lower judiciary at the time when the Constitution came into force. To do so is merely to change the label to be attached to the capacity in which the persons appointed to be members of the new court exercise a jurisdiction previously exercised by the holders of one or other of the judicial offices named in Chapter VII of the Constitution. In their Lordships' view, however, it is the manifest intention of the Constitution that any person appointed to be a member of such a court should be appointed in the same manner and entitled to the same security of tenure as the holder of the judicial office named in Chapter VII of the Constitution which entitled him to exercise the corresponding jurisdiction at the time when the Constitution came into force.

Their Lordships understand the Attorney-General to concede that salaried judges of any new court that Parliament may establish by an ordinary law must be appointed in the manner and entitled to the security of tenure provided for members of the lower judiciary by section 112 of the Constitution. In their Lordships' view this concession was rightly made. To adopt the familiar words used by Viscount Simonds in Attorney-General of Australia v. R. and Boilermakers' Society of Australia [1957] A.C. 288, 309-310, it would make a mockery of the Constitution if Parliament could transfer the jurisdiction previously exercisable by holders of the judicial offices named in Chapter VII of the Constitution to holders of new judicial offices to which some different name was attached and to provide that persons holding the new judicial offices should not be appointed in the manner and on the terms prescribed in Chapter VII for the appointment of members of the judicature. If this were the case there would be nothing to prevent Parliament from transferring the whole of the judicial power of Jamaica (with two minor exceptions referred to below) to bodies composed of persons who, not being members of 'the Judicature,' would not be entitled to the protection of Chapter VII at all.

What the Attorney-General does not concede is that Parliament is prohibited by Chapter VII from transferring to a court composed of duly appointed members of the lower judiciary jurisdiction which, at the time the Constitution came into force, was exercisable only by a court composed of duly appointed members of the higher judiciary.

In their Lordships' view section 110 of the Constitution makes it apparent that in providing in section 103 (1) that: 'There shall be a Court of Appeal for Jamaica …' the draftsman treated this form of words as carrying with it by necessary implication that the judges of the court required to be

established under section 103 should exercise an appellate jurisdiction in all substantial civil cases and in all serious criminal cases; and that the words that follow, viz. 'which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law,' do not entitle Parliament by an ordinary law to deprive the Court of Appeal of a significant part of such appellate jurisdiction or to confer it on judges who do not enjoy the security of tenure which the Constitution guarantees to judges of the Court of Appeal. Section 110 (1) of the Constitution which grants to litigants wide rights of appeal to Her Majesty in Council but only from 'decisions of the Court of Appeal,' clearly proceeds on this assumption as to the effect of section 103, Section 110 would be rendered nugatory if its wide appellate jurisdiction could be removed from the Court of Appeal by an ordinary law without amendment of the Constitution.

Their Lordships see no reason why a similar implication should not be drawn from the corresponding words of section 97. The Court of Appeal of Jamaica was a new court established under the Judicature (Appellate Jurisdiction) Law 1962 , which came into force one day before the Constitution, viz. on 5 August, 1962. The Supreme Court of Jamaica had existed under that title since 1880. In the judges of that court there had been vested all that jurisdiction in Jamaica which in their Lordships' view was characteristic of a court to which in 1962 the description 'a Supreme Court' was appropriate in a hierarchy of courts which was to include a separate 'Court of Appeal.' The three kinds of jurisdiction that are characteristic of a Supreme Court where appellate jurisdiction is vested in a separate court are: (1) unlimited original jurisdiction in all substantial civil cases; (2) unlimited original jurisdiction in all serious criminal offences; (3) supervisory jurisdiction over the proceedings of inferior courts (viz. of the kind which owes its origin to the prerogative writs of certiorari, mandamus and prohibition).

That section 97 (1) of the Constitution was intended to preserve in Jamaica a Supreme Court exercising this characteristic jurisdiction is, in their Lordships' view, supported by the provision in section 13 (1) of the Jamaica (Constitution) Order in Council 1962, that 'the Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purposes of the Constitution.' This is made an entrenched provision of the Constitution itself by section 21 (1) of the Order in Council, and confirms that the kind of court referred to in the words 'There shall be a Supreme Court for Jamaica' was a court which would exercise in Jamaica the three kinds of jurisdiction characteristic of a Supreme Court that have been indicated above.

If, as contended by the Attorney-General, the words italicised above in section 97 (1) entitled Parliament by an ordinary law to strip the Supreme Court of all jurisdiction in civil and criminal cases other than that expressly conferred upon it by section 25 and section 44, what would be left would be a court of such limited jurisdiction that the label 'Supreme

Court' would be a false description; so too if all its jurisdiction (with those two exceptions) were exercisable concurrently by other courts composed of members of the lower judiciary. But more important, for this is the substance of the matter, the individual citizen could be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

Their Lordships therefore are unable to accept that the words in section 97 (1), upon which the Attorney-General relies, entitle Parliament by an ordinary law to vest in a new court composed of members of the lower judiciary a jurisdiction that forms a significant part of the unlimited civil, criminal or supervisory jurisdiction that is characteristic of a 'Supreme Court' and was exercised by the Supreme Court of Jamaica at the time when the Constitution came into force, at any rate where such vesting is accompanied by ancillary provisions, such as those contained in section 6 (1) of the Gun Court Act 1974 , which would have the consequence that all cases falling within the jurisdiction of the new court would in practice be heard and determined by it instead of by a court composed of judges of the Supreme Court.

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In their Lordships' view the provisions of the 1974 Act, in so far as they provide for the establishment of a Full Court Division of the Gun Court consisting of three resident magistrates, conflict with Chapter VII of the Constitution and are accordingly void by virtue of section 2.

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Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. Whilst none would suggest that a Review Board composed as is provided in section 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to

determine the length of custodial sentences for criminal offences on a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion on any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the executive in the whole field of criminal law.

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Their Lordships would hold that the provisions of section 8 of the Act relating to the mandatory sentence of detention during the Governor-General's pleasure and the provisions of section 22 relating to the Review Board are a law made after the coming into force of the Constitution which is inconsistent with the provisions of the Constitution relating to the separation of powers. They are accordingly void by virtue of section 2 of the Constitution."

(ii) In the same sequence, learned counsel for the petitioners invited our attention to Liyanage v. Reginam, (1966) 1 All ER 650. It is first necessary to record the factual/legal matrix, in the cited judgment. All the 11 appellants in the matter before the Privy Council, were charged with offences arising out of an abortive coup d'e'tat on 27.1.1962. The factum of the said coup d'e'tat, was set out in a White Paper issued by the Government of Ceylon on 13.2.1962. The White Paper gave the names of 13 alleged conspirators including the appellants. The White Paper concluded by observing, that a deterrent punishment of a severe character ought to be imposed, on all those who were guilty. On 16.3.1962, the Criminal Law (Special Provisions) Act, No. 1 of 1962 was passed. It was given retrospective effect from 1.1.1962. It was limited in operation to those who were accused of offences against the State, on or around 27.1.1962. The above Act legalized imprisonment of the appellants, while they were awaiting trial. It modified a section of the Penal Code, so as to enact ex post facto, a new offence, to meet the circumstance of the abortive coup. It altered ex post facto,

the law of evidence, regarding settlements made by an accused, while in custody. It enacted a minimum punishment, accompanied by forfeiture of property, for the offences for which the appellants were tried. Under Section 440A of the Criminal Procedure Code, trial in case of sedition, could be directed to be before three judges without a jury. The instant provision was amended by the above Act, so as to extend the same, to the offences for which the appellants were charged. Under Section 9 of the above Act, the Minister of Justice was empowered to nominate the three judges. In exercise of his powers under Section 9, the Minister of Justice had nominated three judges, to try the appellants without a jury. The Supreme Court upheld the objection raised by the appellants, that Section 9 was ultra vires the Constitution of Ceylon, and that, the nomination was invalid. Thereafter, the Criminal Law Act, No. 31 of 1962 was passed. It repealed Section 9 of the earlier Act. It amended the power of nomination, in that, the power was conferred on the Chief Justice. On appeal by the appellants, against the conviction and sentence from their trial before a Court of three judges nominated under the Act, it was held, that the Criminal Law (Special Provisions) Act, No. 1 of 1962, as well as, the Criminal Law Act, No. 31 of 1962, were invalid for the two reasons. Firstly, under the Constitution of Ceylon, there was a separation of powers. The power of the judicature, while the Constitution stood, could not be usurped or infringed by the executive or the legislature. Secondly, the Criminal Law (Special Provisions) Act, No. 1 of 1962, as well as, the Criminal Law Act, No. 31 of 1962 were aimed at individuals concerned in an abortive coup, and were not legislation effecting criminal law of

general application. Although not every enactment *ad hominem*, and *ex post facto*, necessarily infringed the judicial power, yet there was such infringement in the present case, by the above two Acts. In addition to the above conclusions, it was also held, that the joint effect of the Ceylon Constitution Order in Council 1946, and the Ceylon Independence Act, 1947, was intended to, and resulted in, giving the Ceylon Parliament, full legislative powers of an independent sovereign State. Consequently, the legislative power of the Ceylon Parliament, was not limited by inability to pass laws, which offended fundamental principles of justice. The Privy Council while examining the above controversy, rendered the following opinion:-

> "In Ceylon, however, the position was different. The change of sovereignty did not in itself produce any apparent change in the constituents or the functioning of the Judicature. So far as the courts were concerned their work continued unaffected by the new Constitution, and the Ordinances under which they functioned remained in force. The judicial system had been established in Ceylon by the Charter of Justice in 1833. Clause 4 of the Charter read:
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> > "And to provide for the administration of justice hereafter in Our said Island Our will and pleasure is, and We do hereby direct that the entire administration of justice, civil and criminal therein, shall be vested exclusively in the courts erected and constituted by this Our Charter ... and it is Our pleasure and We hereby declare, that it is not, and shall not be competent to the Governor of Our said Island by any Law or Ordinance to be by him made, with the advice of the Legislative Council thereof or otherwise howsoever, to constitute or establish any court for the administration of justice in any case civil or criminal, save as hereinafter is expressly saved and provided."
>
> Clause 5 established the Supreme Court and clause 6 a Chief Justice and two puisne judges. Clause 7 gave the Governor powers of appointing their successors. There follow many clauses with regard to administrative, procedural and jurisdictional matters. Some half a century later Ordinances (in particular the Courts Ordinance) continued the jurisdiction and procedure of the courts. Thereunder the courts have functioned continuously up to the present day.
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The Constitution is significantly divided into parts - "Part 2 The Governor-General," "Part 3 The Legislature," "Part 4 Delimitation of Electoral Districts," "Part 5 The Executive," "Part 6 The Judicature," "Part 7 The Public Service," "Part 8 Finance." And although no express mention is made of vesting in the judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a Judicial Service Commission which shall not contain a member of either House, but shall be composed of the Chief Justice and a judge and another person who is or shall have been a judge. Any attempt to influence any decision of the Commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses.

These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.

Counsel for the appellants succinctly summarises his attack on the Acts in question as follows. The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. and finally it altered ex post facto the punishment to be imposed on them.

In their Lordships' view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These

alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.

The trial court concluded its long and careful judgment with these words ((1965), 67 CNLR at p. 424):

> "But we must draw attention to the fact that the Act of 1962 radically altered ex post facto the punishment to which the defendants are rendered liable. The Act removed the discretion of the court as to the period of the sentence to be imposed, and compels the court to impose a term of 10 years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property. These amendments were not merely retroactive: they were also ad hoc, applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination. To the courts, which must be free of political bias, treasonable offences are equally heinous, whatever be the complexion of the Government in power or whoever be the offenders."

Their Lordships sympathise with that protest and wholly agree with it.

One might fairly apply to these Acts the words of Chase J., in the Supreme Court of the United States in Calder v. Bull: "These acts were legislative judgments; and an exercise of judicial power."

Blackstone in his Commentaries, Vol. I (4th Edition), p. 44, wrote:

> "Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in General: it is rather a sentence than a law."

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly; But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances; and thus judicial power may be eroded. Such an erosion is contrary to the clear intention of

the Constitution. In their Lordships' view the Acts were ultra vires and invalid.

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It was agreed between the parties that if the Acts were ultra vires and invalid, the convictions cannot stand. Their Lordships have therefore humbly advised Her Majesty that this appeal should be allowed and that the convictions should be quashed."

(iii) Reference was then made to Director of Public Prosecutions of Jamaica v. Mollison, (2003) 2 AC 411. The factual controversy which led to the above cited decision of the Privy Council may be noticed. On 16.3.1994, when Kurt Mollison was merely 16 years old, he committed a murder in furtherance of a robbery. His offence was described as a "capital murder", under the law of Jamaica. After his trial, he was convicted on 21.4.1997, when he was 19 years old. On 25.4.997, he was sentenced under Section 29(1) of the Juveniles Act, 1951, to be detained during the Governor-General's pleasure. On 16.2.2000, although the Court of Appeal refused his prayer for leave to appeal against his conviction, it agreed to examine his contention, whether the sentence imposed on him was compatible with the provisions of the Constitution of Jamaica. The Court of Appeal accepted his contention. The sentence of detention, during the Governor-General's pleasure, was set aside. In its place, he was sentenced to life imprisonment, with the recommendation that, he be not considered for parole till he had served a term of 20 years' imprisonment. In the controversy which came up for consideration before the Privy Council, there were two main issues. Firstly, whether the sentence of detention during the Governor-General's pleasure authorized by Section 29(1), was a power exercised by him in his executive capacity. And secondly, whether the power to determine the measure for

punishment to be inflicted on an offender, is compatible with the Constitution.

The Privy Council, while examining the controversy, opined as under:-

> "Section 29 of the Juveniles Act 1951
>
> [3] Section 3 of the Offences against the Person Act 1864, as amended, provides that every person convicted of capital murder shall be sentenced to death. But special provision has been made for those who commit this crime when aged under 18. Following a number of amendments made pursuant to section 4 of the Jamaica (Constitution) Order in Council 1962 (SI 1962/1500), section 29 of the Juveniles Act 1951 now provides, so far as material to the main issue in this appeal, as follows:
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> > "(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody.
> >
> > (4) The Governor-General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as the Governor-General may direct, and may at any time be revoked or varied by the Governor-General. Where such licence is revoked the person to whom it relates shall return forthwith to such place as the Governor-General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place."
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> [4] Section 29 as originally enacted was amended in 1964 to substitute "Minister" for "Governor" in subsection (1) and "Governor General" for "Governor" in each of the four references originally made to the Governor in subsection (4). In 1975 subsection (1) was further amended to make plain, reversing the effect of Baker v The Queen, [1975] AC 774, [1975] 3 All ER 55, that the statutory prohibition on pronouncement of the death sentence applied to those appearing to be aged under 18 at the time when they had committed the offence, not at the time of sentence. In 1985, the reference to "an adult correctional centre" was substituted for the previous reference to "a prison". The enacted reference to "Her Majesty's pleasure" has not, however, been amended, no doubt because section 68(2) of the Constitution of Jamaica provides that the executive authority of Jamaica may be exercised on behalf of Her Majesty by the Governor-General. In recognition of this constitutional reality, it appears to be the practice where section 29(1) applies, as was done in this case, to call the

sentence one of detention during the Governor-General's pleasure, and in this opinion that usage will be adopted.

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The Constitution

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The first question: is section 29 compatible with the Constitution of Jamaica?

[11] Both the Director and the Solicitor-General, who appeared with him, accepted at the hearing that, subject to their argument based on section 26(8) of the Constitution, section 29 of the Juveniles Act 1951 infringes the rights guaranteed by, and so is inconsistent with, sections 15(1)(b) and 20(1) of the Constitution. Given this concession, rightly made, it is unnecessary to do more than note the reason for it. A person detained during the Governor-General's pleasure is deprived of his personal liberty not in execution of the sentence or order of a court but at the discretion of the executive. Such a person is not afforded a fair hearing by an independent and impartial court, because the sentencing of a criminal defendant is part of the hearing and in cases such as the present sentence is effectively passed by the executive and not by a court independent of the executive.

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[13] .....It does indeed appear that the sentencing provisions under challenge in the Hinds case were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded. There appears to be no reason why (subject to the other arguments considered below) the reasoning in the Hindscase does not apply to the present case. It would no doubt be open to the Board to reject that reasoning, but it would be reluctant to depart from a decision which has stood unchallenged for 25 years, the more so since the decision gives effect to a very important and salutary principle. Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": R (Anderson) v Secretary of State for the Home Department, [2002] 4 All ER 1089, [2002] 3 WLR 1800, at pp. 1821-1822, para 5 of the latter report. In the opinion of the Board, Mr Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive.

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> …..The nature and purpose of the sentence of detention during the Governor-General's pleasure are clear, as explained above. The only question is who should decide on the measure of punishment the detainee should suffer. Since the vice of section 29 is to entrust this decision to the executive instead of the judiciary, the necessary modification to ensure conformity with the Constitution is (as in Browne v The Queen, [2000] 1 AC 45) to substitute "the court's" for "Her Majesty's" in subsection (1) and "the court" for each reference to "the Governor-General" in subsection (4)."

(iv) Our attention was also invited to Harry Brandy v. Human Rights and Equal Opportunity Commission, (1995) 183 CLR 245. The instant judgment was rendered by the High Court of Australia. The factual controversy which led to the above determination is being narrated first. The plaintiff Harry Brandy was engaged as an officer of the Aboriginal and Torres Strait Islander Commission. The third defendant John Bell was also an officer of the said Commission. The plaintiff and the third defendant continued to serve the Commission until the Commission itself ceased to exist. On 13.3.1990, John Bell lodged a complaint with the Human Rights and Equal Opportunity Commission, wherein he alleged, verbal abuse and threatening behaviour on the part of Harry Brandy, while both were in the employment of the Commission. Thereafter, John Bell issued a notice under Section 24 of the Racial Discrimination Act, 1975. And accordingly, the Commissioner referred the complaint to the Commission. The power of the Commission, to hold an enquiry under the Racial Discrimination Act, 1975 against Harry Brandy, was exercised by the second defendant. The second defendant had been appointed under Section 24 of the Racial Discrimination Act, 1975, which empowered the Minister, to appoint a person to perform and discharge the functions of the Commissioner. The second defendant returned

his findings under Section 25Z of the Racial Discrimination Act, 1975 on 22.12.1993. The defendant's complaint was found to be substantiated. In disposing of the controversy, the second defendant required Harry Brandy, the plaintiff, to do the following acts/course of conduct:-

> "(1) that the Plaintiff do apologise to the Third Defendant, the form of the apology being annexed to the determination;
> (2) that the Plaintiff do pay the sum of $2 500 to the Third Defendant by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by the Third Defendant;
> (3) that ATSIC do take disciplinary action against the Plaintiff, in relation to the conduct which he perpetrated against the Third Defendant;
> (4) that ATSIC do apologise to the Third Defendant in relation to the handling of his complaint, the form of the apology being annexed to the determination;
> (5) that ATSIC do pay the sum of $10 000 to the Third Defendant by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by the Third Defendant."

In order to contest the determination rendered by the second defendant, Harry Brandy raised a challenge to the provisions of the Racial Discrimination Act, 1975. The challenge raised by him came to be formulated in the following words:-

> "In consequence of the amendments embodied in the Sex Discrimination and other Legislation Amendment Act 1992 and/or the Law and Justice Legislation Amendment Act 1993 as they affect the Racial Discrimination Act 1975 are any, and if so which, of the provisions of Part III of the Racial Discrimination Act invalid?"

While adjudicating upon the matter, the High Court of Australia held as under:-

> "The plaintiff's challenge to the Act-
> 15. <u>The plaintiff's challenge to particular provisions of the Act is based upon the proposition that they provide for an exercise of judicial power otherwise than in conformity with Ch.III of the Commonwealth Constitution in that the power is exercised by the Commission which is not a court established pursuant to s.71 and constituted in accordance with s.72 of the Constitution</u>. The plaintiff further argues that the correctness of this

proposition is not affected by the provisions for review by the Federal Court.

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21. Although many decision-making functions may take their character as an exercise of judicial, executive or legislative power from their legislative setting, the character of the decision-maker and the nature of the decision-making process, some decision-making functions are exclusive and inalienable exercises of judicial power (34 Reg. v. Davison (1954) 90 CLR at 368-370 per Dixon CJ and McTiernan J). As Dixon CJ and McTiernan J observed in Reg. v. Davison (35 ibid. at 369) :

> "The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss.71 and 72 of the Constitution".

In that statement, the expression "judicial determination" means an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.

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25. Turning to the case before the Court, whatever might be the enforceability of a declaration that the plaintiff "do apologise", a declaration that the plaintiff "do pay the sum of $2 500" to the third defendant, once registered, attracts the operation of s.53 of the Federal Court of Australia Act 1976 (Cth). By that section, a person in whose favour a judgment is given is entitled to the same remedies for enforcement, by execution or otherwise, as are allowed by the laws of the State or Territory applicable. In the present case, this means New South Wales. Section 53 does not affect the operation of any provision made by or under any other Act or the Rules of Court for the execution and enforcement of judgments of the Court (40 s.53(2)) .

26. But s.25ZAB goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect "as if it were an order made by the Federal Court". A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the Commission is neither made nor registered in the exercise of judicial power. An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s.25ZAB purports to prescribe what the Constitution does not permit."

(v) Our attention was then invited to Reference Re Residential Tenancies Act, 123 DLR (3d) 554. The factual matrix, in furtherance of which the above judgment was rendered by the Supreme Court of Canada, is as follows. The provisions of the Residential Tenancies Act, 1979 (Ontario), by which the Residential Tenancy Commission was empowered to order eviction of tenants, as also, could require landlords and tenants to comply with the obligations imposed under the said Act, were assailed, as offending against the limitation contained in Section 96 of the British North America Act, 1867, and therefore, *ultra vires*. In recording its conclusions on a similar analogy, as in the judgments noticed above, the Supreme Court of Canada observed as under:-

> "Under s. 92(14) of the British North America Act, 1867, the provincial Legislatures have the legislative power in relation to the administration of justice in the Province. This is a wide power but subject to subtraction of ss. 96 to 100 in favour of the federal authority. Under s. 96 the Governor General has the sole power to appoint the judges of the Superior, District and County Courts in each Province. Under s. 97 the Judges who are to be appointed to the Superior, District and County Courts are to be selected from the respective bars of each Province. Under s. 100 the Parliament of Canada is obliged to fix and provide for their salaries. Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a Province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the Superior Courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined. Section 96 has thus come to be regarded as limiting provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.
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> IV
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> The belief that any function which in 1867 had been vested in a s. 96 Court must forever remain in that Court reached its apogee in the judgment of Lord Atkin in *Toronto Corporation v. York Tp. Et. Al., (1938) 1 DLR 593, (1938) AC 415, (1938) 1 WWR 452.* Describing s. 96 as one of

the "three principal pillars in the temple of justice… not to be undermined", Lord Atkin held that the Ontario Municipal Board could not validly receive "judicial authority". At the same time, he held that the Municipal Board was in 'pith and substance' an administrative body, and the impugned 'judicial functions' were severable from the administrative powers given to the Board under its enabling legislation. There was no analysis of the inter-relationship between the judicial and administrative features of the legislative scheme; the assumption was that any attempt to confer a s. 96 function on a provincially-appointed tribunal was *ultra vires* the Legislature. This sweeping interpretation of s. 96, with its accompanying restrictive view of provincial legislative authority under s. 92, was limited almost immediately by the judgment of this Court in the *Reference re Adoption Act and Other Act, etc., (1938) 3 DLR 497, 71 CCC 110, (1938) SCR 398.* Chief Justice Duff held that the jurisdiction of inferior Courts was not "fixed forever as it stood at the date of Confederation". On his view, it was quite possible to remove jurisdiction from a Superior Court and vest it in a Court of summary jurisdiction. The question which must be asked was whether "the jurisdiction conferred upon Magistrates under these statutes broadly conforms to a type of jurisdiction generally exercisable by Courts of summary jurisdiction rather than the jurisdiction of Courts within the purview of s. 96" (p. 514). In the *Adoption Reference,* Duff C.J. looked to the historical practice in England and concluded that the jurisdiction conferred on Magistrates under the legislation before the Court in the *Reference* was analogous to the jurisdiction under the English *Poor Laws,* a jurisdiction which had belonged to courts of summary nature rather than to Superior Courts. On this basis, the legislation was upheld. The *Adoption Reference* represented a liberalization of the view of s. 96 adopted by the Privy Council in *Toronto v. York,* at least in the context of a transfer of jurisdiction from a Superior Court to an inferior Court.

The same process of liberalization, this time in the context of a transfer of jurisdiction from a Superior Court to an administrative tribunal, was initiated by the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited, (1948) 4 DLR 673, (1949) AC 134, (1948) 2 WWR 1055.* Lord Simonds proposed a two-fold test. The first limb of the test is to ask whether the board or tribunal exercises "judicial power". Lord Simonds did not propose a 'final' answer to the definition of "judicial power", but he suggested at p. 680 DLR, p. 149 AC, that:

> "…the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings."

If the answer to the initial question as to "judicial power" is in the negative, then that concludes the matter in favour of the provincial board.

> If, however, the power is in fact a judicial power, then it becomes necessary to ask a second question: in the exercise of that power, is the tribunal analogous to a Superior, District or County Court?
>
> xxx xxx xxx
>
> Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function? In addressing the issue, it is important to keep in mind the further statement by Rand J. in *Dupont v. Inglis (at p. 424 DLR, p. 543 SCR)* that "…it is the subject-matter rather than the apparatus of adjudication that is determinative". Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'. To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of 'principle', that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of 'policy' involving competing views of the collective good of the community as a whole. (See Dworkin, *Taking Rights Seriously* (1977) at pp. 82-90 (Duckworth)."

A perusal of the conclusions recorded by the Supreme Court of Canada reveals, that the court evolved a three step test to determine the constitutional validity of a provision which vested adjudicatory functions in an administrative tribunal. The first step was determined in the light of the historical conditions existing in 1867, i.e. before the British North America Act, 1867 was enacted. The first step required a determination whether at the time of Confederation, the power or jurisdiction now vested in an administrative tribunal, was exercised through a judicial court process. If the answer to the first step was in the negative, the constitution of the administrative tribunal would be valid. If historical evidence indicated, that the power, now vested with an administrative tribunal, was identical or analogous to a power exercised under Section 96 Courts at

Confederation, then the matter needed to be examined further. The second step was to determine, whether the power to be exercised by the administrative tribunal, should be considered as a judicial function. Insofar as the instant aspect of the matter is concerned, it was illustratively concluded, that where power vested in the administrative tribunal was in respect of adjudication of disputes between the parties, which required to be settled through an application of a recognized body of rules, in a manner consistent with fairness and impartiality, then the said power could be classified as judicial power/function. If, however, while applying the second step, the answer was in the negative, it was not necessary to proceed with the matter further, and the vesting of the power with the administrative tribunal should be considered as valid. If the power or jurisdiction is exercised in a judicial manner, then it is imperative to proceed to the third and final step. The third step contemplates analysis and review of the administrative tribunal's functions as a whole, and to examine the same in its entire institutional context. It contemplated an examination of the inter-relationship between the administrative tribunal's judicial powers, and the other powers and jurisdiction conferred by the legislative enactment. If a judicial hearing is a must, whereafter a judgment was required to be rendered, the administrative tribunal would be deemed to be exercising jurisdiction which is ordinarily vested in a Court . It is after recording a finding in the affirmative on all the three steps, that it will be possible to conclude, whether judicial functions have been required to be exercised by the concerned administrative tribunal. Having examined the controversy in Reference Re Residential Tenancies Act

(supra), the Supreme Court of Canada arrived at the conclusion, that the Residential Tenancy Commission could have been authorized to grant orders for possession to a landlord or to grant orders for specific performance of a tenancy.

23. Finally, learned counsel for the petitioners placed reliance on "Constitutional Law of Canada", by Peter W. Hogg (third edition, 1992, by Carswell, Thomson Professional Publishing) in order to assert, that even under Constitutions where the separation of power rule has not been explicitly provided for, there would be limitations in delegation of Court functions to tribunals. Relevant text on the subject, from the above treatise is being reproduced hereunder:-

> "7.3 Implications of Constitution's judicature sections
> (a) Separation of powers
>
> There is no general "separation of powers" in the Constitution Act, 1867. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only "its own" function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for any such separation. As between the judicial and the two political branches, there is likewise no general separation of powers. Either the Parliament or the Legislatures may by appropriate legislation confer non-judicial functions on the courts and (with one important exception, to be discussed) may confer judicial functions on bodies that are not courts.
>
> Each Canadian jurisdiction has conferred non-judicial functions on its courts, by enacting a statute which enables the government to refer a question of law to the courts for an advisory opinion. The rendering of advisory opinions to government is traditionally an "executive" function, performed by the law officers of the government. For that reason, the supreme Court of the United States and the High Court of Australia have refused to render advisory opinions, reasoning that a separation of powers doctrine in their Constitutions confines the courts to the traditional judicial function of adjudicating upon genuine controversies. But in the Reference Appeal (1912), A-G Ont. V.A.-G. Can. (Reference Appeal) (1912) AC 571, the Privy Council refused to read any such limitation into Canada's Constitution. Their lordships upheld the federal reference statute,

apparently as a law in relation to the supreme court of Canada (s.101). The provincial reference statutes are also valid as laws in relation to the administration of justice in the province (s.92(14)).

The conferral of judicial functions on bodies which are not courts is likewise subject to no general prohibition. However, here there is an important qualification to be made. The courts have held that the provincial Legislatures may not confer on a body other than a superior, district or county court judicial functions analogous to those performed by a superior, district or county court. This little separation of powers doctrine has been developed to preclude evasion of the stipulations of ss. 96 to 100 of the constitution Act, 1867.

If ss. 96 to 100 of the constitution Act, 1867 were read literally, they could easily be evaded by a province which wanted to assume control of its judicial appointments. The province could increase the jurisdiction of its inferior courts so that they assumed much of the jurisdiction of the higher courts; or the province could best higher-court jurisdiction in a newly-established tribunal, and call that tribunal an inferior court or an administrative tribunal. It is therefore not surprising that the courts have added a gloss to s. 96 and the associated constitutional provisions. What they have said is this: if a province invests a tribunal with a jurisdiction of a kind that ought property to belong to a superior, district or county court, then that tribunal, whatever its official name, is for constitutional purposes a superior, district or county court and must satisfy the requirements of s. 96 and the associated provisions of the constitution Act, 1867. This means that such a tribunal will be invalidly constituted, unless its members (1) are appointed by the federal government in conformity with s. 96, (2) are drawn from the bar of the province in conformity with ss. 97 and 98, and (3) receive salaries that are fixed and provided by the federal parliament in conformity with s. 100.

So far the law is clear, and the policy underlying it is comprehensible. But the difficulty lies in the definition of those functions that ought properly to belong to a superior, district or county court. The courts have attempted to fashion a judicially enforceable rule which would separate “s. 96 functions” from other adjudicatory functions. The attempt has not been successful, and it is difficult to predict with confidence how the courts will characterize particular adjudicatory functions. The uncertainty of the law, with its risk of nullification, could be a serious deterrent to the conferral of new adjudicatory functions on inferior courts or administrative tribunals, and a consequent impediment to much new regulatory or social policy. For the most part, the courts have exercised restraint in reviewing the provincial statutes which create new adjudicatory jurisdictions, so that the difficulty has not been as serious as it could have been. However, in the last two decades, there has been a regrettable resurgence of s. 96 litigation: five challenges to the powers of inferior courts or tribunals based on s. 96 have succeeded in the Supreme Court

of Canada, A.G. Que. v. Farrah [1978] 2 S.C.R. 638; Re Residential Tenancies Act [1981] 1 S.C.R. 714; Crevier v. A.G. Que. [1981] 2 S.C.R. 220; Re B.C. Family Relations Act [1982] 1.S.C.R. 62; McEvoy v. A.G.N.B. [1983] 1 S.C.R. 704. Since the abolition of Privy Council appeals, two other challenges have also been successful, namely, A.G. Ont. v. Victoria medical building [1960] S.C.R. 32; Seminary of Chicoutimi v. A.G. Que. [1973] S.C.R. 681, and these decisions have spawned many more challenges. These developments are described in the text that follows.

24. It was also the submission of the learned counsel for the petitioners, that the proposition of law highlighted hereinabove on the basis of the provisions of constitutions of different countries (Jamaica, Ceylon, Australia and Canada) decided either by the Privy Council or the highest courts of the concerned countries, is fully applicable to India as well. In order to demonstrate this, he placed reliance on State of Maharashtra v. Labour Law Practitioners' Association, (1998) 2 SCC 688. The controversy in the cited case originated with the filing of a writ petition by the respondent Association challenging the appointment of Assistant Commissioners of Labour (i.e., Officers discharging executive functions under the Labour Department). The above appointments had been made, consequent upon amendments to the provisions of the Bombay Industrial Relations Act, and the Industrial Disputes (Maharashtra Amendment) Act. The submission advanced at the hands of the respondent Association was, that Labour Courts had been constituted in the State of Maharashtra, under the Industrial Disputes Act, the Bombay Industrial Relations Act, as also, the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices, Act. Qualifications of persons to be appointed as a judge of the Labour Court under the Industrial Disputes Act, was stipulated in Section 7, which provided as under:-

> "(a) that he was or had been a Judge of a High Court; or
> (b) that he had for a period of not less than three years been a District Judge or an Additional District Judge; or
> (c) that he had held the office of the Chairman or any other Member of the Labour Appellate Tribunal or of any Tribunal for a period of not less than two years; or
> (d) that he had held any judicial office in India for not less than seven years; or
> (e) that he had been the Presiding Officer of a Labour Court constituted under any provincial Act for not less than five years."

By the Industrial Disputes (Maharashtra Amendment) Act, 1974, Section 7 was amended, and three more sources of recruitment for the post of judge of the Labour Court were added. These were:-

> "(d-1) he has practiced as an advocate or attorney for not less than seven years in the High Court, or any court, subordinate thereto, or any Industrial Court or Tribunal or Labour Court, constituted under any law for the time being in force; or
> (d-2) he holds a degree in law of a University established by law in any part of India and is holding or has held an office not lower in rank than that of a Deputy Registrar of any such Industrial Court or Tribunal for not less than five years; or
> (d-3) he holds a degree in law of University established by law in any part of India and is holding or has held an office not lower in rank than that of Assistant Commissioner of Labour under the State Government for not less than five years."

Under the Bombay Industrial Relations Act, as it originally stood, Section 9 provided, that only such persons would be eligible for appointment as a judge of the Labour Court, who possessed the qualifications laid down under Article 234 of the Constitution, for being eligible to enter judicial service in the State of Maharashtra. By the Maharashtra Act 47 of 1977, Section 9 of the Bombay Industrial Relations Act was amended by substituting a new sub-section (2), which replaced the original sub-section (2) of Section 9. The amended sub-section (2) was as follows:-

"9. (2) A person shall not be qualified for appointment as the presiding officer of a Labour Court, unless:

(a) he has held any judicial office in India for not less than five years; or

(b) he has practiced as an Advocate or Attorney for not less than seven years in the High Court or any court subordinate thereto, or in any Industrial Court, Tribunal or Labour Court constituted under any law for the time being in force; or

(c) he holds a degree in law of a University established by law in any part of India and is holding or has held an office not lower in rank than that of Deputy Registrar of any such Industrial Court or Tribunal, or of Assistant Commissioner of Labour under the State Government, in both cases for not less than five years."

In the first instance, this Court for the first time declared the salient components of the functions exercised by a civil court , as under:-

"6. In the case of The Bharat Bank Ltd. v. Employees, AIR 1950 SC 188, this Court considered whether an Industrial Tribunal was a court. It said that one cannot go by mere nomenclature. One has to examine the functions of a Tribunal and how it proceeds to discharge those functions. It held that an Industrial Tribunal had all the trappings of a court and performed functions which cannot but be regarded as judicial. The Court referred to the Rules by which proceedings before the Tribunal were regulated. The Court dwelt on the fact that the powers vested in it are similar to those exercised by civil courts under the Code of Civil Procedure when trying a suit. It had the power of ordering discovery, inspection etc. and forcing the attendance of witnesses, compelling production of documents and so on. It gave its decision on the basis of evidence and in accordance with law. Applying the test laid down in the case of Cooper v. Wilson, (1937) 2 K.B. 309 at p.340, this Court said that "a true judicial decision presupposes an existence of dispute between two or more parties and then involves four requisites - (1) the presentation of their case by the parties; (2) ascertainment of facts by means of evidence adduced by the parties often with the assistance of argument; (3) if the dispute relates to a question of law, submission of legal arguments by the parties; and (4) by decision which disposes of the whole matter by findings on fact and application of law to facts so found. Judged by the same tests, a Labour Court would undoubtedly be a court in the true sense of the term. The question, however, is whether such a court and the presiding officer of such a court can be said to hold a post in the judicial service of the State as defined in Article 236 of the Constitution."

The other relevant observations recorded in the above cited judgment are reproduced below:-

> "13. Reliance has been placed upon this judgment as showing that judicial service is interpreted narrowly to cover only the hierarchy of civil courts headed by the District Judge. This Court, however, was not considering the position of other civil courts, in the context of the extensive definition given to the term "district judge". This Court was concerned with preserving independence of the judiciary from the executive and making sure that persons from non-judicial services, such as, the police, excise or revenue were not considered as eligible for appointment as District Judges. That is why the emphasis is on the fact that the judicial service should consist exclusively of judicial officers. This judgment should not be interpreted narrowly to exclude from judicial service new hierarchies of civil courts being set up which are headed by a judge who can be considered as a District Judge bearing in mind the extensive definition of that term in Article 236.
>
> 14. The High Court has, therefore, correctly interpreted the observations of this Court in Chandra Mohan vs. State of U.P., AIR 1966 SC 1987, as giving paramount importance to the enforcement of the constitutional scheme providing for independence of the judiciary. The concern of the court was to see that this independence was not destroyed by an indirect method.
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> xxx xxx xxx
>
> 18. In the case of Shri Kumar Padma Prasad v. Union of India & Ors., (1992) 2 SCC 428, this Court had to consider qualifications for the purpose of appointment as a Judge of the High Court under Article 217 of the Constitution. While interpreting the expression "judicial office" under Article 217(2)(a), this Court held that the expression "judicial office" must be interpreted in consonance with the scheme of Chapters V and VI of Part VI of the Constitution. So construed it means a judicial office which belongs to the judicial service as defined under Article 236(b). Therefore, in order to qualify for appointment as a judge of a High Court, a person must hold a judicial office which must be a part of the judicial service of the State. After referring to the cases of Chandra Mohan (supra) and Statesman (Private) Ltd. vs. H.R. Deb, AIR 1968 SC 1495, this Court said that the term "judicial office" in its generic sense may include a wide variety of offices which are connected with the administration of justice in one way or the other. Officers holding various posts under the executive are often vested with magisterial power to meet a particular situation. The Court said,
>
>> "Did the framers of the Constitution have this type of 'offices' in mind when they provided a source of appointment to the high office, of a judge of the High Court from amongst the holders of a 'judicial office'? The answer, has to be in the negative. We are of the view

that holder of judicial office under Article 217(2)(a) means the person who exercises only judicial functions, determines causes inter-parties and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive control and is disciplined to uphold the dignity, integrity and independence of the judiciary."

Going by these tests laid down as to what constitutes judicial service under Article 236 of the Constitution, the Labour Court judges and the judges of the Industrial Court can be held to belong to judicial service. The hierarchy contemplated in the case of Labour Court judges is the hierarchy of Labour Court judges and Industrial Court judges with the Industrial Court judges holding the superior position of District Judges. The Labour Courts have also been held as subject to the High Court's power of superintendence under Article 227.

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20. The constitutional scheme under Chapter V of Part VI dealing with the High Courts and Chapter VI of Part VI dealing with the subordinate courts shows a clear anxiety on the part of the framers of the Constitution to preserve and promote independence of the judiciary from the executive. Thus Article 233 which deals with appointment of District Judges requires that such appointments shall be made by the Governor of the State in consultation with the High Court. Article 233(2) has been interpreted as prescribing that "a person in the service of the Union or the State" can refer only to a person in the judicial service of the Union or the State. Article 234 which deals with recruitment of persons other than District Judges to the judicial service requires that their appointments can be made only in accordance with the Rules framed by the Governor of the State after consultation with the State Public Service Commission and with the High Court. Article 235 provides that the control over district courts and courts subordinate thereto shall be vested in the High Court; and Article 236 defines the expression "District Judge" extensively as covering judges of a City Civil Court etc. as earlier set out, and the expression "judicial service" as meaning a service consisting exclusively of persons intended to fill the post of the District Judge and other civil judicial posts inferior to the post of District Judge. Therefore, bearing in mind the principle of separation of powers and independence of the judiciary, judicial service contemplates a service exclusively of judicial posts in which there will be a hierarchy headed by a District Judge. The High Court has rightly come to the conclusion that the persons presiding over Industrial and Labour Courts would constitute a judicial service so defined. Therefore, the recruitment of Labour Court judges is required to be made in accordance with Article 234 of the Constitution."

25. According to the learned counsel for the petitioners, the judgments and text cited hereinabove, are fully applicable on the subject of administration of

justice through courts in India. Insofar as the instant aspect of the matter is concerned, learned counsel placed reliance on Article 50 of the Constitution, which is reproduced hereunder:-

> "50. Separation of judiciary from executive - The State shall take steps to separate the judiciary from the executive in the public services of the State."

Based on Article 50 aforementioned, it was the contention of the learned counsel for the petitioners, that the Constitution itself mandates a separate judicial hierarchy of courts distinct from the executive.

26. Coupled with the above mandate, it was the contention of the learned counsel for the petitioners, that the provisions of the Income Tax Act, the Customs Act, and the Excise Act prior to independence of this country, and even thereafter, vested the High Courts with an exclusive jurisdiction to settle "questions of law" emerging out of tax disputes. It was further contended, that even after the enforcement of the Constitution, with effect from 26.11.1949, the adjudicatory power to decide substantial questions of law, continued to be vested in the High Courts, inasmuch as, the jurisdictional High Courts continued to exercise appellate jurisdiction. The position has remained unaltered till date. It is, therefore, the contention of the learned counsel for the petitioners, that historically, constitutionally and legally, the appellate jurisdiction in direct/indirect tax matters, has remained with the High Courts, and it is not permissible either by way of an amendment to the Constitution itself, or by enacting a legislation, to transfer the said appellate jurisdiction exercised by the High Courts to a quasi-judicial tribunal.

The third contention:

27. In the course of the submissions advanced by the learned counsel for the petitioners on the third contention, wherein it was sought to be submitted, that "separation of powers", the "rule of law" and "judicial review" constitute amongst others, the "basic structure" of the Constitution, it was submitted, that Article 323B inserted by the Constitution (Forty-second Amendment) Act, 1976 was violative of the above mentioned components of the basic structure of the Constitution. Article 323B is being extracted hereunder:-

> "323B. Tribunals for other matters - (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.
>
> (2) The matters referred to in clause (1) are the following, namely:-
>
> (a) levy, assessment, collection and enforcement of any tax;
>
> (b) foreign exchange, import and export across customs frontiers;
>
> (c) industrial and labour disputes;
>
> (d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;
>
> (e) ceiling on urban property;
>
> (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A;
>
> (g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
>
> (h) rent, its regulation and control and tenancy issues including the rights, title and interest of landlords and tenants;
>
> (i) offences against laws with respect to any of the matters specified in sub-clauses (a) to (h) and fees in respect of any of those matters;
>
> (j) any matter incidental to any of the matters specified in sub-clauses (a) to (i).
>
> (3) A law made under clause (1) may-
>
> (a) <u>provide for the establishment of a hierarchy of tribunals</u>;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
(d) exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals;
(e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
(f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.—In this article, "appropriate Legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI."

Insofar as the aforesaid provision is concerned it was submitted, that Clause (3) of Article 323B clearly violated all the above mentioned ingredients of the "basic structure" theory. In this behalf it was sought to be asserted, that establishment of a hierarchy of tribunals implicitly led to the inference, that the existing judicial process, where adjudication was before a court of law, was to be substituted in its entirety. Thereby, even the existing appellate process which was vested in High Courts was sought to be substituted by tribunals. It was submitted, that creation of a parallel judicial system, was alien to the provisions of the Constitution, which recognized the judiciary as an independent component, separate from the executive and the legislature. It was accordingly vehemently

asserted, that the process of justice was being substituted, by tribunalization of justice, which was clearly unacceptable under the Constitution. Sub-clause (d) of Article 323B(3), according to the learned counsel for the petitioners, divested jurisdiction vested in all civil courts for the adjudication of the matters on the subjects referred to in Article 323B(2), including not only the appellate jurisdiction of High Courts, but also, the power of "judicial review" vested in High Courts under Articles 226 and 227, of the Constitution. It was also the contention of the learned counsel for the petitioners, that despite decisions rendered by this Court, the legislature has repeated and reiterated what had been found to be unsustainable in law.

28. While canvassing the aforesaid contention learned counsel for the petitioners pointed out, that the above mentioned Article 323B was introduced by the Constitution (Forty-second Amendment) Act, 1976, which was part of an overall scheme, to drastically curtail the power of "judicial review" vested with the higher judiciary. It was pointed out, that all other objectionable provisions were deleted, and powers earlier vested in superior courts were restored. However, Part XIV A of the Constitution, inserting Articles 323A and 323B was allowed to remain. It was submitted that Articles 323A and 323B, enabled the creation of parallel judiciary under executive control. In order to support his aforestated contention, learned counsel invited the Court's attention to the expressions "adjudication or trial", "disputes, complaints or offences", "transfer of suits or proceedings", etc. which could be fashioned in a manner different from that which presently prevailed. It was pointed out, that the aforestated mandate contained

in Article 323B of the Constitution, was incompatible with the "basic structure" of the Constitution, which mandates "separation of powers".

29. In view of the aforementioned submissions, it was the vehement contention of the learned counsel for the petitioners, that Article 323B(4) should be struck down. It was submitted, that if the instant prayer of the petitioners does not find favour with this Court, the alternative prayer of the petitioners was, that Article 323B must be purposefully interpreted, so as to bestow equivalence commensurate to the Court sought to be substituted by the tribunal. It was submitted, that it was imperative to provide for measures to ensure independence in the functioning of tribunals substituting functions carried out by courts. This could be done, according to learned counsel for the petitioners, by extending the conditions of service applicable to judges of the court sought to be substituted. In order to support his aforestated contention, learned counsel for the petitioners placed reliance on judgments rendered by this Court, laying down the limits and parameters within which such tribunals could be created. Despite the declaration of law by this Court it was submitted, that the NTT Act, has been enacted, which suffers from the same vices, which had already been found to be unconstitutional. For reasons of brevity, it is considered inappropriate, to refer to all the judgments relied upon by the rival parties on the instant issue. Suffice it to state, that the same will be examined, only while recording conclusions.

<u>The fourth contention:</u>

30. While advancing the fourth contention, learned counsel for the petitioners referred to various provisions of the NTT Act, which would have the effect of

compromising the independence of the NTT. We may briefly refer to the provisions of the said Act, highlighted by the learned counsel for the petitioners, during the course of hearing, as under:-

(i) First and foremost, reference was made to Section 5 of the NTT Act. The same is being extracted hereunder:-

> "5. Constitution and jurisdiction of Benches- (1) the jurisdiction of the National Tax Tribunal may be exercised by the Benches thereof to be constituted by the Chairperson.
> (2) The Benches of the National Tax Tribunal shall ordinarily sit at any place in the National Capital Territory of Delhi or such other places as the Central Government may, in consultation with the Chairperson, notify:
> Provided that the Chairperson may for adequate reasons permit a Bench to hold its temporary sitting for a period not exceeding fifteen days at a place other than its ordinary place of seat.
> (3) The Central Government shall notify the areas in relation to which each bench of the National Tax Tribunal may exercise its jurisdiction.
> (4) The Central Government shall determine the number of Benches and each Bench shall consist of two members.
> (5) The Central Government may transfer a Member from headquarters of one Bench in one State to the headquarters of another Bench in another State or to the headquarters of any other Bench within a State:
> Provided that no member shall be transferred without the concurrence of the Chairperson."

Referring to sub-section (2) of Section 5 it was sought to be asserted, that benches of the NTT are ordinarily to function in the National Capital Territory of Delhi. This, according to the learned counsel for the petitioners, would deprive the litigating assessee, the convenience of approaching the High Court of the State to which he belongs. In this behalf it was sought to be asserted, that in every tax related dispute, there is an asseessee on one side, and the Revenue on the other. Accordingly, if the NTT is mandated to sit ordinarily in the National Capital Territory of Delhi, assessees from far flung States would have to suffer extreme hardship for the redressal of their grievance, especially at the appellate

stage. Besides the hardships, it was pointed out, that each asseessee would be subjected to unfathomable financial expense. Referring to sub-section (5) of Section 5 of the NTT Act, it was the submission of the learned counsel for the petitioners, that the Central Government was vested with the power to transfer a Member from the headquarters of one bench in one State, to the headquarters of another bench in another State. It was also open to the Central Government to transfer a Member from one bench to another bench in the same State. It was submitted, that in case of High Courts, such power is exercised exclusively by the Chief Justice, in the best interest of the administration of justice. It was submitted, that the Central Government, which is a stakeholder, could exercise the above power of transfer for harassment and exploitation of sitting Members of the NTT. In other words, an inconvenient Member could be moved away, and replaced by one who would tow the desired line.

(ii) Likewise, learned counsel for the petitioners referred to Section 6 of the NTT Act to demonstrate, that the same would also have an undermining effect on the adjudicatory process. Section 6 of the NTT Act is reproduced hereunder:-

> "6. Qualifications for appointment of Chairperson and other Members –
> (1) The Chairperson of the National Tax Tribunal shall be a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.
> (2) <u>A person shall not be qualified for appointment as Member unless he-</u>
>
> (a) <u>is, or has been, or is eligible to be, a Judge of a High Court</u>; or
> (b) <u>is, or has been, a Member of the Income-tax Appellate Tribunal or of the Customs, Excise and Service Tax Appellate Tribunal for at least five years."</u>

Learned counsel for the petitioners pointed out, that sub-section (2), aforementioned, laid down the qualifications for appointment as Member of the

NTT. Referring to clause (a) of sub-section (2) of Section 6 of the NTT Act it was submitted, that a person who is eligible to be a judge of a High Court, is to be treated as eligible as a member of the NTT. Inviting our attention to Article 217 of the Constitution it was submitted, that a person who is a citizen of India and has, for at least 10 years, practiced as an Advocate before one or the other High Court, has been treated as eligible for being appointed as a Member of the NTT. Referring to Section 8 of the NTT Act it was pointed out, that a Member of the NTT is provided with a tenure of five years, from the date of his appointment as Member of the NTT. It was pointed out, that in terms of Article 217 of the Constitution, a person would easily become eligible for appointment as a judge at or around the age of 35-40 years, and as such, if he is assured a tenure of only five years, it would not be possible for him to discharge his duties without fear or favour, inasmuch as, he would always have a larking uncertainty in his mind about his future, after the expiry of the prescribed term of five years, in the event of not being granted an extension. Relying on clause (b) of Section 6(2) of the NTT Act, it was also the submission of the learned counsel for the petitioners, that Members of the Appellate Tribunals constituted under the Income Tax Act, the Customs Act, and the Excise Act, are also eligible for being appointed as Members of the NTT. In this behalf it was sought to be asserted, that there are Accountant Members of the Income Tax Appellate Tribunal, who too would become eligible for appointment as Members of the NTT. It was submitted, that judicial experience on the niceties of law, specially on the different aspects, which need to be dealt with while adjudicating tax matters, would be alien to

them, inasmuch as they can only be experts on the subject of accountancy. It was pointed out, that the jurisdiction vested in the NTT, is an alternative jurisdiction to that of the High Court, and as such, it is difficult to appreciate how an Accountant Member of the Income Tax Appellate Tribunal can be expected to discharge duties relating to settling substantial questions of law in the manner judges of the High Court dispense with the aforesaid responsibilities.

(iii) Learned counsel for the petitioners then invited our attention to Section 7 of the NTT Act. The said section is reproduced hereunder:-

> "7. Appointment of Chairperson and other Members - (1) Subject to the provisions of sub-section (2), the Chairperson and every other Member shall be appointed by the Central Government.
> (2) The Chairperson and the other Members shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of-
> (a) the Chief Justice of India or a Judge of the Supreme Court nominated by him;
> (b) the Secretary in the Ministry of Law and Justice (Department of Legal Affairs);
> (c) the Secretary in the Ministry of Finance (Department of Revenue).
> (3) No appointment of the Chairperson or of any other Member shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee."

A perusal of sub-section (2) of Section 7 reveals the composition of the selection committee for selection of the Chairperson and Members of the NTT. It was sought to be pointed out, that there were two representatives of the executive, out of three member selection committee, and only one member in the selection committee was from the judiciary. Accordingly it was asserted, that the two representatives belonging to the executive would control the outcome of every selection process. Since the NTT was, an alternative to the jurisdiction earlier

vested with the High Court, it was submitted, that the same process of selection, as was prevalent for appointment of judges of the High Court, should be adopted for selection of Chairperson and Members of the NTT. All that is imperative and essential is, that the selection process should be the same, as is in place, for the court sought to be substituted. It was also the contention of the learned counsel for the petitioners, that a provision similar to Section 7(2) of the NTT Act, had been struck down by this Court, in State of Maharashtra v. Labour Law Practitioners' Association (supra).

(iv) Learned counsel for the petitioners then invited our attention to Section 8 of the NTT Act. Section 8 is being reproduced hereunder:-

> "8. Terms of office of Chairperson and other Members - The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office but shall be eligible for re-appointment:
>
> Provided that no Chairperson or other Member shall hold office as such after he has attained, -
>
> (a) in the case of Chairperson, the age of sixty-eight years; and
> (b) in the case of any other Member, the age of sixty-five years."

According to learned counsel, a perusal of Section 8 reveals, that a Chairperson and a Member of the NTT would hold office for a term of five years, from the date of his/her appointment to the NTT. It was, however sought to be pointed out, that a person appointed as such, is clearly eligible for reappointment. It was sought to be asserted, that a provision for reappointment, would itself have the effect of undermining the independence of the Members of the NTT. It was sought to be asserted, that each one of the appointees to the NTT would be prompted to appease the Revenue, so as to solicit reappointment contemplated under Section 8 of the NTT Act. In this behalf it was submitted, that the tenure of

appointment to a tribunal, which is to substitute a High Court, should be akin to that of a judge of High Court.

(v) Our attention was then invited to Section 13 of the NTT Act, which is reproduced hereunder:-

> "13. Appearance before National Tax Tribunal - (1) A party to an appeal other than Government may either appear in person or authorize one or more chartered accountants or legal practitioners to present his or its case before the National Tax Tribunal.
> (2) The Government may authorize one or more legal practitioners or any of its officers to present its case before the National Tax Tribunal.
> Explanation – For the purposes of this Section,-
> (a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
> (b) "legal practitioner" means an advocate, a vakil or any attorney of any High Court, and includes a pleader in practice."

It was submitted, that besides allowing the assessee to represent himself before the NTT, Section 13 allows him to be represented through one or more Chartered Accountants or legal practitioners. Thus far, according to learned counsel for the petitioners, there seemed to be no difficulty in Section 13(1) of the NTT Act. However, allowing "any person duly authorized" by the assessee to represent him before the NTT, is clearly ununderstandable. It was submitted, that the main function of the NTT would be to settle substantial questions of law on tax issues, and as such, under Section 13(1), it would be open to an assessee to engage an individual to represent him, even though he is totally unqualified in the fields on which the adjudicatory process is to be conducted. Likewise, it is the contention of the learned counsel for the petitioners, besides legal practitioners, the Revenue is allowed to be represented through any of its

officers. It was sought to be asserted, that an understanding of the text of the provision is one thing, whereas interpreting it in the contemplated context, quite another. As such, it was submitted, that officers of the Revenue, who lack in interpretative skills, would be wholly unsuited for representing the Revenue before the NTT.

Submissions in opposition, by the respondents/interveners:

The first contention:

31. In response to the first contention, namely, that the reasons for setting up the NTT were fallacious and non-existent, and as such, the legislative enactment under reference creating the NTT as an independent appellate forum to decide appeals on "substantial questions" of law, from orders passed by the Appellate Tribunals constituted under the Income Tax Act, the Customs Act, and the Excise Act deserves to be set aside; it was the contention of the learned counsel for the respondents, that the submissions advanced at the hands of the petitioners, were premised on an improper understanding of the factual background. In this behalf, it is sought to be asserted, that the tax receipts are the primary source of revenue in India. The Government of India meets its budgetary requirements from revenue receipts. It is sought to be explained, that tax is collected by an established administrative and legal structure. On the one hand, while fastening of a tax liability would reduce the profits of an assessee, it would enhance the revenue receipts of the Government. On the other hand, exemption from a tax

liability would increase profits of an assessee, but would reduce the revenue receipts of the Government. In view of the above profit and loss scenario, administration of tax loss, has an inherent tendency to result in disputes and litigation. The process of litigation is primarily based on adoption of innovative means of interpretation of law, both by the revenue and by the tax payers. As a result, significant amount of time is spent, on long drawn litigation, wherein tax payers and the Government lock horns against one another. Naturally, this impacts revenue earnings as levy of tax of thousands of crores of rupees, remains embroiled in such litigation. It was sought to be pointed out, that as per the Centre for Monitoring Indian Economy Database, Indian companies have a vast amount locked in disputed taxes. As per the above report, during the Financial Year 2011-2012; 30 companies that make up the Bombay Stock Exchange sensex, had money locked in disputed taxes estimated at Rs.42,388 crores. The above disputed tax liability, according to the learned counsel for the respondents, was a 27% increase from the amount of the preceding year, which was estimated at Rs.33,339 crores.

32. In respect of disputes on direct taxes, it was submitted, that in a written reply submitted by the Minster of State for Finance, the Lok Sabha was informed in April, 2012, that 5,943 tax cases were pending with the Supreme Court, and 30,213 direct tax cases were pending with High Courts. It was submitted that the Lok Sabha was additionally informed, that the disputed amount of tax, at various levels, was estimated at Rs.4,36,741 crores, as on 31.12.2011. It was further sought to be asserted, that in the preceding year, the estimate in respect of the

disputed amount at various levels, was to the tune of Rs.2,43,603 crores. Accordingly it was sought to be pointed out, that with each succeeding year, not only the tax related litigation was being progressively enhanced, there was also a significant increase in the finance blocked in such matters.

33. It was likewise pointed out, that the number of cases involving levy of indirect taxes, projected a similar unfortunate reflection. In this behalf, it was sought to be pointed out, that as on 31.12.2012, the number of pending customs disputes were approximately 17,800, wherein an amount of approximately Rs.7,400 crores was involved. Insofar as the number of pending central excise cases as on 31.10.2012 is concerned, the figure was approximately 19,800 and the amount involved was approximately Rs.21,450 crores. By adding the figures reflected hereinabove, in respect of the disputes pertaining to indirect taxes, it was suggested that a total of about 37,600 cases were pending, involving an amount of approximately Rs.28,850 crores. Additionally it was submitted, that out of the 17,800 customs cases, approximately 6,300 cases had been pending for adjudication for periods ranging from one to three years, and approximately 2,800 customs cases had been pending adjudication for over three years. Likewise, out of the 19,800 central excise cases, 1,600 cases were pending for decision for a period between one to three years; and 240 cases had been pending for decision for over three years.

34. It was pointed out at the behest of the respondents, that several reasons contributed to the prolonged continuation of tax disputes. The main reason however was, that there was a lack of clarity in law in tax litigation. It was

submitted, that the above lack of clarity resulted in multiple interpretations. Added to that, according to the learned counsel for the respondents, existence of multiple appellate levels, and independent jurisdictional High Courts, resulted in the existence of conflicting opinions at various appellate forums across the country, contributing in unfathomable delay and multiplicity of proceedings.

35. Based on the factors narrated above, it was the submission of the learned counsel for the respondents, that the burden of high volume of disputes had had the effect of straining the adjudicatory, as well as, the judicial system. It was pointed out, that the judicial system was already heavily burdened by the weight of significant number of unresolved cases. It was submitted, that the addition of cases each year, added not only to the inconvenience of the taxpayer, but also to the revenue earned by the government. It was pointed out, that the instant state of affairs created an uncertain and destabilized business environment, with taxpayers not being able to budget, for tax costs. Importantly such uncertainty, according to the learned counsel, emerged out of the two factors. Firstly, the law itself was complex, and therefore, uncertain. And secondly, for an interpretation of the law to achieve a degree of certainty at the Supreme Court level, required several rounds of litigation. It was submitted, that in view of the above, the current scenario called for reforms in the dispute resolution mechanism, and the introduction of, conscious practices and procedures, aimed at limiting the initiation, as well as, the prolongation of tax disputes. It is, therefore, the submission of the learned counsel for the respondents, that the assertions made

at the hands of the petitioners, while projecting the first contention, were wholly misconceived, and as such, are liable to be rejected.

The second contention:

36. In response to the second contention, namely, that it is impermissible for the legislature to abrogate the core judicial appellate functions, traditionally vested with the High Court, or that it is impermissible to vest the same with an independent, parallel quasi-judicial hierarchy of tribunals, it was submitted, that the petitioners had not been able to appreciate the matter in its correct perspective. It was pointed out, that the NTT Act is a legislation which creates an appellate forum, in a hierarchy of fora, as a remedy for ventilation of grievances emerging out of taxing statutes. To fully appreciate the purport of the special remedy created by the statute, the nature of the right and/or the liability created by the taxing statutes, and the enforcement for which these remedies have been provided, needed to be understood in the correct perspective. Accordingly, in order to debate the rightful cause, learned counsel drew our attention to the proposition, in the manner, as was understood by the respondents. The submissions advanced in this behalf are being summarized hereinafter.

37. It was the contention of the learned counsel for the respondents, that the Income Tax Act, the Customs Act, and the Excise Act, as also, other taxing statutes create a statutory liability. The said statutory liability has no existence, *de hors* the statute itself. The said statutory liability, has no existence in common law. It was further submitted, that it had been long well settled, that where a right to plead liability had no existence in common law, but was the creation of a

statute, which simultaneously provided for a special and particular remedy for enforcing it, the remedy provided by the statute was bound to be followed. In respect of such statutory liability, it was not competent for the party to proceed, by action at common law. In this behalf, our attention was invited to the observations recorded by this Court in Dhulabhai v. State of M.P. (1968) 3 SCR 662 wherein the Court observed as under:

> "9. The question that arises in these appeals has been before this Court in relation to other statutes and has been answered in different ways. These appeals went before a Divisional Bench of this Court but in view of the difficulty presented by the earlier rulings of this Court, they were referred to the Constitution Bench and that is how they are before us. At the very start we may observe that the jurisdiction of the Civil Courts is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purport of Section 9 of the Code of Civil Procedure. How Section 9 operates is perhaps best illustrated by referring to the categories of cases, mentioned by Willes,J. in Wolverhampton New Waterworks Co. v. Hawkesford, [1859] 6 C.B. (NS) 336 - They are :
>
> > "One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statue gives the right to sue merely, but provides, no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class."
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> This view of Willes, J. was accepted by the House of Lords in Neville v. London 'Express' Newspaper Ltd., [1919] A.C. 368.
>
> xxx xxx xxx
>
> 35. Neither of the two cases of Firm of Illuri Subayya or Kamla Mills can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statue or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

38. In addition to the above submissions, it was sought to be asserted that the Income Tax Act expressly barred the jurisdiction of civil courts. Reference in this

behalf was made to Section 293 of the Income Tax Act, which is being extracted hereunder:

> "293. Bar of suits in civil courts. – No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act, and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act."

39. It has been further held by this Court following the dictum at Barraclough v. Brown (1897) AC 615, that if a statute confers a right and in the same breath provides for enforcement of such right the remedy provided by such a statute is an exclusive one. Applying this doctrine, in Premier Automobiles v. Kamlekar Shantaram Wadke, (1976) 1 SCC 496 at 513, this Court held as under:

> "23. To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus:
> (1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court.
> (2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
> (3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.
> (4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be."

In paragraph 12 of the Premier Automobiles case (supra), this Court quoted the words of Lord Watson in Barraclough v. Brown (supra) to the following effect:

> "the right and the remedy are given uno flatu and the one cannot be disassociated from the other"

40. It is for this reason, according to learned counsel for the respondents, that civil courts, even the High Court having original jurisdiction, would not entertain suits on matters covered by such special statutes creating rights and providing remedies. [See Argosam Finance Co. Ltd. v. Oxby (1964) 1 All E.R. 791 at 796-H].

> "The principle underlying those passages seem to me to be applicable to the present case Section 341 of the Income Tax Act, 1952, confers the right, the right to an adjustment tax liability by reference to loss; that right does not exist independently of the section; the section uno flatu in the breath gives a specific remedy and appoints a specific tribunal for its enforcement, namely the General Commission or Special Commissioners. In those circumstances in my judgment, the taxpayer must resort to that remedy and that tribunal. In due course if dissatisfied with the decision of the commissioners concerned he can appeal to the high court by way Case Stated, but any original jurisdiction of the high court by declaration or otherwise, is, in my judgment, excluded."

The contentions of the petitioners, that substituting Section 260A of the Income Tax Act and divesting the High Court of the appellate remedy and vesting it in the NTT, is unconstitutional as it constitutes an inroad into the principles of the rule of law and independence of judiciary, according to learned counsel, are fallacious.

41. According to the learned counsel for the respondents, the fallacy in the petitioners' argument is, that they are overlooking the fact that as far as the NTT Act is concerned, there is no common law remedy which has now been divested. Section 260A of the Income Tax Act and Section 35(g), (h), (i) of the Excise Act were all statutorily vested appeals, in the High Court, and as such, as has been held in the above mentioned cases can be completely divested. According to learned counsel, the NTT Act, was on a surer and sounder footing, than the provisions of the Companies Act, which came up for consideration in Union of

India v. Madras Bar Association, (2010) 11 SCC 87. Accordingly, as no common law remedy has been substituted under the present Act, it was submitted, that the contentions advanced on behalf of the petitioners had no legs to stand. Even when the Companies Act set up, the Company Law Tribunal and the Company Law Appellate Tribunal, substituting the jurisdiction of the High Courts, this Court in Union of India v. Madras Bar Association (supra), held that the said provisions were valid and were not unconstitutional. This Court held as under:

> "87. The Constitution contemplates judicial power being exercised by both courts and tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by Legislative enactments. The High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of the High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals."
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> 88. The argument that there cannot be "whole-sale transfer of powers" is misconceived. It is nobody's case that the entire functioning of courts in the country is transferred to tribunals. The competence of the Parliament to make a law creating tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed. When a Tribunal is constituted under the Companies Act, empowered to deal with disputes arising under the said Act and the statute substitutes the word "tribunal" in place of "the High Court" necessarily there will be "whole-sale transfer" of company law matters to the tribunals. It is an inevitable consequence of creation of a tribunal, for such disputes, and will no way affect the validity of the law creating the tribunal."

42. Similarly, statutory provisions providing for a revision to the District Judge, with the finality clauses, have been interpreted to exclude the revisionary powers

of the High Court under Section 115 of CPC. In this behalf reference was made to, Aundal Ammal v. Sadasivan Pilai, (1987) 1 SCC 183, wherein it was held as under:

> "15. Under the scheme of the Act it appears that a landlord who wants eviction of his tenant has to move for eviction and the case has to be disposed of by the Rent Control Court. That is provided by Sub-section(2) of Section 11 of the Act. From the Rent Control Court, an appeal lies to the Appellate Authority under the conditions laid down under Sub-section (l)(b) of Section 18 of the Act. From the Appellate Authority a revision in certain circumstances lies in case where the appellate authority is a Subordinate Judge to the District Court and in other cases to the High Court. In this case as mentioned hereinbefore the appeal lay from Rent Control Court to the appellate authority who was the Subordinate Judge and therefore the revision lay to the District Judge. Indeed it is indisputed that the respondent has in this case taken resort to all these provisions. After the dismissal of the revision by the District Judge from the appellate decision of the Subordinate Judge who confirmed the order of the Rent Controller, the respondent-landlord chose again to go before the High Court under Section 115 of the CPC. The question, is, can he have a second revision to the High Court? Shri Poti submitted that he cannot. We are of the opinion that he is right. This position is clear if Sub-section (5) of Section 18 of the Act is read in conjunction with Section 20 of the Act. Sub-section (5) of Section 18, as we have noted hereinbefore, clearly stipulates that the decision of the appellate authority and subject to such decision, an order of the Rent Controller 'shall be final' and 'shall not be liable to be called in question in any court of law', except as provided in Section 20. By Section 20, a revision is provided where the appellate authority is Subordinate Judge to the District Judge and in other cases, that is to say, where the appellate authority is District Judge, to the High Court. The ambits of revisional powers are well-settled and need not be re-stated. It is inconceivable to have two revisions. The scheme of the Act does not warrant such a conclusion. In our opinion, the expression 'shall be final' in the Act means what it says.
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> 20. The learned judge referred to the decision of the Judicial Committee in the case of Maung Ba Thaw and Anr.—Insolvents v. Ma Pin, AIR 1934 PC 81. The learned judge also referred to a decision of this Court in South Asia Industries (P) Ltd. v. S.B. Sarup Singh and Ors. (supra). The learned judge concluded that so long as there was no specific provision in the statute making the determination by the District Court final and excluding the supervisory power of the High Court under Section 115 of the CPC, it had to be held that the decision rendered by the District Court under Section 20(1) of the Act being a decision of a court subordinate to the High

Court to which an appeal lay to the High Court was liable to be revised by the High Court under Section 115 of the CPC. In that view of the matter, the Full Bench rejected the view of the division bench of the Kerala High Court in Kurien v. Chacko [1960] KLT 1248. With respect, we are unable to sustain the view of the Full Bench of the High Court on this aspect of the matter. In our opinion, the Full Bench misconstrued the provisions of subsection (5) of Section 18 of the Act. Sub-section (5) of Section18 clearly states that such decision of the appellate authority as mentioned in Section 18 of the Act shall not be liable to be questioned except in the manner under Section 20 of the Act. There was thereby an implied prohibition or exclusion of a second revision under Section 115 of the CPC to the High Court when a revision has been provided under Section 20 of the Act in question. When Section 18(5) of the Act specifically states that "shall not be liable to be called in question in any Court of law" except in the manner provided under Section 20, it cannot be said that the High Court which is a court of law and which is a civil court under the CPC under Section 115 of the CPC could revise again an order once again after revision under Section20 of the Act. That would mean there would be a trial by four courts, that would be repugnant to the scheme manifest in the different sections of the Act in question. Public policy or public interest demands curtailment of law's delay and justice demands finality within quick disposal of case. The language of the provisions of Section 18(5) read with Section 20 inhibits further revision. The courts must so construe."

Likewise, our attention was invited to Jetha Bai and Sons v. Sunderdas Rathenai

(1988) 1 SCC 722, and reliance was placed on the following:

"15. Even without any discussion it may be seen from the narrative given above that there is really no conflict between the two decisions because the provisions in the two Acts are materially different. However, to clarify matters further we may point put the differences between the two Acts in greater detail and clarity. Under the Kerala Act, against an order passed by a Rent Control Court presided over by a District Munsif, the aggrieved party is conferred a right of appeal under Section 18. The Appellate Authority has to be a judicial officer not below the rank of a subordinate Judge. The appellate Authority has been conferred powers co-extensive with those of the Rent Control Court but having over-riding effect. Having these factors in mind, the Legislature has declared that in so far as an order of a Rent Control Court is concerned it shall be final subject only to any modification or revision by an Appellate Authority; and in so far as the Appellate Authority is concerned, its decision shall be final and shall not be liable to be called in question in any Court of law except as provided in Section 20. As regards Section 20, a division of the powers of revision

exercisable thereunder has been made between the High Court and the District Court. In all those cases where a revision is preferred against a decision of an Appellate Authority of the rank of a Subordinate Judge under Section 18, the District Judge has been constituted the revisional authority. It is only in other cases i.e. where the decision sought to be revised is that of a judicial officer of a higher rank than a Subordinate Judge, the High Court has been constituted the Revisional authority. The revisional powers conferred under Section 20, whether it be on the District Judge or the High Court as the case may be are of greater amplitude than the powers of revision exercisable by a High Court under Section 115 Code of Civil Procedure Under Section 20 the Revisional Authority is entitled to satisfy itself about the legality regularity, or propriety of the orders sought to be revised. Not only that, the Appellate Authority and the Revisional Authority have been expressly conferred powers of remand under Section 20A of the Act. Therefore, a party is afforded an opportunity to put forth his case before the Rent Control Court and then before the Appellate Authority and there after if need be before the Court of Revision viz. the District Court if the Appellate Authority is of the rank of a Subordinate Judge. The Legislature in its wisdom has thought that on account of the ample opportunity given to a party to put forth his case before three courts, viz. the Trial Court, the Appellate Court and the Revisional Court, there was no need to make the revisional order of the District Court subject to further scrutiny by the High Court by means of a second revision either under the Act or under the Code of Civil Procedure. It has been pointed out in Aundal Ammal's case (supra) that the full Bench of the Kerala High Court had failed to construe the terms of Section 20 read with Section 18(5) in their proper perspective and this failing had effected its conclusion According to the Full Bench, a revisional order of a District, Court under Section 20 laid itself open for further challenge to the High Court under Section115 Code of Civil Procedure because of two factors viz. (1) there was no mention in the Act that the order would be final and (2) there was no provision in the Act for an appeal being filed against a revisional order under Section 20. The full Bench failed to notice certain crucial factors. In the first place, Section 20 is a composite section and refers to the powers of revision exercisable under that Section by a District Judge as well as by the High Court. Such being the case if it is to be taken that an order passed by a District Court under Section 20 will not have finality because the Section does not specifically say so, then it will follow that a revisional order passed by the High Court under Section 20 (1) also will not have finality Surely it cannot be contended by anyone that an order passed by a High Court in exercise of its powers of revision under Section 20 (1) can be subjected to further revision because Section 20(1) has not expressly conferred finality to an order passed under that Section. Secondly, the terms of Section 20 (1) have to be read in conjunction with Section 18(5). Section 18(5) as

already seen, declares that an order of a Rent Control Court shall be final subject to the decision of the Appellate Authority and an order of an Appellate Authority shall be final and shall not be liable to be called in question in any court of law except as provided for in Section 20. When the Legislature has declared that even an order of the Rent Control Court and the decision of the Appellate Authority shall be final at their respective stages unless the order is modified by the Appellate Authority or the Revisional Authority as the case may be, there is no necessity for the legislature to declare once ever again that an order passed in revision under Section 20(1) by the District Judge or the High Court as the case may be will also have the seal of finality. The third aspect is that the Legislature has not merely conferred finality to the decision of an Appellate Authority but has further laid down that the decision shall not be liable to be called in question in any court of law except as provided for in Section 20. These additional words clearly spell out the prohibition or exclusion of a second revision under Section 115 Code of Civil Procedure to the High Court against a revisional order passed by a District Court under Section 20 of the Act. This position has been succinctly set out in para 20 of the judgment in Aundal Ammal's case (supra). As was noticed in Vishesh Kumar's case, the intent behind the bifurcation of the jurisdiction is to reduce the number of revision petitions filed in the High Court and for determining the legislative intent, the Court must as far as possible construe a statute in such a manner as would advance the object of the legislation and suppress the mischief sought to be cured by it."

43. Most importantly, a nine-Judge constitution bench judgment of this Court, in Mafatlal Industries v. Union of India (1997) 5 SCC 536, while dealing with the validity of Section 11B(3) of the Excise Act, held as follows:

"77. Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excise and Salt Act. Whether it is Rule 11 (as it stood from time to time) or Section 11-B (as it obtained before 1991 or subsequent thereto), they invariably purported to be exhaustive on the question of refund. Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted...shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between 6.8.1977 and 17.11.1980 contained Sub-rule (4) which expressly declared : "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11-B, as in force prior to April, 1991 contained Sub-section (4) in identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of

excise shall be entertained". Sub-section (5) was more specific and emphatic. It said:

> "Notwithstanding anything contained in any other law, the provisions of this Section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim."

It started with a non-obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11-B, as it now stands, it's to the same effect - indeed, more comprehensive and all-encompassing. It says:

> "(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or in any law for the time being in force, no refund shall be made except as provided in sub-section".

The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 23 (supra), and has to be respected so long as it stands. The validity of these provisions has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11-B is questioned, no specific reasons have been assigned why a provision of the nature of Sub-section (3) of Section11-B (amended) is unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills case, AIR 1965 SC 1942, it must be held that Section 11-B (both before and after amendment) is valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation of delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge, to repeat - and it is necessary to do so - so long as Section 11-B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that

Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11-A and 11-B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11-A and 11-B are complimentary to each other. To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available -except to the limited extent pointed out in Kamala Mills. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The jurisdiction of a civil Court is expressly barred - vide Sub-section (5) of Section 11-B, prior to its amendment in 1991, and Sub-section (3) of Section 11-B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11-B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this Court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11-B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265. In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provisions, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent

> remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11-B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11-B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11-B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this Court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

It was submitted, that a perusal of the above paragraph shows, that this Court noticed, that against the order of the tribunal an appeal was provided for to this Court. The Court declared, that the tribunal was not a departmental organ and the Supreme Court was a civil court as it was hearing a statutory appeal. More importantly it held, that every ground including violation and infraction of judicial procedure could be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. This Court took care to hold, that so far as the jurisdiction of High Courts under Article 226 or this Court under Article 32 are concerned, they cannot be curtailed. It further held, that it was equally obvious that while exercising the power under Article 226/32 the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment. It was accordingly submitted, that in view of the conclusions drawn, in the above judgment, all the contentions urged by the petitioners, needed to be rejected.

The third contention:

44. Learned counsel for the respondents, vehemently controverted the submissions advanced at the hands of the petitioners, that the NTT Act was *ultra vires* the provisions of the Constitution. Insofar as the instant aspect of the matter is concerned, learned counsel for the respondents, first placed reliance on Article 246 of the Constitution. Article 246 is being extracted hereunder:

> "246. Subject-matter of laws made by Parliament and by the Legislatures of States – (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
> (2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List."

Based on the aforesaid provision, it was sought to be asserted that the Parliament had the unqualified and absolute jurisdiction, power and authority to enact laws in respect of matters enumerated in Lists I and III of the Constitution. Additionally, placing reliance on Article 246(4), it was asserted, that even on subjects not expressly provided for in the three Lists of the Seventh Schedule to the Constitution, the Parliament still had the absolute and untrammeled right to enact legislation. Insofar as the instant aspect of the matter is concerned,

learned counsel for the respondents placed reliance on entries 77 to 79, 82 to 84, 95 and 97 of List I. The above entries are being extracted hereunder:

> List I – Union List
> "77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.
> 78. Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.
> 79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.
> 82. Taxes on income other than agricultural income.
> 83. Duties of customs including export duties.
> 84. Duties of excise on tobacco and other goods manufactured or produced in India except –
> (a) alcoholic liquors for human consumption.
> (b) opium, Indian hemp and other narcotic drugs and narcotics,
> but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.
> 95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.
> 97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

Based on the entries reproduced hereinabove, especially entries 77 to 79, it was submitted, that Parliament had the jurisdiction to enact legislation even in respect of the Supreme Court and the High Courts. Additionally, it had the power to legislate, and thereby, to extend or exclude the jurisdiction of a High Court. Relying on entries 82 to 84, it was the submission of the learned counsel for the respondents, that on matters of income-tax, customs duty and excise duty, the power to legislate was unequivocally vested with the Parliament. Reliance was placed on entry 95, to contend, that the extent of the jurisdiction of all courts including the High Court, in respect of matters expressed in List I could also be laid down by the Parliament. Referring again to entries 82 to 84 it was submitted,

that the extension or exclusion of jurisdiction on tax matters, was also within the domain of Parliament. So as to assert, that in case this Court was of the view, that the subject of the legislation contained in the NTT Act did not find mention, in any of the three Lists of the Seventh Schedule of the Constitution, the submission on behalf of the respondents was, that Parliament would still have the authority to legislate thereon, under entry 97 contained in List I of the Seventh Schedule.

45. Learned counsel for the respondents, also placed reliance on entries 11A and 46 contained in List III of Seventh Schedule. The above entries are being extracted hereunder:

> List III – Concurrent List
> "11A. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts.
> xxx xxx xxx
> 46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."

Referring to the above entries, it was the contention of the learned counsel for the respondents that Parliament had the authority to enact legislation, in respect of the extent of jurisdiction and powers of courts, including the High Court. It was, however pointed out, that this power extended only to such matters and subjects, that found mention in List III of the Seventh Schedule. It was, therefore, that reliance was placed on entry 11A in List III, to contend that administration of justice, constitution and organization of all courts (except the Supreme Court and the High Courts) would lead to the inevitable conclusion that the NTT Act was promulgated, well within the power vested with the Parliament, under Article 246(2) of the Constitution.

46. Additionally, reliance was placed by the learned counsel for the respondents, on Article 247 of the Constitution, which is reproduced hereunder:

> "247. Power of Parliament to provide for the establishment of certain additional courts. - Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List."

Referring to the above provision, it was the assertion of the learned counsel for the respondents, that power was expressly vested with the Parliament, to establish additional courts, for better administration of laws. It was submitted, that this was exactly what the Parliament had chosen to do, while enacting the NTT Act. Referring to the objects and reasons, indicating the basis of the enactment of the NTT Act, it was the categoric assertion at the hands of the learned counsel, that the impugned enactment was promulgated with the clear understanding, that the NTT would provide better adjudication of legal issues, arising out of direct/indirect tax laws.

47. Besides Articles 246 and 247 of the Constitution, learned counsel for the respondents asserted, that Articles 323A and 323B were inserted into the Constitution, by the Constitution (Forty-second Amendment) Act, 1976. The above provisions were included in the newly enacted Part XIV A of the Constitution. It was asserted, that the instant amendment of the Constitution was made for achieving two objectives. Firstly, to exclude the power of judicial review of the High Courts and the Supreme Court, totally. Thus excluding judicial review in its entirety. And secondly, to create independent specialized tribunals, with power of judicial review, which would ease the burden of the High Courts and the

Supreme Court. It was however acknowledged by learned counsel representing the respondents, that the first of the above mentioned objectives, was interpreted by this Court in L. Chandra Kumar v. Union of India (1997) 3 SCC 261, which struck down clause (2)(d) of Article 323A and clause (3)(d) of Article 323B, to the extent the amended provisions introduced by the Forty-second Amendment to the Constitution, excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32/136 respectively. Insofar as the second objective is concerned, placing reliance in L. Chandra Kumar case (supra), it was the contention of the learned counsel for the respondents, that this Court had clearly concluded, that as long as the power of judicial review continue with the High Courts and the Supreme Court, under the provisions referred to hereinabove, the enactment under reference would be constitutionally valid. Therefore, in response to the submissions advanced at the hands of the learned counsel for the petitioners (as have been noticed hereinabove), it was the contention of the learned counsel for the respondents, that the power to enact the NTT Act, was clearly vested with the Parliament even under Article 323B of the Constitution. Furthermore, since the impugned enactment did not exclude the jurisdiction of the High Courts under Articles 226 and 227 of the Constitution, and also, did not exclude the jurisdiction of the Supreme Court under Articles 32 and 136 of the Constitution, the challenge to the constitutional validity of the NTT Act was wholly unjustified.

48. Learned counsel for the respondents was at pains to emphasise, that the jurisdictional road of Courts, as final interpreter of the law, was clearly preserved.

Firstly, because a statutory appeal was provided for under the NTT Act to the Supreme Court. And secondly because, judicial review vested in the High Courts under Articles 226 and 227 of the Constitution, and in the Supreme Court under Articles 32 and 136 of the Constitution, had been kept intact. It is, therefore, the submission of the learned counsel for the respondents, that no fault can be found in the vesting of appellate jurisdiction from orders passed by Appellate Tribunals (constituted under the Income Tax Act, Customs Act and the Excise Act) with the NTT.

49. While acknowledging the fact, that the jurisdiction vested in the High Courts to hear appeals from the Appellate Tribunals, under the Income Tax Act (vide Section 260A), the Customs Act (vide Section 130), and the Excise Act (vide Section 35G), has been transferred from the jurisdictional High Court to the NTT, it was submitted that appellate jurisdiction vested in a High Court under a statute, could be taken away by an amendment of the statute. Stated simply, the submission at the behest of the respondents was, whatever is vested by a statutory enactment, can likewise be divested in the same manner. It was therefore sought to be asserted, that the grounds of challenge to the NTT Act raised, at the behest of the petitioners, were misconceived and unacceptable.

50. Besides the submissions noticed hereinabove, it was also contended on behalf of the respondents, that the assertion made by the petitioners, that appellate jurisdiction on “substantial questions of law” could not be vested with the NTT, was fallacious. In this behalf, it was sought to be reiterated, that jurisdiction of civil courts (including the original side of the High Court) was

barred in respect of tax related issues. It was sought to be explained, that a case could involve questions of fact, as well as, questions of law right from the stage of the initial adjudicatory authority. But, it was pointed out, that only cases involving "substantial questions of law" would qualify for adjudication at the hands of the NTT. As such, placing reliance on the decision in Mafatlal Industries Ltd. v. Union of India (1997) 5 SCC 536, it was submitted, that the above contention raised by the petitioners had no legs to stand. Furthermore, it was sought to be pointed out, that the phrase "substantial questions of law" has been interpreted by this Court to mean, not only questions of general pubic importance, but also questions which would directly and substantially affect the rights of the parties to the litigation. It was also asserted, that a question of law would also include, a legal issue not previously settled, subject to the condition, that it had a material bearing on the determination of the controversy to be settled, between the parties. It is accordingly contended, that no limited interpretation could be placed on the term "substantial questions of law". Accordingly, it was submitted, that a challenge to the constitution of the NTT on the premise that the NTT was vested with the jurisdiction to settle "substantial questions of law" was unsustainable.

51. In order to support his above submission, learned counsel for the respondents placed emphatic reliance on a few judgments rendered by this Court. The same are being noticed hereunder:

(i) Reliance was also placed on L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. Learned counsel for the respondents, while relying on the instant judgment, made a reference to various observations recorded therein. We wish

to incorporate hereunder all the paragraphs on which reliance was placed by the learned counsel:-

> "80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental — as opposed to a substitutional — role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3) of Article 32 of the Constitution which reads as under:
>
> > "32. *Remedies for enforcement of rights conferred by this Part.*—
> > (1) … … … … …
> > (2) … … … … …
> > (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), *Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).*"
>
> 81. If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.
>
> 82. There are pressing reasons why we are anxious to preserve the conferment of such a power on these Tribunals. When the Framers of our Constitution bestowed the powers of judicial review of legislative action upon the High Courts and the Supreme Court, they ensured that other constitutional safeguards were created to assist them in effectively discharging this onerous burden. The expectation was that this power would be required to be used only occasionally. However, in the five decades that have ensued since Independence, the quantity of litigation

before the High .Courts has exploded in an unprecedented manner. The decision in *Sampath Kumar's case*, AIR 1987 SC 386, was rendered against such a backdrop. We are conscious of the fact that when a Constitution Bench of this Court in *Sampath Kumar's case* (supra) adopted the theory of alternative institutional mechanisms, it was attempting to remedy an alarming practical situation and the approach selected by it appeared to be most appropriate to meet the exigencies of the time. Nearly a decade later, we are now in a position to review the theoretical and practical results that have arisen as a consequence of the adoption of such an approach.

83. We must, at this stage, focus upon the factual position which occasioned the adoption of the theory of alternative institutional mechanisms in *Sampath Kumar's case (supra)*. In his leading judgment, R. Misra, J. refers to the fact that since Independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. Reference was made to studies conducted towards relieving the High Courts of their increased load. In this regard, the recommendations of the Shah Committee for setting up independent Tribunals as also the suggestion of the Administrative Reforms Commission that Civil Service Tribunals be set up, were noted. Reference was also made to the decision in K.K. *Dutta* v. *Union of India, (1980) 4 SCC 38,* where this Court had, while emphasising the need for speedy resolution of service disputes, proposed the establishment of Service Tribunals.

84. The problem of clearing the backlogs of High Courts, which has reached colossal proportions in our times is, nevertheless, one that has been the focus of study for close to a half century. Over time, several Expert Committees and Commissions have analysed the intricacies involved and have made suggestions, not all of which have been consistent. Of the several studies that have been conducted in this regard, as many as twelve have been undertaken by the Law Commission of India (hereinafter referred to as "the LCI") or similar high-level committees appointed by the Central Government, and are particularly noteworthy. (Report of the High Court Arrears Committee, 1949; LCI, 14th Report on Reform of Judicial Administration (1958); LCI, 27th Report on Code of Civil Procedure, 1908 (1964); LCI, 41st Report on Code of Criminal Procedure, 1898 (1969); LCI, 54th Report of Code of Civil Procedure, 1908 (1973); LCI, 57th Report on Structure and Jurisdiction of the Higher Judiciary (1974); Report of High Court Arrears Committee, 1972; LCI, 79th Report on Delay and Arrears in High Courts and other Appellate Courts (1979); LCI, 99th Report on Oral Arguments and Written Arguments in the Higher Courts (1984); Satish Chandra's Committee Report 1986; LCI, 124th Report on the High Court Arrears – A Fresh Look (1988); Report of the Arrears Committee (1989-90).

85. An appraisal of the daunting task which confronts the High Courts can be made by referring to the assessment undertaken by the LCI in its 124th Report which was released sometime after the judgment in *Sampath Kumar's case (supra)*. The Report was delivered in 1988, nine years ago, and some changes have occurred since, but the broad perspective which emerges is still, by and large, true:

> "… The High Courts enjoy civil as well as criminal, ordinary as well as extraordinary, and general as well as special jurisdiction. The source of the jurisdiction is the Constitution and the various statutes as well as letters patent and other instruments constituting the High Courts. The High Courts in the country enjoy an original jurisdiction in respect of testamentary, matrimonial and guardianship matters. Original jurisdiction is conferred on the High Courts under the Representation of the People Act, 1951, Companies Act, 1956, and several other special statutes. The High Courts, being courts of record, have the power to punish for its contempt as well as contempt of its subordinate courts. The High Courts enjoy extraordinary jurisdiction under Articles 226 and 227 of the Constitution enabling it to issue prerogative writs, such as, the one in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto and certiorari*. Over and above this, the High Courts of Bombay, Calcutta, Delhi, Himachal Pradesh, Jammu and Kashmir and Madras also exercise ordinary original civil jurisdiction. The High Courts also enjoy advisory jurisdiction, as evidenced by Section 256 of the Indian Companies Act, 1956, Section 27 of the Wealth Tax Act, 1957, Section 26 of the Gift Tax Act, 1958, and Section 18 of the Companies (Profits) Surtax Act, 1964. Similarly, there are parallel provisions conferring advisory jurisdiction on the High Courts, such as, Section 130 of the Customs Act, 1962, and Section 354 of the Central Excises and Salt Act, 1944. The High Courts have also enjoyed jurisdiction under the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Different types of litigation coming before the High Court in exercise of its wide jurisdiction bear different names. The vast area of jurisdiction can be appreciated by reference to those names, viz., (*a*) first appeals; (*b*) appeals under the letters patent; (*c*) second appeals; (*d*) revision petitions; (*e*) criminal appeals; (*f*) criminal revisions; (*g*) civil and criminal references; (*h*) writ petitions; (*i*) writ appeals; (*j*) references under direct and indirect tax laws; (*k*) matters arising under the Sales Tax Act; (*l*) election petitions under the Representation of the People Act; (*m*) petitions under the Companies Act, Banking Companies Act and other special Acts and (*n*) wherever the High Court has original jurisdiction, suits and other proceedings in exercise of that jurisdiction. This varied jurisdiction has to some extent been

responsible for a very heavy institution of matters in the High Courts."

86. After analysing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunals thereby lending force to the approach adopted in *Sampath Kumar's case (supra)*. The LCI noted the erstwhile international judicial trend which pointed towards generalist courts yielding their place to specialist Tribunals. Describing the pendency in the High Courts as "catastrophic, crisis-ridden, almost unmanageable, imposing … an immeasurable burden on the system", the LCI stated that the prevailing view in .Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It, therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist courts/Tribunals while simultaneously eliminating the jurisdiction of the High Courts.

87. It is important to realise that though the theory of alternative institutional mechanisms was propounded in *Sampath Kumar's case* (supra) in respect of the Administrative Tribunals, the concept itself — that of creating alternative modes of dispute resolution which would relieve High Courts of their burden while simultaneously providing specialised justice — is not new. In fact, the issue of having a specialised tax court has been discussed for several decades; though the Report of the High Court Arrears Committee (1972) dismissed it as "ill-conceived", the LCI, in its 115th Report (1986) revived the recommendation of setting up separate Central Tax Courts. Similarly, other Reports of the LCI have suggested the setting up of 'Gram Nyayalayas' [LCI, 114th Report (1986)], Industrial/Labour Tribunals [LCI, 122nd Report (1987)] and Education Tribunals [LCI, 123rd Report (1987)].

88. In *R.K. Jain's case, (1993) AIR SCW 1899,* this Court had, in order to understand how the theory of alternative institutional mechanisms had functioned in practice, recommended that the LCI or a similar expert body should conduct a survey of the functioning of these Tribunals. It was hoped that such a study, conducted after gauging the working of the Tribunals over a sizeable period of more than five years would provide an answer to the questions posed by the critics of the theory. Unfortunately, we do not have the benefit of such a study. We may, however, advert to the Report of the Arrears Committee (1989-90), popularly known as the Malimath Committee Report, which has elaborately dealt with the aspect. The observations contained in the Report, to this extent they contain a review of the functioning of the Tribunals over a period of three years or so after their institution, will be useful for our purpose. Chapter VIII of the second volume of the Report, "*Alternative Modes and Forums for Dispute Resolution*", deals with the issue at length. After forwarding its specific recommendations on the feasibility of setting up 'Gram Nyayalayas', Industrial Tribunals and Educational Tribunals, the Committee has dealt with the issue of Tribunals set up under Articles 323-A and 323-B of the

Constitution. The relevant observations in this regard, being of considerable significance to our analysis, are extracted in full as under:

"*Functioning of Tribunals*

8.63 Several tribunals are functioning in the country. *Not all of them, however, have inspired confidence in the public mind*. The reasons are not far to seek. *The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of calibre are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning*. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.

8.64 Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decision of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

Tribunals — Tests for Including High Court's Jurisdiction

8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. *Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach*. When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (See *S.P. Sampath Kumar*'s case (supra)).

The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to overlook these vital and important aspects. *It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself*. Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid.

8.66 The overall picture regarding the tribunalisation of justice in our country is not satisfactory and encouraging. There is a need for a fresh look and review and a serious consideration before the experiment is extended to new areas of fields, *especially if the constitutional jurisdiction of the High Courts is to be simultaneously ousted*. Not many tribunals satisfying the aforesaid tests can possibly be established."

Having expressed itself in this manner, the Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the High Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more Judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High Courts.

89. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed up to expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In *R.K. Jain's case (supra)*, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals,

whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of ,the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

94. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial

proceedings, we have invoked the doctrine of prospective overruling so as not to disturb the procedure in relation to decisions already rendered."

Based on the decisions of this Court referred to above, it was the contention of the learned counsel for the respondents, that the submissions advanced on behalf of the petitioners, are liable to outright rejection.

(ii) Reliance was placed first of all on Union of India v. Delhi High Court Bar Association, (2002) 4 SCC 275. Insofar as the controversy raised in the instant judgment is concerned, it would be relevant to mention, that banks and financial institutions had been experiencing considerable difficulties in recovery of loans, and enforcement of securities. The procedure for recovery of debts due to banks and financial institutions, which was being followed, had resulted in the funds being blocked. To remedy the above situation, Parliament enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Act, *inter alia*, provided for establishment of tribunals and Appellate Tribunals. The said tribunals were given jurisdiction, powers and authority, to entertain and decide, applications from banks and financial institutions, for recovery of debts, due to banks and financial institutions. The Appellate Tribunal, was vested with the jurisdiction and authority, to entertain appeals. The procedure to be followed by the tribunals, as also, the Appellate Tribunals, was provided for under the above enactment. The legislation also provided for modes of recovery of debts through Recovery Officers (appointed under the Act). The constitutional validity of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was raised on the ground, that the legislation was unreasonable and violative of Article 14 of the Constitution. It was also the claim of those who raised the said challenge,

that the enactment was beyond the legislative competence of the Parliament. The controversy came to be examined, in the first instance, by the Delhi High Court (in Delhi High Court Bar Association v. Union of India, AIR 1975 Delhi 323). The Delhi High Court held, that even though the tribunal could be constituted by the Parliament, and even though the constitution of the tribunal was within the purview of Articles 323A and 323B of the Constitution, and despite the fact that, the expression "administration of justice" appearing in entry 11A of List III of the Seventh Schedule to the Constitution, would also include tribunals administering justice, yet the impugned Act was unconstitutional, as it had the effect of eroding the independence of the judiciary, besides being irrational, discriminatory, unreasonable and arbitrary. As such it was held, that the provisions of the enactment were violative of the mandate contained in Article 14 of the Constitution. The High Court, in its judgment, also quashed the appointment of Presiding Officers of the tribunal. While adjudicating upon the above controversy in reference to some of the issues that have been raised before us, our pointed attention was invited to the following observations:

> "21. ….. Sub-section (20) of Section 19 provides that after giving the applicant and the defendant an opportunity of being heard, the Tribunal may pass such interim or final order as it thinks fit to meet the ends of justice. It is after this order that a certificate is issued by the Presiding Officer to the Recovery Officer for recovery of money. Section 22 of the Act has not been amended. Therefore, reading Sections 19 and 22 of the Act together, it appears that the Tribunal and the Appellate Tribunal are to be guided by the principles of natural justice while trying the matter before them. Section 22(1) of the Act stipulates that the Tribunal and the Appellate Tribunal, while being guided by the principles of natural justice, are to be subjected to the other provisions of the Act and the Rules. Rule 12(7) provides that if a defendant denies his liability to pay the claim made by the applicant, the Tribunal may act upon the affidavit of the applicant

who is acquainted with the facts of the case. In this Rule, which deals with the consideration of the applicant's bank application, there is no reference to the examination of witnesses. This sub-rule refers only to the affidavit of the applicant. Rule 12(6), on the other hand, provides that the Tribunal may, at any time, for sufficient reason order a fact to be proved by affidavit or may pass an order that the affidavit of any witness may be read at the hearing. It is in the proviso to this sub-rule that a reference is made to the cross-examination of witnesses.

22. At the outset, we find that Rule 12 is not happily worded. The reason for establishing Banking Tribunals being to expedite the disposal of the claims by the banks, Parliament thought it proper only to require the principles of natural justice to be the guiding factor for the Tribunals in deciding the applications, as is evident from Section 22 of the Act. While the Tribunal has, no doubt, been given the power of summoning and enforcing the attendance of any witness and examining him on oath, but the Act does not contain any provision which makes it mandatory for the witness to be examined, if such a witness could be produced. Rule 12(6) has to be read harmoniously with the other provisions of the Act and the Rules. As we have already noticed, Rule 12(7) gives the Tribunal the power to act upon the affidavit of the applicant where the defendant denies his liability to pay the claims. Rule 12(6), if paraphrased, would read as follows:

1. the Tribunal may, at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit … on such conditions as the Tribunal thinks reasonable;
2. the Tribunal may, at any time for sufficient reason, order … that the affidavit of any witness may be read at the hearing, on such conditions as the Tribunal thinks reasonable.

23. In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order that the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same. The proviso to Rule 12(6) would certainly apply only where the Tribunal chooses to issue a direction on its own, for any particular fact to be proved by affidavit or the affidavit of a witness being read at the hearing. The said proviso refers to the desire of an applicant or a defendant for the production of a witness for cross-examination. In the setting in which the said proviso occurs, it would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise. It is at that time, if it appears to the Tribunal, that such a witness can be produced and it is necessary to do so and there is no desire to prolong the case that it shall require the witness to be present for cross-examination and in the event of his not appearing, then the affidavit shall not be taken into evidence. When the High Courts and the Supreme Court in exercise of their jurisdiction under Article 226

and Article 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before them ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the *bona fide* need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case, would not be sufficient.

24. The manner in which a dispute is to be adjudicated upon is decided by the procedural laws which are enacted from time to time. It is because of the enactment of the Code of Civil Procedure that normally all disputes between the parties of a civil nature would be adjudicated upon by the civil courts. There is no absolute right in anyone to demand that his dispute is to be adjudicated upon only by a civil court. The decision of the Delhi High Court proceeds on the assumption that there is such a right. As we have already observed, it is by reason of the provisions of the Code of Civil Procedure that the civil courts had the right, prior to the enactment of the Debts Recovery Act, to decide the suits for recovery filed by the banks and financial institutions. This forum, namely, that of a civil court, now stands replaced by a Banking Tribunal in respect of the debts due to the bank. When in the Constitution Articles 323-A and 323-B contemplate establishment of a Tribunal and that does not erode the independence of the judiciary, there is no reason to presume that the Banking Tribunals and the Appellate Tribunals so constituted would not be independent, or that justice would be denied to the defendants or that the independence of the judiciary would stand eroded.

25. Such Tribunals, whether they pertain to income tax or sales tax or excise or customs or administration, have now become an essential part of the judicial system in this country. Such specialised institutions may not strictly come within the concept of the judiciary, as envisaged by Article 50, but it cannot be presumed that such Tribunals are not an effective part of the justice delivery system, like courts of law. It will be seen that for a person to be appointed as a Presiding Officer of a Tribunal, he should be one who is qualified to be a District Judge and, in case of appointment of the Presiding Officer of the Appellate Tribunal he is, or has been, qualified to be a Judge of a High Court or has been a member of the Indian Legal Service who has held a post in Grade I for at least three years or has held office as the Presiding Officer of a Tribunal for at least three years. Persons who are so appointed as Presiding Officers of the Tribunal or of the Appellate Tribunal would be well versed in law to be able to decide cases independently and judiciously. It has to be borne in mind that the decision of the Appellate Tribunal is not final, in .the sense that the same can be subjected to judicial review by the High Court under Articles 226 and 227 of the Constitution.

26. With the establishment of the Tribunals, Section 31 provides for the transfer of pending cases from civil courts to the Tribunal. We do not find such a provision being in any way bad in law. Once a Debts Recovery Tribunal has been established, and the jurisdiction of courts barred by Section 18 of the Act, it would be only logical that any matter pending in the civil court should stand transferred to the Tribunal. This is what happened when the Central Administrative Tribunal was established. All cases pending in the High Courts stood transferred. Now that exclusive jurisdiction is vested in the Banking Tribunal, it is only in that forum that bank cases can be tried and, therefore, a provision like Section 31 was enacted.

27. With regard to the observations of the Delhi High Court in relation to the pecuniary jurisdiction of the Tribunals and of the Delhi High Court, the Act has been enacted for the whole of India. In most of the States, the High Courts do not have original jurisdiction. In order to see that the Tribunal is not flooded with cases where the amounts involved are not very large, the Act provides that it is only where the recovery of the money is more than Rs 10 lakhs that the Tribunal will have the jurisdiction to entertain the application under Section 19. With respect to suits for recovery of money less than Rs 10 lakhs, it is the subordinate courts which would continue to try them. In other words, for a claim of Rs 10 lakhs or more, exclusive jurisdiction has been conferred on the Tribunal but for any amount less than Rs 10 lakhs, it is the ordinary civil courts which will have jurisdiction. The bifurcation of original jurisdiction between the Delhi High Court and the subordinate courts is a matter which cannot have any bearing on the validity of the establishment of the Tribunal. It is only in those High Courts which have original jurisdiction that an anomalous situation arises where suits for recovery of money less than Rs 10 lakhs have to be decided by the High Courts while the Tribunals have jurisdiction to decide suits for recovery of more than Rs 10 lakhs. This incongruous situation, which can be remedied by the High Court divesting itself of the original jurisdiction in regard to such claims and vesting the said jurisdiction with the subordinate courts or vice versa, cannot be a ground for holding that the Act is invalid.

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30. By virtue of Section 29 of the Act, the provisions of the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, have become applicable for the realisation of the dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income Tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer would act in an arbitrary manner. Furthermore, Section 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an

appellate forum has been provided against any orders of the Recovery Officer which may not be in accordance with law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner. The provisions of Sections 25 and 28 are, therefore, not bad in law.

31. For the aforesaid reasons, while allowing the appeals of the Union of India and the Banks, we hold that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is a valid piece of legislation. As a result thereof, the writ petitions or appeals filed by various parties challenging the validity of the said Act or some of the provisions thereof, are dismissed. It would be open to the parties to raise other contentions on the merits of their cases before the authority constituted under the Act and, only thereafter, should a High Court entertain a petition under Articles 226 and/or 227 of the Constitution. Transferred cases stand disposed of accordingly. Parties to bear their own costs."

(iii) Reliance was next placed on State of Karnataka v. Vishwabharathi House Building Cooperative Society & Ors., (2003) 2 SCC 412. The primary question which arose for consideration was the constitutional validity of the Consumer Protection Act, 1986. The challenge was raised on the ground, that Parliament was not empowered to establish a hierarchy of courts like the District Fora, the State Commission and the National Commission, as this would constitute a parallel hierarchy of courts, in addition to the courts established under the Constitution, namely, District Courts, High Courts and the Supreme Court. In this behalf the pointed submission was, that Parliament could only establish courts, with power to deal with specific subjects, but not such a court which would run parallel to the civil courts. It was sought to be asserted, that even under Articles 323A and 323B of the Constitution, Parliament could not enact a legislation, by which it could establish tribunals, in substitution of civil courts including the High Court. This, according to those who raised the challenge, would strike at the independence of the judiciary. As against the above assertions, the legislative

competence of the Parliament and the State Legislatures, to provide for creation of courts and tribunals, reliance was placed on entries 77, 78 and 79 in List I of the Seventh Schedule, as also, entries 11A and 46 contained in List III of the Seventh Schedule to the Constitution. While examining the challenge raised to the Consumer Protection Act, 1986, on the grounds referred to above, this Court held as under:-

> "12. A bare perusal of the aforementioned provisions does not leave any manner of doubt as regard the legislative competence of Parliament to provide for creation of Special Courts and Tribunals. Administration of justice; constitution and organization of all courts, except the Supreme Court .and the High Courts is squarely covered by Entry 11-A of List III of the Constitution of India. The said entry was originally a part of Entry 3 of List II. By reason of the Constitution (Forty-second Amendment) Act, 1976 and by Section 57(*a*)(*vi*) thereof, it was inserted into List III as Item 11-A.
>
> 13. By virtue of clause (2) of Article 246 of the Constitution, Parliament has the requisite power to make laws with respect of constitution of organization of all courts except the Supreme Court and the High Court.
>
> 14. The learned counsel appearing on behalf of the petitioners could not seriously dispute the plenary power of Parliament to make a law as regard constitution of courts but as noticed supra, merely urged that it did not have the competence to create parallel civil courts.
>
> 15. The said submission has been made purported to be relying on or on the basis of the following observations made by Shinghal, J. while delivering a partially dissenting judgment in *Special Courts Bill, 1978, In re*: (1979) 1 SCC 380 (SCC at p. 455, para 152)
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> > "*152*. The Constitution has thus made ample and effective provision for the establishment of a strong, independent and impartial judicial administration in the country, with the necessary complement of civil and criminal courts. It is not permissible for Parliament or a State Legislature to ignore or bypass that scheme of the Constitution by providing for the establishment of a civil or criminal court parallel to a High Court in a State, or by way of an additional or extra or a second High Court, or a court other than a court subordinate to the High Court. Any such attempt would be unconstitutional and will strike at the independence of the judiciary which has so nobly been enshrined in the Constitution and so carefully nursed over the years."
>
> 16. The argument of the learned counsel is fallacious inasmuch as the provisions of the said Act are in addition to the provisions of any other law

for the time being in force and not in derogation thereof as is evident from Section 3 thereof.

17. The provisions of the said Act clearly demonstrate that it was enacted keeping in view the long-felt necessity of protecting the common man from wrongs wherefor the ordinary law for all intent and purport had become illusory. In terms of the said Act, a consumer is entitled to participate in the proceedings directly as a result whereof his helplessness against a powerful business house may be taken care of.

18. This Court in a large number of decisions considered the purport and object of the said Act. By reason of the said statute, quasi-judicial authorities have been created at the district, State and Central levels so as to enable a consumer to ventilate his grievances before a forum where justice can be done without any procedural wrangles and hypertechnicalities.

19. One of the objects of the said Act is to provide momentum to the consumer movement. The Central Consumer Protection Council is also to be .constituted in terms of Section 4 of the Act to promote and protect the rights of the consumers as noticed hereinbefore.

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24. In terms of Section 10, the President of a District Forum shall be a person who is, or has been, or is qualified to be a District Judge and the Forum shall also consist of two other members who are required to be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration and one of them shall be a woman. The tenure of the members of the District Forum is fixed.

25. Section 13 of the said Act lays down a detailed procedure as regards the mode and manner in which the complaints received by the District Forum are required to be dealt with. Section 14 provides for the directions which can be issued by the District Forum on arriving at a satisfaction that the goods complained against suffer from any of the defects specified in the complaint .or that any of the allegations contained in the complaint about the deficiencies in services have been proved.

26. Section 15 provides for an appeal from the order made by the District Forum to the State Commission.

27. Section 16 provides for composition of the State Commission which reads thus:

> "*16*. (1) Each State Commission shall consist of,—
>
> (*a*) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President:
>
> Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;
>
> (*b*) two other members, who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or

have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman:

Provided that every appointment under this clause shall be made by the State Government on the recommendation of a Selection Committee consisting of the following, namely:

(*i*) President of the State Commission: Chairman

(*ii*) Secretary of the Law Department of the State: Member

(*iii*) Secretary in charge of the Department dealing with consumer affairs in the State: Member

(2) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the State Commission shall be such as may be prescribed by the State Government.

(3) Every member of the State Commission shall hold office for a term of five years or up to the age of sixty-seven years, whichever is earlier and shall not be eligible for reappointment.

(4) Notwithstanding anything contained in sub-section (3), a person appointed as a President or as a member before the commencement of the Consumer Protection (Amendment) Act, 1993, shall continue to hold such office as President or member, as the case may be, till the completion of his term."

The members of the State Commission are to be selected by a Selection Committee, the Chairman whereof would be the President of the State Commission.

28. Section 19 provides for an appeal from a decision of the State Commission to the National Commission. Section 20 deals with the composition of the National Commission, the President whereof would be a person who is or has been a Judge of the Supreme Court and such appointment shall be made only upon consultation with the Chief Justice of India. So far as the members of the National Commission are concerned, the same are also to be made on the recommendation of the Selection Committee, the Chairman whereof would be a person who is a Judge of the .Supreme Court to be nominated by the Chief Justice of India. The tenure of the office of the National Commission is also fixed by reason of sub-section (3) of Section 20.

29. By reason of the provisions of the said Act, therefore, independent authorities have been created.

30. Sections 15, 19 and 23 provide for the hierarchy of appeals. By reason of sub-sections (4), (5) and (6) of Section 13, the District Forum shall have the same powers as are vested in the civil courts for the purposes mentioned therein. Sub-sections (2) and (2-A) of Section 14 mandate that the proceedings shall be conducted by the President of the District Forum and at least one member thereof sitting together. Only in the event of any difference between them on any point or points, the same is

to be referred to the other member for hearing thereon and the opinion of the majority shall be the order of the District Forum. By reason of Section 18, the provisions of Sections 12, 13 and 14 and the rules made thereunder would mutatis mutandis be applicable to the disposal of disputes by the State Commission.

31. Section 23 provides for a limited appeal to the Supreme Court from an order made by the National Commission i.e. when the same is made in exercise of its original power as conferred by sub-clause (*i*) of clause (*a*) of Section 21."

This Court then, having placed reliance on Union of India v. Delhi High Court Bar Association (supra), Navinchandra Mafatlal, Bombay v. The Commissioner of Income Tax, Bombay City, AIR 1955 SC 58, and Union of India v. Harbhajan Singh Dhillon, (1971) 2 SCC 779, concluded as under:-

"37. Once it is held that Parliament had the legislative competence to enact the said Act, the submissions of the learned counsel that the relevant provisions of the Constitution required amendments must be neglected.

38. The scope and object of the said legislation came up for consideration before this Court in *Common Cause, A Registered Society* v. *Union of India, (1997) 10 SCC 729*. It was held: (SCC p. 730, para 2)

> "2. The object of the legislation, as the preamble of the Act proclaims, is 'for better protection of the interests of consumers'. During the last few years preceding the enactment there was in this country a marked awareness among the consumers of goods that they were not getting their money's worth and were being exploited by both traders and manufacturers of consumer goods. The need for consumer redressal fora was, therefore, increasingly felt. Understandably, therefore, legislation was introduced and enacted with considerable enthusiasm and fanfare as a path-breaking benevolent legislation intended to protect the consumer from exploitation by unscrupulous manufacturers and traders of consumer goods. A three-tier fora comprising the District Forum, the State Commission and the National Commission came to be envisaged under the Act for redressal of grievances of consumers."

39. The rights of the parties have adequately been safeguarded by reason of the provisions of the said Act inasmuch as although it provides for an alternative system of consumer jurisdiction on summary trial, they are required to arrive at a conclusion based on reasons. Even when quantifying damages, they are required to make an attempt to serve the ends of justice aiming not only at recompensing the individual but also to

bring about a .qualitative change in the attitude of the service provider. Assignment of reasons excludes or at any rate minimizes the chances of arbitrariness and the higher forums created under the Act can test the correctness thereof.

40. The District Forum, the State Commission and the National Commission are not manned by lay persons. The President would be a person having judicial background and other members are required to have the expertise in the subjects such as economics, law, commerce, accountancy, industry, public affairs, administration etc. It may be true that by reason of sub-section (2-A) of Section 14 of the Act, in a case of difference of opinion between two members, the matter has to be referred to a third member and, in rare cases, the majority opinion of the members may prevail over the President. But, such eventuality alone is insufficient for striking down the Act as unconstitutional, particularly, when provisions have been made therein for appeal thereagainst to a higher forum.

41. By reason of the provisions of the said Act, the power of judicial review of the High Court, which is a basic feature of the Constitution, has not been nor could be taken away.

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49. The question as regards the applicability or otherwise of Articles 323-A and 323-B of the Constitution in the matter of constitution of such Tribunals came up for consideration before this Court in *L. Chandra Kumar* v. *Union of India, (1997) 3 SCC 261*. This Court therein clearly held that the constitutional provisions vest Parliament and the State Legislatures, as the case may be, with powers to divest the traditional courts of a considerable portion of their judicial work. It was observed that the Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and High Court apart from the authorisation that flows from Articles 323-A and 323-B in terms of Entries 77, 78, 79 and 95 of List I so far as the Parliament is concerned, and in terms of Entry 65 of List II and Entry 46 of List III so far as the State Legislatures are concerned. It was further held that power of judicial review being the basic structure of the Constitution cannot be taken away.

50. We, therefore, are clearly of the opinion that the said Act cannot be said to be unconstitutional."

The fourth contention:

52(i) In response to the fourth contention, namely, the challenge raised by the learned counsel for the petitioners, to the various provisions of the NTT Act, it was the submission of the learned counsel for the respondents, that in view of

the submissions advanced in respect of the third contention, it is apparent that the Parliament had the legislative competence to enact the NTT Act. It was submitted, that the NTT Act was enacted keeping in mind the parameters laid down by this Court, by preserving the power of judicial review vested in the High Courts under Articles 226 and 227 of the Constitution, as also, by preserving the power of judicial review vested in this Court under Articles 32 and 136 of the Constitution. It is, therefore, submitted that the final word in respect of the instant adjudicatory process, stands preserved with courts of law. And therefore, the submissions advanced at the hands of the learned counsel for the petitioners on the individual provisions of the NTT Act, pertaining to the independence of the adjudicatory process, were being exaggerated out of proportion.

(ii) Despite having made the above submissions, the Attorney General for India, was fair and candid in stating, that if this Court felt that there was need to make certain changes in the provisions referred to by the petitioners, he had the instructions to state, that any suggestion made by this Court will be viewed positively, and necessary amendments in the NTT Act would be carried out.

<u>The debate, and the consideration:</u>

I. <u>Constitutional validity of the NTT Act – Does the NTT Act violate the "basic structure" of the Constitution?</u>

53. The principal contention advanced at the hands of the learned counsel for the petitioners was premised on the submission, that Article 323B, inserted by the Constitution (Forty-second Amendment) Act 1976, to the extent that it violated the principles of, "separation of powers", "rule of law", and "judicial

review", was liable to be struck down. This striking down was founded on an alleged violation of the "basic structure" doctrine. Similarly, various provisions of the NTT Act, were sought to be assailed. The provisions of the NTT Act were challenged, on the premise, that they had trappings of executive control, over the adjudicatory process vested with the NTT, and therefore, were liable to be set aside as unconstitutional.

54. In the context of the foregoing submissions advanced at the hands of the learned counsel for the petitioners, it is essential for us to examine the exact contours of "judicial review", in the framework and scheme, of the concepts of "rule of law" and "separation of powers", which have been held to constitute the "basic structure" of the Constitution. And also, the essential ingredients, of an independent adjudicatory process. It is, therefore, that we would travel the ladder of history and law, to determine the exact scope of the "judicial review", which constitutes the "basic structure" of the Constitution. This would lead us to unravel the salient ingredients of an independent adjudicatory process. Based thereon, we will record our conclusions. The analysis:

55. Reference must first of all be made to the decision rendered by this Court in Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225. In the above cited case, this Court was engaged with the validity of the Constitution (Twenty-fourth Amendment) Act, 1971, as also, the Constitution (Twenty-fifth Amendment) Act, 1971. The former Act related to the amendments of Articles 13 and 368 of the Constitution, whereas the latter, pertained to the amendment of Article 31 of the Constitution. The instant judgment was rendered by a

constitution bench of 13 Judges. Seven of the Judges expressed the majority view. The observations recorded by this Court recognising "judicial review" as a component of the "basic structure" of the Constitution, were made by four Judges. Reference is first of all being made, to the view expressed by S.M. Sikri, CJ.:

> "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.
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> 293. The above structure is built on the basic foundation i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed."

It is also imperative to refer to the view expressed by J.M. Shelat and A.N. Grover, JJ., who delivered a common judgment:

> "487. .....The Rule of Law has been ensured by providing for judicial review.".
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> 577. ….. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". The respondents have also contended that to let the court have judicial review over constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in Commonwealth of Australia v. Bank of New South Wales, 1950 AC 235 at 310,:
>
> > "The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a Court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand

and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament."

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in Ranasinghe's case, 1965 AC 172. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution (per Haldane, L.C. in Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co., 1914 AC 237 and Ex parte Walsh & Johnson; In re Yates, (1925) 37 CLR 36 at page 58. The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the Legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the respondents have contested the proposition that the validity of a constitutional amendment can be the subject of review by this Court. The Advocate-General of Maharashtra has characterized judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of Judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21 and the affirmation in Article 141 that Judges declare but not make law. To this may be added the none too .rigid amendatory process which authorizes amendment by means of 2/3 majority and the additional requirement of ratification.

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582. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

(1) The supremacy of the Constitution.

(2) Republican and Democratic form of government and sovereignty of the country.

(3) Secular and federal character of the Constitution.

(4) Demarcation of power between the Legislature, the executive and the judiciary.

(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

(6) The unity and the integrity of the Nation."

In this behalf it is also imperative for us to record the observations of P. Jaganmohan Reddy, J., who observed as under:-

"1104. .....There is no constitutional matter which is not in some way or the other involved with political, social or economic questions, and if the Constitution-makers have vested in this Court a power of Judicial review, and while so vesting, have given it a prominent place describing it as the heart and soul of the Constitution, we will not be deterred from discharging that duty, merely because the validity or otherwise of the legislation will affect the political or social policy underlying it. The basic approach of this Court has been, and must always be, that the Legislature has the exclusive power to determine the policy and to translate it into law, the constitutionality of which is to be presumed, unless there are strong and cogent reasons for holding that it conflicts with the constitutional mandate. In this regard both the Legislature, the executive, as well as the judiciary are bound by the paramount instrument, and, therefore, no court and no Judge will exercise the judicial power dehors that instrument, nor will it function as a supreme legislature above the Constitution. The bona fides of all the three of them has been the basic assumption, and though all of them may be liable to error, it can be corrected in the manner and by the method prescribed under the Constitution and subject to such limitations as may be inherent in the instrument."

Some of the observations of H.R. Khanna, J., are also relevant to the issue in hand. The same are placed hereunder:

"1529. .....The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution. Our Constitution-makers have provided for fundamental rights in Part III and made them justiciable. As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. Dealing with draft Article 25 (corresponding to present Article 32 of the Constitution) by which a right is given to move the

Supreme Court for enforcement of the fundamental rights, Dr Ambedkar speaking in the Constituent Assembly on December 9, 1948 observed:

> "If I was asked to name any particular article in this Constitution as the most important an article without which this Constitution would be a nullity — I could not refer to any other article except this one It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance" (Constituent Assembly Debates, Vol VII, p. 953).

Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes.

Our Constitution postulates rule of law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State Legislature, contemplated by Article 31-C, in my opinion, strikes at the basic structure of the Constitution. The second part of Article 31-C thus goes beyond the permissible limit of what constitutes amendment under Article 368.

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1533. The position as it emerges is that it is open to the authority amending the Constitution to exclude judicial review regarding the validity of an existing statute. It is likewise open to the said authority to exclude judicial review regarding the validity of a statute which might be enacted by the legislature in future in respect of a specified subject. In such an event, judicial review is not excluded for finding whether the statute has been enacted in respect of the specified subject. Both the above types of constitutional amendments are permissible under Article 368. What is not permissible, however, is a third type of constitutional amendment, according to which the amending authority not merely excludes judicial review regarding the validity of a statute which might be enacted by the legislature in future in respect of a specified subject but also excludes judicial review for finding whether the statute enacted by the legislature is in respect of the subject for which judicial review has been excluded.

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1537. I may now sum up my conclusions relating to power of amendment under Article 368 of the Constitution as it existed before the amendment made by the Constitution (Twenty-fourth Amendment) Act as well as about the validity of the Constitution (Twenty-fourth Amendment) Act, the Constitution (Twenty-fifth Amendment) Act and the Constitution (Twenty-ninth Amendment) Act:

(i) Article 368 contains not only the procedure for the amendment of the Constitution but also confers the power of amending the Constitution.

(ii) Entry 97 in List I of the Seventh Schedule of the Constitution does not cover the subject of amendment of the Constitution.

(iii) The word "law" in Article 13(2) does not include amendment of the Constitution. It has reference to ordinary piece of legislation. It would also

in view of the definition contained in clause (a) of Article 13(3) include an ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

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(vii) The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence, or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

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(xiv) The second part of Article 31-C contains the seed of national disintegration and is invalid on the following two grounds:

.(1) It gives a carte blanche to the legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the legislature including a State Legislature, to amend the Constitution in important respects.

(2) The legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C --

"and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy"."

56(i) The next judgment having a bearing on the subject is Smt. Indira Nehru Gandhi v. Shri Raj Narain, 1975 Supp. SCC 1. In the instant judgment, this

Court examined the constitutional validity of the Constitution (Thirty-ninth Amendment) Act, 1975. The issue under reference included the insertion of Article 329A (and more particularly, the second clause thereof), which had the effect of taking out from the purview of "judicial review", the validity of the election of a person who was holding, either the office of the Prime Minister or of the Speaker, or had come to be appointed/chosen as the Prime Minister or the Speaker, after such election. Insofar as the instant aspect of the matter is concerned, it would be relevant to mention, that the election of the appellant from the Rae Bareli constituency in the General Parliamentary Elections of 1971, was set aside by the High Court of Judicature at Allahabad (hereinafter referred to as, the High Court), on 12.6.1975. The appellant had assailed the order passed by the High Court before this Court. During the pendency of the above appeal, on 10.8.1975, the Constitution (Thirty-ninth Amendment) Act was passed, which introduced two new Articles, namely, Articles 71 and 329A of the Constitution. The controversy arising out of the above referred appeal, therefore, virtually came to be rendered infructuous. It was, by way of a cross-appeal, that the constitutional validity of the amended provisions was assailed.

(ii) In the above cross-appeal, it was asserted at the hands of the respondent, that "judicial review" was an essential feature of the "basic structure" of the Constitution. This assertion was under the doctrine of "separation of powers". The pointed submission at the hands of the learned counsel for the respondent was, that "judicial review", in matters of election was imperative. The issue canvassed was, that "judicial review" would ensure free, fair and pure elections.

It was sought to be asserted, that the power of "judicial review" in the context referred to hereinabove, was available both under the American Constitution, as also, the Australian Constitution. And therefore, even though there was no express/clear provision on the subject under the Indian Constitution, since the executive, the legislature and the judiciary were earmarked respective spheres of activity (by compartmentalising them into separate parts and chapters), the charge and onus of "judicial review" fell within the sphere of activity of the judiciary. It was sought to be asserted, that under Article 136 of the Constitution, all tribunals and courts are amenable to the jurisdiction of this Court. The corollary sought to be drawn was, that if under clause 4 of Article 329A of the Constitution, the power of "judicial review" was taken away, it would amount to a destruction of the "basic structure" of the Constitution. The relevant observations made in the instant judgment rendered by a constitution bench of 5 Judges of this Court are being extracted hereunder. First and foremost reference may be made to the following observations of A.N. Ray, CJ:-

> "16. It should be stated here that the hearing has proceeded on the assumption that it is not necessary to challenge the majority view in Kesavananda Bharati's case, (1973) 4 SCC 225. The contentions of the respondent are these: First, under Article 368 only general principles governing the organs of the State and the basic principles can be laid down. An amendment of the Constitution does not contemplate any decision in respect of individual cases. Clause (4) of Article 329-A is said to be exercise of a purely judicial power which is not included in the constituent power conferred by Article 368.
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> 20. <u>Fifth, clause (4) destroys not only judicial review but also separation of power. The order of the High Court declaring the election to be void is declared valid (lie void). The cancellation of the judgment is denial of political justice which is the basic structure of the Constitution.</u>
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52. Judicial review in election disputes is not a compulsion. Judicial review of decisions in election disputes may be entrusted by law to a judicial tribunal. If it is to a tribunal or to the High Court the judicial review will be attracted either under the relevant law providing for appeal to this Court or Article 136 may be attracted. Under Article 329(b) the contemplated law may vest the power to entertain election petitions in the House itself which may determine the dispute by a resolution after receiving a report from a special committee. In such cases judicial review may be eliminated without involving amendment of the Constitution. ….. If judicial review is excluded the court is not in a position to conclude that principles of equality have been violated.

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153. The contentions of the respondent that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure or basic framework fails on two grounds. First, legislative measures are not subject to the theory of basic features or basic structure or basic framework. Second, the majority view in Kesavananda Bharati's case (supra) is that the Twenty-ninth Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights."

The views expressed by H.R. Khanna, J. are now being reproduced below:-

"175. The proposition that the power of amendment under Article 368 does not enable Parliament to alter the basic structure of framework of the Constitution was laid down by this Court by a majority of 7 to 6 in the case of His Holiness Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225. Apart from other reasons which were given in some of the judgments of the learned Judges who constituted the majority, the majority dealt with the connotation of the word "amendment". It was held that the words "amendment of the Constitution" in Article 368 could not have the effect of destroying or abrogating the basic structure of the Constitution. Some of us who were parties to that case took a different view and came to the conclusion that the words "amendment of the Constitution" in Article 368 did not admit of any limitation. Those of us who were in the minority in Kesavananda Bharati's case (supra) may still hold the same view as was given expression to in that case. For the purpose of the present case, we shall have to proceed in accordance with the law as laid down by the majority in that case.

176. Before dealing with the question as to whether the impugned amendment affects the basic structure of the Constitution, I may make it clear that this Court is not concerned with the wisdom behind or the propriety of the impugned constitutional amendment. These are matters essentially for those who are vested with the authority to make the constitutional amendment. All that this Court is concerned with is the constitutional validity of the impugned amendment.

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210. It has been argued in support of the constitutional validity of clause (4) that as a result of this amendment, the validity of one election has been preserved. Since the basic structure of the Constitution, according to the submission, continues to be the same, clause (4) cannot be said to be an impermissible piece of constitutional amendment. The argument has a seeming plausibility about it, but a deeper reflection would show that it is vitiated by a basic fallacy. Law normally connotes a rule or norm which is of general application. It may apply to all the persons or class of persons or even individuals of a particular description. Law prescribes the abstract principles by the application of which individual cases are decided. Law, however, is not what Blackstone called "a sentence". According to Roscoe Pound, law, as distinguished from laws, is the system of authoritative materials for grounding or guiding judicial and administrative action recognised or established in a politically organized society (see p. 106, Jurisprudence, Vol. III). Law is not the same as judgment. Law lays down the norm in abstract terms with a coercive power and sanction against those guilty of violating the norm, while judgment represents the decision arrived at by the application of law to the concrete facts of a case. Constitutional law relates to the various organs of a State; it deals with the structure of the Government, the extent of distribution of its powers and the modes and principles of its operation. The Constitution of India is so detailed that some of the matters which in a brief Constitution like that of the United States of America are dealt with by statutes form the subject-matter of various articles of our Constitution. There is, however, in a constitutional law, as there is in the very idea of law, some element of generality or general application. It also carries with it a concept of its applicability in future to situations which may arise in that context. If there is amendment of some provision of the Constitution and the amendment deals with matters which constitute constitutional law, in the normally accepted sense, the court while deciding the question of the validity of the amendment would have to find out, in view of the majority opinion in Kesavananda Bharati's case (supra), as to whether the amendment affects the basic structure of the Constitution. The constitutional amendment contained in clause (4) with which we are concerned in the present .case is, however, of an altogether different nature. Its avowed object is to confer validity on the election of the appellant to the Lok Sabha in 1971 after that election had been declared to be void by the High Court and an appeal against the judgment of the High Court was pending in this Court. In spite of our query, we were not referred to any precedent of a similar amendment of any Constitution of the world. The uniqueness of the impugned constitutional amendment would not, however, affect its validity. If the constituent authority in its wisdom has chosen the validity of a disputed election as the subject-matter of a constitutional amendment, this Court cannot go behind that wisdom. All that this Court is concerned with is the validity of the amendment. I need not go into the question as to whether such a matter, in view of the normal concept of

constitutional law, can strictly be the subject of a constitutional amendment. I shall for the purpose of this case assume that such a matter can validly be the subject-matter of a constitutional amendment. The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases. If an amendment striking at the basic structure of the Constitution is not permissible, it would not acquire validity by being related only to one case. To accede to the argument advanced in support of the validity of the amendment would be tantamount to holding that even though it is not permissible to change the basic structure of the Constitution, whenever the authority concerned deems it proper to make such an amendment, it can do so and circumvent the bar to the making of such an amendment by confining it to one case. What is prohibited cannot become permissible because of its being confined to one matter."

On the issue in hand, K.K. Mathew, J.'s views were as under:-

"318. The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and, the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever-shifting tangle of human affairs. A large part of the effort of man over centuries has been expended in seeking a solution of this great problem. A region of law, in contrast to the tyranny of power, can be achieved only through separating appropriately the several powers of the Government. If the lawmakers should also be the constant administrators and dispensers of law and justice, then, the people would be left without a remedy in case of injustice since no appeal can lie under the fiat against such a supremacy. And, in this age-old search of political philosophers for the secret of sound Government, combined with individual liberty, it was Montesquieu who first saw the light. He was the first among the political philosophers who saw the necessity of separating judicial power from the executive and legislative branches of Government. Montesquieu was the first to conceive of the three functions of Government as exercised by three organs, each juxtaposed against others. .He realised that the efficient operation of Government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers. As Holdsworth says, Montesquieu convinced the world that he had discovered a new constitutional

principle which was universally valid. The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have us think, three watertight compartments. Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation. (See generally: "the Doctrine of Separation of Powers and its present day significance" by T. Vanderbilt.)

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343. I think clause (4) is bad for the reasons which I have already summarised. Clauses (1) to (3) of Article 329-A are severable but I express no opinion on their validity as it is not necessary for deciding this case.

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361. I therefore hold that these Acts are not liable to be challenged on any of the grounds argued by Counsel."

57. Insofar as the third judgment in the series of judgments is concerned, reference may be made to Minerva Mills Ltd. & Ors. v. Union of India & Ors., (1980) 2 SCC 591, as also, Minerva Mills Ltd. & Ors. v. Union of India & Ors., (1980) 3 SCC 625. Insofar as the former of the above two judgments is concerned, the same delineates the pointed controversy dealt with by a constitution bench of 5 Judges of this Court. The issue adjudicated upon, pertained to the constitutional validity of the Constitution (Forty-second Amendment) Act, 1976, and more particularly, Sections 4 and 55 thereof, whereby Articles 31C and 368 of the Constitution, came to be amended. The majority view was expressed in the ratio of 4:1, P.N. Bhagwati, J. (as he then was) having rendered the dissent. The majority arrived at the conclusion, that Section 4 of the Constitution (Forty-second Amendment) Act, 1976 was beyond the amending power of the Parliament and was void, as it had the effect of violating the basic or essential features of the Constitution and destroying the

"basic structure" of the Constitution, by a total exclusion of a challenge to any law, even on the ground that it was inconsistent with, or had taken away, or had abridged any of the rights, conferred by Articles 14 or 19 of the Constitution. Likewise, Section 55 of the Constitution (Forty-second Amendment) Act was struck down as unconstitutional, as the same was beyond the amending power of the Parliament. Relevant observations recorded in the instant judgment pertaining to the issue in hand, are being extracted hereunder. The opinion expressed by Y.V. Chandrachud, CJ, A.C. Gupta, N.L. Untawalia and P.S. Kailasam, JJ. on the subject in hand, was to the following effect:-

> "68. We must … mention, what is perhaps not fully realised, that Article 31-C speaks of laws giving effect to the "policy of the State", "towards securing all or any of the principles laid down in Part IV". In the very nature of things it is difficult for a court to determine whether a particular law gives effect to a particular policy. Whether a law is adequate enough to give effect to the policy of the State towards securing a directive principle is always a debatable question and the courts cannot set aside the law as invalid merely because, in their opinion, the law is not adequate enough to give effect to a certain policy. In fact, though the clear intendment of Article 31-C is to shut out all judicial review, the argument of the learned Additional Solicitor-General calls for a doubly or trebly extensive judicial review than is even normally permissible to the courts. Be it remembered that the power to enquire into the question whether there is a direct and reasonable nexus between the provisions of a law and a directive principle cannot confer upon the courts the power to sit in judgment over the policy itself of the State. At the highest, courts can, under Article 31-C, satisfy themselves as to the identity of the law in the sense whether it bears direct and reasonable nexus with a directive principle. If the court is satisfied as to the existence of such nexus, the inevitable consequence provided for by Article 31-C must follow. Indeed, if there is one topic on which all the 13 Judges in Kesavananda Bharati, (1973) 4 SCC 225, were agreed, it is this: that the only question open to judicial review under the unamended Article 31-C was whether there is a direct and reasonable nexus between the impugned law and the provisions of Article 39(b) and (c) Reasonableness is evidently regarding the nexus and not regarding the law. It is therefore impossible to accept the contention that it is open to the courts to undertake the kind of enquiry suggested by the Additional Solicitor General.

The attempt therefore to drape Article 31-C into a democratic outfit under which an extensive judicial review would be permissible must fail.

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.73. It was finally urged by the learned Attorney General that if we uphold the challenge to the validity of Article 31-C, the validity of clauses (2) to (6) of Article 19 will be gravely imperilled because those clauses will also then be liable to be struck down as abrogating the rights conferred by Article 19(1) which are an essential feature of the Constitution. We are unable to accept this contention. Under clauses (2) to (6) of Article 19, restrictions can be imposed only if they are reasonable and then again, they can be imposed in the interest of a stated class of subjects only. It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31-C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law.

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75. These then are our reasons for the Order (See Minerva Mills Ltd. vs. Union of India, (1980) 2 SCC 591) which we passed on May 9, 1980 to the following effect: (SCC pp. 592-593, paras 1 & 2)

> "Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution.
> Section 55 of the Constitution (Forty-second Amendment) Act is beyond the amending power of the Parliament and is void since it removes all limitations on the power of the Parliament to amend the Constitution and confers power upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure."

In order to appreciate the minority view on the issue, reference may be made to the following observations of P.N. Bhagwati, J.:-

"87. It is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as

to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of government are divided; the executive, the legislature and the judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in Indira Gandhi case, 1975 Supp SCC 1, "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged". Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on .the judiciary by Articles 32 and 226 of the Constitution. Speaking about draft Article 25, corresponding to present Article 32 of the Constitution, Dr Ambedkar, the principal architect of our Constitution, said in the Constituent Assembly on December 9, 1948:

> "If I was asked to name any particular Article in this Constitution as the most important — an Article without which this Constitution would be a nullity — I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance. (CAD, Vol. 7, p.953)"

It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its

power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of Article 368 is unconstitutional and void as damaging the basic structure of the Constitution.

88. That takes us to clause (5) of Article 368. This clause opens with the words "for the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368. It is difficult to appreciate the meaning of the opening words "for the removal of doubts" because the majority decision in Kesavananda Bharati case (supra) clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the amendatory power of

Parliament and in Indira Gandhi case (supra), all the judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329-A(4) was to be judged. Therefore, after the decisions in Kesavananda Bharati case (supra) and Indira Gandhi case (supra), there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and clause (5) could not remove the doubt which did not exist. What clause (5) really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which the validity of this clause can be successfully assailed. This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold clause (5) of Article 368 to be unconstitutional and void."

58. Reference may now be made to another decision of this Court rendered by a bench of 7 Judges, namely, S.P. Gupta v. Union of India, 1981 (Supp.) SCC 87. P.N. Bhagwati, J. (as he then was) opined as under:-

"Concept of Independence of the Judiciary

27. Having disposed of the preliminary objection in regard to locus standi of the petitioners, we may now proceed to consider the questions which arise

for determination in these writ petitions. The questions are of great constitutional significance affecting the principle of independence of the judiciary which is a basic feature of the Constitution and we would therefore prefer to begin the discussion by making a few prefatory remarks highlighting what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law, for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. .....Now this approach to the judicial function may be alright for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice, between chronic unequals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal-oriented approach. But this cannot be achieved unless we have judicial cadres who share the fighting faith of the Constitution and who are imbued with the constitutional values. The necessity of a judiciary which is in tune with the social philosophy of the Constitution has nowhere been better emphasised than in the words of Justice Krishna Iyer which we quote:

> "Appointment of Judges is a serious process where judicial expertise, legal learning, life's experience and high integrity are components, but above all are two indispensables — social philosophy in active unison with the socialistic articles of the Constitution, and second, but equally important, built-in resistance to pushes and pressures by class interests, private prejudices, government threats and blandishments, party loyalties and contrary economic and politicial ideologies projecting into pronouncements. (Mainstream, November 22, 1980)"

Justice Krishna Iyer goes on to say in his inimitable style:

> "Justice Cardozo approvingly quoted President Theodore Roosevelt's stress on the social philosophy of the Judges, which shakes and shapes the course of a nation and, therefore, the choice of Judges for the higher Courts which makes and declares the law of the land, must be in tune with the social philosophy of the Constitution. Not mastery of the law alone, but social vision and creative craftsmanship are

important inputs in successful justicing. (Mainstream, November 22, 1980)"

What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and. who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half-hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. This has to be the broad blueprint of the appointment project for the higher echelons of judicial service. It is only if appointments of Judges are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India. The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution-makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in Union of India vs. Sankalchand Himmatlal Sheth, (1977) 4 SCC 193. But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. If we may again quote the eloquent words of Justice Krishna Iyer:

"Independence of the Judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither Judiciary made to

Opposition measure nor Government's pleasure. (Mainstream, November 22, 1980)

The tycoon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and subconsciously . shaping judicial mentations are menaces to judicial independence when they are at variance with Parts III and IV of the Paramount Parchment."

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution."

S. Murtaza Fazal Ali, J., on the issue of "judicial review" and the "basic structure",

opined as under:-

"332. It would appear that our Constitution has devised a wholesome and effective mechanism for the appointment of Judges which strikes a just balance between the judicial and executive powers so that while the final appointment vests in the highest authority of the executive, the power is subject to a mandatory consultative process which by convention is entitled to great weight by the President. Apart from these safety valves, checks and balances at every stage, where the power of the President is abused or misused or violates any of the constitutional safeguards it is always subject to judicial review. The power of judicial review, which has been conceded by the Constitution to the judiciary, is in our opinion the safest possible safeguard not only to ensure independence of judiciary but also to prevent it from the vagaries of the executive. Another advantage of the method adopted by our Constitution is that by vesting the entire power in the President, the following important elements are introduced:

(1) a popular element in the matter of administration of justice,

(2) linking with judicial system the dynamic goals of a progressive society by subjecting the principles of governance to be guided by the Directive Principles of State Policy,

(3) in order to make the judiciary an effective and powerful machinery, the Constitution contains a most onerous and complicated system by which Judges can be removed under Article 124(4), which in practice is almost an impossibility,

(4) in order to create and subserve democratic processes the power of appointment of the judiciary in the executive has been so vested that the

head of the executive which functions through the Council of Ministers, which is a purely elected body, is made accountable to the people.

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336. This Court has in several cases held that the condition of consultation which the Governor has to exercise implies that he would have to respect the recommendations of the High Court and cannot turn it down without cogent reasons and even if he does so, it is manifest that his order is always subject to judicial review on the ground of mala fide or exceeding his jurisdiction.

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345. This, therefore, disposes of all the contentions of the counsel for the parties so far as the various aspects of interpretation of Article 222 are concerned. On a consideration, therefore, of the facts, circumstances and authorities the position is as follows:

(1) that Article 222 expressly excludes 'consent' and it is not possible to read the word 'consent' into Article 222 and thereby whittle down the power conferred on the President under this Article,

(2) that the transfer of a Judge or a C.J. of a High Court under Article 222 must be made in public interest or national interest,

(3) that non-consensual transfer does not amount to punishment or involve any stigma,

(4) that in suitable cases where mala fide is writ large on the face of it, an order of transfer made by the President would be subject to judicial review,

(5) that the transfer of a Judge from one High Court to another does not amount to a first or fresh appointment in any sense of the term,

(6) that a transfer made under Article 222 after complying with the conditions and circumstances mentioned above does not mar or erode the independence of judiciary.

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402. It has been vehemently argued by Mr. Seervai as also by Mr. Sorabjee who followed him that their main concern is that independence of judiciary should be maintained at all costs. Indeed, if they are really concerned that we should build up an independent judiciary then it is absolutely essential that new talents from outside should be imported in every High Court either to man it or to head it so that they may generate much greater confidence in the people than the local Judges. The position of a C.J. is indeed a very high constitutional position and our Constitution contains sufficient safeguards to protect both his decision-making process and his tenure. It is a well-known saying that power corrupts and absolute power corrupts absolutely. As man is not infallible, so is a Chief Justice, though a person holding a high judicial post is likely to be incorruptible because of the quality of sobriety and restraint that the judicial method contains. Even so, if a C.J. is from outside the State, the chances of his misusing his powers are reduced to the absolute minimum. We have pointed out that the power to formulate or evolve this policy clearly lies within the four-corners of Article 222 itself which contains a very wide power conditioned only by consultation with

C.J.I. who is the highest judicial authority in the country. It is always open to the President, which in practice means the Central Government, to lay down a policy, norms and guidelines according to which the presidential powers are to be exercised and once these norms are followed, the powers of the President would be beyond judicial review."

On the issue in hand, V.D. Tulzapurkar, J. expressed the following view:-

"624. As regards the constitutional convention or practice and the undertaking which have been pressed into service in relation to Bar recruits as Additional Judges for basing their right to be considered for their continuance on the expiry of their initial term, the learned Attorney-General appearing for the Union of India raised a two fold contention. Regarding the former he urged that a constitutional convention or practice, howsoever wholesome, cannot affect, alter or control the plain meaning of Article 224(1) which according to him gives absolute power and complete discretion to the President in the matter of continuance of sitting Additional Judges on the expiry of their initial term, the pendency of arrears being relevant only for deciding whether or not Additional Judges should be appointed and not relevant with regard to a particular person to be appointed. As regards the undertaking he pointed out that the usual undertaking obtained from a Member of the Bar in all High Courts — and for that matter even the additional undertaking that is being obtained in the Bombay High Court if properly read will show that it merely creates a binding obligation on the concerned Member of the Bar but does not create any .obligation or commitment on the part of the appointing authority to make the offer of permanent Judgeship to him. It is difficult to accept either of these contentions of the learned Attorney General. It was not disputed before us that constitutional conventions and practices have importance under unwritten as well as written Constitutions and the position that conventions have a role to play in interpreting articles of a Constitution is clear from several decided cases. In U.N.R. Rao v. Indira Gandhi, (1971) 2 SCC 63, Chief Justice Sikri observed thus: (SCC p. 64, para 3)

> "It was said that we must interpret Article 75(3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an Article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed."

In State of Rajasthan v. Union of India, (1977) 3 SCC 592, also the importance of a constitutional convention or practice by way of crystallising the otherwise vague and loose content of a power to be found in certain article has been emphasised. In the State of W.B. v. Nripendra Nath Bagchi,

AIR 1966 SC 447, the entire interpretation of the concept of 'vesting of control' over District Courts and Courts subordinate thereto in the High Court was animated by conventions and practices having regard to the history, object and purpose that lay behind the group of relevant articles, the principal purpose being, the securing of the independence of the subordinate judiciary. It is true that no constitutional convention or practice can affect, alter or control the operation of any article if its meaning is quite plain and clear but here Article 224(1) merely provides for situations when Additional Judges from duly qualified persons could be appointed to a High Court and at the highest reading the article with Section 14 of the General Clauses Act it can be said that the power conferred by that article may be exercised from time to time as occasion requires but on the question as to whether when the occasion arises to make appointment on expiry of the term of a sitting Additional Judge whether he should be continued or a fresher or outsider could be appointed by ignoring the erstwhile incumbent even when arrears continue to obtain in that High Court the article is silent and not at all clear and hence the principle invoked by the learned Attorney-General will not apply. On the other hand, it will be proper to invoke in such a situation the other well-settled principle that in construing a constitutional provision the implications which arise from the structure of the Constitution itself or from its scheme may legitimately be made and looking at Article 224(1) from this angle a wholesome constitutional convention or practice that has grown because of such implications will have to be borne in mind especially when it serves to safeguard one of the basic features which is the cardinal faith underlying our Constitution, namely, independence of the judiciary. In other words a limitation on the otherwise absolute power and discretion contained in Article 224(1) is required to be read into it because of the clear implication arising from the said cardinal faith which forms a fundamental pillar supporting the basic structure of the Constitution, as otherwise the exercise of the power in the absolute manner as suggested will be destructive of the same. That it is not sound approach to embark upon 'a strict literal reach' of any constitutional provision in order to determine its true ambit and effect is strikingly illustrated in the case of Article 368 which came up for consideration before this Court in Kesavananda Bharati case, (1973) 4 SCC 225, where this Court held that the basic or essential features of the Constitution do act as fetters or limitations on the otherwise wide amending power contained in that article. In Australia limitations on the law-making powers of the Parliament of the Federal Commonwealth over the States were read into the concerned provisions of the Constitution because of implications arising from the very federal nature of the Constitution: (vide Lord Mayor Councillors and Citizens of the City of Melbourne v. Commonwealth, 74 Commonwealth LR 31, and the State of Victoria v. Commonwealth of Australia, 122 Commonwealth LR 353). As regards the undertakings of the types mentioned above, it is true that strictly and legally speaking these undertakings only create a binding obligation on the concerned Member of the Bar and not on the appointing authority but it

cannot be forgotten that when such undertakings were thought of, the postulate underlying the same was that there was no question of the appointing authority not making the offer of permanent Judgeship to the concerned Member of the Bar but that such an offer would be made and upon the same being made the sitting Additional Judge recruited from the Bar should not decline to accept it and revert to the Bar. I am therefore clearly of the view that the aforesaid convention or practice and the undertaking serve the cause of public interest in two respects as indicated above and those two aspects of public interest confer upon these sitting Additional Judges recruited from the Bar a legitimate expectancy and the enforceable right not to be dropped illegally or at the whim or caprice of the appointing authority but to be considered for continuance in that High Court either by way of extending their term or making them permanent in preference to freshers or outsiders and it is impossible to construe Article 224(1) as conferring upon the appointing authority absolute power and complete discretion in the matter of appointment of Additional Judges to a High Court as suggested and the suggested construction has to be rejected. In view of the above discussion it is clear that there is a valid classification between proposed appointees for initial recruitment and the sitting Additional Judges whose cases for their continuance after the expiry of their initial term are to be decided and the two are not in the same position."

The observations of D.A. Desai, J. are expressed hereunder:-

"696. It may be briefly mentioned here that Writ Petition No. 274 of 1981 filed in this Court and Transferred Cases Nos. 2, 6 and 24 of 1981 were listed to be heard along with the present batch of cases with a view to avoiding the repetition of the arguments on points common to both sets of .cases. In the first group of cases the question of construction of Articles 217, 224 and other connected articles prominently figured in the context of circular of the Law Minister dated March 18, 1981, seeking consent of Additional Judges for being appointed as permanent Judges in other High Courts and the short-term extensions given to Shri O.N. Vohra, Shri S.N. Kumar and Shri S.B. Wad, Additional Judges of Delhi High Court and the final non-appointment of Shri O.N. Vohra and Shri S.N. Kumar. The submission was that the circular of the Law Minister manifests a covert attempt to transfer Additional Judges from one High Court to other High Court without consulting the Chief Justice of India as required by Article 222(1) and thereby circumventing the majority decision in Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193. The central theme was the scope, ambit and content of consultation which the President must have with the three constitutional functionaries set out in Article 217(1). In the second group of cases, the question arose in the context of transfer of Shri K.B.N. Singh, Chief Justice of Patna High Court as Chief Justice of Madras High Court consequent upon the transfer of Shri M.M. Ismail, Chief Justice of Madras High Court as Chief Justice of Kerala High Court by Presidential Notification dated January 19, 1981, in exercise of the

power conferred upon him by Article 222. The controversy centred down the scope, ambit and content of consultation that the President must have with the Chief Justice of India before exercising the power to transfer under Article 222. Thus, the scope, ambit and content of consultation under Article 217 as also one of Article 222 which, as Mr Seervai stated, was more or less the same though the different facets on which consultation must be focussed may differ in the case of transfer and in the case of appointment, figured prominently in both the groups of cases. The parameters of scope, ambit and content of consultation both under Articles 217(1), 222 and 224, were drawn on a wide canvas to be tested on the touchstone of independence of judiciary being the fighting faith and fundamental and basic feature of the Constitution. It was stated that if the consultation itself is to provide a reliable safeguard against arbitrary and naked exercise of power against judiciary, the procedure of consultation must be so extensive as to cover all aspects of the matter and it must be made so firm and rigid that any contravention or transgression of it would be treated as mala fide or subversive of independence of judiciary and the decision can be corrected by judicial review. Therefore, at the outset it is necessary to be properly informed as to the concept of independence of judiciary as set out in the Constitution.

697. The entire gamut of arguments revolved principally round the construction of Articles 217 and 224 in one batch of petitions and Article 222 in another batch but the canvas was spread wide covering various other articles of the Constitution, analogous provisions in previous Government of India Acts, similar provisions in other democratic constitutions and reports of Law Commission. Rival constructions canvassed centred upon the pivotal assumption that independence of judiciary is a basic and fundamental .feature of the Constitution which has its genesis in the power of judicial review which enables the court to declare executive and legislative actions ultra vires the Constitution. In this connection we are not starting on a clean slate as the contention in this very form and for an avowed object was widely canvassed in Sankalchand Himatlal Sheth v. Union of India, (1976) 17 Guj LR 1017 (FB), and in Union of India v. Sankalchand Himatlal Sheth (supra). Some additional dimensions were added to this basic concept of independence of judiciary while both the parties vied with each other as in the past (see statement of Shri S.V. Gupte, then Attorney-General in Sheth case (supra), on proclaiming their commitment to independence of judiciary though in its scope and content and approach there was a marked divergence.

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771. Now, power is conferred on the President to make appointment of Judge of Supreme Court after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. The submission is that the expression 'may deem necessary' qualifies the expression 'consultation' and that if he deems otherwise the President can proceed to make appointment of the Chief Justice of India without consultation with any of the Judges of the Supreme

Court and of the High Courts. In other words, it was submitted on behalf of the respondents, the President has a discretion to consult or not to consult Judges of the Supreme Court and High Courts before making appointment of Chief Justice of India. It was pointed out that where consultation is obligatory it is specifically provided and reference was made to the proviso extracted hereinabove wherein it is stated that it would be obligatory upon the President to consult the Chief Justice of India before making appointment of a Judge of the Supreme Court other than the Chief Justice of India. Undoubtedly, the proviso leaves no option to the President but to consult the Chief Justice of India while making appointment of a Judge of the Supreme Court other than the Chief Justice of India, but it is rather difficult to accept the construction as suggested on behalf of the respondents that in making appointment of the Chief Justice of India the President is at large and may not consult any functionary in the judicial branch of the State before making appointment of Chief Justice of India. The expression 'may .deem necessary' qualifies the number of Judges of the Supreme Court and High Courts to be consulted. What is optional is selection of number of Judges to be consulted and not the consultation because the expression 'shall be appointed after consultation' would mandate consultation. An extreme submission that the President may consult High Court Judges for appointment of the Chief Justice of India omitting altogether Supreme Court Judges does not commend to us, because the consultation with 'such of the Judges of the Supreme Court and of the High Courts' would clearly indicate that the consultation has to be with some Judges of the Supreme Court and some Judges of the High Courts. The conjunction 'and' is clearly indicative of the intendment of the framers of the Constitution. If there was disjunctive 'or' between Supreme Court and High Courts in sub-article (2) of Article 124 there could have been some force in the submission that the President may appoint Chief Justice of India ignoring the Supreme Court and after consulting some High Court Judges. Undoubtedly, sub-article (2) does not cast an obligation to consult all Judges of the Supreme Court and all Judges of the High Courts but in practical working the President in order to discharge his function of selecting the best suitable person to be the Chief Justice of India must choose such fair sprinkling of Supreme Court and High Court Judges as would enable him to gather enough and relevant material which would help him in decision-making process. Mr Seervai submitted that this Court must avoid such construction of Article 124 which would enable the President to appoint Chief Justice of India without consultation with any judicial functionaries. That is certainly correct. But then he proceeded to suggest a construction where, by a constitutional convention, any necessity of consultation would be obviated and yet the executive power to be choosy and selective in appointment of Chief Justice of India can be controlled or thwarted. He said that a constitutional convention must be read that the seniormost amongst the puisne Judges of the Supreme Court should as a rule be appointed as Chief Justice of India except when he is physically unfit to shoulder the responsibilities. This constitutional

convention, it was said, when read in Article 124(2) would obviate any necessity of consultation with any functionary in the judicial branch before making appointment of Chief Justice of India and yet would so circumscribe the power of the President as not to enable the executive to choose a person of its bend and thinking. In this very context it was pointed out that Article 126 permits the President to appoint even the juniormost Judge of the Supreme Court to be an acting Chief Justice of India and it was said that such an approach or such construction of Article 126 would be subversive of the independence of judiciary. It was said that if the juniormost can be appointed acting Chief Justice of India, every Judge in order to curry favour would decide in favour of executive. And as far as Article 124 is concerned it was said that if the convention of seniority is not read in Article 124(2), every Judge of the Supreme Court would be a possible candidate for the office of Chief Justice of India and on account of personal bias would be disqualified from being consulted. There is no warrant for such an extreme position and the reflection on the Judges of the Supreme Court is equally unwarranted. On the construction as indicated above there will be positive limitation on the power of the President while making appointment of Chief Justice of India and it is not necessary to read any limitation on the power of the President under Article 126 while making appointment of a Judge of the Supreme Court as acting Chief Justice of India. But the observation is incidental to the submission and may be examined in an appropriate case. And the question of construction is kept open.

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775. It was also stated that the expression 'obtain' in the circular has the element of coercion and a consent ceases to be consent if it is obtained under coercion. It was said that consent and coercion go ill together because forced assent would not be consent in the eye of law. It was said that the threat implicit in the circular becomes evident because the Chief Minister, the strong arm of the executive is being asked to obtain consent. If every little thing is looked upon with suspicion and as an attack on the independence of judiciary, it becomes absolutely misleading. Law Minister, if he writes directly to the Chief Justice or the Judge concerned, propriety of the action may be open to question. Chandrachud, J., has warned in Sheth case (supra) that the executive cannot and ought not to establish rapport with Judges (SCR p. 456 CD : SCC p. 230, para 43). Taking this direction in its letter and spirit, the Law Minister wrote to the Chief Ministers. The Chief Minister in turn was bound to approach the Chief Justice. This is also known to be a proper communication channel with Judges of High Court. In this context the expression 'obtain' would only mean request the Judge to give consent if he so desires. If he gives the consent, well and good, and if does not give, no evil consequences are likely to ensue. I am not impressed by the submission of the learned Attorney-General that one who gives consent may have some advantage over the one who does not. I do not see any remote advantage and if any such advantage is given and if charge of victimisation is made out by the Judge not

giving consent, the arm of judicial review is strong enough to rectify the executive error.

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815. The public interest like public policy is an unruly horse and is incapable of any precise definition and, therefore, it was urged that this safeguard is very vague and of doubtful utility. It was urged that these safeguards failed to checkmate the arbitrary exercise of power in 1976. This approach overlooks the fact that the Lakshman Rekha drawn by the safeguards when transgressed or crossed, the judicial review will set at naught the mischief. True it is that it is almost next to impossible for individual Judge of a High Court to knock at the doors of the Courts because access to justice is via the insurmountable mountain of costs and expenses. This need not detain us because we have seen that in time of crisis the Bar has risen to the occasion twice over in near past though it must be conceded that judicial review is increasingly becoming the preserve of the high, mighty and the affluent. But the three safeguards, namely, full and effective consultation with the Chief Justice of India, and that the power to transfer can be exercised in public interest, and judicial review, would certainly insulate independence of judiciary against an attempt by the executive to control it."

Last of all, reference may be made to the observations of E.S. Venkataramiah, J., (as he then was) who held as under:-

"1245. The question of policy is a matter entirely for the President to decide. Even though the Chief Justice of India is consulted in that behalf by the President since the policy relates to the High Courts, his opinion is not binding on the President. It is open to the President to adopt any policy which is subject only to the judicial review by the Court. Under Article 222 of the Constitution the Chief Justice of India has to be consulted on the question whether a particular Judge should be transferred and where he should be transferred while implementing the said policy. If the Government requests the Chief Justice of India to give his opinion on a transfer to implement the said policy which is really in the public interest he cannot decline to do so. Even though the Chief Justice was opposed to the 'wholesale transfers' of Judges there is no bar for the Government treating the recommendation for transfers made by the Chief Justice of India as a part of the implementation of its policy. That the transfer of Shri K.B.N. Singh was on account of the policy of the Government can be gathered from the following statements in the affidavits filed before this Court: In para 8 of the affidavit dated September 16, 1981 of Shri K.B.N. Singh it is stated: "When the deponent wanted to know why he might be transferred to Madras, the Hon'ble Chief Justice of India merely said that it was the Government policy, but gave no clue as to what necessitated his transfer from Patna to Madras." In para 2(g) of the affidavit of the Chief Justice of India he has stated: "I deny that when Shri K.B.N. Singh

wanted to know over the telephone on January 5, 1981, I stated merely that it was the 'Government policy'....". In paragraph 8 of the rejoinder-affidavit dated October 16, 1981 of Shri K.B.N. Singh, it is stated "at one point he also said that it was Government policy to effect transfer in batches of two or three".

59. The sequence of judgments would now lead us to the judgment of this Court in S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124. The view expressed by a bench of 5 Hon'ble Judges of this Court in the above case, was in respect of a controversy quite similar to the one in hand. In the instant judgment, the constitutional vires of the Administrative Tribunals Act, 1985 was under challenge. The above Act was framed under Article 323A of the Constitution. Article 323A was introduced in the Constitution by the Constitution (Forty-second Amendment) Act, 1976. The main judgment was delivered by Ranganath Misra, J. (as he then was) on behalf of himself and V. Khalid, G.L. Oza and M.M. Dutt, JJ. Insofar as the concurring view rendered by P.N. Bhagwati, CJ is concerned, the conclusion recorded in the following paragraphs has a bearing on the present controversy.

JUDGMENT

"3. It is now well settled as a result of the decision of this Court in Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. Now a question may arise as to what are the powers of the executive and whether the executive has acted within the scope of its power. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First the decision of the question would depend upon the interpretation of the Constitution and the

laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the rule of law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the Rule of Law would become a teasing illusion and a promise of unreality. That is why I observed in my judgment in Minerva Mills Ltd. case (supra) at p. 287 and 288: (SCC p. 678, para 87)

> "I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be

nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of the Article 368 is unconstitutional and void as damaging the basic structure of the Constitution."

It is undoubtedly true that my judgment in Minerva Mills Ltd. case (supra) was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision .that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanism or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the rule of law. Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court.

4. Here, in the present case, the impugned Act has been enacted by Parliament in exercise of the power conferred by clause (1) of Article 323-A which was introduced in the Constitution by Constitution (42nd Amendment) Act, 1976. Clause (2)(d) of this article provides that a law made by Parliament under clause (1) may exclude the jurisdiction of courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1). The exclusion of the jurisdiction of the High Court under Articles 226 and 227 by any law made by Parliament under

clause (1) of Article 323-A is, therefore, specifically authorised by the constitutional amendment enacted in clause (2)(d) of that article. It is clear from the discussion in the preceding para that this constitutional amendment authorising exclusion of the jurisdiction of the High Court under Articles 226 and 227 postulates for its validity that the law made under clause (1) of Article 323-A excluding the jurisdiction of the High Court under Articles 226 and 227 must provide for an effective alternative institutional mechanism or authority for judicial review. If this constitutional amendment were to permit a law made under clause (1) of Article 323-A to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent power of Parliament. It must, therefore, be read as implicit in this constitutional amendment that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it. Consequently, the impugned Act excluding the jurisdiction of the High Court under Articles 226 and 227 in respect of service matters and vesting such jurisdiction in the Administrative Tribunal can pass the test of constitutionality as being within the ambit and coverage of clause (2)(d) of Article 323-A, only if it can be shown that the Administrative Tribunal set up under the impugned Act is equally efficacious as the High Court, so far as the power of judicial review over service matters is concerned. We must, therefore, address ourselves to the question whether the Administrative Tribunal established under the impugned Act can be regarded as equally effective and efficacious in exercising the power of judicial review as the High Court acting under Articles 226 and 227 of the Constitution."

Extracts from the judgment rendered by Ranganath Misra, J. (as he then was) are first of all being reproduced hereunder:-

"10. In the writ applications as presented, the main challenge was to the abolition of the jurisdiction of this Court under Article 32 in respect of specified service disputes. Challenge was also raised against the taking away of the jurisdiction of the High Court under Articles 226 and 227. It was further canvassed that establishment of Benches of the Tribunal at Allahabad, Bangalore, Bombay, Calcutta, Gauhati, Madras and Nagpur with the principal seat at Delhi would still prejudice the parties whose cases were already pending before the respective High Courts located at places other than these places and unless at the seat of every High Court facilities for presentation of applications and for hearing thereof were provided the parties and their lawyers would be adversely affected. The interim order made on October 31, 1985, made provision to meet the working difficulties. Learned Attorney-

General on behalf of the Central Government assured the court that early steps would be taken to amend the law so as to save the jurisdiction under Article 32, remove other minor anomalies and set up a Bench of the Tribunal at the seat of every High Court. By the Administrative Tribunals (Amendment) Ordinance, 1986, these amendments were brought about and by now an appropriate Act of Parliament has replaced the Ordinance. Most of the original grounds of attack thus do not survive and the contentions that were canvassed at the hearing by the counsel appearing for different parties are these:

(1) Judicial review is a fundamental aspect of the basic structure of our Constitution and bar of the jurisdiction of the High Court under Articles 226 and 227 as contained in Section 28 of the Act cannot be sustained;

.(2) Even if the bar of jurisdiction is upheld, the Tribunal being a substitute of the High Court, its constitution and set up should be such that it would in fact function as such substitute and become an institution in which the parties could repose faith and trust;

(3) Benches of the Tribunal should not only be established at the seat of every High Court but should be available at every place where the High Courts have permanent Benches;

(4) So far as Tribunals set up or to be set up by the Central or the State Governments are concerned, they should have no jurisdiction in respect of employees of the Supreme Court or members of the subordinate judiciary and employees working in such establishments inasmuch as exercise of jurisdiction of the Tribunal would interfere with the control absolutely vested in the respective High Courts in regard to the judicial and other subordinate officers under Article 235 of the Constitution.

11. After oral arguments were over, learned Attorney-General, after obtaining instructions from the Central Government filed a memorandum to the effect that Section 2(q) of the Act would be suitably amended so as to exclude officers and servants in the employment of the Supreme Court and members and staff of the subordinate judiciary from the purview of the Act. In the same memorandum it has also been said that Government would arrange for sittings of the Benches of the Tribunal at the seat or seats of each High Court on the basis that 'sittings' will include 'circuit sittings' and the details thereof would be worked out by the Chairman or the Vice-Chairman concerned.

12. With these concessions made by the learned Attorney-General, only two aspects remain to be dealt with by us, namely, those covered by the first and the second contentions.

13. Strong reliance was placed on the judgment of Bhagwati, J. (one of us — presently the learned Chief Justice) in Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, where it was said: (SCC p. 678, para 87)

> "The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am

of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review…"

14. Article 32 was described by Dr Ambedkar in course of the debate in the Constituent Assembly as the 'soul' and 'heart' of the Constitution and it is in recognition of this position that though Article 323-A(2)(d) authorised exclusion of jurisdiction under Article 32 and the original Act had in Section 28 provided for it, by amendment jurisdiction under Article 32 has been left untouched. The Act thus saves jurisdiction of this Court both under Article 32 in respect of original proceedings as also under Article 136 for entertaining appeals against decisions of the Tribunal on grant of special leave. Judicial review by the Apex Court has thus been left intact.

15. The question that arises, however, for consideration is whether bar of jurisdiction under Articles 226 and 227 affects the provision for judicial review. The right to move the High Court in its writ jurisdiction — unlike the one under Article 32 — is not a fundamental right. Yet, the High Courts, as the working experience of three-and-a-half decades shows have in exercise of the power of judicial review played a definite and positive role in the matter of preservation of fundamental and other rights and in keeping administrative action under reasonable control. In these thirty-six years following the enforcement of the Constitution, not only has India's population been more than doubled but also the number of litigations before the courts including the High Courts has greatly increased. As the pendency in the High Courts increased and soon became the pressing problem of backlog, the nation's attention came to be bestowed on this aspect. Ways and means to relieve the High Courts of the load began to engage the attention of the government at the Centre as also in the various States. As early as 1969, a Committee was set up by the Central Government under the chairmanship of Mr Justice Shah of this Court to make recommendations suggesting ways and means for

effective, expeditious and satisfactory disposal of matters relating to service disputes of government servants as it was found that a sizeable portion of pending litigations related to this category. The Committee recommended the setting up of an independent Tribunal to handle the pending cases before this Court and the High Courts. While this report was still engaging the attention of government, the Administrative Reforms Commission also took note of the situation and recommended the setting up of Civil Services Tribunals to deal with appeals of Government servants against disciplinary action. In certain States, Tribunals of this type came into existence and started functioning. But the Central Government looked into the matter further as it transpired that the major chunk of service litigations related to matters other than disciplinary action. In May 1976, a Conference of Chief Secretaries of the States discussed this problem. Then came the Forty-second Amendment of the Constitution bringing in Article 323-A which authorized Parliament to provide by law "for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation owned or controlled by the government". As already stated this article envisaged exclusion of the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1). Though the Constitution now contained the enabling power, no immediate steps were taken to set up any Tribunal as contemplated by Article 323-A. A Constitution Bench of this Court in K.K. Dutta v. Union of India, (1980) 4 SCC 38, observed: [SCC p. 39, para 1 : SCC (L & S) p. 486]

> "There are few other litigative areas than disputes between members of various services inter se, where the principle that public policy requires that all litigation must have an end can apply with greater force. Public servants ought not to be driven or required to dissipate their time and energy in courtroom battles. Thereby their attention is diverted from public to private affairs and their inter se disputes affect their sense of oneness without which no institution can function effectively. The constitution of Service Tribunals by State Governments with an apex Tribunal at the Centre, which, in the generality of cases, should be the final arbiter of controversies relating to conditions of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such Tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce solutions which will satisfy many…"

In the meantime the problem of the backlog of cases in the High Courts became more acute and pressing and came to be further discussed in Parliament and in conferences and seminars. Ultimately in January 1985,

both Houses of Parliament passed the Bill and with the Presidential assent on February 27, 1985, the law enabling the long awaited Tribunal to be constituted came into existence. As already noticed, the Central Government notified the Act to come into force with effect from November 1, 1985.

16. Exclusion of the jurisdiction of the High Courts in service matters and its propriety as also validity have thus to be examined in the background indicated above. We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification. Thus exclusion of the jurisdiction of the High Court does not totally bar judicial review. This Court in Minerva Mills' case (supra) did point out that "effective alternative institutional mechanisms or arrangements for judicial review" can be made by Parliament. Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review. The debates and deliberations spread over almost two decades for exploring ways and means for relieving the High Courts of the load of backlog of cases and for assuring quick settlement of service disputes in the interest of the public servants as also the country cannot be lost sight of while considering this aspect. It has not been disputed before us - and perhaps could not have been - that the Tribunal under the scheme of the Act would take over a part of the existing backlog and a share of the normal load of the High Courts. The Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. To provide the Tribunal as an additional forum from where parties could go to the High Court would certainly have been a retrograde step considering the situation and circumstances to meet which the innovation has been brought about. Thus barring of the jurisdiction of the High Court can indeed not be a valid ground of attack.

17. What, however, has to be kept in view is that the Tribunal should be a real substitute of the High Court - not only in form and *de jure* but in content and *de facto*. As was pointed out in Minerva's Mills case (supra), the alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations. Article 16 of the Constitution guarantees equality of opportunity in matters of public employment. Article 15 bars discrimination on grounds of religion, race, caste, sex or place of birth. The touch-stone of equality enshrined in Article 14 is the greatest of guarantees for the citizen. Centering around these articles in the Constitution a service jurisprudence has already grown in this country. Under Sections 14 and 15 of the Act all the powers of the Courts except those of this Court in regard to matters specified therein vest in the Tribunal —- either Central or State. Thus the Tribunal is the substitute of the High Court and is entitled to exercise the powers thereof.

18. The High Courts have been functioning over a century and a quarter and until the Federal Court was established under the Government of India Act, 1935, used to be the highest courts within their respective

jurisdictions subject to an appeal to the Privy Council in a limited category of cases. In this long period of about six scores of years, the High Courts have played their role effectively, efficiently as also satisfactorily. The litigant in this country has seasoned himself to look upto the High Court as the unfailing protector of his person, property and honour. The institution has served its purpose very well and the common man has thus come to repose great confidence therein. Disciplined, independent and trained Judges well versed in law and working with all openness in an unattached and objective manner have ensured dispensation of justice over the years. Aggrieved people approach the Court - the social mechanism to act as the arbiter - not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the Court. It is, therefore, of paramount importance that the substitute institution - the Tribunal - must be a worthy successor of the High Court in all respects. That is exactly what this Court intended to convey when it spoke of an alternative mechanism in Minerva Mills' case (supra)."

60. Reference may also be made to the decision rendered by this Court in L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. The instant decision was rendered by a constitution bench of 7 Judges. The question which arose for determination in the instant judgment was, whether the power conferred upon the Parliament and the State legislatures vide Articles 323A(2)(d) and 323B(3)(d) totally excluding the jurisdiction of "all courts" except the Supreme Court, under Article 136 of the Constitution, violated the "basic structure" of the Constitution. In other words, the question was, whether annulling/retracting the power of "judicial review" conferred on High Courts (under Articles 226 and 227 of the Constitution) and on the Supreme Court (under Articles 32 of the Constitution), was violative of the "basic structure" of the Constitution. Furthermore, whether the tribunals constituted under Articles 323A and 323B of the Constitution, possess the competence to test the constitutional validity of statutory provisions/rules? And also, whether Tribunals constituted under Articles 323A

and 323B of the Constitution could be said to be effective substitutes of the jurisdiction vested in the High Courts? And if not, what changes were required? The above controversy came to be referred to the constitution bench in furtherance of an order passed in L. Chandra Kumar v. Union of India, (1995) 1 SCC 400, on account of the decisions rendered in post S.P. Sampath Kumar cases (supra), namely, J.B. Chopra v. Union of India, (1987) 1 SCC 422, M.B. Majumdar v. Union of India, (1990) 4 SCC 501, Amulya Chandra Kalita v. Union of India, (1991) 1 SCC 181, R.K. Jain v. Union of India, (1993) 4 SCC 119, and Dr. Mahabal Ram v. Indian Council of Agricultural Research, (1994) 2 SCC 410. On the issues which are relevant to the present controversy, this Court observed as under:-

> "76. To express our opinion on the issue whether the power of judicial review vested in the High Courts and in the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The doctrine of basic structure was evolved in *Kesavananda Bharati case,*(1973*)* 4 SCC 225. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat and Grover, JJ., Hegde and Mukherjea, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In *Indira Gandhi case*, 1975 Supp. SCC 1, Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country. (*supra* at pp. 751-752). This approach was specifically adopted by Bhagwati, J. in *Minerva Mills case,* (1980) 3 SCC 625, (at pp. 671-672) and is not regarded as the definitive test in this field of Constitutional Law.

77. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect [Gajendragadkar, C.J. in *Keshav Singh case*, AIR 1965 SC 745, Beg, J. and Khanna, J. in *Kesavananda Bharati .case* (supra), Chandrachud, C.J. and Bhagwati, J. in *Minerva Mills* (supra), Chandrachud, C.J. in *Fertilizer Kamgar*, (1981) 1 SCC 568, K.N. Singh, J. in *Delhi Judicial Service Assn.*, (1991) 4 SCC 406] the rest have made general observations highlighting the significance of this feature.

78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the

function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

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96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State

levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

97. The suggestions that we have made in respect of appointments to Tribunals and the supervision of their administrative function need to be considered in detail by those entrusted with the duty of formulating the policy in this respect. That body will also have to take into consideration the comments of expert bodies like the LCI and the Malimath Committee in this regard. We, therefore, recommend that the Union of India initiate action in this behalf and after consulting all concerned, place all these Tribunals under one single nodal department, preferably the Legal Department.

98. Since we have analysed the issue of the constitutional validity of Section 5(6) of the Act at length, we may now pronounce our opinion on this aspect. Though the vires of the provision was not in question in *Dr Mahabal Ram case*, (1994) 2 SCC 401, we believe that the approach adopted in that case, the relevant portion of which has been extracted in the first part of this judgment, is correct since it harmoniously resolves the manner in which Sections 5(2) and 5(6) can operate together. We wish to make it clear that where a question involving the interpretation of a statutory provision or rule in relation to the Constitution arises for the consideration of a Single Member Bench of the Administrative Tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to a Bench consisting of at least two Members, one of whom must be a Judicial Member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a Single Member Bench or a Bench which does not consist of a Judicial Member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality.

99. In view of the reasoning adopted by us, we hold that clause 2(*d*) of Article 323-A and clause 3(*d*) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory

provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

61. Reference was then made to Union of India v. Madras Bar Association, (2010) 11 SCC 1. The instant decision was rendered by a constitution bench of 5 Judges. The controversy adjudicated upon in this case related to a challenge to the constitutional validity of Parts 1B and 1C of the Companies Act, 1956. These parts were inserted into the Companies Act, by the Companies (Second Amendment) Act, 2002. Thereby, provision was made for the constitution of the National Company Law Tribunal and the National Company Law Appellate Tribunal. The relevant questions raised in the present controversy, are being noticed. Firstly, whether Parliament does not have the jurisdiction/legislative competence, to vest intrinsic judicial functions, that have been traditionally performed by High Courts, in any tribunal outside the judiciary? Secondly, whether transferring of the entire company law jurisdiction, hitherto before vested in High Courts, to the National Company Law Tribunal, which was not under the control of the judiciary, was violative of the principles of "separation of powers" and "independence of judiciary"? Thirdly, whether Sections 10-FB, 10-FD, 10-FE, 10-FF, 10-FL(2), 10-FO, 10-FR(3), 10-FT, 10-FX contained in Parts I-B and I-C of the Companies Act, by virtue of the above amendment, were unconstitutional being in breach of the principles of the "rule of law", "separation

of powers" and "independence of judiciary"? The relevant narration and conclusions recorded by this Court are being reproduced hereunder:-

> "Section 10-FD(3)(f): Appointment of Technical Member to NCLT
>
> 16. The High Court has held that appointment of a member under the category specified in Section 10-FD(3)(*f*), can have a role only in matters concerning revival and rehabilitation of sick industrial companies and not in relation to other matters. The High Court has therefore virtually indicated that NCLT should have two divisions, that is an Adjudication Division and a Rehabilitation Division and persons selected under the category specified in clause (*f*) should only be appointed as Members of the Rehabilitation Division.
>
> 17. The Union Government contends that similar provision exists in Section 4(3) of the Sick Industrial Companies (Special Provisions) Act, 1985; that the provision is only an enabling one so that the best talent can be selected by the Selection Committee headed by the Chief Justice of India or his nominee; and that it may not be advisable to have division or limit or place restrictions on the power of the President of the Tribunal to constitute appropriate benches. It is also pointed out that a technical member would always sit in a Bench with a judicial member.
>
> Section 10-FD(3)(g): Qualification for appointment of Technical Member
>
> 18. The High Court has observed that in regard to the Presiding Officers of the Labour Courts and the Industrial Tribunals or the National Industrial Tribunal, a minimum period of three to five years' experience should be prescribed, as what is sought to be utilised is their expert knowledge in labour laws.
>
> 19. The Union Government submits that it may be advisable to leave the choice of selection of the most appropriate candidate to the Committee headed by the Chief Justice of India or his nominee.
>
> 20. The High Court has also observed that as persons who satisfy the qualifications prescribed in Section 10-FD(3)(g) would be persons who fall under Section 10-FD(2)(a), it would be more appropriate to include this qualification in Section 10-FD(2)(a). It has also observed in Section 10-FL dealing with "Benches of the Tribunal", a provision should be made that a "judicial member" with this qualification shall be a member of the Special Bench referred to in Section 10-FL(2) for cases relating to rehabilitation, restructuring or winding up of companies.
>
> 21. The Union Government has not accepted these findings and contends that the observations of the High Court would amount to judicial legislation.
>
> Section 10-FD(3)(h): Qualification of Technical Member of NCLT
>
> 22. The High Court has observed that clause (*h*) referring to the category of persons having special knowledge of and experience in matters relating to labour, for not less than 15 years is vague and should

be suitably amended so as to spell out with certainty the qualification which a person to be appointed under clause (*h*) should possess.

23. The Union Government contends that in view of the wide and varied experience possible in labour matters, it may not be advisable to set out the nature of experience or impose any restrictions in regard to the nature of experience. It is submitted that the Selection Committee headed by the Chief Justice of India or his nominee would consider each application on its own merits.

24. The second observation of the High Court is that the member selected under the category mentioned in clause (*h*) must confine his participation only to the Benches dealing with revival and rehabilitation of sick companies and should also be excluded from functioning as a single-Member Bench for any matter.

25. The Union Government contends that it may not be advisable to fetter the prerogative of the President of the Tribunal to constitute benches by making use of available members. It is also pointed out that it may not be proper to presume that a person well versed in labour matters will be unsuitable to be associated with a judicial member in regard to adjudication of winding-up matters.

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Section 10-FX: Selection process for President/Chairperson

31. The High Court has expressed the view that the selection of the President/Chairperson should be by a Committee headed by the Chief Justice of India in consultation with two senior Judges of the Supreme Court.

32. The Union Government has submitted that it would not be advisable to make such a provision in regard to appointment of the President/Chairperson of statutory tribunals. It is pointed out that no other legislation constituting tribunals has such a provision."

In order to assail the challenge to the provisions extracted hereinabove, the Union of India asserted, that the Madras High Court (the judgment whereof was, also under challenge) having held that the Parliament had the competence and the power to establish the National Company Law Tribunal and the National Company Law Appellate Tribunal, ought to have dismissed the writ petition. The assertion at the hands of the Union of India was, that some of the directions contained in the judgment rendered by the Madras High Court, reframed and recast Parts 1B and 1C introduced by the Amendment Act and amounted to

converting "judicial review" into judicial legislation. It was, however noticed, that the Union of India having agreed to rectify several of the defects pointed out by the High Court, the appeal of the Union of India was restricted to the findings of the High Court relating to Sections 10-FD(3)(f), (g), (h) and 10-FX. To understand the tenor of the issue which was the subject matter before this Court, it is relevant to extract some of the provisions of the Companies Act, 1956 as amended by the Companies (Second Amendment) Act, 2002, relating to the constitution of the National Company Law Tribunal and the National Company Law Appellate Tribunal). The same are reproduced hereunder:-

"PART I-B

NATIONAL COMPANY LAW TRIBUNAL

10-FB. *Constitution of National Company Law Tribunal*.—The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

10-FC. *Composition of Tribunal*.—The Tribunal shall consist of a President and such number of judicial and technical members not exceeding sixty-two, as the Central Government deems fit, to be appointed by that Government, by notification in the Official Gazette.

10-FD. *Qualifications for appointment of President and Members*.—(1) The Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court as the President of the Tribunal.

(2) A person shall not be qualified for appointment as judicial member unless he—

(*a*) has, for at least fifteen years, held a judicial office in the territory of India; or

(*b*) has, for at least ten years been an advocate of a High Court, or has partly held judicial office and has been partly in practice as an advocate for a total period of fifteen years; or

(*c*) has held for at least fifteen years a Group A post or an equivalent post under the Central Government or a State Government including at least three years of service as a Member of the Indian Company Law Service (Legal Branch) in Senior Administrative Grade in that service; or

(*d*) has held for at least fifteen years a Group A post or an equivalent post under the Central Government (including at least three years of service as a Member of the Indian Legal Service in Grade I of that service).

. (3) A person shall not be qualified for appointment as technical member unless he—

(*a*) has held for at least fifteen years a Group A post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade in that service]; or

(*b*) is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or held any other post under the Central Government or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India, for at least five years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or

(*c*) is, or has been, for at least fifteen years in practice as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949); or

(*d*) is, or has been, for at least fifteen years in practice as a cost accountant under the Cost and Works Accountants Act, 1959 (23 of 1959); or

(*e*) is, or has been, for at least fifteen years working experience as a Secretary in wholetime practice as defined in clause (45-A) of Section 2 of this Act and is a member of the Institute of the Company Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980); or

(f) is a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty years in science, technology, economics, banking, industry, law, matters relating to industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in, which would be in the opinion of the Central Government useful to the Tribunal; or

(*g*) is, or has been, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947); or

(*h*) is a person having special knowledge of, and experience of not less than fifteen years in, the matters relating to labour.

Explanation.—For the purposes of this Part,—

(*i*) 'judicial member' means a Member of the Tribunal appointed as such under sub-section (2) of Section 10-FD and includes the President of the Tribunal;

(*ii*) 'technical member' means a Member of the Tribunal appointed as such under sub-section (3) of Section 10-FD.

10-FE. *Term of office of President and Members*.—The President and every other Member of the Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for reappointment:

Provided that no President or other Member shall hold office as such after he has attained,—

(*a*) in the case of the President, the age of sixty-seven years;

(*b*) in the case of any other Member, the age of sixty-five years:

Provided further that the President or other Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such.

10-FF. *Financial and administrative powers of Member Administration*.—The Central Government shall designate any judicial member or technical member as Member (Administration) who shall exercise such financial and administrative powers as may be vested in him under the rules which may be made by the Central Government:

Provided that the Member (Administration) shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the Tribunal subject to the condition that such officer shall, while exercising such delegated powers continue to act under the direction, superintendence and control of the Member (Administration).

* * *

10-FK. *Officers and employees of Tribunal*.—(1) The Central Government shall provide the Tribunal with such officers and other employees as it may deem fit.

(2) The officers and other employees of the Tribunal shall discharge their functions under the general superintendence of the Member Administration.

(3) The salaries and allowances and other terms and conditions of service of the officers and other employees of the Tribunal shall be such as may be prescribed.

10-FL. *Benches of Tribunal*.—(1) Subject to the provisions of this section, the powers of the Tribunal may be exercised by Benches, constituted by the President of the Tribunal, out of which one shall be a judicial member and another shall be a technical member referred to in clauses (*a*) to (*f*) of sub-section (3) of Section 10-FD:

Provided that it shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member of the Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the

Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.

(2) The President of the Tribunal shall, for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, constitute one or more special Benches consisting of three or more Members, each of whom shall necessarily be a judicial member, a technical member appointed under any of the clauses (*a*) to (*f*) of sub-section (3) of Section 10-FD, and a Member appointed under clause (*g*) or clause (*h*) of sub-section (3) of Section 10-FD:

Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding-up proceedings of such company may be conducted by a Bench consisting of a single Member.

(3) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it.

(4) There shall be constituted such number of Benches as may be notified by the Central Government.

(5) In addition to the other Benches, there shall be a Principal Bench at New Delhi presided over by the President of the Tribunal.

(6) The Principal Bench of the Tribunal shall have powers of transfer of proceedings from any Bench to another Bench of the Tribunal in the event of inability of any Bench from hearing any such proceedings for any reason:

Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.

* * *

10-FO. *Delegation of powers*.—The Tribunal may, by general or special order, delegate, subject to such conditions and limitations, if any, as may be specified in the order, to any Member or officer or other employee of the Tribunal or other person authorized by the Tribunal to manage any industrial company or industrial undertaking or any operating agency, such powers and duties under this Act as it may deem necessary.

PART I-C

APPELLATE TRIBUNAL

* * *

10-FR. *Constitution of Appellate Tribunal*.—(1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the 'National Company Law Appellate Tribunal' consisting of a

Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

(2) The Chairperson of the Appellate Tribunal shall be a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(3) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

* * *.

10-FT. *Term of office of Chairperson and Members*.—The Chairperson or a Member of the Appellate Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for reappointment for another term of three years:

Provided that no Chairperson or other Member shall hold office as such after he has attained,—

(*a*) in the case of the Chairperson, the age of seventy years;

(*b*) in the case of any other Member, the age of sixty-seven years.

* * *

10-FX. *Selection Committee*.—(1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of—

(*a*) Chief Justice of India or his nominee Chairperson;

(*b*) Secretary in the Ministry of Finance and Company Affairs Member;

(*c*) Secretary in the Ministry of Labour Member;

(*d*) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department) Member;

(*e*) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs) Member.

(2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.

* * *

(5) Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his

functions as such Chairperson or Member of the Appellate Tribunal or President or Member of the Tribunal, as the case may be.

(6) No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

* * *

10-G. *Power to punish for contempt*.—The Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as the High Court has and may exercise, for this purpose under the provisions of the Contempt of Courts Act, 1971 (70 of 1971), which shall have the effect subject to modifications that—

(*a*) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(*b*) the reference to Advocate General in Section 15 of the said Act shall be construed as a reference to such law officers as the Central Government may specify in this behalf.

* * *

10-GB. *Civil court not to have jurisdiction*.—(1) No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force.

* * *

10-GF. *Appeal to Supreme Court*.—Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

Having noticed the relevant statutory provisions, this Court made detailed observations relating to "difference between Courts and Tribunals", "Re: independence of judiciary", "separation of powers", and "whether the Government can transfer judicial functions traditionally performed by Courts, to Tribunals", as under:-

"70. But in India, unfortunately tribunals have not achieved full independence. The Secretary of the "sponsoring department" concerned sits in the Selection Committee for appointment. When the tribunals are formed, they are mostly dependent on their sponsoring department for funding, infrastructure and even space for functioning. The statutes constituting tribunals routinely provide for members of civil services from the sponsoring departments becoming members of the tribunal and continuing their lien with their parent cadre. Unless wide ranging reforms as were implemented in United Kingdom and as were suggested by *L. Chandra Kumar vs. Union of India, (1997) 3 SCC 261,* are brought about, tribunals in India will not be considered as independent.

Whether the Government can transfer the judicial functions traditionally performed by courts to tribunals?

71. It is well settled that courts perform all judicial functions of the State except those that are excluded by law from their jurisdiction. Section 9 of the Code of Civil Procedure, for example, provides that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

72. Article 32 provides that without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2) of the said Article, Parliament may by law, empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2) of Article 32.

73. Article 247 provides that notwithstanding anything contained in Chapter I of Part XI of the Constitution, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List. Article 245 provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State.

74. Article 246 deals with the subject-matter of laws made by Parliament and by the legislatures of States. The Union List (List I of the Seventh Schedule) enumerates the matters with respect to which Parliament has exclusive powers to make laws. Entry 77 of List I refers to constitution, organisation, jurisdiction and powers of the Supreme Court. Entry 78 of List I refers to constitution and organisation of the High Courts. Entry 79 of List I refers to extension or exclusion of the jurisdiction of a High Court, to or from any Union Territory. Entry 43 of List I refers to incorporation, regulation and winding up of trading corporations and Entry 44 of List I refers to incorporation, regulation and winding up of corporations. Entry 95 of List I refers to jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in the Union List.

75. The Concurrent List (List III of the Seventh Schedule) enumerates the matters with respect to which Parliament and the Legislature of a State

will have concurrent power to make laws. Entry 11-A of List III refers to administration of justice, constitution and organization of all courts except the Supreme Court and the High Courts. Entry 46 of List III refers to jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List III.

76. Part XIV-A was inserted in the Constitution with effect from 3-1-1977 by the Constitution (Forty-second Amendment) Act, 1976. The said part contains two articles. Article 323-A relates to Administrative Tribunals and empowers Parliament to make a law, providing for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Government or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

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80. The legislative competence of Parliament to provide for creation of courts and tribunals can be traced to Entries 77, 78, 79 and Entries 43, 44 read with Entry 95 of List I, Entry 11-A read with Entry 46 of List III of the Seventh Schedule. Referring to these articles, this Court in two cases, namely, Union of India v. Delhi High Court Bar Assn., (2002) 4 SCC 75, and State of Karnataka v. Vishwabharathi House Building Coop. Society, (2003) 2 SCC 412, held that Articles 323-A and 323-B are enabling provisions which enable the setting up of tribunals contemplated therein; and that the said articles, however, cannot be interpreted to mean that they prohibited the legislature from establishing tribunals not covered by those articles, as long as there is legislative competence under the appropriate entry in the Seventh Schedule.

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90. <u>But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred from courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals are Rent</u>

Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialised knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional.

91 In *R.K. Jain* v. *Union of India*, (1993) 4 SCC 119, this Court observed: (SCC pp. 169-70, para 67)

> "*67*. The tribunals set up under Articles 323-A and 323-B of the Constitution or under an Act of legislature are creatures of the statute and in no case claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained Judges in the High Court and Supreme Court would arise for discussion and decision."

92. Having held that legislation can transfer certain areas of litigation from courts to tribunals and recognising that the legislature can provide for technical members in addition to judicial members in such tribunals, let us turn our attention to the question as to who can be the members.

93. If the Act provides for a tribunal with a judicial member and a technical member, does it mean that there are no limitations upon the power of the legislature to prescribe the qualifications for such technical member? The question will also be whether any limitations can be read into the competence of the legislature to prescribe the qualification for the judicial member? The answer, of course, depends upon the nature of jurisdiction that is being transferred from the courts to tribunals. Logically and necessarily, depending upon whether the jurisdiction is being shifted from a High Court, or a District Court or a Civil Judge, the yardstick will differ. It is for the court which considers the challenge to the qualification, to determine whether the legislative power has been exercised in a manner in consonance with the constitutional principles and constitutional guarantees.

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101. Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the rule of law. The rule of law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the executive. Another facet of the rule of law is equality before law. The essence of the equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model.

102. The fundamental right to equality before law and equal protection of laws guaranteed by Article 14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognised principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative Act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one or more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative Act cannot be challenged on the ground it violates the basic structure of the Constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of the rule of law, separation of powers and independence of the judiciary.

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106. We may summarise the position as follows:

(*a*) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(*b*) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.

(*c*) Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does

not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special ,aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.

(*d*) The legislature can reorganise the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts). Similarly while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere to preserve the independence and standards of the judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

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113. When the Administrative Tribunals were constituted, the presence of members of civil services as Technical (Administrative) Members was considered necessary, as they were well versed in the functioning of government departments and the rules and procedures applicable to government servants. But the fact that senior officers of civil services could function as Administrative Members of the Administrative Tribunals, does not necessarily make them suitable to function as technical members in the Company Law Tribunals or other tribunals requiring technical expertise. The tribunals cannot become providers of sinecure to members of civil services, by appointing them as technical members, though they may not have technical expertise in the field to which the tribunals relate, or worse, where purely judicial functions are involved. While one can understand the presence of the members of the civil services being technical members in Administrative Tribunals, or Military Officers being members of the Armed Forces Tribunals, or electrical engineers being members of the Electricity Appellate Tribunal, or telecom engineers being members of TDSAT, we find no logic in members of the general civil services being members of the Company Law Tribunals.

114. Let us now refer to the dilution of independence. If any member of the tribunal is permitted to retain his lien over his post with the parent cadre or ministry or department in the civil service for his entire period of service as member of the tribunal, he would continue to think, act and function as a member of the civil services. A litigant may legitimately think that such a member will not be independent and impartial. We reiterate

that our observations are not intended to cast any doubt about the honesty and integrity or capacity and capability of the officers of civil services in particular those who are of the rank of Joint Secretary or for that matter even junior officers. What we are referring to is the perception of the litigants and the public about the independence or conduct of the members of the tribunal. Independence, impartiality and fairness are qualities which have to be nurtured and developed and cannot be acquired overnight. The independence of members discharging judicial functions in a tribunal cannot be diluted.

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120. We may tabulate the corrections required to set right the defects in Parts I-B and I-C of the Act:

(*i*) Only Judges and advocates can be considered for appointment as judicial members of the Tribunal. Only High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practised as a lawyer for ten years can be considered for appointment as a judicial member. Persons who have held a Group A or equivalent post under the Central or State Government with experience in the Indian Company Law Service (Legal Branch) and the Indian Legal Service (Grade I) cannot be considered for appointment as judicial members as provided in sub-sections (2)(*c*) and (*d*) of Section 10-FD. The expertise in Company Law Service or the Indian Legal Service will at best enable them to be considered for appointment as technical members.

(*ii*) As NCLT takes over the functions of the High Court, the members should as nearly as possible have the same position and status as High Court Judges. This can be achieved, not by giving the salary and perks of a High Court Judge to the members, but by ensuring that persons who are as nearly equal in rank, experience or competence to High Court Judges are appointed as members. Therefore, only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as technical members of the National Company Law Tribunal. Clauses (*c*) and (*d*) of sub-section (2) and clauses (*a*) and (*b*) of sub-section (3) of Section 10-FD which provide for persons with 15 years experience in Group A post or persons holding the post of Joint Secretary or equivalent post in the Central or the State Government, being qualified for appointment as Members of Tribunal, are invalid.

(*iii*) A "technical member" presupposes an experience in the field to which the Tribunal relates. A member of the Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of company law cannot be considered as "experts" qualified to be appointed as technical members. Therefore clauses (*a*) and (*b*) of sub-section (3) are not valid.

(*iv*) The first part of clause (*f*) of sub-section (3) providing that any person having special knowledge or professional experience of 20 years in science, technology, economics, banking, industry could be considered to be persons with expertise in company law, for being appointed as technical members in the Company Law Tribunal, is invalid.

(*v*) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as technical members.

(*vi*) In regard to category of persons referred in clause (*g*) of sub-section (3) at least five years' experience should be specified.

(*vii*) Only clauses (*c*), (*d*), (*e*), (*g*), (*h*), and the latter part of clause (*f*) in sub-section (3) of Section 10-FD and officers of civil services of the rank of the Secretary or Additional Secretary in the Indian Company Law Service and the Indian Legal Service can be considered for purposes of appointment as technical members of the Tribunal.

(*viii*) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:

(*a*) Chief Justice of India or his nominee—Chairperson (with a casting vote);

(*b*) A Senior Judge of the Supreme Court or Chief Justice of High Court—Member;

(*c*) Secretary in the Ministry of Finance and Company Affairs—Member; and

(*d*) Secretary in the Ministry of Law and Justice—Member.

(*ix*) The term of office of three years shall be changed to a term of seven or five years subject to eligibility for appointment for one more term. This is because considerable time is required to achieve expertise in the field concerned. A term of three years is very short and by the time the members achieve the required knowledge, expertise and efficiency, one term will be over. Further the said term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens. If these Tribunals are to function effectively and efficiently they should be able to attract younger members who will have a reasonable period of service.

(*x*) The second proviso to Section 10-FE enabling the President and members to retain lien with their parent cadre/ministry/department while holding office as President or Members will not be conducive for the independence of members. Any person appointed as member should be prepared to totally disassociate himself from the executive. The lien cannot therefore exceed a period of one year.

(*xi*) To maintain independence and security in service, sub-section (3) of Section 10-FJ and Section 10-FV should provide that suspension of the President/Chairman or member of a Tribunal can be only with the concurrence of the Chief Justice of India.

(*xii*) The administrative support for all Tribunals should be from the Ministry of Law and Justice. Neither the Tribunals nor their members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or Department concerned.

(*xiii*) Two-member Benches of the Tribunal should always have a judicial member. Whenever any larger or special Benches are constituted, the number of technical members shall not exceed the judicial members."

62. Before venturing to examine the controversy in hand it needs to be noticed, that some of the assertions raised at the hands of the petitioners in the present controversy have since been resolved. These have been noticed in an order passed by this Court in Madras Bar Association v. Union of India, (2010) 11 SCC 67, which is being extracted hereunder:-

"1. In all these petitions, the constitutional validity of the National Tax Tribunal Act, 2005 ("the Act", for short) is challenged. In TC No. 150 of 2006, additionally there is a challenge to Section 46 of the Constitution (Forty-second Amendment) Act, 1976 and Article 323-B of the Constitution of India. It is contended that Section 46 of the Constitution (Forty-second Amendment) Act, is ultra vires the basic structure of the Constitution as it enables proliferation of the tribunal system and makes serious inroads into the independence of the judiciary by providing a parallel system of administration of justice, in which the executive has retained extensive control over matters such as appointment, jurisdiction, procedure, etc. It is contended that Article 323-B violates the basic structure of the Constitution as it completely takes away the jurisdiction of the High Courts and vests them in the National Tax Tribunal, including trial of offences and adjudication of pure questions of law, which have always been in the exclusive domain of the judiciary.

2. When these matters came up on 9-1-2007 before a three-Judge Bench, the challenge to various sections of the Act was noticed.

3. The first challenge was to Section 13 which permitted "any person" duly authorised to appear before the National Tax Tribunal. The Union of India submitted that the appropriate amendment will be made in the Act to ensure that only lawyers, chartered accountants and parties in person will be permitted to appear before the National Tax Tribunal.

4. The second challenge was to Section 5(5) of the Act which provided that:

> "5. (5) The Central Government may in consultation with the Chairperson transfer a member from headquarters of one Bench in one State to the headquarters of another Bench in another State or to the headquarters of any other Bench within a State:"

5. The Union of India submitted that having regard to the nature of the functions to be performed by the Tribunal and the constitutional scheme of separation of powers and independence of judiciary, the expression "consultation with the Chairperson" occurring in Section 5(5) of the Act should be read and construed as "concurrence of the Chairperson".

6. The third challenge was to Section 7 which provided for a Selection Committee comprising of (a) the Chief Justice of India or a Judge of the Supreme Court nominated by him, (b) Secretary in the Ministry of Law and Justice, and (c) Secretary in the Ministry of Finance. It was contended by the petitioners that two of the members who are Secretaries to the Government forming the majority may override the opinion of the Chief Justice or his nominee which was improper. It was stated on behalf of the Union of India that there was no question of two Secretaries overriding the opinion of the Chief Justice of India or his nominee since primacy of the Chairperson was inbuilt in the system and this aspect will be duly clarified.

7. In regard to certain other defects in the Act, pointed out by the petitioners, it was submitted that the Union Government will examine them and wherever necessary suitable amendments will be made.

8. In view of these submissions, on 9-1-2007, this Court made an order reserving liberty to the Union Government to mention the matter for listing after the appropriate amendments were made in the Act.

9. On 21-1-2009, when arguments in CA No. 3067 of 2004 and CA No. 3717 of 2005, which related to the challenge to Parts I-B and I-C of the Companies Act, 1956 were in progress before the Constitution Bench, it was submitted that these matters involved a similar issue and they could be tagged and disposed of in terms of the decision in those appeals. Therefore the Constitution Bench directed these cases to be listed with those appeals, even though there is no order of reference in these matters. CA No. 3067 of 2004 and CA No. 3717 of 2005 were subsequently heard at length and were reserved for judgment. These matters which were tagged were also reserved for judgment.

10. We have disposed of CA No. 3067 of 2004 and CA No. 3717 of 2005 today (Union of India vs. Madras Bar Association, (2010) 11 SCC 1), by a separate order. Insofar as these cases are concerned, we find that TC (Civil) No. 150 of 2006 involves the challenge to Article 323-B of the Constitution. The said article enables appropriate legislatures to provide by law, for adjudication or trial by tribunals or any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) thereof. Sub-clause (i) of clause (2) of Article 323-B enables such tribunals to try offences against laws with respect to any of the matters specified in sub-clauses (a) to (h) of clause (2) of the said article.

11. One of the contentions urged in support of the challenge to Article 323-B relate to the fact that tribunals do not follow the normal rules of evidence contained in the Evidence Act, 1872. In criminal trials, an accused is presumed to be innocent till proved guilty beyond reasonable doubt, and the Evidence Act plays an important role, as appreciation of evidence and consequential findings of facts are crucial. The trial would require experience and expertise in criminal law, which means that the Judge or the adjudicator to be legally trained. Tribunals which follow their own summary procedure, are not bound by the strict rules of evidence and the members will not be legally trained. Therefore it may lead to convictions of persons on evidence which is not sufficient in probative value or on the basis of inadmissible evidence. It is submitted that it would thus be a retrograde step for separation of executive from the judiciary.

12. Appeals on issues on law are traditionally heard by the courts. Article 323-B enable constitution of tribunals which will be hearing appeals on pure questions of law which is the function of the courts. In L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, this Court considered the validity of only clause (3)(d) of Article 323-B but did not consider the validity of other provisions of Article 323-B.

13. The appeals relating to constitutional validity of the National Company Law Tribunals under the Companies Act, 1956 did not involve the consideration of Article 323-B. The constitutional issues raised in TC (Civil) No. 150 of 2006 were not touched on as the power to establish Company Tribunals was not traceable to Article 323-B but to several entries of Lists I and III of the Seventh Schedule and consequently there was no challenge to this article.

14. The basis of attack in regard to Parts I-B and I-C of the Companies Act and the provisions of the NTT Act are completely different. The challenge to Parts I-B and I-C of the Companies Act, 1956 seeks to derive support from Article 323-B by contending that Article 323-B is a bar for constitution of any tribunal in respect of matters not enumerated therein. On the other hand the challenge to the NTT Act is based on the challenge to Article 323-B itself.

15. We therefore find that these petitions relating to the validity of the NTT Act and the challenge to Article 323-B raise issues which did not arise in

the two civil appeals. Therefore these cases cannot be disposed of in terms of the decision in the civil appeals but require to be heard separately. We accordingly direct that these matters be delinked and listed separately for hearing."

63(i) A perusal of the judgment rendered in Kesavananda Bharati case (supra) reveals, that "separation of powers" creates a system of checks and balances, by reasons of which, powers are so distributed, that none of the three organs transgresses into the domain of the other. The concept ensures the dignity of the individual. The power of "judicial review" ensures, that executive functioning confines itself within the framework of law enacted by the legislature. Accordingly, the demarcation of powers between the legislature, the executive and the judiciary, is regarded as the basic element of the constitutional scheme. When the judicial process is prevented by law, from determining whether the action taken, was or was not, within the framework of the legislation enacted, it would amount to the transgression of the adjudicatory/determinatory process by the legislature. Therefore, the exclusion of the power of "judicial review", would strike at the "basic structure" of the Constitution.

(ii) In Indira Nehru Gandhi case (supra), this Court arrived at the conclusion, that clause (4) of Article 329A of the Constitution, destroyed not only the power of "judicial review", but also the rule of "separation of powers". By the above legislative provision, an election declared void, on the culmination of an adjudicatory process, was treated as valid. Meaning thereby, that the judicial process was substituted by a legislative pronouncement. It was held, that the issue to be focused on was, whether the amendment which was sought to be

assailed, violated a principle which constituted the "basic structure" of the Constitution. The argument raised in opposition was, that a determination which had a bearing on just one (or a few) individual(s) would not raise such an issue. The query was answered by concluding, that it would make no difference whether it related to one case, or a large number of cases. Encroachment on the "basic structure" of the Constitution would be invalid, irrespective of whether, it related to a limited number of individuals or a large number of people. The view expressed was, that if lawmakers were to be assigned the responsibility of administering those laws, and dispensing justice, then those governed by such laws would be left without a remedy in case they were subjected to injustice. For the above reason, clause (4) of Article 329A was declared invalid. This Court by majority held, that clauses (4) and (5) of Article 329A were unconstitutional and void.

(iii) In Minerva Mills Ltd. case (supra), first and foremost, this Court confirmed the view expressed in Kesavananda Bharati case (supra) and Indira Nehru Gandhi case (supra), that the amending power of the Parliament, was not absolute. The Parliament, it was maintained, did not have the power to amend the "basic structure" of the Constitution. A legislative assertion, that the enacted law had been made, for giving effect to a policy to secure the provisions made in Part IV of the Constitution, had the effect of excluding the adjudicatory process. In the case on hand, this Court arrived at the conclusion, that Section 4 of the Constitution (Forty-second Amendment) Act was beyond the amending power of the Parliament, and the same was void, because it had the effect of damaging

the basic and essential features of the Constitution and destroying its "basic structure", by totally excluding any challenge to any law, even on the ground, whether it was inconsistent with or it had abridged, any of the rights conferred by Articles 14 and 19 of the Constitution. Furthermore, Section 55 of the Constitution (Forty-second Amendment), Act was held to be beyond the amending power of the Parliament. It was held to be void, as it had the effect of removing all limitations on the powers of Parliament, to amend the Constitution including, the power to alter its basic and essential features, i.e., its "basic structure". According to this Court, the reason for a broad "separation of powers" under the Constitution was, because concentration of powers in any one of the organs of the Government, would destroy the foundational premise of a democratic Government. The illustrations narrated in the judgment are of some relevance. We shall therefore, narrate them hereunder, in our own words:

(a) Take for example a case where the executive, which is in-charge of administration, acts to the prejudice of a citizen. And a question arises, as to what are the powers of the executive, and whether the executive had acted within the scope of its powers. Such a question obviously, cannot be left to the executive to decide, for two very good reasons. Firstly, because the decision would depend upon the interpretation of the Constitution or the laws, which are, pre-eminently fit to be decided by the judiciary, as it is the judiciary alone which would be possessed of the expertise in decision making. And secondly, because the legal protection afforded to citizens by the Constitution

or the laws would become illusory, if it were left to the executive to determine the legality, of its own actions.

(b) Take for example, a case where the legislature makes a law, which is to the prejudice of a citizen. And a dispute arises, whether in making the law the legislature had acted outside the area of its legislative competence, or whether the law was violative of the fundamental rights of the citizen, or of some other provision(s) of law. Its resolution cannot be left to the legislature to decide, for two very good reasons. Firstly, because the decision would depend upon the interpretation of the Constitution or the laws, which are, pre-eminently fit to be decided by the judiciary, as it is the judiciary alone which would be possessed of the expertise in decision making. And secondly, because the legal protection afforded to citizens, by the Constitution or the laws would become illusory, if it were left to the legislature to determine the legality of its own actions.

On the basis of the examples cited above, this Court concluded, that the creation of an independent machinery, for resolving disputes, was constitutionally vested with the judiciary. The judiciary was vested with the power of "judicial review", to determine the legality of executive action, and the validity of laws enacted by legislature. It was further held, that it was the solemn duty of the judiciary under the Constitution, to keep the different organs of the State, such as the executive and the legislature, within the limits of the powers conferred upon them by the Constitution. It was accordingly also held, that the power of "judicial review" was an integral part of India's constitutional system, and without it, the "rule of law"

would become a teasing illusion, and a promise of unreality. Premised on the aforesaid inferences, this Court finally concluded, that if there was one feature of the Indian Constitution, which more than any others, was its "basic structure" fundamental to the maintenance of democracy and the "rule of law", it was the power of "judicial review". While recording the aforementioned conclusion, this Court also recorded a clarificatory note, namely, that it should not be taken, that an effective alternative institutional mechanism or arrangement for "judicial review" could not be made by Parliament. It was, however, clearly emphasized, that "judicial review" was a vital principle of the Indian Constitution, and it could not be abrogated, without affecting the "basic structure" of the Constitution. It is therefore, that it came to be held, that a constitutional amendment, which had the effect of taking away the power of "judicial review", by providing, that it would not be liable to be questioned, on any ground, was held to be beyond the amending power of the Parliament. For, that would make the Parliament the sole judge, of the constitutional validity, of what it had done, and thereby, allow it to determine the legality of its own actions. In the above judgment, the critical reflection, in our considered view was expressed by the words, "Human ingenuity, limitless though it may be, has yet not devised a system, by which the liberty of the people can be protected, except for the intervention of the courts of law".

(iv) In S.P. Gupta case (supra), the concept of "independence of judiciary" came up for consideration before this Court. This Court having examined the issue, arrived at certain conclusions with reference to High Court and Supreme Court Judges. It was held, that their appointment and removal, as also their

transfer, deserved to be preserved, within the framework of the judicial fraternity. Likewise, the foundation of appointment of outside Chief Justices, was made with a similar objective. Based on the same, parameters were also laid down, in respect of appointment of Judges to the Supreme Court. The consideration even extended to the appointment of the Chief Justice of the Supreme Court. All this, for ensuring judicial autonomy. It was felt that independence of the judiciary, could be preserved only if primacy in the above causes rested with the judiciary itself, with a minimal involvement of the executive and the legislature. It needs to be highlighted, that independence of judges of the High Courts and the Supreme Court was considered as salient, to ensure due exercise of the power of "judicial review". It would be pertinent to mention, that the judgment rendered by this Court in S.P. Gupta case (supra) came to be doubted in Subhash Sharma v. Union of India, (1991) Suppl. 1 SCC 574. Thereupon, the matter was reconsidered by a constitution bench of nine Judges in, Supreme Court Advocates on Record Association v. Union of India, (1993) 4 SCC 441. On the subject of preserving independence in respect of appointment of judges of the High Courts, as also their transfer, the position recorded earlier in S.P.Gupta case (supra) remained substantially unaltered. So also, of appointments of Chief Justices of High Courts and the Supreme Court. It was reiterated, that to ensure judicial independence, primacy in all these matters should be with the judiciary.

(v) Having recorded the determination rendered by this Court to the effect that "separation of powers", "rule of law" and "judicial review" at the hands of an independent judiciary, constitute the "basic structure" of the Constitution, we are

in a position now to determine, how the aforesaid concepts came to be adopted by this Court, while adjudicating upon the validity of provisions similar to the ones, which are subject of consideration, in the case on hand. The first controversy arose with reference to the Administrative Tribunals Act, 1985, which was enacted under Article 323A of the Constitution. In S.P. Sampath Kumar case (supra), it was sought to be concluded, that the power of "judicial review" had been negated by the aforementioned enactment, inasmuch as, the avenue of redress under Articles 226 and 227 of the Constitution before the High Court, was no longer available. It was also sought to be asserted, that the tribunal constituted under the enactment, being a substitute of the High Court, ought to have been constituted in a manner, that it would be able to function in the same manner as the High Court itself. Since insulation of the judiciary from all forms of interference, even from the coordinate branches of the Government, was by now being perceived as a basic essential feature of the Constitution, it was felt that the same independence from possibility of executive pressure or influence, needed to be ensured for the Chairman, Vice Chairman and Members of the administrative tribunal. In recording its conclusions, even though it was maintained, that "judicial review" was an integral part of the "basic structure" of the Constitution, yet it was held, that Parliament was competent to amend the Constitution, and substitute in place of the High Court, another alternative institutional mechanism or arrangement. This Court, however cautioned, that it was imperative to ensure, that the alternative arrangement, was no less independent, and no less judicious, than the High Court (which was sought to be

replaced) itself. This was conveyed by observing, "if any constitutional amendment made by the Parliament takes away from the High Court the power of "judicial review" in any particular area, and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the Parliament by amendment is no less effective than the High Court". The exclusion of the High Courts' jurisdiction under Articles 226 and 227 of the Constitution, it was held, would render the Administrative Tribunals Act, 1985 unconstitutional, unless the amendments to the provisions of Sections 4, 6 and 8 thereof, as suggested by this Court, were carried out. Insofar as Section 4 is concerned, it was suggested that it must be amended so as not to confer absolute and unfettered discretion on the executive in matters of appointment of the Chairman, Vice Chairman and Members of the administrative tribunals. Section 6(1)(c) was considered to be invalid, and as such, needed to be deleted. It was also indicated, that appointment of Chairman, Vice Chairman and Administrative Members should be made by the executive, only in consultation with the Chief Justice of India, and that, such consultation had to be meaningful and effective, inasmuch as, ordinarily the recommendation of the Chief Justice of India ought to be accepted, unless there were cogent reasons not to. If there were any reasons, for not accepting the recommendation, they needed to be disclosed to the Chief Justice. Alternatively, it was commended, that a high powered Selection Committee headed by the Chief Justice or a sitting Judge of the Supreme Court, or of the

concerned High Court (nominated by the Chief Justice of India), could be set up for such selection. If either of these two modes of appointment was adopted, it was believed, that the impugned Act would be saved from invalidation. It was mentioned, that Section 6(2) also needed to be amended, so as to make a District Judge or an Advocate, who fulfilled the qualifications for appointment as a judge of the High Court, eligible for appointment as Vice Chairman. With reference to Section 8 it was felt, that a term of five years of office, would be too short and ought to be suitably extended. It was so felt, because the presently prescribed tenure would neither be convenient to the persons selected for the job, nor expedient to the scheme of adjudication contemplated under the Administrative Tribunals Act. It was also opined, that the Government ought to set up a permanent bench wherever there was a seat of the High Court. And if that was not feasible, at least a circuit bench of the administrative tribunal, wherever there is a seat of the High Court. That would alleviate the hardship, which would have to be faced by persons, who were not residing close to the places at which the benches of the tribunal were set up. In this behalf, it may only be stated that all the suggestions made by this Court were adopted.

(vi) Post S.P. Sampath Kumar case (supra), divergent views came to be expressed in a number of judgments rendered by this Court. It is therefore, that the judgment in S.P. Sampath Kumar case (supra), came up for reconsideration in L. Chandra Kumar case (supra). On reconsideration, this Court declared, that the power of "judicial review" over legislative action was vested in the High Courts under Article 226, and in the Supreme Court under Article 32 of the

Constitution. "Judicial review" was again held to be an integral and essential feature of the Constitution, constituting its "basic structure". It was further concluded, that ordinarily the power of High Courts and the Supreme Court, to test the constitutional validity of legislations, could never be ousted or excluded. It was also held, that the power vested in the High Courts of judicial superintendence over all Courts and tribunals within their respective jurisdictions, was also part of the "basic structure" of the Constitution. And that, a situation needed to be avoided where High Courts were divested from their judicial functions, besides the power of constitutional interpretation. Referring to the inappropriate and ineffective functioning of the tribunals, this Court observed, that the above malady was on account of lack of the responsibility, of fulfilling the administrative requirements of administrative tribunals. It was opined, that the malady could be remedied by creating a single umbrella organization, to ensure the independence of the members of such tribunals, and to provide funds for the fulfillment of their administrative requirements. Although the determination of the governmental organization, to discharge such a role was left open, it was recommended, that it should preferably be vested with the Law Department. With reference to the controversies which arose before the tribunals, it was held, that matters wherein interpretation of statutory provisions or rules, or where the provisions of the Constitution were expected to be construed, the same would have to be determined by a bench consisting of at least two Members, one of whom must be a Judicial Member. Having found that the provisions of the Administrative Tribunals Act, had impinged on the power of "judicial review"

vested in the High Court, clause (2)(d) of Article 323A and clause (3)(d) of Article 323B, to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, were held to be unconstitutional. Likewise, the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B, were also held to be unconstitutional. In view of the above, it was concluded, that the jurisdiction conferred upon the High Court under Articles 226/227, and upon the Supreme Court under Article 32 of the Constitution, was a part of the inviolable "basic structure" of the Constitution. Since the said jurisdiction could not be ousted, jurisdiction vested in the tribunals would be deemed to be discharging a supplemental role, in the exercise of the powers conferred by Articles 226/227 and 32 of the Constitution. Although it was affirmed, that such tribunals would be deemed to be possessed of the competence to test the constitutional validity of the statutory provisions and rules, it was provided, that all decisions of tribunals would be subject to scrutiny before a division bench of the High Court, within whose jurisdiction the concerned tribunal had passed the order. In the above view of the matter, it was held that the tribunals would act like courts of first instance, in respect of the areas of law, for which they had been constituted. After adjudication at the hands of the tribunals, it would be open for litigants to directly approach the High Courts. Section 5(6) of the Administrative Tribunals Act, interpreted in the manner indicated above, was bestowed with validity.

(vii) In Union of India v. Madras Bar Association case (supra), all the conclusions/propositions narrated above, were reiterated and followed,

whereupon the fundamental requirements, which need to be kept in mind while transferring adjudicatory functions from courts to tribunals, were further crystalised. It came to be unequivocally recorded that tribunals vested with judicial power (hitherto before vested in, or exercised by courts), should possess the same independence, security and capacity, as the courts which the tribunals are mandated to substitute. The Members of the tribunals discharging judicial functions, could only be drawn from sources possessed of expertise in law, and competent to discharge judicial functions. Technical Members can be appointed to tribunals where technical expertise is essential for disposal of matters, and not otherwise. Therefore it was held, that where the adjudicatory process transferred to tribunals, did not involve any specialized skill, knowledge or expertise, a provision for appointment of Technical Members (in addition to, or in substitution of Judicial Members) would constitute a clear case of delusion and encroachment upon the independence of the judiciary, and the "rule of law". The stature of the members, who would constitute the tribunal, would depend on the jurisdiction which was being transferred to the tribunal. In other words, if the jurisdiction of the High Court was transferred to a tribunal, the stature of the members of the newly constituted tribunal, should be possessed of qualifications akin to the judges of the High Court. Whereas in case, the jurisdiction and the functions sought to be transferred were being exercised/performed by District Judges, the Members appointed to the tribunal should be possessed of equivalent qualifications and commensurate stature of District Judges. The conditions of service of the members should be such, that they are in a position

to discharge their duties in an independent and impartial manner. The manner of their appointment and removal including their transfer, and tenure of their employment, should have adequate protection so as to be shorn of legislative and executive interference. The functioning of the tribunals, their infrastructure and responsibility of fulfilling their administrative requirements ought to be assigned to the Ministry of Law and Justice. Neither the tribunals nor their members, should be required to seek any facilities from the parent ministries or department concerned. Even though the legislature can reorganize the jurisdiction of judicial tribunals, and can prescribe the qualifications/eligibility of members thereof, the same would be subject to "judicial review" wherein it would be open to a court to hold, that the tribunalization would adversely affect the adjudicatory standards, whereupon it would be open to a court to interfere therewith. Such an exercise would naturally be, a part of the checks and balances measures, conferred by the Constitution on the judiciary, to maintain the rule of "separation of powers" to prevent any encroachment by the legislature or the executive.

64. The position of law summarized in the foregoing paragraph constitutes a declaration on the concept of the "basic structure", with reference to the concepts of "separation of powers", the "rule of law", and "judicial review". Based on the conclusions summarized above, it will be possible for us to answer the first issue projected before us, namely, whether "judicial review" is a part of the "basic structure" of the Constitution. The answer has inevitably to be in the affirmative. From the above determination, the petitioners would like us to further conclude,

that the power of "judicial review" stands breached with the promulgation of the NTT Act. This Court in Minerva Mills Ltd. case (supra) held, that it should not be taken, that an effective alternative institutional mechanism or arrangement for "judicial review" could not be made by Parliament. The same position was reiterated in S.P. Sampath Kumar case (supra), namely, that "judicial review" was an integral part of the "basic structure" of the Constitution. All the same it was held, that Parliament was competent to amend the Constitution, and substitute in place of the High Court, another alternative institutional mechanism (court or tribunal). It would be pertinent to mention, that in so concluding, this Court added a forewarning, that the alternative institutional mechanism set up by Parliament through an amendment, had to be no less effective than the High Court itself. In L. Chandra Kumar case (supra), even though this Court held that the power of "judicial review" over legislative action vested in High Courts, was a part of the "basic structure", it went on to conclude that "ordinarily" the power of High Courts to test the constitutional validity of legislations could never be ousted. All the same it was held, that the powers vested in High Courts to exercise judicial superintendence over decisions of all courts and tribunals within their respective jurisdictions, was also a part of the "basic structure" of the Constitution. The position that Parliament had the power to amend the Constitution, and to create a court/tribunal to discharge functions which the High Court was discharging, was reiterated, in Union of India v. Madras Bar Association case (supra). It was concluded, that the Parliament was competent to enact a law, transferring the jurisdiction exercised by High Courts, in regard to

any specified subject, to any court/tribunal. But it was clarified, that Parliament could not transfer power vested in the High Courts, by the Constitution itself. We therefore have no hesitation in concluding, that appellate powers vested in the High Court under different statutory provisions, can definitely be transferred from the High Court to other courts/tribunals, subject to the satisfaction of norms declared by this Court. Herein the jurisdiction transferred by the NTT Act was with regard to specified subjects under tax related statutes. That, in our opinion, would be permissible in terms of the position expressed above. Has the NTT Act transferred any power vested in courts by the Constitution? The answer is in the negative. The power of "judicial review" vested in the High Court under Articles 226 and 227 of the Constitution, has remained intact. This aspect of the matter, has a substantial bearing, to the issue in hand. And will also lead to some important inferences. Therefore, it must never be overlooked, that since the power of "judicial review" exercised by the High Court under Articles 226 and 227 of the Constitution has remained unaltered, the power vested in High Courts to exercise judicial superintendence over the benches of the NTT within their respective jurisdiction, has been consciously preserved. This position was confirmed by the learned Attorney General for India, during the course of hearing. Since the above jurisdiction of the High Court has not been ousted, the NTT will be deemed to be discharging a supplemental role, rather than a substitutional role. In the above view of the matter, the submission that the NTT Act violates the "basic structure" of the Constitution, cannot be acquiesced to.

65. Even though we have declined to accept the contention advanced on behalf of the petitioners, premised on the "basic structure" theory, we feel it is still essential for us, to deal with the submission advanced on behalf of the respondents in response. We may first record the contention advanced on behalf of the respondents. It was contended, that a legislation (not being an amendment to the Constitution), enacted in consonance of the provisions of the Constitution, on a subject within the realm of the concerned legislature, cannot be assailed on the ground that it violates the "basic structure" of the Constitution. For the present controversy, the respondents had placed reliance on Articles 245 and 246 of the Constitution, as also, on entries 77 to 79, 82 to 84, 95 and 97 of the Union List of the Seventh Schedule, and on entries 11A and 46 of the Concurrent List of the Seventh Schedule. Based thereon it was asserted, that Parliament was competent to enact the NTT Act. For examining the instant contention, let us presume it is so. Having accepted the above, our consideration is as follows. The Constitution regulates the manner of governance in substantially minute detail. It is the fountainhead distributing power, for such governance. The Constitution vests the power of legislation at the Centre, with the Lok Sabha and the Rajya Sabha, and in the States with the State Legislative Assemblies (and in some States, the State Legislative Councils, as well). The instant legislative power is regulated by "Part XI" of the Constitution. The submission advanced at the hands of the learned counsel for the respondents, insofar as the instant aspect of the matter is concerned, is premised on the assertion that the NTT Act has been enacted strictly in

consonance with the procedure depicted in "Part XI" of the Constitution. It is also the contention of the learned counsel for the respondents, that the said power has been exercised strictly in consonance with the subject on which the Parliament is authorized to legislate. Whilst dealing with the instant submission advanced at the hands of the learned counsel for the respondents, all that needs to be stated is, that the legislative power conferred under "Part XI" of the Constitution has one overall exception, which undoubtedly is, that the "basic structure" of the Constitution, cannot be infringed, no matter what. On the instant aspect, some relevant judgments, rendered by constitutional benches of this Court, have been cited hereinabove. It seems to us, that there is a fine difference in what the petitioners contend, and what the respondents seek to project. The submission advanced at the hands of the learned counsel for the petitioners does not pertain to lack of jurisdiction or inappropriate exercise of jurisdiction. The submission advanced at the hands of the learned counsel for the petitioners pointedly is, that it is impermissible to legislate in a manner as would violate the "basic structure" of the Constitution. This Court has repeatedly held, that an amendment to the provisions of the Constitution, would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out, by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination, that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was

within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable. Such submissions advanced at the hands of the learned counsel for the respondents are, therefore, liable to be disallowed. And are accordingly declined.

II. Whether the transfer of adjudicatory functions vested in the High Court to the NTT violates recognized constitutional conventions?

III. Whether while transferring jurisdiction to a newly created court/tribunal, it is essential to maintain the standards and the stature of the court replaced?

66. In addition to the determination on the adjudication of the present controversy on the concept of basic structure, the instant matter calls for a determination on the sustainability of the NTT Act, from other perspectives also. We shall now advert to the alternative contentions. First and foremost, it was the submission of the learned counsel for the petitioners, that it is impermissible for legislature to abrogate/divest the core judicial appellate functions, specially, the functions traditionally vested in a superior court, to a quasi judicial authority devoid of essential ingredients of the superior court. The instant submission was premised on the foundation, that such action is constitutionally impermissible.

67. In order to determine whether or not the appellate functions which have now been vested with the NTT, constituted the core judicial appellate function traditionally vested with the jurisdictional High Courts, we have recorded under the heading – "The Historical Perspective", legislative details, pertaining to the Income Tax Act, the Customs Act and the Excise Act. We had to do so, for that was the only manner to deal with the instant aspect of the controversy. A perusal of the historical perspective reveals, that as against the initial assessment of

tax/duty liability, the first forum for challenge has traditionally been with an executive appellate adjudicatory authority. Legislative details reveal, that for some time there was a power of reference, exercisable on "questions of law". The adjudication thereof rested with the jurisdictional High Courts. The second appellate remedy has always been before a quasi-judicial appellate authority, styled as an Appellate Tribunal. Across the board, under all the enactments which are relevant for the present controversy, proceedings before the Appellate Tribunal have been legislatively described as "judicial proceedings". It is, therefore apparent, that right from the beginning, the clear legislative understanding was, that from the stage of the proceedings before the Appellate Tribunal, the proceedings were of the nature of "judicial proceedings". Again across the board, under all the enactments, relevant for the present controversy, questions of law were originally left to be adjudicated by the jurisdictional High Courts. The reference jurisdiction, was substituted in all the enactments, and converted into appellate jurisdiction. The instant appellate jurisdiction was vested with the jurisdictional High Court. Under the Income Tax Act, 1961, Section 260A, provided an appellate remedy from an order passed by the Appellate Tribunal, to the jurisdictional High Court. Similarly Section 129A of the Customs Act, 1962, and Section 35G of the Central Excise Act, 1944, provided for an appellate remedy from the concerned Appellate Tribunal to the High Court. The jurisdictional High Court would hear appeals on questions of law, against orders passed by the Appellate Tribunals. It is, therefore apparent, that right from the beginning, well before the promulgation of the Constitution, the core

judicial appellate functions, for adjudication of tax related disputes, were vested with the jurisdictional High Courts. The High Courts have traditionally, been exercising the jurisdiction to determine questions of law, under all the above tax legislations. In this view of the matter, it is not possible for us to conclude, that it was not justified for the learned counsel for the petitioners to contend, that the core judicial appellate function in tax matters, on questions of law, has uninterruptedly been vested with the jurisdictional High Courts.

68. Before we proceed with the matter further, it is necessary to keep in mind the composition of the adjudicatory authorities which have historically dealt with the matters arising out of tax laws. First, we shall deal with the composition of the Appellate Tribunals. All Appellate Tribunals which are relevant for the present controversy were essentially comprised of Judicial Members, besides Accountant or Technical Members. To qualify for appointment as a Judicial Member, it was essential that the incumbent had held a judicial office in India for a period of 10 years, or had practiced as an Advocate for a similar period. It is the above qualification, which enabled the enactments to provide, by a fiction of law, that all the said Appellate Tribunals were discharging "judicial proceedings". The next stage of appellate determination, has been traditionally vested with the High Courts. The income-tax legislation, the customs legislation, as well as, the central excise legislation uniformly provided, that in exercise of its appellate jurisdiction, the jurisdictional High Court would adjudicate appeals arising out of orders passed by the respective Appellate Tribunals. The said appeals were by a legislative determination, to be heard by benches comprising of at least two

judges of the High Court. Adjudication at the hands of a bench consisting of at least two judges, by itself is indicative of the legal complications, insofar as the appellate adjudicatory role, of the jurisdictional High Court was concerned. It would, therefore, not be incorrect to conclude, by accepting the submissions advanced at the hands of the learned counsel for the petitioners, that before and after promulgation of the Constitution, till the enactment of the NTT Act, all legislative provisions vested the appellate power of adjudication, arising out of the Income Tax Act, the Customs Act and the Excise Act, on questions of law, with the jurisdictional High Courts.

69. Having recorded the above conclusion, the next issue to be determined is whether the adjudication of the disputes arising out of the provisions under reference, must remain within the realm of the jurisdictional High Courts? The instant proposition has two perspectives. Firstly, whether constitutional interpretation in the manner accepted the world over (details whereof have been narrated by us under the heading – "The Issues canvassed on behalf of the petitioners", under the sub-title – "The second contention"), would be a constitutional mandate, for the appellate jurisdiction pertaining to tax matters, to remain with the High Court? Secondly, whether the express provisions of the Constitution mandate, that tax issues should be decided by the concerned jurisdictional High Court?

70. We shall first deal with the first perspective, namely, whether constitutional interpretation in the manner accepted the world over, would be a constitutional mandate for appellate jurisdiction on tax matters, to remain with the jurisdictional

High Court. Insofar as the instant aspect of the matter is concerned, reliance was placed on judgments emerging out of the Constitutions of Jamaica, Ceylon, Australia and Canada, rendered either by the Privy Council or the highest Courts of the concerned countries. The contention of the learned counsel for the petitioners was, that the constitutions of the above countries were based on the Westminster model. It was further pointed out, that the Indian Constitution was also based on the Westminster model, and that, the instant position stands recognized in the judgment rendered by this Court in Union of India v. Madras Bar Association case (supra). Incidentally, it may be mentioned that we have extracted paragraph 101 of the above judgment hereinabove, wherein it is so recorded. It is accordingly the contention of the learned counsel for the petitioners, that the judgments relied upon by the petitioners on the instant aspect of the matter, would be fully applicable to the controversy in hand. Under the constitutional convention, adverted to in the judgments referred to on behalf of the petitioners, it was submitted, that judicial power which rested with definite courts at the time of enactment of the constitutions based on the Westminster model, had to remain with the same courts, even after the constitutions had become effective and operational. Furthermore, it was submitted, that the judicial power had to be exercised in the same manner as before, i.e., whether by a judge sitting singly, or with other judges. And therefore it was asserted, that on constitutional conventions well recognized the world over, appellate jurisdiction in respect of tax matters, would have to remain with the jurisdictional High Courts, and would have to be determined by a bench of at least two judges of the High

Court, as was the position before the enactment of the Constitution, and, as has been the position thereafter, till the promulgation of the NTT Act.

71. We have given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the petitioners, insofar as the first perspective is concerned. We find substance in the submission advanced at the hands of the learned counsel for the petitioners, but not exactly in the format suggested by the learned counsel. A closer examination of the judgments relied upon lead us to the conclusion, that in every new constitution, which makes separate provisions for the legislature, the executive and the judiciary, it is taken as acknowledged/conceded, that the basic principle of "separation of powers" would apply. And that, the three wings of governance would operate in their assigned domain/province. The power of discharging judicial functions, which was exercised by members of the higher judiciary, at the time when the constitution came into force, should ordinarily remain with the court, which exercised the said jurisdiction, at the time of promulgation of the new constitution. But the judicial power could be allowed to be exercised by an analogous/similar court/tribunal, with a different name. However, by virtue of the constitutional convention, while constituting the analogous court/tribunal, it will have to be ensured, that the appointment and security of tenure of judges of that court would be the same, as of the court sought to be substituted. This was the express conclusion drawn in Hinds case (supra). In Hinds case it was acknowledged, that Parliament was not precluded from establishing a court under a new name, to exercise the jurisdiction that was being exercised by members of the higher

judiciary, at the time when the constitution came into force. But when that was done, it was critical to ensure, that the persons appointed to be members of such a court/tribunal, should be appointed in the same manner, and should be entitled to the same security of tenure, as the holder of the judicial office, at the time when the constitution came into force. Even in the treatise "Constitutional Law of Canada" by Peter W. Hogg, it was observed; if a province invested a tribunal with a jurisdiction of a kind, which ought to properly belong to a superior, district or county Court, then that court/tribunal (created in its place), whatever is its official name, for constitutional purposes has to, while replacing a superior, district or county Court, satisfy the requirements and standards of the substituted court. This would mean, that the newly constituted court/tribunal will be deemed to be invalidly constituted, till its members are appointed in the same manner, and till its members are entitled to the same conditions of service, as were available to the judges of the court sought to be substituted. In the judgments under reference it has also been concluded, that a breach of the above constitutional convention could not be excused by good intention (by which the legislative power had been exercised, to enact a given law). We are satisfied, that the aforesaid exposition of law, is in consonance with the position expressed by this Court, while dealing with the concepts of "separation of powers", the "rule of law" and "judicial review". In this behalf, reference may be made to the judgments in L. Chandra Kumar case (supra), as also, in Union of India v. Madras Bar Association case (supra). Therein, this Court has recognized, that transfer of jurisdiction is permissible, but in effecting such transfer, the court to which the

power of adjudication is transferred, must be endured with salient characteristics, which were possessed by the court from which the adjudicatory power has been transferred. In recording our conclusions on the submission advanced as the first perspective, we may only state, that our conclusion is exactly the same as was drawn by us while examining the petitioners' previous submission, namely, that it is not possible for us to accept, that under recognized constitutional conventions, judicial power vested in superior courts cannot be transferred to coordinate courts/tribunals. The answer is, that such transfer is permissible. But whenever there is such transfer, all conventions/customs/practices of the court sought to be replaced, have to be incorporated in the court/tribunal created. The newly created court/tribunal would have to be established, in consonance with the salient characteristics and standards of the court which is sought to be substituted.

72. Now we shall deal with the second perspective, namely, whether the provisions of the Indian Constitution itself mandate, that tax issues at the appellate level, must be heard by the concerned jurisdictional High Court. Insofar as the instant aspect of the matter is concerned, learned counsel for the petitioners placed reliance on Articles 50 and 225 of the Constitution. Article 50 of the Constitution was relied upon to demonstrate the intent of the framers of the Constitution, namely, that they wished to ensure the exclusivity and the separation of the judiciary, from the executive. It is not necessary for us to deal with the instant aspect of the matter, for the reason that, in the judgments

rendered by this Court which have been referred to by us hereinabove, the issue has already been debated with reference to Article 50 of the Constitution.

73. The other provision relied upon by the learned counsel for the petitioners is Article 225 of the Constitution. The tenor of the submission advanced by the learned counsel for the petitioners, has been recorded by us while dealing with the second contention (advanced on behalf of the petitioners). The same may be adverted to. There can be no doubt whatsoever, that Article 225 of the Constitution does expressly provide, that the jurisdiction of existing High Courts and the respective powers of the judges thereof "shall be the same as immediately before the commencement of the Constitution". It is also apparent, that the proviso thereto expressly mandates, "that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in collection thereof was subject immediately before the commencement of the Constitution shall no longer apply to the exercise of such jurisdiction". Insofar as the contention emerging out of the proviso is concerned, it needs to be pointed out, that the same pertains to "the exercise of original jurisdiction by any of the High Courts". It is, therefore apparent, that the issue in hand, namely, the appellate jurisdiction vested with the jurisdictional High Courts, under the provisions of the Income Tax Act, the Customs Act and the Excise Act, has no bearing to the proviso under reference. We may therefore conclude by recording, that the instant submission advanced on behalf of the petitioners, is not made out from Article 225 of the Constitution.

IV. Whether Company Secretaries should be allowed to appear before the NTT to represent a party to an appeal in the same fashion, and on parity with, Accountants?

V. Whether Section 13(1) of the NTT Act insofar as it allows Accountants to represent a party to an appeal before the NTT is valid?

74. We may first take up for consideration, Writ Petition (Civil) no. 621 of 2007. The same has been filed by members of the Institute of Company Secretaries of India, seeking the right to appear before the NTT, as representatives of a party to an appeal. Respondent no. 5 in the said Writ Petition, is the Institute of Chartered Accountants. It has entered appearance and canvassed that the claim of Company Secretaries and Chartered Accountants is not comparable. While indicating the permissibility of Chartered Accountants to represent a party to an appeal before the NTT on account of their special acumen, their claim is, that this issue raised on behalf of the Company Secretaries is a matter of policy. And therefore, it would not be open to this Court to bestow, on account of parity, the right to represent a party to an appeal, before the NTT, on Company Secretaries.

75. While examining the above contention, we will indeed be dealing with Section 13 of the NTT Act, which has already been extracted while recording the submissions advanced on behalf of the petitioners, with reference to the fourth contention. A perusal of the said provision reveals, that a party to an appeal (other than the Revenue) may appear either in person, or may authorize one or more Chartered Accountants, or legal practitioners, or any person duly authorized by him, to present his case before the NTT. The pointed submission advanced on behalf of the Institute of Chartered Accountants of India was, that under Section 13 of the NTT Act, Chartered Accountants are entitled to appear

before the NTT, because of their recognized acumen. It was submitted, that it is the prerogative of the legislature and a matter of policy, to determine persons who are entitled to appear before the NTT. It was pointed out, that courts should not ordinarily interfere in such policy matters. It is therefore, that learned counsel for the Institute of Chartered Accountants of India, has placed reliance on the decision rendered by this Court in Delhi Pradesh Registered Medical Practitioners v. Director of Health, Delhi Administration Services, (1997) 11 SCC 687, wherefrom our pointed attention was invited to the following observations:-

> "2. The propriety and validity of the public notice issued by the Director, Health Services, Delhi Administration indicating that the Indian Medicine Central Council had recognized Ayurveda Ratna and Vaid Visharada degrees awarded by the Hindi Sahitya Sammelan, Prayag, Allahabad only up to 1967 and the certificate of Ayurveda Ratna and Vaid Visharada given by the said organization after 1967 not being recognized under the said Act, registration obtained by any person as a medical practitioner on the basis of such degrees therefore would not be recognized and any person having such qualification would not be entitled to practise in Delhi are impugned in these appeals. It was also indicated in the said public notice that no Indian university or Board conducts one year's course for giving the bachelor's degree in Ayurvedic Medicine or through correspondence course no M.D. Degree in Ayurveda was conferred by any university or Board. The public at large was cautioned by the said public notice published in the newspaper about such position in law.
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> 5. We are, however, unable to accept such contention of Mr. Mehta. Sub-section (3) of Section 17 of the Indian Medicine Central Council Act, 1970, in our view, only envisages that where before the enactment of the said Indian Medicine Central Council Act, 1970 on the basis of requisite qualification which was then recognized, a person got himself registered as medical practitioner in the disciplines contemplated under the said Act or in the absence of any requirement for registration such person had been practising for five years or intended to be registered and was also entitled to be registered, the right of such person to practise in the discipline concerned including the privileges of a registered medical practitioner stood protected even though such practitioner did not possess requisite qualification under the said Act of 1970. It may be indicated that such view of ours is reflected from the Objects and Reasons indicated for introducing

sub-section (3) of Section 17 in the Act. In the Objects and Reasons, it was mentioned:

> "[T]he Committee are of the opinion that the existing rights and privileges of practitioners of Indian Medicine should be given adequate safeguards. The Committee, in order to achieve this object, have added three new paragraphs to sub-section (3) of the clause protecting (*i*) the rights to practise of those practitioners of Indian Medicine who may not, under the proposed legislation, possess a recognized qualification subject to the condition that they are already enrolled on a State Register of Indian Medicine on the date of commencement of this Act, (*ii*) the privileges conferred on the practitioners of Indian Medicine enrolled on a State Register, under any law in force in that State, and (*iii*) the right to practise in a State of those practitioners who have been practising Indian . Medicine in that State for not less than five years where no register of Indian Medicine was maintained earlier."

As it is not the case of any of the writ petitioners that they had acquired the degree in between 1957 (*sic* 1967) and 1970 or on the date of enforcement of provisions of Section 17(2) of the said Act and got themselves registered or acquired right to be registered, there is no question of getting the protection under sub-section (3) of Section 17 of the said Act. It is to be stated here that there is also no challenge as to the validity of the said Central Act, 1970. The decision of the Delhi High Court therefore cannot be assailed by the appellants. We may indicate here that it has been submitted by Mr. Mehta and also by Ms. Sona Khan appearing in the appeal arising out of Special Leave Petition No. 6167 of 1993 that proper consideration had not been given to the standard of education imparted by the said Hindi Sahitya Sammelan, Prayag and expertise acquired by the holders of the aforesaid degrees awarded by the said institution. In any event, when proper medical facilities have not been made available to a large number of poorer sections of the society, the ban imposed on the practitioners like the writ petitioners rendering useful service to the needy and poor people was wholly unjustified. <u>It is not necessary for this Court to consider such submissions because the same remains in the realm of policy decision of other constitutional functionaries. We may also indicate here that what constitutes proper education and requisite expertise for a practitioner in Indian Medicine, must be left to the proper authority having requisite knowledge in the subject.</u> As the decision of the Delhi High Court is justified on the face of legal position flowing from the said Central Act of 1970, we do not think that any interference by this Court is called for. These appeals therefore are dismissed without any order as to costs."

Reliance was also placed on State of Rajasthan v. Lata Arun, (2002) 6 SCC 252, wherein it was held as under:-

> "4. The question which arises for determination in this case is whether the respondent had the eligibility qualification for admission in General Nursing and Midwifery and Staff Nurse Course (hereinafter referred to as "Nursing Course") commencing in the year 1990. The Director, Medical and Health Services had invited applications by 15-12-1989 from eligible candidates for admission in the Nursing Course to be started from January 1990. It was stated in the notification that the candidates should have passed first year of three years' degree course (TDC) or 10+2; and that the candidates with Science subjects (Biology, Chemistry, Physics) will be given preference. During the period, the Indian Nursing Council had issued a set of Syllabi and Regulations for courses in General Nursing and Midwifery in which the prescribed minimum educational qualification for all candidates was 12th class-pass or its equivalent preferably with Science subjects.
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> 10. The points involved in the case are twofold: one relating to prescription of minimum educational qualification for admission to the course and the other relating to recognition of the Madhyama Certificate issued by the Hindi Sahitya Sammelan, Allahabad as equivalent to or higher than +2 or 1st year of TDC for the purpose of admission. Both these points relate to matters in the realm of policy decision to be taken by the State Government or the authority vested with power under any statute. It is not for courts to determine whether a particular educational qualification possessed by a candidate should or should not be recognized as equivalent to the prescribed qualification in the case. That is not to say that such matters are not justiciable. In an appropriate case the court can examine whether the policy decision or the administrative order dealing with the matter is based on a fair, rational and reasonable ground; whether the decision has been taken on consideration of relevant aspects of the matter; whether exercise of the power is obtained with mala fide intention; whether the decision serves the purpose of giving proper training to the candidates admitted or it is based on irrelevant and irrational considerations or intended to benefit an individual or a group of candidates."

76. In addition to the above submissions it was contended, that the Chartered Accountants are permitted to appear before a large number of tribunals/fora. Illustratively it was submitted, that under Section 288 of the Income Tax Act, 1961, read with Rule 50 of the Income Tax Rules, 1962, Chartered Accountants

are permitted to appear in income tax matters. Likewise, it was asserted that Chartered Accountants are entitled to appear in Central Excise matters under Section 35Q of the Central Excise Act, 1944. They are also permitted to appear in matters arising out of the Customs Act, 1962 (wherefor reliance was placed on Section 146A of the Customs Act, 1962, read with Rule 9(a), Customs (Appeals) Rules, 1982). Besides the aforesaid provisions, it was contended, that Chartered Accountants were entitled to appear before various tribunals/fora under different statutory provisions, such as, under the Securities and Exchange Board of India Act, 1992, the Securities Contracts (Regulation) Act, 1956, the Telecom Regulatory Authority of India Act, 1991, the Companies Act, 2013, the Company Law Board Regulations, 1991, the Competition (Amendment) Act, 2007, and the Special Economic Zone Rules, 2006. We were informed, that Chartered Accountants were also entitled to appear before the Central Electricity Regulatory Commission vide Notification dated 27.8.1999. It was submitted, that if Chartered Accountants are competent to canvass complicated disputes which arise under the provisions referred to hereinabove, there should be no difficulty in allowing them to appear before the NTT, as also, to consider them eligible for being appointed as Members of the NTT. It was therefore asserted, that Section 13 of the NTT Act rightly permitted Chartered Accountants to represent a party to an appeal before the NTT. The submission on behalf of the Institute of Chartered Accountants was, that Company Secretaries were not comparable with them, and therefore, as a matter of policy, they had no legitimate claim for being allowed to represent a party before the NTT.

77. It is pertinent to record, that during the course of hearing we had required learned counsel representing the petitioners, to file a compilation of cases, wherein provisions of different laws on diverse subjects had to be taken into consideration, while deciding tax related disputes. In compliance, learned counsel have submitted a compilation on behalf of the Madras Bar Association (in Transferred Case (Civil) no. 150 of 2006), tabulating by way of illustration, reported cases on tax disputes, which also involved provisions of different laws on different subjects. The compilation brought to our notice is summarized hereunder:-

I: Hindu Law:

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	Sri Sri Sridhar Jiew v. I.T.O. (1967) 63 ITR 192 (Cal)	A Hindu idol is a juristic entity that is given the status of a human being capable of having property and it can be called an 'individual'.
2	C.E.D. v. Alladi Kuppuswamy (1977) 108 ITR 439 (SC)	Though a widow cannot be a coparcener, she has copercenary interests and she is also a member of the coparcenary by virtue of the rights conferred by the Hindu Women's Rights to Property Act, 1937.
3	Narendranath v. C.W.T. (1969) 74 ITR 190 (SC)	There is no distinction between property obtained by a member of HUF on a partition and the property that belongs to a member as a sole surviving coparcener by right of survivorship.
4	Goli Eswariah v. C.G.T. (1970) 76 ITR 675 (SC)	A unilateral declaration of a Hindu coparcener, whereby he throws his self-acquired property into the common stock of the joint family property, does not amount to a transfer and, therefore, such an act does not constitute a gift.
5	C.I.T. v. Sandhya Rani Dutta (2001) 248 ITR 201 (SC)	The Supreme Court held that the wife and daughters inheriting the property of a male Hindu do not form a HUF and that they could not also form such family by agreement among themselves by throwing their respective inherited shares in the hotchpot.
6	C.I.T. v. Bharat Prasad Anshu	The gift of property of a HUF to the members of the family is not void but voidable.

	Kumar (2001) 249 ITR 755 (Delhi)	
7	C.W.T. v. M.A.R. Rajkumar (1997) 226 ITR 804 (AP)	Even the fact that the wife had given up her right to maintenance does not mean that she is no longer a member of the family of her husband.
8	C.G.T. v. B.S. Apparao (2001) 248 ITR 103 (AP)	The amount spent by a Hindu father on his daughter's marriage is treated as maintenance (and not a gift) under the Hindu Adoptions and Maintenance Act, 1956.
9	Gowli Buddanna v. C.I.T. 60 ITR 293 (SC)	A sole surviving coparcener can constitute a Hindu undivided family.
10	C.W.T. v. Chander Sen 161 ITR 370(SC)	The separate property of the father inherited upon intestacy by the son is to be treated as the son's separate property and not as the property of his joint family.
11	C.I.T. v. Radhe Shyam Agrawal 230 ITR 21 (Patna)	If on partition of the family, separate shares are allotted to the *karta,* his wife and children, the existence of the Hindu undivided family comes to an end, and the share of the erstwhile *karta* becomes his separate property.
12	Kaniram Hazarimull v. C.I.T. 27 ITR 294 (Cal)	A joint Hindu family, as such, cannot be a partner in a firm. However, it may enter into a partnership through its *karta.*
13	C.I.T. v. Bainik Industries 119 ITR 282 Pat)	A female member, as a member of a joint family, can become a partner in a firm as the representative of her family.
14	C.G.T. v. Getti Chettiar 82 ITR 599 (SC)	Unequal partition amongst coparceners in a HUF does not amount to a gift.
15	Paramanand Bajaj v. C.I.T. 135 ITR 673(Kar)	In the reunion of a HUF, all assets originally partitioned need not be pooled back.
16	Pushpa Devi v. C.I.T. 109 ITR 730(SC)	The scope of the theory of blending in Hindu law was discussed in detail.
17	C.I.T. v. B. Indira Devi 238 ITR 846 (Ker)	Gift deed executed by the assessee in favour of her daughter to secure her future after marriage was not due to any legal obligation enjoined upon the assessee by virtue of Section 20 of the Hindu Adoptions and Maintenance Act, but for other considerations. Therefore, the gift being voluntary within the meaning of Section 2(xii) of the Gift Tax Act, 1964, was liable to tax.

18	Sathyaprana Manjunatha Gowda v. C.E.D. 227 ITR 130 (SC)	Meaning of "coparcenary", "HUF" and "survivorship" discussed.
19	C.I.T. v. Shakuntala (1961) 43 ITR 352 (SC)	Income from shares held by the members of HUF cannot be termed as the income of HUF.
20	C.W.T. v. Late R. Sridharan 104 ITR 436 (SC)	Divided member marrying a Christian under Special Marriage Act, 1956. HUF way of living practiced by divided member and son – continue to be HUF – meaning of word "Hindu" discussed.

II: Company Law:

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	C.I.T. v. Light Publications Ltd. (2001) 251 ITR 0120 (Guj.)	A private company becoming a public company by virtue of the provisions of Section 43A of the Companies Act, 1956 may still not become a "company in which the public are substantially interested" due to the restriction imposed on its shareholders upon transferability of its shares to the other members of the public.
2	C.I.T. v. Sunaero Ltd. (2012) 345 ITR 0163 (Del)	Presumption that a registered shareholder holds the share in his own right and any claim that shares were being held as a nominee has to be proved by the person claiming so.
3	Rajasthan Financial Corporation v. C.I.T. 163 ITR 278(Raj)	Shares of a single type issued by a State Financial Corporation providing for minimum and maximum dividend cannot be termed as 'preference shares'.
4	Bacha F. Guzdar v. C.I.T. AIR 1955 SC 74	(i) Partnership is merely an association of persons for carrying on the business of partnership and, in law, the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders. (ii) Shareholders have no right in the property of the company. They are only entitled to dividends and a share in the surplus, if any, after the dissolution of the company.
5	Juggilal Kamlapat v. C.I.T. AIR 1969 SC 932; C.I.T. v. Poulose and	Although company is a separate legal entity, in certain exceptional cases, the Court can lift the veil of the corporate entity and have regard to the economic realities behind the legal façade.

	Mathen (Pvt.) Ltd. (1999) 236 ITR 416 (Ker)	
6	C.G.T. v. Indo Traders & Agencies (Madras) Ltd. 131 ITR 313 (Mad)	Valuation of shares-reasonable valuation has to be accepted unless the valuation shocks conscience of the court.
7	Vodafone International Holdings BV v. UoI 341 ITR 1 (SC)	In company law, there is no transfer of a share when there is a transfer of underlying assets. Various issues of lifting of the corporate veil discussed. Also discussed, briefly, the enforceability of shareholders' agreements.
8	C.I.T. v. Suleman Khan and Mahaboob Khan and Co. (2002) 257 ITR 0170 (AP)	A firm of 20 major partners and 3 minor partners does not contravene Section 11(2) of the Companies Act, 1956 since minors are not to be reckoned as partners for the purposes of the calculation.
9	Marshall Sons and Co. (India) Ltd. v. I.T.O. (1997) 223 ITR 809 (SC)	Amalgamation – date of transfer/ date of amalgamation / transfer is the date specified in the scheme as the transfer date.
10	C.I.T. v. Mrs. Grace Collis and others 248 ITR 323(SC)	a) On amalgamation there is an extinguishment of rights and, therefore, there is a transfer. b) The amalgamation scheme sanctioned by the court would be an instrument within the meaning of Section 2(1) of the Bombay Stamp Act, 1958, and liable for stamp duty. A document creating or transferring a right is an instrument.
11	Anarkali Sarabhai v. C.I.T. 227 ITR 260(SC)	Redemption of preference shares amounts to transfer and is liable to capital gains.
12	C.I.T. v. Artex Manufacturing Co. 227 ITR 260(SC)	Gains arising out of slump sale of business as a going concern is liable to tax under Section 41(2) on itemized basis if slump sale is determined on valuation of each asset/ liability.
13	C.I.T. v. Gold Mohore Investment Company Ltd. (1970) 78 ITR 16 (SC)	Valuation of bonus shares – The correct method to apply in cases where bonus shares rank *pari passu* is to take the cost of the original shares and to spread it over all the original as well as the bonus shares and to find out the average price of all the shares.

14	Hansur Plywood Works Ltd. v. C.I.T. (1998) 229 ITR 112 (SC)	When a shareholder gets a bonus share the value of the original share held by him goes down. In effect, the shareholder gets two shares instead of the one share held by him and the market value as well as the intrinsic value of the two shares put together will be the same or nearly the same as the value of the original share before the bonus issue.
15	Shree Gopal Paper Mills Ltd. v. C.I.T. (1967) 64 ITR 233 (Cal)	Issuance of share takes place when entry of name of subscriber or successful offerer is made in the Register of Members.
16	Dalmia Investment Co. Ltd. v. C.I.T. (1961) 41 ITR 705 (Pat)	Though no cash is paid by the shareholders for allotment of the bonus shares, the set-off for dividend which was due to be paid to the shareholder out of undistributed profits of company can be regarded as consideration for the bonus shares. Therefore, real cost of bonus shares to shareholder/assessee is the value of shares as shown in books of account of the company.
17	Anarkali Sarabhai v. C.I.T. 227 ITR 260 (SC)	Redemption of preference shares is "transfer" and liable to capital gains.
18	C.I.T. v. Artex Manufacturing Co. 227 ITR 260 (SC)	Gains arising out of "slump sale" of a business as a going concern is liable to tax under Section 41(2) on itemized basis if the slump sale is determined on valuation of each asset/liability.

<u>III: Mohammedan Law:</u>

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	Trustees of Sahebzadi Oalia Kuslsum Trust v. C.E.D. [1998] 233 ITR 434 (SC)	A gift was made to the assessee by his father granting him life estate and the remainder to his children. Deed was held to be void under Mohammedan law. It was held to be an absolute gift.
2	S.C.M. Mohammed v. C.I.T. [1999] 235 ITR 75 (Mad)	Principles of Mohammedan law regarding gift analyzed and applied – gift with limited estate not valid in Muslim law – gift to be that of an entire property though the document only gave him a limited right.
3	Ghiasuddin Babu Khan v. C.I.T. [1985] 153 ITR	Deferred dower on the dissolution of marriage by death or divorce is not a contingent debt because one of the two events is bound to happen. Wife cannot demand the

	707 (AP)	payment of deferred dower before the event, but husband can pay even earlier.
4	Ziauddin Ahmed v. C.G.T. (1976) 102 ITR 253 (Gau)	A family arrangement is valid amongst Muslims.
5	C.I.T. v. Puthiya Ponmanichintakam Wakf, 44 ITR 172 (SC)	A wakf cannot be a partner, but the *mutawalli* of a wakf can be.
6	Ahmed G H Ariff v. C.W.T. 76 ITR 471 (SC)	Held, the moment a wakf is created all rights of property pass out of wakf and vest in the Almighty – Property is a term of the widest import and subject to any limitation which the context may require; it signifies every possible interest which a person can clearly hold or enjoy.

IV: Family Arrangement:

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	C.I.T. v. R. Ponnammal (1987) 164 ITR 706 (Mad)	Even if a party to the settlement had no title but, under the family arrangement, the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld.
2	C.I.T. v. Shanti Chandran (2000) 241 ITR 371 (Mad)	An asset acquired by way of a family arrangement to be considered as an asset acquired on partition or other succession.

V: Law of Partnership:

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	C.I.T. v. Palaniappa Enterprises (1998) 234 ITR 635 (Mad)	Asset of partnership firm – transfer to partner by agreement – not valid – registered deed necessary.
2	Saraladevi Sarabhai v. C.I.T. (2001) 250 ITR 745 (Guj)	Contribution of capital by a partner to a firm constitutes “transfer”.
3	Sunil Siddharthabhai v. C.I.T.	Conversion of an exclusive interest into a shared interest would amount to a “transfer” and does not amount to a conveyance by way of sale.

	(1985) 156 ITR 509 (SC)	
4	C.I.T. v. S. Rajamani and Thangarajan Industries (2000) 241 ITR 668 (Mad)	Transaction of a partner with the firm, during the subsistence of the firm requires a registered instrument, where the transaction involves immovable property.
5	Malabar Fisheries v. C.I.T. (1979) 120 ITR 49 (SC)	Distribution of assets on dissolution is not transfer by the firm.
6	C.I.T. v. Gupta Brothers (1981) 131 ITR 492 (All)	Validity of partnership – contribution of partner need not be cash or property. Skill and labor would constitute contribution.
7	C.G.T. v. Pranay Kr. Saharia (1993) 204 ITR 78 (Gau)	Minors who were admitted to the benefits of the partnership could not claim their share of goodwill on the reconstruction of the firm by excluding the minors and consequently they were not liable to gift-tax.
8	Beniram Moolchand v. C.I.T. 25 ITR 287 (All)	The mere fact that two persons take a commission agency business jointly would not necessarily constitute a partnership between them.
9	C.I.T. v. Chandra Shekhar Pawan Kumar 203 ITR 435 (Raj.)	If a partnership has been entered between two persons of whom one is a benamidar of the other, there is no relation of partnership between the two persons and one person cannot constitute a firm.
10	Addl. C.I.T. v. Mohanbhai Pamabhai 165 ITR 166 (SC)	On retirement of a partner from the firm, there is no transfer of interest of the partner I the assets thereof including the goodwill. The amount received is no assessable as capital gains. This case law is valid even after amendment in Section 45(4) which talks of dissolution or otherwise transferred.
11	Manohardas Kedarnath v. C.I.T. 25 ITR 287 (All)	It is open to the partners to agree not to take the whole of the firm's profits for their personal use and to reserve a part of the firm's profits for charity.
12	C.I.T. v. Bharani Pictures (Mad) (1981) 129 ITR 244	A partner has no interest in the property of the firm. In a case where there are two partners and one signs a release deed to a property in favour of the other, it is in fact a transfer from the partnership to that partner.

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VI: Territoriality :

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	C.I.T. v. H.E.H. Mir Osman Ali Bahadur (1966) 59 ITR 666 (SC)	The case involved international law, municipal law and a convenant between the Government of India and the Nizam of Hyderabad. Held, that Hyderabad State never acquired an international personality under international law and its ruler was not entitled to claim immunity from taxation of his income.
2	Electronics Corporation of India Ltd. v. C.I.T. 183 ITR 43 (SC)	Legislative powers of Parliament to enact laws which have provisions of having extra-territorial operation, is within the competence of Parliament. But nexus with something in India or object relating to India necessary.
3	G.V.K. Industries Ltd. v. I.T.O. 332 ITR 130 (SC)	Parliament is constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor are expected to have, any direct or indirect, tangible or intangible, impact on or effect in or consequences for (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India and Indians.
4	C.I.T. v. R.D. Agarwal & Co. 56 ITR 20	Business connection – there must be continuity as well as real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the nonresident in his trading activity.

VII: Trusts/ Societies:

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	L.R. Patel Family Trust v. I.T.O. 262 ITR 520 (Bom)	Trustees of a fixed (specific) trust cannot be considered as an association of persons or body of individuals.
2	C.I.T. v. Thanthi Trust (1982) 137 ITR 735 (Mad)	Discussion on the Doctrine of Cypres as applicable to public charities.
3	C.I.T. v. Swashraya 286 ITR 265 (Guj)	Power of trustees to contract on behalf of trust. Consent of beneficiaries, if necessary.
4	Pandit v. C.I.T.	The number of ultimate beneficiaries of a trust may increase

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	(1972) 83 ITR 136 (Bom)	or decrease by reason of death and other circumstances and the interests of beneficiaries may, at a relevant date, be only contingent and may become vested at much a later date. If at that date, the beneficiaries can be ascertained, the Court must hold that the beneficiaries are determinate and known and that assets are held by the trustees for their benefit.
5	C.I.T. v. All India Hindu Mahasabha 140 ITR 748 (Del)	A society registered under the Societies Registration Act may be treated as an association of persons.
6	Tulsidas Kilachand v. C.I.T. 42 ITR 1 (SC)	India Trust Act, 1882 – trustee can also be a beneficiary.
7	C.I.T. v. P. Bhandari (1984) 147 ITR 500 (Mad)	Trust may be created in favour of an unborn person if it satisfies conditions laid down in Section 13 of the Transfer of Property Act, 1882, even though coming into existence of such a beneficiary is uncertain. A trust deed cannot be bad for uncertainty or vagueness.

VIII: Contract Law :

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	C.I.T. v. Shantilal Pvt. Ltd. (1983) 144 ITR 57 (SC)	Nature of breach – whether payment of damage results in settlement of the original contract.
2	C.I.T. v. Best & Co. P. Ltd. 60 ITR 11 (SC)	Compensation received on termination of agency and restrictive convenant – nature of receipt – revenue or capital – restrictive convenant – whether an independent obligation – whether compensation severable.
3	N. Sundareswaran v. C.I.T. (1997) 226 ITR 142 (Ker)	Breach of contract – arbitration clause – scope of Section 73 – liquidated and unliquidated damages – no deduction can be claimed on potential liability for damages.

IX: Transfer of Property Act :

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	Bansidhar Sewabhogowan	Difference between a sale with a condition to re-purchase and a mortgage by conditional sale.

	& Co. v. C.I.T. (1996) 222 ITR 16 (Gau)	
2	Jagadishchandran v. C.I.T. 227 ITR 240 (SC) Arunachalam v. C.I.T. 227 ITR 222(SC)	Whether self-created mortgage or mortgage by previous owner affects the cost of acquisition.
3	C.I.T. v. Brig. Kapil Mohan 252 ITR 830 (Del)	Though a transfer cannot be made directly to an unborn person, since under the definition of "transfer" in Section 5 of the Transfer of Property Act, 1882, a transfer is limited to living persons, transfer to an unborn person can only be made by the machinery of trusts.
4	C.G.T. v. Aloka Lata Sett (1991) 190 ITR 556 (Cal)	If two registered documents re-executed by the same person in respect of the same property to two different persons at different times, the one which was executed first has priority over the other, although the former was registered subsequent to the latter. In other words, registration of a document relates to the date of its execution.
5	C.I.T. v. N.R. Bhusanraj (2002) 256 ITR 0340 (Mad)	Whether a sale along with deed for re-conveyance of property amounts to transfer under both common law and income-tax law?

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X: Intellectual Property :

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	Anantram v. C.I.T. 5 ITR 511 (Lah)	The assignment of a patent is a transaction on capital account, but where a person carries on a trade in the buying and selling of patents or habitually sells his own patents, or carries on the vocation of an inventor, the sale proceeds would be business income.
2	Mysore Elect. V. C.I.T. 114 ITR 865 (Kar)	If the owner gets a lump sum or periodic payment for imparting the know-how to others, without substantially reducing its value to himself, the payment would ordinarily be taxable as business income and the ground that the exploitation of the know-how is in the course of business and the imparting is no more than a business service of however special kind.
3	Janki v. C.I.T.	Royalties paid by a licensee for the right to take away earth

5 ITC 42	to be used for brick making or extracting saltpeter are income. The fact that removal of the soil itself is involved does not make the case any different from cases of royalties on underground coal and quarries

XI : Interpretation :

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	Prakash Nath Khanna v. C.I.T. (2004) 266 ITR 1 (SC)	The SC ruled that interpretation should avoid "the danger of a prior determination of the meaning with one's own preconceived notions" and that the court interprets the law and cannot legislate. It referred to two other principles of construction, one relating to *casus omissus* and the other requiring a statute to be read as a whole.
2	I.T.A.T. vs. V.K. Agarwal 235 ITR 175(SC)	Contempt of court – law applicable to ITAT.
3	C.I.T. v. Bhogilal Mangilal 69 ITR 288 (Guj)	Spes Successionis – Transfer of Property Act dealt with.
4	Ellerman Lines Ltd. v. C.I.T. (1971) 82 ITR 913 (SC) C.I.T. v. K.P. Varghese (1981) 131 ITR 597 (SC)	Discusses the binding nature of CBDT's instructions on the revenue department.

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XII :Miscellaneous:

Sl. No	Name and citation of case	Allied subject/law adjudicated upon
1	Sree Meenakshi Mills v. C.I.T. 31 ITR 25 (SC)	Benami – meaning and effect of taxation in benamidars hands discussed.
2	Leo Machado v. C.I.T. 172 ITR 744 (Mad)	Boat belonging to the assessee met with an accident and sank in high seas; the compensation received from insurance company was due to destruction of property, thus no "transfer" as contemplated by Section 45 read with Section 48. The insurance amount received cannot be considered as consideration and amount received not liable to capital gains tax.
3	Gangadhar Bera v. Asst. C.I.T. (2004) 190 ITR	A clarificatory notice is a mere addendum to the original notice and the effect of clarification is always retrospective so it must relate to the original notice. A mere non-mention

	467 (Cal)	of specific clause does not render notice bad in law.
4	C.I.T. v. Andhra Chamber of Commerce 55 ITR 722 (SC)	The expression "charitable purpose" is very wide in its amplitude. The object need not benefit the whole mankind or even all persons living in a particular country or province. It is sufficient if the intention is to benefit a section of the public as distinguished from the specified individuals.
5	Deccan Wine & General Stores v. C.I.T. (1977) 106 ITR 111 (AP)	Explained the difference between 'association of persons' and 'body of individuals'.
6	C.I.T. v. Maharashtra Sugar Mills Ltd. (1971) 82 ITR 452 (Bom)	What constitutes an agricultural activity? There must be cultivation of land in the strict sense of the term meaning thereby tilling the land.
7	I.T.O. v. M.K. Mohammed Kunhi (1968) 71 ITR 815 (SC)	Income Tax Appellate Tribunal has inherent power to grant stay of collection taxes and proceedings.
8	C.I.T. v. Indira Balakrishna (1960) 39 ITR 546 (SC)	Association of persons – when persons do not combine together to produce income, they cannot be assessed as an AOP. Note – The law has been amended after 1.4.2002
9	C.I.T. v. H.H. Maharani Usha Devi 231 ITR 793 (MP)	Personal effects of a ruler (heirloom jewellery) is not taxable upon its sale for a profit.
10	C.I.T. v. Bai Shrinbhai Kooka 46 ITR 86 (SC)	When an person re-values his capital asset and credits his capital account there is no gain for the purpose of taxation. One cannot make loss or profit out of transactions with himself.
11	Dhakeswari Cotton Mills v. C.I.T. (1954) 26 ITR 775	Principles of Natural Justice set out almost for the first time – *locus classicus.*
12	Chemsford Club v. C.I.T. 243 ITR 89 (SC) C.I.T. v. Bankipur Club Ltd. 226 ITR 97 (SC)	Principle of mutuality applies to income from property.

SUPREME COURT OF INDIA JUDGMENT

It is apparent from the compilation extracted hereinabove, that the Members of the NTT would most definitely be confronted with the legal issues emerging out of Family Law, Hindu Law, Mohammedan Law, Company Law, Law of Partnership, Law related to Territoriality, Law related to Trusts and Societies, Contract Law, Law relating to Transfer of Property, Law relating to Intellectual Property, Interpretation of Statutes, and other Miscellaneous Provisions of Law, from time to time. The NTT besides the aforesaid statutes, will not only have to interpret the provisions of the three statutes, out of which appeals will be heard by it, but will also have to examine a challenge to the vires of statutory amendments made in the said provisions, from time to time. They will also have to determine in some cases, whether the provisions relied upon had a prospective or retrospective applicability.

78. Keeping in mind the fact, that in terms of Section 15 of the NTT Act, the NTT would hear appeals from the Income Tax Appellate Tribunal and the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) only on "substantial questions of law", it is difficult for us to appreciate the propriety of representation, on behalf of a party to an appeal, through either Chartered Accountants or Company Secretaries, before the NTT. The determination at the hands of the NTT is shorn of factual disputes. It has to decide only "substantial questions of law". In our understanding, Chartered Accountants and Company Secretaries would at best be specialists in understanding and explaining issues pertaining to accounts. These issues would, fall purely within the realm of facts. We find it difficult to accept the prayer made by the Company Secretaries to

allow them, to represent a party to an appeal before the NTT. Even insofar as the Chartered Accountants are concerned, we are constrained to hold that allowing them to appear on behalf of a party before the NTT, would be unacceptable in law. We accordingly reject the claim of Company Secretaries, to represent a party before the NTT. Accordingly the prayer made by Company Secretaries in Writ Petition (Civil) no. 621 of 2007 is hereby declined. While recording the above conclusion, we simultaneously hold Section 13(1), insofar as it allows Chartered Accountants to represent a party to an appeal before the NTT, as unconstitutional and unsustainable in law.

VI. The constitutional validity of Sections 5, 6, 7, 8 and 13 of the NTT Act:

79. We shall now endeavour to deal with the validity of some other individual provisions of the NTT Act, based on the parameters laid down by constitutional benches of this Court and on the basis of recognized constitutional conventions referable to constitutions framed on the Westminster model. While dealing with the prayers made in Writ Petition (Civil) no. 621 of 2007, we have already dealt with Section 13 of the NTT Act, and have held, the same to be partly unconstitutional. We shall now proceed chronologically, and examine the validity of Sections 5, 6, 7 and 8 of the NTT Act.

80. We shall first examine the validity of Section 5 of the NTT Act. The basis of challenge to the above provision, has already been narrated by us while dealing with the submissions advanced on behalf of the petitioners, with reference to the fourth contention. According to the learned counsel for the

petitioners, Section 5(2) of the NTT Act mandates, that the NTT would ordinarily have its sittings in the National Capital Territory of Delhi. According to the petitioners, the aforesaid mandate would deprive the litigating assessee, the convenience of approaching the jurisdictional High Court in the State, to which he belongs. An assessee may belong to a distant/remote State, in which eventuality, he would not merely have to suffer the hardship of traveling a long distance, but such travel would also entail uncalled for financial expense. Likewise, a litigant assessee from a far-flung State may find it extremely difficult and inconvenient to identify an Advocate who would represent him before the NTT, since the same is mandated to be ordinarily located in the National Capital Territory of Delhi. Even though we have expressed the view, that it is open to the Parliament to substitute the appellate jurisdiction vested in the jurisdictional High Courts and constitute courts/tribunals to exercise the said jurisdiction, we are of the view, that while vesting jurisdiction in an alternative court/tribunal, it is imperative for the legislature to ensure, that redress should be available, with the same convenience and expediency, as it was prior to the introduction of the newly created court/tribunal. Thus viewed, the mandate incorporated in Section 5(2) of the NTT Act to the effect that the sittings of the NTT would ordinarily be conducted in the National Capital Territory of Delhi, would render the remedy inefficacious, and thus unacceptable in law. The instant aspect of the matter was considered by this Court with reference to the Administrative Tribunals Act, 1985, in S.P. Sampath Kumar case (supra) and L. Chandra Kumar case (supra), wherein it was held, that permanent benches needed to be established at the

seat of every jurisdictional High Court. And if that was not possible, at least a circuit bench required to be established at every place where an aggrieved party could avail of his remedy. The position on the above issue, is no different in the present controversy. For the above reason, Section 5(2) of the NTT Act is in clear breach of the law declared by this Court.

81. One needs to also examine sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act, with pointed reference to the role of the Central Government in determining the sitting of benches of the NTT. The Central Government has been authorized to notify the area in relation to which each bench would exercise jurisdiction, to determine the constitution of the benches, and finally, to exercise the power of transfer of Members of one bench to another bench. One cannot lose sight of the fact, that the Central Government will be a stakeholder in each and every appeal/case, which would be filed before the NTT. It cannot, therefore, be appropriate to allow the Central Government to play any role, with reference to the places where the benches would be set up, the areas over which the benches would exercise jurisdiction, the composition and the constitution of the benches, as also, the transfer of the Members from one bench to another. It would be inappropriate for the Central Government, to have any administrative dealings with the NTT or its Members. In the jurisdictional High Courts, such power is exercised exclusively by the Chief Justice, in the best interest of the administration of justice. Allowing the Central Government to participate in the aforestated administrative functioning of the NTT, in our view, would impinge upon the independence and fairness of the Members of the NTT. For the NTT

Act to be valid, the Chairperson and Members of the NTT should be possessed of the same independence and security, as the judges of the jurisdictional High Courts (which the NTT is mandated to substitute). Vesting of the power of determining the jurisdiction, and the postings of different Members, with the Central Government, in our considered view, would undermine the independence and fairness of the Chairperson and the Members of the NTT, as they would always be worried to preserve their jurisdiction based on their preferences/inclinations in terms of work, and conveniences in terms of place of posting. An unsuitable/disadvantageous Chairperson or Member could be easily moved to an insignificant jurisdiction, or to an inconvenient posting. This could be done to chastise him, to accept a position he would not voluntarily accede to. We are, therefore of the considered view, that Section 5 of the NTT Act is not sustainable in law, as it does not ensure that the alternative adjudicatory authority, is totally insulated from all forms of interference, pressure or influence from co-ordinate branches of Government. There is therefore no alternative, but to hold that sub-sections (2), (3), (4) and (5) of Section 5 of the NTT Act are unconstitutional.

82. We shall now examine the validity of Section 6 of the NTT Act. The above provision has already been extracted in an earlier part of this judgment, while dealing with the submissions advanced on behalf of the petitioners, with reference to the fourth contention. A perusal of Section 6 reveals, that a person would be qualified for appointment as a Member, if he is or has been a Member of the Income Tax Appellate Tribunal or of the Customs, Excise and Service Tax

Appellate Tribunal for at least 5 years. While dealing with the historical perspective, with reference to the Income Tax legislation, the Customs legislation, as also, the Central Excise legislation, we have noticed the eligibility of those who can be appointed as Members of the Appellate Tribunals constituted under the aforesaid legislations. Under the Income Tax Act, a person who has practiced in accountancy as a Chartered Accountant (under the Chartered Accountants Act, 1949) for a period of 10 years, or has been a Registered Accountant (or partly a Registered Accountant, and partly a Chartered Accountant) for a period of 10 years, is eligible to be appointed as an Accountant Member. Under the Customs Act and the Excise Act, a person who has been a member of the Indian Customs and Central Excise Service (Group A), subject to the condition, that such person has held the post of Collector of Customs or Central Excise (Level I), or equivalent or higher post, for at least 3 years, is eligible to be appointed as a Technical Member. It is apparent from the narration recorded hereinabove, that persons with the above qualifications, who were appointed as Accountant Members or Technical Members in the respective Appellate Tribunals, are also eligible for appointment as Members of the NTT, subject to their having rendered specified years' service as such. The question to be determined is, whether persons with the aforesaid qualifications, satisfy the parameters of law declared by this Court, to be appointed as, Members of the NTT? And do they satisfy the recognized constitutional conventions?

83. This Court has declared the position in this behalf in L. Chandra Kumar case (supra) and in Union of India v. Madras Bar Association case (supra), that

Technical Members could be appointed to the tribunals, where technical expertise is essential for disposal of matters, and not otherwise. It has also been held, that where the adjudicatory process transferred to a tribunal does not involve any specialized skill, knowledge or expertise, a provision for appointment of non-Judicial Members (in addition to, or in substitution of Judicial Members), would constitute a clear case of delusion and encroachment upon the "independence of judiciary", and the "rule of law". It is difficult to appreciate how Accountant Members and Technical Members would handle complicated questions of law relating to tax matters, and also questions of law on a variety of subjects (unconnected to tax), in exercise of the jurisdiction vested with the NTT. That in our view would be a tall order. An arduous and intimidating asking. Since the Chairperson/Members of the NTT will be required to determine "substantial questions of law", arising out of decisions of the Appellate Tribunals, it is difficult to appreciate how an individual, well-versed only in accounts, would be able to discharge such functions. Likewise, it is also difficult for us to understand how Technical Members, who may not even possess the qualification of law, or may have no experience at all in the practice of law, would be able to deal with "substantial questions of law", for which alone, the NTT has been constituted.

84. We have already noticed hereinabove, from data placed on record by the learned counsel for the petitioners, that the NTT would be confronted with disputes arising out of Family Law, Hindu Law, Mohemmedan Law, Company Law, Law of Partnership, Law relating to Territoriality, Law relating to Trusts and

Societies, Contract Law, Law relating to Transfer of Property, Law relating to Intellectual Property, Interpretation of Statutes/Rules, and other Miscellaneous Provisions of Law. Besides the above, the Members of the NTT will regularly have to interpret the provisions of the Income Tax Act, the Customs Act and the Excise Act. We are of the considered opinion, that only a person possessing professional qualification in law, with substantial experience in the practice of law, will be in a position to handle the onerous responsibilities which a Chairperson and Members of the NTT will have to shoulder.

85. There seems to be no doubt, whatsoever, that the Members of a court/tribunal to which adjudicatory functions are transferred, must be manned by judges/members whose stature and qualifications are commensurate to the court from which the adjudicatory process has been transferred. This position is recognized the world over. Constitutional conventions in respect of Jamaica, Ceylon, Australia and Canada, on this aspect of the matter have been delineated above. The opinion of the Privy Council expressed by Lord Diplock in Hind case (supra), has been shown as being followed in countries which have constitutions on the Westminster model. The Indian Constitution is one such Constitution. The position has been clearly recorded while interpreting constitutions framed on the above model, namely, that even though the legislature can transfer judicial power from a traditional court, to an analogous court/tribunal with a different name, the court/tribunal to which such power is transferred, should be possessed of the same salient characteristics, standards and parameters, as the court the power whereof was being transferred. It is not possible for us to accept, that

Accountant Members and Technical Members have the stature and qualification possessed by judges of High Courts.

86. It was not disputed, that the NTT has been created to handle matters which were earlier within the appellate purview of the jurisdictional High Courts. We are accordingly satisfied, that the appointment of Accountant Members and Technical Members of the Appellate Tribunals to the NTT, would be in clear violation of the constitutional conventions recognized by courts, the world over. References on questions of law (under the three legislative enactments in question), were by a legislative mandate, required to be adjudicated by a bench of at least two judges of the jurisdictional High Court. When the remedy of reference (before the High Court) was converted into an appellate remedy (under the three legislative enactments in question), again by a legislative mandate, the appeal was to be heard by a bench of at least two judges, of the jurisdictional High Court. One cannot lose sight of the fact, that hitherto before, the issues which will vest in the jurisdiction of the NTT, were being decided by a bench of at least two judges of the High Court. The onerous and complicated nature of the adjudicatory process is clear. We may also simultaneously notice, that the power of "judicial review" vested in the High Courts under Articles 226 and 227 of the Constitution has not been expressly taken away by the NTT Act. During the course of hearing, we had expressed our opinion in respect of the power of "judicial review" vested in the High Courts under Articles 226 and 227 of the Constitution. In our view, the power stood denuded, on account of the fact that, Section 24 of the NTT Act vested with an aggrieved party, a remedy of appeal

against an order passed by the NTT, directly to the Supreme Court. Section 24 aforementioned is being extracted hereunder:

> "24. Appeal to Supreme Court.- Any person including any department of the Government aggrieved by any decision or order of the National Tax Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the National Tax Tribunal to him:
>
> Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within such time as it may deem fit."

In view of the aforestated appellate remedy, from an order passed by the NTT directly to the Supreme Court, there would hardly be any occasion, to raise a challenge on a tax matter, arising out of the provisions of the Income Tax Act, the Customs Act and the Excise Act, before a jurisdictional High Court. Even though the learned Attorney General pointed out, that the power of "judicial review" under Articles 226 and 227 of the Constitution had not been taken away, yet he acknowledged, that there would be implicit limitations where such power would be exercisable. Therefore, all the more, the composition of the NTT would have to be on the same parameters as judges of the High Courts. Since the appointments of the Chairperson/Members of the NTT are not on the parameters expressed hereinabove, the same are unsustainable under the declared law. A perusal of Section 6 of the NTT Act leaves no room for any doubt, that none of the above parameters is satisfied insofar as the appointment of Chairperson and other Members of the NTT is concerned. In the above view of the matter, Section 6(2)(b) of the NTT Act is liable to be declared unconstitutional. We declare it to be so.

87. We would now deal with the submissions advanced by the learned counsel for the petitioners in respect of Section 7 of the NTT Act. It seems to us, that Section 7 has been styled in terms of the decision rendered by this Court in L. Chandra Kumar case (supra). Following the above judgment for determining the manner of selection of the Chairperson and Members of the NTT, is obviously a clear misunderstanding of the legal position declared by this Court. It should not have been forgotten, that under the provisions of the Administrative Tribunals Act, 1985, which came up for consideration in L. Chandra Kumar case (supra), the tribunals constituted under the said Act, are to act like courts of first instance. All decisions of the tribunal are amenable to challenge under Articles 226/227 of the Constitution before, a division bench of the jurisdictional High Court. In such circumstances it is apparent, that tribunals under the Administrative Tribunals Act, 1985, were subservient to the jurisdictional High Courts. The manner of selection, as suggested in L. Chandra Kumar case (supra) cannot therefore be adopted for a tribunal of the nature as the NTT. Herein the acknowledged position is, that the NTT has been constituted as a replacement of High Courts. The NTT is, therefore, in the real sense a tribunal substituting the High Courts. The manner of appointment of Chairperson/Members to the NTT will have to be, by the same procedure (or by a similar procedure), to that which is prevalent for appointment of judges of High Courts. Insofar as the instant aspect of the matter is concerned, the above proposition was declared by this Court in Union of India v. Madras Bar Association case (supra), wherein it was held, that the stature of the Members who would constitute the tribunal, would depend on the jurisdiction

which was being transferred to the tribunal. Accordingly, if the jurisdiction of the High Courts is being transferred to the NTT, the stature of the Members of the tribunal had to be akin to that of the judges of High Courts. So also the conditions of service of its Chairperson/Members. And the manner of their appointment and removal, including transfers. Including, the tenure of their appointments.

88. Section 7 cannot even otherwise, be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of the NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention, that the interests of the Central Government would be represented on one side, in every litigation before the NTT. It is not possible to accept a party to a litigation, can participate in the selection process, whereby the Chairperson and Members of the adjudicatory body are selected. This would also be violative of the recognized constitutional convention recorded by Lord Diplock in Hinds case (supra), namely, that it would make a mockery of the constitution, if the legislature could transfer the jurisdiction previously exercisable by holders of judicial offices, to holders of a new court/tribunal (to which some different name was attached) and to provide that persons holding the new judicial offices, should not be appointed in the manner and on the terms prescribed for appointment of Members of the judicature. For all the reasons recorded hereinabove, we hereby declare Section 7 of the NTT Act, as unconstitutional.

89. Insofar as the validity of Section 8 of the NTT Act is concerned, it clearly emerges from a perusal thereof, that a Chairperson/Member is appointed to the NTT, in the first instance, for a duration of 5 years. Such Chairperson/Member is eligible for reappointment, for a further period of 5 years. We have no hesitation to accept the submissions advanced at the hands of the learned counsel for the petitioners, that a provision for reappointment would itself have the effect of undermining the independence of the Chairperson/Members of the NTT. Every Chairperson/Member appointed to the NTT, would be constrained to decide matters, in a manner that would ensure his reappointment in terms of Section 8 of the NTT Act. His decisions may or may not be based on his independent understanding. We are satisfied, that the above provision would undermine the independence and fairness of the Chairperson and Members of the NTT. Since the NTT has been vested with jurisdiction which earlier lay with the High Courts, in all matters of appointment, and extension of tenure, must be shielded from executive involvement. The reasons for our instant conclusions are exactly the same as have been expressed by us while dealing with Section 5 of the NTT Act. We therefore hold, that Section 8 of the NTT Act is unconstitutional.

90. Sections 5, 6, 7, 8 and 13 of the NTT Act have been held by us (to the extent indicated hereinabove) to be illegal and unconstitutional on the basis of the parameters laid down by decisions of constitutional benches of this Court and on the basis of recognized constitutional conventions referable to constitutions framed on the Westminster model. In the absence of the aforesaid provisions which have been held to be unconstitutional, the remaining provisions have been

rendered otiose and worthless, and as such, the provisions of the NTT Act, as a whole, are hereby set aside.

Conclusions:

91 (i) The Parliament has the power to enact legislation, and to vest adjudicatory functions, earlier vested in the High Court, with an alternative court/tribunal. Exercise of such power by the Parliament would not *per se* violate the "basic structure" of the Constitution.

(ii) Recognized constitutional conventions pertaining to the Westminster model, do not debar the legislating authority from enacting legislation to vest adjudicatory functions, earlier vested in a superior court, with an alternative court/tribunal. Exercise of such power by the Parliament would *per se* not violate any constitutional convention.

(iii) The "basic structure" of the Constitution will stand violated, if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure, that the newly created court/tribunal, conforms with the salient characteristics and standards, of the court sought to be substituted.

(iv) Constitutional conventions, pertaining to constitutions styled on the Westminster model, will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced, are not incorporated in the court/tribunal sought to be created.

(v) The prayer made in Writ Petition (C) No.621 of 2007 is declined. Company Secretaries are held ineligible, for representing a party to an appeal before the NTT.

(vi) Examined on the touchstone of conclusions (iii) and (iv) above, Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions, constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional.

……...CJI.
(R.M. LODHA)

…….....J.
(JAGDISH SINGH KHEHAR)

…….....J.
(J. CHELAMESWAR)

…….....J.
(A.K. SIKRI)

Note: The emphases supplied in all the quotations in the instant judgment, are ours.

New Delhi,
September 25, 2014.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
TRANSFERRED CASE (CIVIL) No. 150 of 2006

Madras Bar Association ……Petitioner

Versus

Union of India & Anr. …..Respondents

WITH

CIVIL APPEAL NO. 3850 OF 2006
CIVIL APPEAL NO. 3862 OF 2006
CIVIL APPEAL NO. 3881 OF 2006
CIVIL APPEAL NO. 3882 OF 2006
CIVIL APPEAL No. 4051 OF 2006
CIVIL APPEAL NO. 4052 OF 2006
WRIT PETITION (C) NO.621 OF 2007
TRANSFERRED CASE(C) NO.116 OF 2006
TRANSFERRED CASE (C) NO. 117 OF 2006
TRANSFERRED CASE (C) NO.118 OF 2006
WRIT PETITION (C) NO. 697 OF 2007

J U D G M E N T

R.F.NARIMAN, J. (concurring in the result)

1. In these cases, essentially four contentions have been urged on behalf of the petitioners. The first contention is that the reason for setting up a National Tax Tribunal is non-existent as uniformity of decisions pertaining to tax laws is hardly a reason for interposing another tribunal between an appellate Tribunal and the Supreme Court, as High Court decisions are more or less uniform, since they follow the law laid down by each other. Since this is so, the Act must be struck down. The second contention is that it is

impermissible for the legislature to divest superior courts of record from the core judicial function of deciding substantial questions of law. The third contention is as regards the Constitutional validity of Article 323-B being violative of the separation of powers doctrine, the rule of law doctrine and judicial review. The fourth contention concerns itself with the nitty gritty of the Act, namely, that various sections undermine the independence of the adjudicatory process and cannot stand judicial scrutiny in their present form. Since I am accepting the second contention urged by the petitioners, this judgment will not deal with any of the other contentions.

2. *"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."*

What was said over 200 years ago by Chief Justice John Marshall in the celebrated case of **Marbury v. Madison**, holds true even today in every great republican system of Government.

These words take their colour from Alexander Hamilton's famous federalist Paper No.78 which ran thus:

> *"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature*

not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power, that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter, I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." (Emphasis supplied)

3. The precise question arising in these appeals concerns the constitutional validity of the National Tax Tribunals Act, 2005. The question raised on behalf of the petitioners is one of great public importance and has,

therefore, been placed before this Constitution Bench. Following upon the heels of the judgment in **Union of India v. R.Gandhi, (2010) 11 SCC 1,** these matters were delinked and ordered to be heard separately vide judgment and order dated 11th May 2010 reported in (2010) 11 SCC 67. The precise question formulated on behalf of the petitioners is whether a tribunal can substitute the High Court in its appellate jurisdiction, when it comes to deciding substantial questions of law.

4. Sections 15 and 24 of National Tax Tribunal Act state:

> *"15. (1) An appeal shall lie to the National Tax Tribunal from every order passed in appeal by the Income-tax Appellate Tribunal and the Customs, Excise and Service Tax appellate Tribunal, if the National Tax Tribunal is satisfied that the case involves a substantial question of law.*
> *(2) The Chief Commissioner or the Commissioner of Income-tax or the Chief Commissioner or Commissioner of Customs and Central Excise, as the case may be, or an assessee aggrived by any order passed by the Income-tax Appellate Tribunal or any person aggrieved by any order passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as aggrieved person), may file an appeal to the National Tax Tribunal and such appeal under this sub-section shall-*
> *(a) be filed within one hundred and twenty days from the date on which the order appealed against is received by the assesee or the aggrieved person or the Chief Commissioner or Commissioner, as the case may be;*
> *(b) be in the form of a memorandum of appeal precisely stating therein the substantial question of law involved; and*
> *(c) be accompanied by such fees as may be prescribed:*
> *Provided that separate form of memorandum of appeal shall be filed for matters involving direct and indirect taxes:*
> *Provided further that the National Tax Tribunal may entertain the appeal within sixty days after the expiry of the said period of*

one hundred and twenty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring an appeal in time.

(3) Where an appeal is admitted under sub-section (1), the National Tax Tribunal.-

(a) shall formulate the question of law for hearing the appeal; and

(b) may also determine any relevant issue in connection with the question so formulated-

(i) which has not been so determined by the Income-tax Appellate Tribunal or by the Customs, Excise and Service Tax Appellate Tribunal or

(ii) which has been wrongly determined by the income-tax Appellate Tribunal or by the Customs, Excise and Service Tax Appellate Tribunal, and shall decide the question of law so formulated and the other relevant issue so determined and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(4) Where in any appeal under this section, the decision of the income-tax Appellate Tribunal or the Customs, Excise and Service Tax Appellate Tribunal involves the payment of any tax or duties, the assessee or the aggrieved person, as the case may be, shall not be allowed to prefer such appeal unless he deposits at least twenty-five per cent of such tax or duty payable on the basis of the order appealed against:

Provided that where in a particular case the National Tax Tribunal is of the opinion that the deposit of tax or duty under this sub-section would case undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the interest of revenue.

24. Appeal to Supreme Court.- Any person including any department of the Government aggrieved by any decision or order of the National tax Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the National Tax Tribunal to him;

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the

appeal within the said period, allow it to be filed within such time as it may deem fit."

5. According to the petitioners, deciding substantial questions of law, even if they arise from specialized subject matters, would be a core function of the superior courts of India, and cannot be usurped by any other forum. To test the validity of this argument, we need to go to some constitutional fundamentals.

6. It has been recognized that unlike the U.S. Constitution, the Constitution of India does not have a rigid separation of powers. Despite that, the Constitution contains several separate chapters devoted to each of the three branches of Government. Chapter IV of part V deals exclusively with the Union judiciary and Chapter V of part VI deals with the High Courts in the States.

7. Article 50 of the Constitution states:

"50. Separation of judiciary from executive: The State shall take steps to separate the judiciary from the executive in the public services of the State."

8. Art.129 states that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Art.131 vests the Supreme Court with original jurisdiction in disputes arising between the Government of India and the States. Art. 132

to 134A vest an appellate jurisdiction in civil and criminal cases from the High Courts. Art. 136 vests the Supreme Court with an extraordinary discretionary jurisdiction to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. Under Art. 137, the Supreme Court is given power to review any judgment or order made by it. By Article 141, the law declared by the Supreme Court shall be binding on all courts within the territory of India. And by virtue of Art. 145(3) substantial questions as to the interpretation of the Constitution of India are vested exclusively in a bench of at least 5 Hon'ble Judges.

9. Similarly, under Art. 214 High Courts for each State are established and under Art. 215 like the Supreme Court, High Courts shall be courts of record and shall have all the powers of such courts including the power to punish for contempt. Under Art. 225, the jurisdiction of, and the law administered in any existing High Courts, is preserved. Art. 226 vests the High Court with power to issue various writs for the protection of fundamental rights and for any other purpose to any person or authority. Under Art. 228 questions involving interpretation of the constitution are to be decided by the High Court alone when a court subordinate to it is seized of such question. Further, the importance of these provisions is further

highlighted by Art. 368 proviso which allows an amendment of all the aforesaid Articles only if such amendment is also ratified by the legislatures of not less than one half of the States.

10. The Code of Civil Procedure also contains provisions which vest the High Court with the power to decide certain questions of law under Section 113 and, when they relate to jurisdictional errors, Section 115.

11. Art. 227 is of ancient vintage. It has its origins in Section 107 of the Government of India Act 1915 which reads as follows:

> *"Each of the High Courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say.-*
> *(a) Call for returns;*
> *(b) Direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction;*
> *(c) Make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;*
> *(d) Prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and settle tables of fees to be allowed to the sheriff, attorneys and all clerks and officers of courts:*
> *Provided that such rules, forms and tables shall not be inconsistent with the provisions of law for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in Council, and in other cases of the local government."*

12. Section 224 of the Government of India Act 1935 more or less adopted Section 107 of the Act of 1915 with a few changes.

"(1)Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and may do any of the following thing, that is to say,-

(a) call for returns;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(d) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts:

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

Article 227 of the Constitution states:

227. Power of superintendence over all courts by the High Court

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction

(2) Without prejudice to the generality of the foregoing provisions, the High Court may

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor

> *(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."*

13. It will be noticed that Art. 227 adds the words "and tribunals" and contains no requirement that the superintendence over subordinate courts and tribunals should be subject to its appellate jurisdiction.

14. In **Waryam Singh v. Amarnath, 1954 SCR 565**, Das,J. stated the High Courts power under Art. 227:

> *"This power of superintendence conferred by article 227 is, as pointed out by Harries C.J., in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. As rightly pointed out by the Judicial Commissioner in the case before us the lower courts in refusing to make an order for ejectment acted arbitrarily. The lower courts realized the legal position but in effect declined to do what was by section 13(2) (i) incumbent on them to do and thereby refused to exercise jurisdiction vested in them by law. It was, therefore, a case which called for interference by the court of the Judicial Commissioner and it acted quite properly in doing so."* (at 571)

15. It is axiomatic that the superintending power of the High Courts under Art. 227 is to keep courts and tribunals within the bounds of the law. Hence, errors of law that are apparent on the face of the record are liable to be corrected. In correcting such errors, the High Court has necessarily to state what the law is by deciding questions of law, which bind subordinate courts and tribunals in future cases. Despite the fact that there is no equivalent of

Art. 141 so far as High Courts are concerned, in **East India Commercial Co. Ltd. Calcutta v. The Collector of Customs, (1963) 3 SCR 338**, Subba Rao, J. stated:

> *"This raises the question whether an administrative tribunal can ignore the law declared by the highest court in the State and initiate proceedings in direct violation of the law so declared. Under Art. 215, every High Court shall be a court of record including the power to punish for contempt of itself. Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercise jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendant can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the sub-ordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding."*(at 366)

16. The aforesaid analysis shows that the decision by superior courts of record of questions of law and the binding effect of such decisions are implicit in the constitutional scheme of things. It is obvious that it is

emphatically the province of the superior judiciary to answer substantial questions of law not only for the case at hand but also in order to guide subordinate courts and tribunals in future. That this is the core of the judicial function as outlined by the constitutional provisions set out above.

17. As to what is a substantial question of law has been decided way back in **Sir Chunilal V. Mehta v. The Century Spinning and Manufacturing Co. Ltd., (1962) Suppl. 3 SCR 549** at pages 557-558 thus:

> *"....The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

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18. It is clear, therefore, that the decision of a substantial question of law is a matter of great moment. It must be a question of law which is of general public importance or is not free from difficulty and/or calls for a discussion of alternative views. It is clear, therefore, that a judicially trained mind with the experience of deciding questions of law is a *sine qua non* in order that such questions be decided correctly. Interestingly enough, our attention has

been drawn to various Acts where appeals are on questions of law/substantial questions of law.

> *"i) The Electricity Act, 2003*
> *125. Appeal to Supreme Court - Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):*
> *Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.*
> *(ii) The National Green Tribunal Act, 2010*
> *Section 22. Appeal to Supreme Court - Any person aggrieved by any award, decision or order of the tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908) .*
> *Provided that the Supreme Court, entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal.*
> *(iii) The Telecom Regulatory Authority of India Act, 1997*
> *Section 18. Appeal to Supreme Court - (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that code.*
> *(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.*
> *(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:*
> *Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that*

the appellant was prevented by sufficient cause from preferring the appeal in time.
(iv) The Securities and Exchange Board of India Act, 1992
Section 15Z. Appeal to Supreme Court. - Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out to such order:
Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
(v) Companies Act, 1956
Section 10GF. Appeal to Supreme Court. - Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:
Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

19. Whether one looks at the old Section 100 of the Code of Civil Procedure or Section 100 of the Code of Civil Procedure as substituted in 1976, the result is that the superior courts alone are vested with the power to decide questions of law.

<u>Section 100 (Before amendment)</u>
"100(1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court on any of the following grounds, namely:

(a) the decision being contrary to law or to some usage having the force of law;
(b) the decision having failed to determine some material issue of law or usage having the force of law;
(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
(2) An appeal may lie under this section from an appellate decree passed ex-parte.
Section 100 (After amendment)
100. Second appeal
(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
(2) An appeal may lie under this section from an appellate decree passed exparte.
(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :
Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

20. It is obvious that hitherto Parliament has entrusted a superior court of record with decisions on questions of law/substantial questions of law. Also, as has been pointed in Khehar, J.'s judgment traditionally, such questions

were always decided by the High Courts in the country. The present Act is a departure made for the first time by Parliament.

21. In this regard, the respondents argued that since taxation is a specialised subject and there is a complete code laid down for deciding this subject, the present impugned Act being part of that code is constitutionally valid. For this purpose, the respondents have relied on a passage from the nine Judge Bench in **Mafatlal Industries v. Union of India, (1997) 5 SCC 536** at para 77.

22. This Court in **Mafatlal's** case was faced with whether **Kanhaiya Lal Mukundlal Saraf's** case, 1959 SCR 1350, has been correctly decided in so far as it said that where taxes are paid under a mistake of law, the person paying is entitled to recover from the State such taxes on establishing the mistake and that this consequence flows from Section 72 of the Contract Act. In answering this question, this Court made an observation that so long as an appeal is provided to the Supreme Court from the orders of the appellate tribunal, the Act would be constitutionally valid. This Court while deciding whether Saraf's case was correctly decided or not, was not faced with the present question at all. Further, at the time that Mafatlal's case was decided, the scheme contained in the Central Excise and Salt Act, 1944, required the High Court on a statement of case made to it to decide a question of law

arising out of the order of the appellate tribunal, after which the High Court is to deliver its judgment and send it back to the appellate tribunal which will then make such orders as are necessary to dispose of the case in conformity with such judgment. The then statutory scheme of the Central Excise and Salt Act, 1944 is contained in Sections 35G to 35L.

> *"35G Statement of case to High Court.*
> *(1) The Collector of Central Excise or the other party may, within sixty days of the date upon which he is served with notice of an order under section 35C (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court:*
> *Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding thirty days.*
> *(2) On receipt of notice that an application has been made under sub- section (1), the person against whom such application has been made, may, notwithstanding that he may not have filed such an application, file, within forty- five days of the receipt of the notice, a memorandum of cross- objections verified in the prescribed manner against any part of the order in relation to which an application for reference has been made and such memorandum shall be disposed of by the Appellate Tribunal as if it were an application presented within the time specified in sub- section (1).*

(3) If, on an application made under sub- section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the Collector of Central Excise, or, as the case may be, the other party may, within six months from the date on which he is served with notice of such refusal, apply to the High Court and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition, the Appellate Tribunal shall state the case and refer it accordingly.

(4) Where in the exercise of its powers under sub- section (3), the Appellate Tribunal refuses to state a case which it has been required by an applicant to state, the applicant may, within thirty days from the date on which he receives notice of such refusal, withdraw his application and, if he does so, the fee, if any, paid by him shall be refunded.

35H. Statement of case to Supreme court in certain cases. If, on an application made under section 35G, the Appellate Tribunal is of opinion that, on account of conflict in the decisions of High Courts in respect of any particular question of law, it is expedient that a reference should be made direct to the Supreme Court, the Appellate Tribunal may draw up a statement of the case and refer it through the President direct to the Supreme Court.

35I. Power of High Court or Supreme Court to require statement to be amended. If the High Court or the Supreme Court is not satisfied that the statements in a case referred to it are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Appellate Tribunal, for the purpose of making such additions thereto or alterations therein as it may direct in that behalf.

35J. Case before High Court to be heard by not less than two Judges.

(1) When any case has been referred to the High Court under section 35G, it shall be heard by a Bench of not less than two Judges of the High Court and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(2) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall then be

heard upon that point only by one or more of the other Judges of the High Court, and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

35K. Decision of High Court or Supreme Court on the case stated.

(1) The High Court or the Supreme Court hearing any such case shall decide the questions of law raised therein and shall deliver its judgment thereon containing the grounds on which such decision is founded and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case in conformity with such judgment.

(2) The costs of any reference to the High Court or the Supreme Court which shall not include the fee for making the reference shall be in the discretion of the Court.

35L. Appeal to Supreme Court. An appeal shall lie to the Supreme Court from-

(a) any judgment of the High Court delivered on a reference made under section 35G in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after the passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or

(b) any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment."

23. It is obvious that the decision of the nine Judge Bench was only referring to decisions of the appellate tribunal falling under sub-clause (b) of Section 35L relating to orders passed by the Appellate Tribunal on questions having a relation to the rate of duty of excise or value of goods for the purpose of assessment and not to appeals from judgments of the High Court

delivered on a reference under Section 35G after the High Court had decided on a question of law. It is clear, therefore, that the context of Mafatlal's decision was completely different and the decision did not advert to Sections 35G to 35L as they then stood.

24. Art. 323B was part of the constitution 42nd Amendment Act which was, as is well known, an amendment which was rushed through during the 1975 emergency. Many of its features were undone by the constitution 44th Amendment Act passed a couple of years later. One of the interesting features that was undone was the amendment to Art. 227.

The 42nd Amendment substituted the following clause for clause (1) of Art. 227:

> *"(1) Every High Court shall have superintendence over all courts subject to its appellate jurisdiction."*

25. A cursory reading of the substituted clause shows that the old section 107 of the Government of India Act 1915 was brought back: Tribunals were no longer subject to the High Courts' superintendence, and subordinate courts were only subject to the High Courts' superintendence, if they were also subject to its appellate jurisdiction. As stated above, the 44th Amendment undid this and restored sub-clause (1) to its original position.

26. However, Art. 323B continues as part of the constitution. The real reason for the insertion of the said article was the same as the amendment

made to Art. 227 – the removal of the High Courts' supervisory jurisdiction over tribunals. **L. Chandra Kumar v.Union of India (1997) 3 SCC 261,** undid the very raison d'etre of Article 323B by restoring the supervisory jurisdiction of the High Courts so that a reference to Article 323B would no longer be necessary as the legislative competence to make a law relating to tribunals would in any case be traceable to Entries 77 to79, 95 of List I, Entry 65 of List II and Entry 11A and 46 of List III of the 7th Schedule to the Constitution of India.

27. In a significant statement of the law, **Chandra Kumar's** judgment, in upholding the vesting of the High Court's original jurisdiction in a Central Administrative Tribunal, stated thus:

> *"The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by*

*the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Articles 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.(*See *Para 78)*

*We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided. (*See *Para 79)*

Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging

> *this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts."*(see Para 93)

28. The stage is now set for the Attorney General's reliance on **Union of India v. R. Gandhi (2010) 11 SCC 1**.

Various provisions of the Companies Act, 1956 were under challenge before the Constitution Bench. The effect of these provisions was to replace the Company Law Board by a Tribunal vested with original jurisdiction, and to replace the High Court in First Appeal with an appellate tribunal. After noticing the difference between courts and tribunals in paras 38 and 45, the court referred to the independence of the judiciary and to the separation of powers doctrine, as understood in the Indian Constitutional Context in paras 46 to 57. In a significant statement of the law, the Constitution Bench said:

> *"The Constitution contemplates judicial power being exercised by both courts and tribunals. Except the powers and jurisdiction vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by legislative enactments. The High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create Tribunals with reference to specific enactments and*

confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to Tribunals." (para 87)

In another significant paragraph, the Constitution bench stated:
"But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialized knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred from courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals are Rent Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialized knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional."(at para 90)

The Bench then went on to hold that only certain areas of litigation can be transferred from courts to tribunals. (see para 92)

In paragraphs 101 and 102 the law is stated thus:

"Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the rule of law. The rule of law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the executive. Another facet of the rule of law is equality before law. The essence of the equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model.

The fundamental right to equality before law and equal protection of laws guaranteed by Art.14 of the Constitution, clearly includes a right to have the person's rights, adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication. Therefore wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge if it violates the right to adjudication by an independent forum. Therefore, though the challenge by MBA is on the ground of violation of principles forming part of the basic structure, they are relatable to one of more of the express provisions of the Constitution which gave rise to such principles. Though the validity of the provisions of a legislative act cannot be challenged on the ground it violates the basic structure of the Constitution, it can be challenged as violative of constitutional provisions which enshrine the principles of the rule of law, separation of powers and independence of the judiciary."

29. **Gandhi's** case dealt with one specialized tribunal replacing another specialized tribunal (The Company Law Board) at the original stage. It is significant to note that the first appeal provided to the appellate tribunal is not

restricted only to questions of law. It is a full first appeal as understood in the section 96 CPC sense – (See section 10FQ of the Companies Act). A further appeal is provided to the Supreme Court under Section 10GF only on questions of law. When **Gandhi's** case states in paragraph 87 that the jurisdiction of the High Courts can be taken away by deleting provisions for appeals, revisions or references, and that these functions traditionally performed by courts can be transferred to tribunals, the court was only dealing with the situation of the High Court being supplanted at the original and first appellate stage so far as the company `jurisdiction' is concerned in a situation where questions of fact have to be determined afresh at the first appellate stage as well. These observations obviously cannot be logically extended to cover a situation like the present where the High Court is being supplanted by a tribunal which would be deciding only substantial questions of law.

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30. The present case differs from Gandhi's case in a very fundamental manner. The National Tax Tribunal which replaces the High Courts in the country replaces them only to decide substantial questions of law which relate to taxation. In fact, a Direct Tax Laws Committee delivered a report in 1978 called the Choksi Committee after its Chairman. This report had in fact recommended that a Central Tax Court should be set up. The report stated:

"II-6.10. In paragraph 11.30 of our Interim Report, we had expressed the view that the Government should consider the establishment of a Central Tax Court to deal with all matters arising under the Income-tax Act and other Central Tax Laws, and had left the matter for consideration in greater detail in our Final Report. We have since examined the matter from all aspects.

II-6.11. The problem of tax litigation in India has assumed staggering proportions in recent years. From the statistics supplied to us, it is seen that, as on 30th June, 1977, there were as many as 10,500 references under the direct tax laws pending with the various High Courts, the largest pendency being in Bombay, Calcutta, Madras, Karnataka and Madhya Pradesh. The number of references made to the High Courts in India under all the tax laws is of the order of about 3,300 in a year, whereas the annual disposals of such references by all the High Courts put together amount to about 600 in a year. In addition to these references, about 750 writ petitions on tax matters are also filed before the High Courts every year. Under the existing practice of each High Court having only a single bench for dealing with the tax matters and that too not all round the year, there is obviously no likelihood of the problem being brought down to manageable proportions at any time in, the future, but, on the other hand, it is likely to become worse. Even writ petitions seeking urgent remedy against executive action take several years for disposal. The Wanchoo Committee, which had considered this problem, recommended the creation of permanent Tax Benches in High Courts and appointment of retired Judges to such Benches under Article 224A of the Constitution to clear the backlog. Although more than 6 years have passed since that recommendation was made, the position of arrears in tax matters has shown no improvement but, on the other hand, it has worsened. In this connection, it would be worth noting that the Wanchoo Committee considered an alternative course for dealing with this problem through the establishment of a Tax Court but they desisted from making any recommendation to that effect us, in their opinion, that would involve extensive amendments to law and procedures. We have directed our attention to this matter in the context of the mounting arrears of tax cases before the courts.

II-6.12. The pendency of cases before the courts in tax matters has also a snow-balling effect all along the line of appellate hierarchies inasmuch as proceedings in hundreds of cases are initiated and kept pending, awaiting the law to be finally settled by the Supreme Court after prolonged litigation in some other cases. This obviously adds considerably to the load of infructuous word in the Department and clutters up the files of appellate authorities at all levels, with adverse consequences on their efficiency. According to the figures supplied to us, out of tax arrears amounting to Rs.986.53 crores as on 31st December, 1977, Rs.293.26 crores (30 per cent) were disputed in proceedings before various appellate authorities and courts.

II-6.13. Apart from the delays which are inherent in the existing system, the jurisdiction pattern of the High Courts also seems to contribute to the generation of avoidable work. At present, High Courts are obliged to hear references on matters falling within their jurisdiction notwithstanding that references on identical points have been decided by other High Courts. The decision of one High Court is not binding on another High Court even on identical issues. Finality is reached only when the Supreme Court decides the issue which may take 10 to 15 years.

II-6.14. Tax litigation is currently handled by different Benches of the High Courts constituted on an ad hoc basis. The absence of permanent benches also accounts for the delay in the disposal of the tax cases by High Courts.

II-6.15. The answer to these problems, in our view, is the establishment of a Central Tax Court with all-India jurisdiction to deal with such litigation to the exclusion of High Courts. Such a step will have several advantages. In the first place, it would lead to uniformity in decisions and bring a measure of certainty in tax matters. References involving common issues can be conveniently consolidated and disposed of together, thereby accelerating the pace of disposal. Better co-ordination among the benches would make for speedy disposal of cases and reduce the scope for proliferation of appeals on the same issues before the lower appellate authorities, which in its turn will reduce the volume of litigation going up before the Tax Court as well. Once a Central Tax Court is established, the judges appointed to the

Benches thereof will develop the requisite expertise by continuous working in this field. This would facilitate quicker disposal of tax matters and would also help in reducing litigation by ensuring uniformity in decisions.

II-6.16. In the light of the foregoing discussions, we recommend that the Government should take steps for this early establishment of a Central Tax Court with all-India jurisdiction to deal exclusively with litigation under the direct Tax laws in the first instance, with provisions for extending its jurisdiction to cover all other Central Tax laws, if considered necessary in the future. We suggest that such a court should be constituted under a separate statute. As the implementation of this recommendation may necessitate amendment of the constitution, which is likely to take time, we further recommend that Government may in the meanwhile, consider the desirability of constituting special Tax benches in the High Courts to deal with the large number of Tax cases by continuously sitting throughout the year. The Judges to be appointed to these special benches may be selected from among those, who have special knowledge and experience in dealing with matters relating to direct Tax laws so that, when the Central Tax Court is established at a later date, these judges could be transferred to that Court.

II-6.17. The Central Tax Court should have Benches located at important centres. To start with it may have Benches at the following seven places, viz., Ahmedabad, Bombay, Calcutta, Delhi, Kanpur, Madras and Nagpur. Each Bench should consist of two judges. Highly qualified persons should be appointed as judges of the Central Tax Court, from among persons who are High Court judges or who are eligible to be appointed as High Court judges. In the matter of conditions of service, scales or pay and other privileges, judges of the Central Tax Court should be on par with the High Court judges.

II-6.18. The Supreme Court and, following it, the High Courts have held that the Tribunal and the tax authorities, being creatures of the Act cannot pronounce on the constitutional validity or vires of any provision of the Act; that; therefore, such a question cannot arise out of the order of the Tribunal and cannot be made the subject matter of a reference to the

High Court and a subsequent appeal to the Supreme court; and that such a question of validity or vires can be raised only in a suit or a writ petition. While an income-tax authority or the Tribunal cannot decide upon the validity or vires of the other provisions of the law. We recommend that the powers of the Central Tax Court in this regard should be clarified in the law itself by specifically giving it the right to go into questions of validity of the provisions of the Tax Laws or of the rules framed thereunder.

II-6.19. Another important matter, in which we consider that the present position needs improvement, is the nature of the Court's jurisdiction in tax matters. Under the present law, the High Court's jurisdiction in such matters is merely advisory on questions of law. For this purpose, the Appellate Tribunal has to draw up a statement of the case and refer the same to the High Court for its opinion. After the High Court delivers its judgment on the reference, the matter goes back to the Tribunal, which has then to pass such orders as are necessary to dispose of the case conformably to such judgment. Under this procedure, the aggrieved party before the Tribunal has to file an application seeking a reference to the High Court on specified questions of law arising out of the Tribunal's order. The hearing of such application by the Tribunal, followed by the drawing up of the statement of the case to the High Court, delays the consideration of the issue by the High Court for a considerable time. Where the Tribunal refuses to state the case as sought by the applicant, then again, the law provides for a direct approach to the High Court for issue of directions to the Appellate Tribunal to state the case to the High Court on the relevant question of law. This process also delays the consideration of the matter by the High court for quite some time. In addition to these types of delay, there will be further delays after the High Court decides the matter, as the Tribunal has to pass consequential orders disposing of the case, before the relief, if any due, can be granted to the assessee.

II-6.20. In our view, the disposal of tax litigation can be speeded up considerably by vesting jurisdiction in the proposed Central Tax Court to hear appeals against the orders of the Tribunal on questions of law arising out of such orders. We, accordingly, recommend that the jurisdiction of the Central

Tax Court should be Appellate and not advisory. We also recommend that appeals before the Central Tax Court should be heard by a Bench of two judges. The judgment of a division Bench should be binding on other division Benches of the Tax Court unless it is contrary to a decision of the Supreme Court or of a full Bench of the Tax Court.

II-6.21. In the matter of appeals before the Central Tax Court, it would be necessary to make a special provision for enabling Chartered Accountants to appear on behalf of appellants or respondents to argue the appeals before it. Legal practitioners would, in any event, be entitled to appear before the Central Tax Court. In addition, any other person, who may be permitted by the Court to appear before it, may also represent the appellant or the respondent in tax matters.

II-6.22. Our recommendation for setting up of a Central Tax Court may not be interpreted to be only a modified version of the concept of administrative and other tribunals authorized to be set up for various purposes under the amendments effected by the 42nd Amendment of the Constitution. The Central Tax Court, which we have in view, will be a special kind of High court with functional jurisdiction over tax matters and enjoying judicial independence in the same manner as the High Courts. The controversy generated by the 42nd Amendment to the Constitution should not, therefore, be held to militate against the proposal for the establishment of a Central Tax Court to exercise the functions of a High Court in tax matters."

This recommendation was not acceded to by Parliament.

31. It is obvious, that substantial questions of law which relate to taxation would also involve many areas of civil and criminal law, for example Hindu Joint Family Law, partnership, sale of goods, contracts, Mohammedan Law, Company Law, Law relating to Trusts and Societies, Transfer of Property, Law relating to Intellectual Property, Interpretation of Statutes and sections dealing with prosecution for offences. It is therefore not correct to say that

taxation, being a specialized subject, can be dealt with by a tribunal. All substantial questions of law have under our constitutional scheme to be decided by the superior courts and the superior courts alone. Indeed, one of the objects for enacting the National Tax Tribunals Act, as stated by the Minister on the floor of the House, is that the National Tax Tribunal can lay down the law for the whole of India which then would bind all other authorities and tribunals. This is a direct encroachment on the High Courts' power under Art. 227 to decide substantial questions of law which would bind all tribunals vide East India Commercial Co. case, supra.

32. In fact, it is a little surprising that the National Tax Tribunal is interposed between the appellate Tribunal and the Supreme Court for the very good reason that ultimately it will only be the Supreme Court that will declare the law to be followed in future. As the appellate tribunal is already a second appellate court, it would be wholly unnecessary to have a National Tax Tribunal decide substantial questions of law in case of conflicting decisions of High Courts and Appellate Tribunals as these would ultimately be decided by the Supreme Court itself, which decision would under Article 141 be binding on all tax authorities and tribunals. Secondly, in all tax matters, the State is invariably a party and the High Court is ideally situated to decide substantial questions of law which arise between the State and

private persons, being constitutionally completely independent of executive control. The same cannot be said of tribunals which, as L. Chandra Kumar states, will have to be under a nodal ministry as tribunals are not under the supervisory jurisdiction of the High Courts.

33. Indeed, other constitutions which are based on the Westminster model, like the British North America Act which governs Canada have held likewise. In **Attorney General for Quebec v. Farrah (1978), Vol.86 DLR [3d] 161** a transport tribunal was given appellate jurisdiction over the Quebec Transport Commission. The tribunal performed no function other than deciding questions of law. Since this function was ultimately performed only by superior courts, the impugned section was held to be unconstitutional. This judgment was followed in **Re. Residential Tenancies Act, 123 DLR (3d) 554**. This judgment went further, and struck down the Residential Tenancy Act which established a tribunal to require landlords and tenants to comply with the obligations imposed under the Act. The court held:

> *"The Court of Appeal delivered a careful and scholarly unanimous judgment in which each of these questions was answered in the negative. The Court concluded it was not within the legislative authority of Ontario to empower the Residential Tenancy Commission to make eviction orders and compliance orders as provided in the Residential Tenancies Act, 1979. The importance of the issue is reflected in the fact that five Judges of the Court, including the Chief Justice and Associate Chief Justice, sat on the appeal."*

It then went on to enunciate a three steps test with which we are not directly concerned. The Court finally concluded:

> *"Implicit throughout the argument advanced on behalf of the Attorney-General of Qntario is the assumption that the Court system is too cumbersome, too expensive and therefore unable to respond properly to the social needs which the residential Tenancies Act, 1979 is intended to meet. All statutes respond to social needs. The Courts are unfamiliar with equity and the concept of fairness, justice, convenience, reasonableness. Since the enactment in1976 of the legislation assuring "security of tenure" the Country Court Judges of Ontario have been dealing with matters arising out of that legislation, apparently with reasonable dispatch, as both landlords and tenants in the present proceedings have spoken clearly against transfer of jurisdiction in respect of eviction and compliance orders from the Courts to a special commission. It is perhaps also of interest that there is no suggestion in the material filed with us that the Law Reforms Commission favoured removal from the Courts of the historic functions performed for over 100 years by the Courts.*
>
> *I am neither unaware of, nor unsympathetic to, the arguments advanced in support of a view that s.96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. Yet, however worthy the policy objectives, must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past. If the impugned power is violative of s.96 it must be struck down."*

34. In **Hins v. The Queen Director of Public Prosecutions v Jackson Attorney General of Jamaica (intervener) 1976 (1) All ER 353**, the Privy Council had to decide a matter under the Jamaican Constitution. A Gun

Courts Act, 1974 was passed by the Jamaican Parliament in which it set up various courts. A question similar to the question posed in the instant case was decided thus:

> *"All constitutions on the Westminister model deal under separate chapter heading with the legislature, the executive and the judicature. The chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of Constitution of Ceylon, contain nothing more. To the extent to which the constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new constitution came into force; but the legislature, in exercise of its power to make laws for the 'peace, order and good government of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is implicit in the very structure of a constitution on the Westminister model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this not expressly stated in the constitution (Liyanage v. R [1966] All ER 650 at 658 [1976] AC 259 at 287, 288]*
>
> *The more recent constitutions on the Westminister model, unlike their earlier prototypes, include a chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers. The remaining chapters of the constitutions are primarily concerned not with the*

legislature, the executive and the judicatures as abstractions, but with the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers – their qualifications for legislative, executive or judicial office, the method of selecting them, their tenure of office, the procedure to be followed where powers are conferred on a class of persons acting collectively and the majorities required for the exercise of these powers. Thus, where a constitution on the Westminister model speaks of a particular 'court' already in existence when the constitution comes into force, it uses this expression as a collective description of all those individual judges who, whether sitting alone or with other judges or with a jury, are entitled to exercise the jurisdiction exercised by that court before the constitution came into force. Any express provision in the constitution for the appointment or security of tenure of judges of that court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the 'court' in which they sit (Attorney General for Ontario v. attorney General for Canada.)

Where, under a constitution on the Westminister model, a law is made by the parliament which purports to confer jurisdiction on a court described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of the judicial power does not depend on the label (in the instant case 'The Gun Court') which the parliament attaches to the judges when exercising the jurisdiction conferred on them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Does the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature? (Attorney General for Australia v. R and Boilermakers' Society of Australia)."

35. Ultimately, a majority of the court found that the provisions of the 1974 Act, in so far as they provide for the establishment of a full court division of the Gun Court consisting of three resident Magistrates were unconstitutional.

36. It was also argued by the learned Attorney General that the High Courts' jurisdiction under Section 260A of the Income Tax Act and other similar tax laws could be taken away by ordinary law and such sections could be deleted. If that is so surely the jurisdiction vested in the High Court by the said section can be transferred to another body.

37. It is well settled that an appeal is a creature of statute and can be done away by statute. The question posed here is completely different and the answer to that question is fundamental to our jurisprudence: that a jurisdiction to decide substantial questions of law vests under our constitution, only with the High Courts and the Supreme Court, and cannot be vested in any other body as a core constitutional value would be impaired thereby.

38. In fact, the Attorney General in his written argument at paras 16 and 21(a) has stated before us:

> *"16. It is submitted that the present Act does not take away the power of judicial superintendence of the High Court under Article 227. Direct appeal to the Supreme Court from the decisions of a tribunal of first instance is an acceptable form of*

judicial scrutiny. Provision for direct appeal to Supreme Court from the decision of a tribunal can be purely on questions of law as well. Since the High Court as a rule does not exercise its power of judicial superintendence when an appeal is provided to the Supreme Court, the power of judicial superintendence of the High Court over the tribunal stands curtailed in such cases as well. But this curtailment does not violate the rule of law as a court of law i.e. the Supreme Court continues to be the final interpreter of the law. By the same analogy a decision of an appellate tribunal with unrestricted right of appeal to the Supreme Court will not curtail the power of High Court under 227 as recourse to the High Court under Articles 226/227 would still be available if the tribunal exceeds its jurisdiction or violates the principles of natural justice or commits such other transgressions.

21. (a) The present Act provides ample scope for judicial scrutiny in the form of an Appeal under Section 24 of the Act and also under Articles 226/227, Article 32 and Article 136 of the Constitution."

39. On reading the above argument, it is clear that even according to this argument, the High Court's power of judicial review under Articles 226/227 has in fact been supplanted by the National Tax Tribunal, something which L. Chandrakumar said cannot be done. See Para 93 of **L. Chandra Kumar's** case quoted above. In State of West Bengal v. Committee for Protection of Democratic Rights, 2010 (3) SCC 571, a Constitution Bench of this Court held:

"39. *It is trite that in the constitutional scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. In fact, the importance of separation of powers in our system of governance was recognised in Special Reference No. 1 of*

1964 [AIR 1965 SC 745 : (1965) 1 SCR 413] , even before the basic structure doctrine came to be propounded in the celebrated case of Kesavananda Bharati v. State of Kerala [(1973) 4 SCC 225] , wherein while finding certain basic features of the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Later, similar view was echoed in Indira Nehru Gandhi v. Raj Narain [1975 Supp SCC 1] and in a series of other cases on the point. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a constitutional amendment. (See L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] .) Besides, judicial review is otherwise essential for resolving the disputes regarding the limits of constitutional power and entering the constitutional limitations as an ultimate interpreter of the Constitution."

***"68.** Thus, having examined the rival contentions in the context of the constitutional scheme, we conclude as follows:*

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the

principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review."

40. In **Proprietary Articles Trades Association v. Attorney General for Canada, 1931 AC 311,** Lord Atkin said:

> *"Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment." At Pg 317.*

41. Chandra Kumar and R. Gandhi have allowed tribunalization at the original stage subject to certain safeguards. The boundary has finally been crossed in this case. I would, therefore, hold that the National Tax Tribunals Act is unconstitutional, being the ultimate encroachment on the exclusive domain of the superior Courts of Record in India.

……..J.
(R.F. Nariman)

New Delhi,
September 25, 2014

SUPREME COURT OF INDIA
JUDGMENT

ITEM NO.1A COURT NO.1 SECTION XVIA
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Transfer Case (Civil) No(s). 150/2006

MADRAS BAR ASSOCIATION Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

WITH

C.A. No. 3850/2006

C.A. No. 3862/2006

C.A. No. 3881/2006

C.A. No. 3882/2006

C.A. No. 4051/2006

C.A. No. 4052/2006

T.C.(C) No. 116/2006

T.C.(C) No. 117/2006

T.C.(C) No. 118/2006

W.P.(C) No. 621/2007

W.P.(C) No. 697/2007

Date : 25/09/2014 These matters were called on for Judgment today.

For Petitioner(s) Mr. Mukul Rohatgi, Attorney General's
Mr. Arijit Prasad, Adv.
Mr. B. V. Balaram Das,Adv.

Mr. Nikhil Nayyar,Adv.

Mr. P. Parmeswaran,Adv.

Mr. D. S. Mahra,Adv.

Mr. K. C. Dua,Adv.

Mr. Shibashish Misra,Adv.

Mr. Rustom B. Hathikhanawala,Adv.

Mr. E. C. Vidya Sagar,Adv.

Mr. Pramod Dayal, Adv.

For Respondent(s) Mr. P. Parmeswaran,Adv.

Mr. Ardhendumauli Kumar Prasad,Adv
Mr. Aviral Shukla, Adv.
Mr. Amit A. Pai, Adv.
Ms. Pankhuri Bhardwaj, Adv.
Mr. Nitesh Ranjan, Adv.

M/s. Parekh & Co.

Mr. Pramod Dayal,Adv.

Mr. K.C. Dua, Adv.

Mr. Nikhil Nayyar, Adv.

Mr. Satya Mitra Garg, Adv.

Mr. Rustom B. Hathikhanawala,Adv.

Mr. B. Krishna Prasad, Adv.

Mr. Ajay Pal, Adv.

Mr. Parmanand Gaur, Adv.

Hon'ble Mr. Justice Jagdish Singh Khehar pronounced the Judgment on behalf of Hon'ble the Chief Justice, His Lordship, Hon'ble Mr. Justice J. Chelameswar and Hon'ble Mr. Justice A.K. Sikri.

Hon'ble Mr. Justice Rohinton Fali Nariman pronounced a separate Judgment concurring in the result.

All matters are disposed of in terms of reportable Judgments.

(RAJESH DHAM)
COURT MASTER

(RENU DIWAN)
COURT MASTER

(two signed reportable Judgments are placed on the file)

SUPREME COURT OF INDIA
॥ यतो धर्मस्ततो जयः ॥
JUDGMENT

SUPREME COURT OF INDIA
॥ यतो धर्मस्ततो जयः ॥
JUDGMENT