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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 09TH DAY OF SEPTEMBER 2020 / 18TH BHADRA, 1942

WA.No.1083 OF 2020

AGAINST THE COMMON JUDGMENT OF THE LEARNED SINGLE JUDGE IN WP(C) NO.14341/2020(P) DATED 22.07.2020

APPELLANTS/RESPONDENTS 1 AND 2:

1 SULOCHANA GUPTA, AGED 68 YEARS,
W/O. RADHA BALLABH GUPTA, RESIDING AT HOUSE NO. CCVIII/2109,
GUJARATI ROAD, MATTANCHERRY, KOCHI-682002.

2 MINAKSHI GUPTA, AGED 38 YEARS,
W/O. MAHESH KUMAR GUPTA, RESIDING AT HOUSE NO. CCVIII/2109,
GUJARATI ROAD, MATTANCHERRY, KOCHI-682002.

BY ADVS. SRI.SUMUKAR NAINAN OOMMEN
SMT. SHERRY SAMUEL OOMMEN

RESPONDENTS/PETITIONERS 1 & 2 AND RESPONDENTS 3 & 4:

1 RBG ENTERPRISES PRIVATE LTD.,
HAVING ITS REGISTERED OFFICE AT VI/93 JEW TOWN,
MATTANCHERRY P.O., KOCHI-682002,
REPRESENTED BY ITS DIRECTOR RAJKUMAR GUPTA.

2 RAJKUMAR GUPTA, MANAGING DIRECTOR,
RBG ENTERPRISES PRIVATE LIMITED, VI/93 JEW TOWN,
MATTANCHERRY P.O., KOCHI-682002.

3 VISHNUKANT GUPTA, AGED 48 YEARS,
S/O. RADHA BALLABH GUPTA,
RBG ENTERPRISES PRIVATE LIMITED, RESIDING AT IB,
SUNRISE APARTMENTS, INDIAN CHAMBER ROAD,
MATTANCHERRY, KOCHI-682002.

4 MAHESH KUMAR GUPTA, AGED 43 YEARS,
S/O. RADHA BALLABH GUPTA, DIRECTOR,
RBG TRADING CORPORATION PRIVATE LIMITED,
RESIDING AT HOUSE NO.CCVIII/2109, GUJARATI ROAD,
MATTANCHERRY, KOCHI-682002.

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R1 & R2 BY ADVS. SRI.P.SANJAY
SMT.A.PARVATHI MENON
SRI.BIJU MEENATTOOR
SRI.KIRAN NARAYANAN
SRI.PAUL VARGHESE (PALLATH)
SRI.P.A.MOHAMMED ASLAM
SRI.PRASOON SUNNY
SRI.RAHUL RAJ P.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 09.09.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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“C.R.”

JUDGMENT

Dated this the 9th day of September, 2020

Manikumar, CJ

Instant writ appeal is filed by respondents 1 and 2, against the common judgment passed in W.P.(C) No.14341 of 2020 and other connected cases dated 22.07.2020, by which, a learned single Judge of this Court disposed of the writ petitions, by ordering thus:

> “................It is an admitted fact that the company petitions nine in number were pending before the NCLT. In the impugned order itself, the NCLT refers to the prayers in the company petitions and post the matter for hearing of the I.A. to 7.8.2020. The learned counsel for the petitioners has submitted that the proper course of action is to file an appeal before the NCLAT. It is submitted that such a course of action is presently rendered impossible due to the prevailing pandemic situation in the country and the petitioners are disabled from travelling to Delhi to prefer the appeal in view of the restrictions and the rising number of cases in the country. Though it is contended by the learned counsel appearing for the respondents that the writ petitions are not maintainable without the NCLT on the party array, I am of the opinion that in the facts and circumstances of the instant cases, especially in view of Ext.P6 request for adjournment made by the counsel for the petitioners before the NCLT, the passing of an order interdicting all financial transactions by running companies would create serious prejudice to the company. The technical objection raised that the NCLT is not made a party to these proceedings, according to me, should not stand in the way of the consideration of these writ petitions in the peculiar circumstances prevalent at present.

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In view of the fact that an appeal before the NCLAT is not practically possible, it would be for the petitioners to approach the NCLT seeking appropriate modification of the orders. However, till such time, in view of the present situation prevalent, I am of the opinion that the petitioners should be permitted to carry out the day-to-day financial transactions as are necessary for the conduct of the companies. It is made clear that general body meetings shall not be conducted and withdrawal of amounts from the accounts of the company shall not be made except for the carrying out of the day-today administration. The further financial transaction shall be subject to further orders to be passed either by the NCLT after hearing the parties or by the NCLAT in appeal.

These writ petitions are ordered accordingly."

2. Facts leading to the appeal are that, appellants are the shareholders of RBG Enterprises Pvt. Ltd., Kochi, represented by its Managing Director, respondent No.1, owned by the members of a family consisting of the founder of the group named 'RBG', the husband of the 1st appellant; Radha Ballabh Gupta (HUF), their eldest son, Rajkumar Gupta, respondent No.2 herein, Ritu Gupta, wife of the 2nd respondent, Vishnukant Gupta, their son, and the 3rd respondent herein, Anika Gupta, wife of the 3rd respondent, Mahesh Kumar Gupta (HUF), their youngest son, the 4th respondent herein, and Minakshi Gupta, wife of the 4th respondent, the 2nd appellant herein. The company is a family enterprise and its management vests in the Board of Directors and not in any one individual, including the Managing Director, which is clearly stated in Clause 34 of the Articles of Association.

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3. Appellants have further stated that as per Section 96(1) of the Companies Act, 2013, the company should hold its Annual General Meeting (AGM) every year and not more than 15 months shall elapse between the date of one AGM and of the next. The failure to hold the AGM attracts penalty provided under Section 99 of the Act. Furthermore, the financial statements, including the balance sheet and profit and loss account with the Auditor's report and Director's report, are to be laid before the AGM, as per Section 136 of the Act. In case of default, the company would be liable to pay penalty of INR 25,000/- and every Director of the Company, who was in default, would be liable to pay penalty of INR 5,000/-.

4. Appellants have further stated that the 2nd respondent has not obtained approval from them or the above mentioned majority shareholders on the financial statements for the years 2015-16, 2016-17 and 2017-18, which have been filed by the 2nd respondent before the Registrar of Companies (ROC), Ernakulam and the Income Tax authorities surreptitiously. Appellants apprehended that the 2nd respondent has either forged or has caused to be forged the signatures of the majority shareholders with the intention to suggest that the financial statements have been approved by the shareholders at the Annual General Meeting, in the respective years.

5. Appellants have further contended that the financial statements filed before the Registrar of Companies, Ernakulam, for the years 2015-16, 2016-17 and 2017-18 respectively, would disclose related party transactions, in

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contravention of the provisions of the Companies Act, 2013 and the transactions have not obtained the approval of the board of shareholders of the company. The majority shareholders, including the appellants, therefore, have sought intervention of the National Company Law Tribunal under Sections 96 and 97(1) of the Companies Act, for a direction to the 2nd respondent viz., the Managing Director of RBG Enterprises Pvt. Ltd., to convene the AGM through company petitions viz., 98/KOB/291, 99/KOB/2019, 100/KOB/2019, 101/KOB/2019, 102/KOB/2019, & 103/KOB/2019. As an interim relief, NCLT has passed an order dated 03.10.2019 in C.P. No.99/KOB/2019, to restrain respondents 2 and 3 from resorting to related party transactions in the bank accounts of the company.

6. Appellants have further stated that they have filed C.P No.114/KOB/ 2019 before the National Company Law Tribunal under Sections 130, 241 & 242 of the Companies Act, 2013, for mismanagement and oppression of majority shareholders by the 2nd respondent in the above mentioned company. In the said petition, the appellants have elaborated various instances of mismanagement of the company, including misappropriation of funds, related party transactions and violation of the Act, in respect of holding of the AGM for the years 2015-16 to 2017-18.

7. Appellants have further stated that on 10.10.2019, the 2nd respondent convened a meeting of the Board of Directors, to consider, *inter alia*, holding of the AGM for the year 2018-19 on 30.10.2019. The majority shareholders of

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the company, including the appellants herein, challenged the proposals of the 2nd respondent before the NCLT, among other grounds, for violation of statutory provisions relating to convening of such meetings. The National Company Law Tribunal, vide order dated 25.10.2019 in I.A. No.49/2019 in C.P. No.99/KOB/2019, directed that the decisions taken at the Board Meeting on 10.10.2019 and at the AGM on 31.10.2019 would be subject to its approval. The 3rd respondent has suppressed the said order in W.P.(C) No.14341/2019.

8. Appellants have further stated that the majority shareholders have thereafter, adopted a number of resolutions, including one, to remove the 2nd respondent, as the Managing Director of the company. They have appointed the first appellant as the MD. The appellants have presented the resolutions to the NCLT for its approval in I.A. No.58/2019 in C.P. No.114/KOB/2019 and a transcript of the proceedings at the AGM in their rejoinder, in the same company petition. The National Company Law Tribunal referred the inter-party litigation to Retd. Justice C. N. Ramachandran Nair, for mediation. He submitted a failure report on 2.7.2020. Thereafter, the company petitions stand posted to 07.09.2020 for final hearing.

9. Appellants have further contended that in the meanwhile, the 2nd respondent has convened a meeting of the Board of Directors on 29.06.2020, without issuing notice, as required under the Act. Hence, the appellants approached the NCLT for the reliefs mentioned in I.A. No.83/2020 in C.P. No.114/KOB/2019. After issuing notice to respondents 2 and 3, NCLT heard

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the matter on 09.07.2020, and restrained the 2nd respondent from convening any meetings and further restrained the respondents 2 and 3 from making any financial transactions vide its order dated 09.07.2020. The I.A. stood posted to 07.08.2020, for further hearing.

10. Challenging the above said order of the NCLT in C.P.No.114/ KOB/2019 dated 09.07.2020, W.P.(C) No.14341/2020 has been filed by writ petitioners/respondents 1 and 2 herein, seeking the following reliefs:

(i) Call for the records leading to Exhibit-P7 order dated 9.7.2020 in I.A. No.83/KOB/2020 in C.P. No.114/KOB/2019 passed by the National Company Law Tribunal, Kochi.

(ii) Issue a writ of certiorari or such other writ and quash Exhibit-P7 order dated 9.7.2020 passed by the NCLT, Kochi.

(iii) Direct the Tribunal to pass orders on Exhibit-P6 emails dated 9.7.2020 addressed to the Registrar, NCLT, Kochi, after giving an opportunity to file objections and after hearing the petitioners and other respondents therein;

(iv) Issue such other writ, order or direction that this Court may deem it fit in the facts and circumstances of the case.

(v) Award cost of this petition.

11. A learned single Judge of this Court allowed the writ petition in part, by judgment dated 22.07.2020, as extracted above. Against the impugned judgment, instant writ appeal is filed.

12. On the grounds raised Mr. Sukumar Nainan Oommen, learned counsel for the appellants, submitted that the cause title of the writ petition and the contents therein, indubitably establish the fact that respondents 2 and 3

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have been canvassing a matter, which is in the nature of a civil dispute and is clearly outside the scope of writ jurisdiction under Article 226 of the Constitution of India.

13. He further submitted that the reliefs sought for in the writ petition establish, without any shadow of doubt, the fact that respondents 2 and 3 have been canvassing the matters in a dispute between the shareholders of the company, regulated by the provisions of the Companies Act, 2013 and that, a writ petition under Article 226 of the Constitution of India is not maintainable. On the above aspect, he invited our attention to the array of parties, the prayers made in the Company Petition, and the shareholdings of the parties thereto. Learned counsel for the appellants further submitted that to settle the scores of dispute between shareholders of a company, remedy under Article 226 of the Constitution of India is not a proper remedy. In support of his contention, he placed reliance on a decision in **Shalini Shyam Shetty v. Rajendra Shankar Patil** [(2010) 8 SCC 329].

14. He further submitted that a writ petition under Article 226 of the Constitution of India is maintainable only against the State or an Authority or instrumentality of State, or against a person discharging public duty and, in the case on hand, none of the party respondents, in the writ petition, filed against the interim order of the NCLT in CP No.99/KOB/2019 dated 03.10.2019 would fall in the ambit of Article 12 of the Constitution of India.

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15. Placing reliance on the decision of the Hon'ble Supreme Court in **Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar** (AIR 1963 SC 786), learned counsel for the appellants further submitted that in the Writ Petition (C) No.14341/2020, filed by respondents 1 & 2, NCLT ought to have been impleaded as a necessary party, when there is a challenge to its order. Reference was also made to Rule 148 of the Rules of the Kerala High Court, 1971. But, the learned single Judge declined to consider the dictum in ***Udit Narain Singh Malpaharia's*** case (cited supra) on the ground of “technicality”. According to the learned counsel, the writ court ought to have dismissed the writ petition, at the threshold itself, for the failure to implead National Company Law Tribunal, as a necessary party.

16. Learned counsel for the appellants further submitted that the reliefs sought for by respondents 1 & 2 in the writ petition is on the fallacious plea that NCLAT, Delhi was not conducting any hearing. But, this claim stands demolished by the documents presented by the learned counsel for the appellants, that at the time of hearing the writ petition on 15.07.2020, NCLAT was indeed hearing the appeals, but the writ court has failed to take note of the same. In this context, he produced the proceedings of NCLAT, to controvert the contention of the respondents/writ petitioners in this appeal.

17. Learned counsel for the appellants further submitted that before the writ court, 2nd respondent has filed a petition to receive documents. Along with the petition, he has attached the memorandum of appeal, preferred under

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Section 421 of the Companies Act, 2013, to the NCLT, presented on or around 15.07.2020 i.e., on the same date of hearing of the writ petition, wherein he had consciously and knowingly made the following affirmation in the memorandum of appeal. In para 10 of the appeal, he has affirmed thus:

> “The appellant further declares that the appellant had not previously filed any writ petition or suit regarding the matter in respect of which this appeal is preferred before any court or any other authority nor any such writ petition or suit is pending before any of them.”

18. Knowing fully well that an appeal has been filed before the NCLAT, and is pending, on the date of hearing of the writ petition, i.e. on 15.07.2020, the respondents/writ petitioners have simultaneously pursued parallel remedies, challenging the very same interim order in CP No.99/KOB/2019 dated 03.10.2019, i.e.., one under Section 421 of the Companies Act, 2013, and another with under Article 226 of the Constitution of India, and that the same is not permissible in the light of the decision in **New Saravana Stores Bramandamai v. The Assistant Commissioner (CT)** [W.A. Nos. 1360 to 1362 of 2017 and CMP Nos. 18806 to 18808 of 2017 dated 03.11.2017 of High Court of Madras].

19. Placing reliance on the decision of the Hon'ble Supreme Court in **T.C. Basappa v. T. Nagappa**, [AIR 1954 SC 440] and **Radhey Shyam and Ors. v. Chhabi Nath and Ors.** [(2015) 5 SCC 423], learned counsel for the appellants further submitted that a challenge to an order of the National Company Law Tribunal does not fall under the scope of Article 226 of the

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Constitution of India. Such an order can be challenged only under Article 227 of the Constitution.

20. Mr. Sukumar Nainan Oommen, learned counsel for the appellants, further submitted that writ court ought to have taken cognizance of the fact that an efficacious remedy, to challenge the interim order of the NCLT, is provided under Rule 49(2) of the NCLT Rules, 2016, or in the alternative, according to the writ petitioners/respondents 1 & 2, under Section 421 of the Companies Act, 2013. The 2nd respondent, in "Ground J" of the writ petition, has admitted that a remedy under Section 421 of the Companies Act, 2013 is available.

21. On the aspect of alternate remedy and that a writ petition under Article 226 of the Constitution of India is not maintainable, learned counsel for the appellants relied on the decisions in **ICICI Bank Ltd. and others v. Umakanta Mohapatra and others** [(2019) 13 SCC 497] and **Union Bank of India and Ors. v. K.B. Baby Saroja** (WA No. 275 of 2020 dated 14.02.2020).

22. Learned counsel for the appellants further submitted that before the writ court, the 2nd respondent has placed reliance on a judgment dated 21.12.2017 of a learned single Bench of this Court in W.P.(C) No.41662/2017 (Exhibit-P8). According to the learned counsel for the appellants, the said judgment is opposed to the doctrine of binding precedents/stare decisis, especially in the light of the judgment dated 23.10.2017 passed by a Hon'ble Division Bench of this Court in **Alexander Correya and Others v. Dominic Savio & Others** [2017 (4) KLJ 650].

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23. It is the submission of the learned counsel for the appellants that the Hon'ble Division Bench in the above decision, has unambiguously concluded that a writ petition would not lie against an interim order of the NCLT, which has also been followed by a Coordinate Bench of this Court in O.P(C) No.733 of 2020. According to the learned counsel, in terms of **Raman Gopi and another v. Kunju Raman Uthaman** [2011 (4) KLT 458 (FB)] and **Ehvees v. The District Collector, Malappuram and Others** (W.A. No. 706 of 2020 dated 08.06.2020 - Kerala High Court), the decision of the Hon'ble Division Bench is binding on the judgment of the learned single Judge.

24. Learned counsel for the appellants further contended that 2nd respondent filed the writ petition and obtained a favourable order by suppressing the crucial documents viz., Annexures-A1 and A2 orders of the NCLT dated 3.10.2019 and 25.10.2019, which form part of the company petition CP/114/KOB/2019 on the files of the NCLT, Kochi Bench.

25. Learned counsel for the appellants further submitted the learned single Judge ought to have taken cognizance of the fact that a fraud has been committed by respondents 2 and 3, which constitutes offences under Sections 447 and 448 of the Companies Act, 2013. He further submitted that the order made in I.A. No.49/2019 in C.P. No.99/KOB/2019 dated 25.10.2019 and I.A.No.58/2019 in C.P. No.114/KOB/2019 have been suppressed in the writ petition. He also submitted that the writ petition is a sheer abuse of judicial process, forum shopping, suppression of material facts, presented with

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unclean hands, and, therefore, the writ petition ought to have been dismissed with exemplary costs.

26. Inviting our attention to paragraph No.13 of the Statement of facts and Ground (J) raised therein, learned counsel for the appellants submitted that the contention of the respondents/writ petitioners that the only remedy available to the writ petitioners is to file a writ petition, is an incorrect statement, when Rule 49(2) of the NCLT Rules, 2016 provides for an alternate remedy by moving NCLT, Kochi. He further submitted that when W.P(C). No.14341 of 2020 came up for admission on 15.07.2020, it was adjourned to 17.07.2020 and thereafter to 22.07.2020 for orders. Writ court ought to have granted time to the appellants for filing counter affidavit. Referring to the materials to be furnished to the appellants, he submitted that the entire papers, filed in the writ petition, were not served by the respondents/writ petitioners and, therefore, counter affidavit could not be filed. He also submitted that the writ court failed to consider as to whether, denial of furnishing the entire papers, has deprived the right of the appellants to file a counter affidavit.

27. Attention of this Court was also invited to contend that on 15.07.2020, when the matter was heard, materials were produced by the appellants before the writ court to substantiate that on 15.07.2020, the respondents had already filed an appeal before the NCLAT, and that, the same was pending. Cause list on 16.07.2020, on the file of the NCLAT, was also produced before the writ court, to substantiate the contention that on

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16.07.2020, a case from the State of Kerala, was also listed before NCLAT and that the contention to the contrary, by the respondents/writ petitioners, was factually incorrect.

28. *Per contra*, to sustain the impugned judgment dated 22.07.2020 in W.P.(C) No.14341/2020, Mr. P. Sanjay, learned counsel for the respondents/ writ petitioners submitted that, orders of the NCLT in I.A. No.83/KOB/2020 in CP/114/KOB/2019 dated 09.07.2020, has completely paralyzed the three companies of the writ petitioners. Running business of the companies was stopped and export commitments were at stake. On coming to know of this catastrophe, writ petitioners have rushed to meet the learned counsel and to somehow keep the order in abeyance immediately, because the next two days were holidays.

29. Enquiries with NCLT revealed that it would be difficult to file applications and get the same posted urgently before the Bench. Initial enquiries made by the writ petitioners/respondents 1 & 2 revealed that NCLAT, New Delhi, was not functioning at all. Even immediate filing of appeal was not possible, because there was no e-filing procedure before the NCLAT. This is the reason, as to why the subject writ petition and other connected cases were filed in a tearing hurry on 10.07.2020 before this Court under Article 226 of the Constitution of India. There were voluminous records and that only the writ petition under Article 226 of the Constitution of India is the only remedy. But, even the same did not get listed on the next working day, i.e. 13.07.2020, due

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to certain defects noted by the registry. After curing the defects, the writ petition was listed on 15.07.2020, along with the W.P.(C) Nos. 14369 & 14380 of 2020.

30. On 15.07.2020, learned counsel for the appellants appeared before the learned single Judge and made a mention, even before the calling of the cases, and submitted that a caveat had been filed, but they were not served with copies. Learned single Judge reminded the learned counsel that there is no provision for a caveat in writ petitions, but said that he would be heard at the time of hearing the writ petitioners.

31. When the case was called, appellants opposed the grant of any interim order and sought for time to file counter, whereas writ petitioners pressed for an interim order. Learned Single Judge did not grant interim order, as sought for, but posted all the three cases together on 17.07.2020 for counter affidavits, if any. Writ petitioners were also told by the learned Single Judge that the writ petitions will not be considered, if appeals are not filed before the NCLAT. Accordingly, the writ petitioners filed appeals to NCLAT with respect to all three companies and sent them by email, hoping that the matter will be entertained in view of the Hon'ble Supreme Court's order. When the matter came up on 17.07.2020, the appellants did not file counter, but instead, filed copies of certain judgments as regards maintainability, to oppose the writ petitions. In abundant caution, writ petitioners also filed hard copies of the appeals, after serving copies on the appellants. The requisite fees were

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also paid by way of demand drafts enclosed therein. The appeals along with a covering letter and email to prove that the appeals were filed, were produced along with I.A. No.1/2020 in the writ petition.

32. All the cases were heard and after writ petitioners' arguments, the learned counsel for the appellants argued in detail, opposing the grant of any interim order. The only objection raised by the appellants was that the writ petitions are not maintainable without the NCLT being on the party array, and the decision reported in ***Udit Narain Singh Malpaharia's*** *case* (cited supra) was produced, in support of the said argument. It was also argued that the Hon'ble Apex Court held that when there is an efficacious alternate remedy of appeal before NCLAT, writ petition would not be maintainable. It is contended that the 2nd respondent has been removed from the post of Managing Director on 31.10.2019 and that he could not, therefore, continue. It was further contended by the appellants before the writ court that though the decisions in the so-called meeting on 31.10.2019 were produced before the NCLT along with I.A. No.58/2019, for its approval, there were no orders on the same, and the said fact was conveniently suppressed by the writ petitioners/respondents 1 & 2 in this appeal. The appellants further contended that the appeal preferred before the NCLAT by the writ petitioners/respondents contains an undertaking that no challenge has been made to the order under appeal, which is a false statement. Appellants have also stated that the case stands posted to 07.08.2020 before NCLT, on which date, writ petitioners would be

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free to raise all contentions against the orders passed. All the contentions raised by the appellants are noted in paragraph 5 of the impugned judgment by the learned Single Judge.

33. Respondents/writ petitioners have not suppressed any material facts before the writ court. Immediately, after the hearing, learned counsel for the appellants submitted that he had received missed calls from Delhi. Respondents' colleague also called, to state that officials of the NCLAT registry had called the learned counsel too. Because of the video conferencing and sensing the urgency, she had sent text messages copying the number from which she received the call, as evident from Annexure R1(k). Writ petitioners' counsel immediately called back and found that it was indeed an official from NCLAT registry. The said official confirmed that the appeals are received, but said that they will not be listed for hearing. The official further said that as per NCLAT Rules, the registry cannot receive appeals by emails or through post. The same will have to be delivered directly to the registry, either by the learned counsel or clerk. Request of the respondents' counsel before the NCLAT's registry, citing the Covid-19 situation, was in vain. By this time, the lunch recess was almost over and, therefore, respondents' counsel thought it appropriate to bring it to the notice of the learned single Judge, by making a mentioning, after intimating the other side. It was under the above circumstances, after hearing the learned counsel for both sides, learned single Judge passed the impugned judgment.

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34. Learned counsel for the respondents/writ petitioners submitted that learned single Judge has not set aside the order of the NCLT, Kochi, in I.A. No.83/KOB/2020 in C.P.No.114/KOB/2019 dated 09.07.2020 and all that is done is to make a temporary arrangement, to ensure that the functioning of the companies are not affected till 07.08.2020. No prejudice has been caused to the appellants, in any manner, due to the impugned judgment. It is contended that the writ petitioners have already filed objections to I.A. No.83/2020 in C.P. No.114/KOB/2009, as evident from Annexure-R1(m).

35. Learned counsel for the respondents/writ petitioners further contended that on 07.08.2020, both appellants and the 3rd respondent, through their respective learned counsel, were ready for hearing in I.A. No.83/2020. Despite waiting from morning, the link for video conferencing was not received by email from the NCLT. When contacted over phone, NCLT registry informed that an email has been received from the appellants' counsel seeking adjournment and, therefore, the matter will not be called in VC. This information seemed strange because earlier on 09-07-2020, when requests for adjournment were made by the learned counsel for the respondents, the appellants were alone heard in the VC. Neither the appellants and the 3rd respondent nor their respective learned counsel/representatives had received the email link. But, it can be seen from Exhibit-P7 that the appellants' counsel alone has been heard on that day.

36. It was later understood that the appellants' counsel alone appeared

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during video conferencing on 09.07.2020, which is evident from Exhibit-P7 order dated 9.7.2020 in I.A. No.83/KOB/2020 in C.P. No.114/2019, and the Tribunal considered the interim application and posted the case on 07-08-2020 for the counter of the respondents therein. It was also observed that the main prayer and the interim prayer are the same. I.A. No.83/2020 filed by the appellants did not have any new facts or reasons for grant of any order in the application. In fact, there is no prayer for not holding meetings or stopping financial transactions. However, without considering any of these aspects, in I.A. No.83/KOB/2020 in C.P.No.114/2019 dated 9.7.2020, a direction has been issued not to conduct any board meetings and also curtailing further financial transactions. Even before receipt of the order in I.A. from the NCLT, appellants have addressed emails to all the banks of the three companies, to immediately stop the financial operations, on the basis of the order. However, no bona fide shareholder would have done so because such an act hinders the functioning of the company. This brought the functioning of the company to a grinding halt and petitioners were completely helpless.

37. Learned counsel for the writ petitioners/respondents further contended that since the NCLT has not extended the interim order dated 09.07.2020, the above appeal has already become infructuous. IA No.83/ KOB/2020 and the objection filed to the same will have to be heard in detail and orders passed on the same. Hence, it is only just and fair that the matter is heard, on the next posting date. Respondents 1 & 2 had approached the writ

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court only to save themselves when the entire business had come to a standstill due to the sudden passing of the order dated 9.7.2020 in I.A. No.83/KOB/2020 in C.P.No.114/KOB/2020.

38. On the merits of the case, learned counsel for the respondents further contended that after the AGM held on 31.10.2019, at the behest of the 4th respondent, who is sailing with the appellants, a claim was made that they have conducted an AGM and unilaterally had taken a decision to remove the 2nd writ petitioner from the post of Managing Director. Styling this, as a resolution, I.A. No.58/2019 was filed seeking approval of the NCLT. However, no such approval has been granted by the NCLT and Exhibit-R1(i) is already filed and it is for the NCLT to take a final decision in the matter.

39. Despite a clear division of the family into two groups, each of the groups carried on the management of the companies that were being under their control. While so, in the year 2016, at the instance of friends and relatives, both groups were brought to the table and after prolonged discussions and deliberations, for months together, a Memorandum of Understanding (MoU) dated 15-09-2016 was signed between all, as evident from Annexure R1(a). In the said MoU, the role of the 2nd respondent, in establishing the companies, was duly recognised and he was given 2% extra share. There is also a clause that gives preference to the person and management of the company while partitioning the businesses.

40. Learned counsel for the respondents/writ petitioners further stated

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that the companies under the control of the 2nd respondent flourished making profits by leaps and bounds, while those under the control of Mahesh Kumar Gupta, initially did well, but later did not do well. He, therefore, became instrumental in not having the MoU implemented. Since any further delay would have resulted in limitation, the 2nd petitioner approached the Hon'ble Munsiff's Court, Kochi, by way of O.S. No. 310/2019, and an injunction order was passed in I.A. No.2023/2019 dated 08.08.2019. Finding that his game plan will not work, Mahesh Kumar Gupta started filing cases after cases, through the father, mother and his wife, with the aim of ousting his elder brothers. The parents are mere puppets in his hands. All the cases are listed for final hearing on 07.09.2020. The following are the list of cases filed:-

Sl. No.	Case No.	Name of Company	Next Posting date
1.	CP No.98/2019	RBG Enterprises (P) Ltd.	7-09-2020
2.	CP No.99/2019	RBG Enterprises (P) Ltd.	7-09-2020
3.	CP No.100/2019	RBG Enterprises (P) Ltd.	7-09-2020
4.	CP No.101/2019	RBG Enterprises (P) Ltd.	7-09-2020
5.	CP No.102/2019	RBG Enterprises (P) Ltd.	7-09-2020
6.	CP No.103/2019	RBG Enterprises (P) Ltd.	7-09-2020
7.	CP No.114/2019	RBG Enterprises (P) Ltd.	7-09-2020
8.	CP No.119/2019	RBG Trading Corporation (P) Ltd.	7-09-2020
9.	CP No.125/2019	RBG Enterprises (P) Ltd.	7-09-2020

41. The first 6 cases were filed alleging that AGM for the years 2015-16, 2016-17 & 2017-18 have not been held and for a direction to the Managing Director to convene the AGM. In the said cases an ex parte order was passed restraining related party transactions. True copy of the interim order dated 03-10-2019 in CP No.99/KOB/2019 is produced herewith and marked as

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Annexure-R1(d). Wild and baseless allegations are made against the 2nd petitioner to somehow oust him from the post of Managing Director. Petitioners and other respondents have filed objections explaining that the said allegations are not true and cannot be treated as 'related party transactions'. The objections were filed as early as December 2019.

42. Not satisfied with the order, the appellants and the 4th respondent filed three more cases viz., C.P.Nos.114/2019, 119/2019 and 125/2019, for reconstituting the Board of Directors, by the shareholders, in a meeting to be convened and for refund of amounts alleged to be 'related party transactions'. The NCLT posted the above cases along with the one filed earlier. Further dissatisfied, interim applications were filed one after the other to somehow dislodge the 2nd petitioner from his post and to hamper the functioning of the company. The allegation in all six cases was that AGM has not been convened and for a direction to convene AGM, IA No.49/2019 in C.P. No.99/2019 [Annexure-R1(e)] was filed for staying the notice dated 17-10-2019, for convening the AGM. NCLT did not grant the relief sought for and found that no new evidence is produced by the petitioner therein, but made the decisions subject to further orders, as evident from Annexure R1(f) order dated 25.10.2019 in IA No.49/2019 in C.P. 99/2019. Petitioners have filed Annexure R1(g) objection to the said application and the matter is pending. No further orders are passed in IA No.49/2019. Thereafter I.A. No.58/2019 was filed seeking approval of the resolutions alleged to have been passed by the

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petitioners in a meeting after the AGM was conducted, as evident from Annexure R1(h). Petitioners have filed objections to IA No.58/2019 and opposed the same. However, the NCLT has not passed any orders giving approval to the so called decisions that are produced in IA. No.58/2020.

43. Learned counsel for the respondents further contended that AGM for every year has been conducted and records were produced before the Registrar of Companies. The company has completed all statutory compliance and there is no default, as alleged. The averment that the company is being run at the whims and fancies of the 2nd respondent, in collusion with the 3rd respondent, and in exclusion of the 4th respondent, is incorrect. All the matters are to be decided by NCLT, where the claim petitions and objections are pending. It is true that appellants have filed CP/114/KOB/2019 alleging acts of oppression. But, the various instances of alleged mismanagement and misappropriation of funds, related party transactions and violations, are not correct. All transactions of the company are legally valid and can be examined by the NCLT. A meeting of the Board of Directors was convened on 10.10.2019, to consider, *inter alia*, holding of AGM for the year 2018-2019 on 31.10.2019, and appellants have challenged the same by filing I.A. No.49 of 2019. The NCLT has passed an order stating that the decisions would be subject to its approval. The said order was not considered relevant and was, therefore, not produced.

44. Respondents have further stated that upon finding that the above

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cases are actually a family dispute, NCLT sent the same for mediation, hoping that the disputes can be settled once for all between the family members. Hon'ble Mr. Justice C. N. Ramachandran Nair was appointed as Mediator and mediation continued till the end of June. It is understood that failure report was submitted on 02.07.2020. Thus, all the above cases came up before the NCLT on 06.07.2020 and they were adjourned and posted to 07.09.2020, since regular sitting was not there and it was found that the matter required a detailed consideration.

45. First appellant, then filed I.A. No.83/2020, seeking to oust the 2nd petitioner from the post of Managing Director, to appointment Advocate Commissioner, and to change the signatories authorised to operate the bank accounts of the company. Since all the company petitions were already posted on 07.09.2020, counsel for petitioners and the 3rd respondent made separate requests for adjournments. It may be pointed out that, by that time, regular sittings were substituted by video conferencing, due to Covid-19 situation. Unlike the video conferencing system before this Court, where the link is published in the website for all to sign in, in the NCLT, it is understood that the link is sent by email to the respective counsel. Learned counsel for the respondents/writ petitioners and the 3rd respondent did not receive any link and hence, it was presumed that the matter was adjourned.

46. Learned counsel for the respondents further contended that the writ petition under Article 226 of the Constitution of India, was filed, in view of

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Exhibit-P8 judgment of this Court. Even if there existed an alternate remedy, it could not have been exercised during Covid period. But, mere availability of another alternate remedy does not mean that the writ petition has to be dismissed. It is true that by mistake, NCLT was not arrayed as a party in the writ petition, but certainly it is not a fatal mistake and NCLT could be impleaded at a later stage.

47. In support of the above contentions, respondents 1 & 2 relied on the decisions in **M.S. Kazhi v. Muslim Education Society** [(2016) 9 SCC 263]; **Rashid Ahmed v. Municipal Board, Kairana** [(1950) SCR 566]; **State of Uttar Pradesh v. Mahammed Nooh** (1958 SCR 595, 605); **Motilal, S/o. Khamdeo Rokade & Ors. v. Balkrushna Baliram Lokhande** (2020 AIR Bom. 39); and **Ramesh Ahluwalia v. State of Punjab** [(2012 SCC 331].

48. Issues raised for consideration in this appeal are:-

1. On the facts and circumstances of the case, when an order of the NCLT is challenged, writ petition has to be filed under Article 226 or 227 of the Constitution of India.
2. Whether a writ petition filed under Article 226 of the Constitution of India is maintainable, when an alternate remedy is available.
3. Whether a writ petition is maintainable under Article 226 of the Constitution, when a party pursues multiple remedies.
4. Whether a writ petition is maintainable under Article 226 of the Constitution, in a dispute between private parties.
5. Whether a relief available under Article 226 of the Constitution, when the respondents/writ petitioners are guilty of suppression of crucial material.
6. Whether NCLT should be made a party, in a petition filed under Articles 226 or 227 of the Constitution, as the case may be.
7. Whether the judgment in W.P.(C) No.14341/2020 dated 22.07.2020 can be treated as a binding precedent, so as to enable the

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respondents to file a writ petition under Article 226 of the Constitution of India.

8. Whether the appellants have been given adequate opportunity to file a counter affidavit before the writ court.

9. Whether the writ appeal has become infructuous.

49. Heard learned counsel for the respective parties and perused the materials available on record.

50. Though rival contentions have been made on the merits of the disputes, in the company petition, we are not inclined to delve into the same, and deem it fit to address issues stated above.

51. Admittedly, challenging the interim order of the NCLT, Kochi in I.A. No.83/2020 in C.P. No.114/KOB/2019 dated 09.07.2020, writ petition has been filed under Article 226 of the Constitution of India for the reliefs, stated above

52. Let us have a cursory look at the provisions of the Companies Act, 2013 and the NCLT Rules, 2016.

53. Section 421 of the Companies Act, 2013, reads thus:

> "**421. Appeal from orders of Tribunal**.- (1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.
>
> (2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.
>
> (3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:
>
> Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

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(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal."

54. Rule 49(2) of the NCLT Rules, 2016 reads thus:

"**49. Ex-parte Hearing and disposal**.- (1) Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application ex-parte.

(2) Where a petition or an application has been heard ex-parte against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the ex-parte hearing as against him or them upon such terms as it thinks fit. Provided that where the ex-parte hearing of the petition or application is of such nature that it cannot be set aside as against one respondent only, it may be set aside as against all or any of the other respondents also."

55. Order dated 25.10.2019 in I.A. No.49/2019 in C.P.No. 99/KOB/2019, wherein directions have been issued that the decisions taken at the board meeting on 10.10.2019 and at the Annual General Meeting on 31.10.2019 would be subject to its approval, is stated to have been suppressed in the writ petition. The said order reads thus:

"THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
IA NO.49
IN
CP No.99/KOB/2019
(under sections 96 and 97(1) of the Companies Act 2013)

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Interim Order delivered on 25th October 2019

Coram

1. Hon'ble Shri Ashok Kumar Borah, Member (Judicial)

2. Sri. Hon'ble Shri Vedera Bhrahma Rao Arekapudi, Member (Technical)

In the matter of

Sulochana Gupta : Petitioner

Vs.

RBG Enterprises Pvt. Ltd & 3 others : Respondents

Parties/Counsel present

Counsel for the petitioners	:	Shri Sukumar Oommen & Shri Sherry Oommen, Advocates
Counsel for the respondents	:	Shri P.P.Zibi Jose, PCS Shri P. Sanjay, Advocate

1. Learned Counsel for the petitioner as well as the respondents are present.

2. The petitioner filed this IA 49/KOB/2019 in the Company Petition No. CP/99/KOB/2019 seeking the following interim reliefs:

i. Stay the notice dated 17.10.2019 shown in Annexure A12;

ii. Direct the 2nd Respondent to convene a meeting, the AGM on a date and time to be determined by this Tribunal,

iii. Appoint an Advocate Commissioner to preside over the said AGM;

iv. That the AGM shall consider the following subject matters:

i. Consideration of financial statements for the years 2015-16, 2016-17 and 2017-18 and matters connected therewith:

ii. Consideration of related party transactions mentioned in the financial statements for the years 2015-16, 2016-17 and 2017-18.

iii. Appointment of Rajkumar Gupta as Managing Director and the terms of the appointment;

iv. Appointment of Ritu Gupta as Whole Time Director;

v. Appointment of P.P.Zibi Jose, Practicing Company Secretary and the terms of the appointment;

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vi. Appointment of Statutory Auditors of the company;

vii. Appointment of Signatories in the operation of bank accounts of the company; and

viii. Declaration of dividend.

iv. Direct that the resolutions to be adopted at the said AGM shall be by voting by secret ballot and not by show of hands.

v. That the Advocate Commissioner shall submit his report to this Tribunal within 48 hours of the AGM.

3. On perusal of the records, we observed that the petitioner, Smt. Sulochana Gupta filed the above main Company Petition under section 96 and 97(1) of the Companies Act for issue of direction to the respondents to hold the Annual General Meeting of the Respondent No.1 Company.

4. We have gone through the notice of the AGM (Annexure A-12) filed along with the IA and noted the Agenda mentioned therein as under:

1. To consider and adopt the Audited Financial Statements for the Financial year ended March 31, 2019 together with the Report of the Directors and the Auditors thereon.

2. To re-appoint auditors who retires after completion of five-year term and, being eligible, offer themselves for re-appointment as Statutory Auditors of the Company and in this connection, to pass, with or without modification(s), the following resolution as an ordinary resolution:

“RESOLVED THAT pursuant to the provisions of Section 139, 142 and other applicable provisions, if any, of the Companies Act, 2013, (the Act) and the Companies (Audit and Auditors) Rules, 2014 (including statutory modifications(s) or re. enactment thereof, for the time being in force), Mk, Venugopal Kammath & Co (Firm Regn.No.004674S), Chartered Accounts, Kochi, be and is hereby re-appointed as Statutory Auditors of the Company for a period of Five years (2019-20 to 2023-24) from the conclusion of this meeting to hold office till the conclusion of the 190 Annual General Meeting on such remuneration as may be fixed by the Managing Director or Chair an in consultation with the Auditors from time to time."

5, On perusal of the above notice, facts and circumstances and after hearing the learned counsel for both the parties, we observed that interim orders were passed by this Tribunal in related cases against the same respondents. The petitioners of this IA have not provided any now

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evidence or shown a valid reason to modify our stand. We are therefore of the view that no interim order is required in this IA as sought for by the learned counsel for the petitioner at this stage. However, the decision taken in the Board meeting dated 10.10.2019 as well as the resolutions to be passed in the AGM to be held on 31.10.2019 will be subject to the final orders of this Tribunal.

6. Respondents are therefore directed to file their counter and petitioners may also file their rejoinder, if any before the next date of hearing.
7. List the matter for further hearing on 26.11.2019

Dated this the 25th day of October 2019.

Sd/- Sd/-
Veera Brahma Rao Arekapudi Ashok Kumar Borah
Member (Judicial) "

56. It is further contended that before the writ court, the respondents/writ petitioners have suppressed I.A. No.58/2019 in C.P. No.114/KOB/2019 dated 07.11.2019, filed before the NCLT, Kochi Bench. In the said application, appellant No.1 has sought for the following reliefs:

I. Issue a direction to the Company that the Resolution passed by the majority shareholders, at the AGM held at 4:00 pm on 31.10.2019, at the registered office of the Company, appointing Mr. Radha Ballabh Gupta as Chairman of the AGM, in accordance with Section 104 of the Companies Act, 2013 is in order and, therefore, deserving to be confirmed.

II. Issue a direction to the Company that the Resolution passed by the majority shareholders at the AGM held at 4:00 pm on 31.10.2019, at the registered office of the Company, appointing Mr. Radha Ballabh Gupta as Director of the Company for a period of five years from 31.10.2019 to 30.10 2024, in accordance with Section 152 of the Companies Act, 2013, is in order is in order and, therefore, deserving to be confirmed.

III. Issue a direction to the Company that the Resolution passed by the majority shareholders at the AGM held at 4:00 pm on 31.10.2019 at the registered office of the Company, appointing Mrs. Sulochane Gupta (DIN: 02233110) as

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Managing Director of the Company for a period of five years from 31.10.2019 to 30.10 2024, in accordance with Section 196 of the Companies Act, 2013, is in order and therefore deserving to be confirmed.

IV. Issue a direction to the Company that the Resolution passed by the majority shareholders at the AGM held at 4:00 pm on 31.10.2019 at the registered office of the Company staying the decision of the Board of Directors of the Company taken on 26.061019 enhancing the annual remuneration of Mr.Rajkurnar Gupta from INR 12,00,000/- (twelve lakhs) to INR 60,00,000/- (sixty lakhs) is in order and, therefore, deserving to be confirmed.

V. Issue a direction to the Company that the Resolution passed by the majority shareholders at the AGM held at 4:00 pm on 31.10.2019 at the registered office of the Company authorising Mr. K. O. Kuriachan, Practicing Company Secretary, to sign and file necessary form with the Registrar of Companies, Kerala, and to do all such acts, deeds and things, as may be necessary, to give effect to the Resolutions adopted at the said is in order and, therefore, deserving to be confirmed.

VI. Issue a direction to the Company that the Resolution passed by the majority shareholders at the AGM held at 4:00 pm on 31.10:2019 at the registered office of the Company, in accordance with Section 123 of the Companies Act, to issue dividend of INR 300 (three hundred) per share, post adoption of accounts, out of the free reserves of the Company and out of profits of the financial year ended on 31.03.2019, which is to be paid for the current financial year 2019-20, to the shareholders whose names appear on the register of members as on the date of Book Closing in proportion to the paid up value of the equity shares, is in order and therefore deserving to be confirmed.

VII. Issue a direction to the Company that the Resolution passed by the majority shareholders at the AGM held at 4:00 pm on 31.10.2019 at the registered office of the Company,to open a new Current Account with Indusind Bank in the name and style, RBG Enterprises Private Limited, Dividend Account, is in order and therefore deserving to be confirmed.

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VIII. Issue a direction to the Company to re-convene the AGM of the Company on a date to be specified by this Hontle Tribunal, under the supervision of an Advocate Commissioner appointed by this Hon'ble Tribunal to consider the following:

a. The financial statements for the years 2015-16, 2016-17, 2017-18 and 2018-2019, and, matters connected therewith;

b. Related party transactions mentioned in the financial statements for the years 2015-16, 2016-17, 2017-18 & 2018-2019;

c. Appointment of Statutory Auditors of the Company;

d. Appointment of Signatories in the operation of bank accounts of the Company; and further;

e. Direct that the Resolutions to be adopted at the said AGM shall be by voting by secret ballot and not by show of hands;

f. Direct that the Advocate Commissioner shall submit his report to this Hon'ble Tribunal within 48 hours of the AGM.

IX. Issue a direction to the Company to inform the Registrar of Companies, all statutory authorities, income tax department and such persons as may be required, of the directions issued by this Hon'ble Tribunal in this behalf within a period of seven days of receipt of the Orders of this Hon'ble Tribunal."

57. Email communication dated 03.12.2019 sent by Mahesh Kumar Gupta, requesting to refrain from the conduct of the meeting appended along with Exhibit-P5 I.A. No.83/2020, an application for appointing an advocate commission, before the NCLT, Kochi reads thus:

"From:
Mahesh Kumar Gupta
VI83, Jew Town, Kochi -682002
Mr. Rajkumar Gupta.

To:
Mr. Rajkumar Gupta,
RBG Enterprises Private Limited,

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Door No VI/93, Jew Town, Mattancherry P.O.
Kochi - 682002.

Date: 03.12.2019

Dear Rajkumar,

Sub: Meeting of Board of Directors lo be held at 11 am on 04.12.2019.
Ref: Your letter dated 25.11.2019.

I refer to your Notice dated 25.11.2019 on the above subject. I urge you to take notice of the following:

1. The shareholders of the Company, namely Radha Ballabh Gupta, Radha Ballabh Gupta (HUF), Sulochana Gupta, Mahesh Kumar Gupta (HUF), Minakshi Gupta and I hold 51.68% of the equity of the Company. We have challenged your right to occupy the position ol Managing Director of the Company in Company Petition No. 114/KOB/2019 since you stand disqualified under Sec. 203 of the Companies Act 2013. The matter is under scrutiny of the Hon'ble NCLT Kochi Bench. You have been directed by the Hon'ble Tribunal to file your reply before 25.11.2019. You will admit that you have not complied with the direction of the Hon'ble NCLT.

2. The above-named shareholders, who constitute majority shareholders of the Company have appointed Mrs. Sulochana Gupta as the Managing Director of the Company al tho AGM held at 4 pm on 31.10.2019 In the registered office of the Company. In our opinion, you do not have the legal authority to convene a meeting of the Board of Directors of the Company for the above reasons.

Meeting of Board of Directors to be held at 11 am on 04.12.2019.

3. The agenda for the proposed Board Meeting includes review of the status of the cases before the Hon'ble NCLT, in our opinion, it would not be appropriate for the Board to discuss the matter which is under the scrutiny of the Hon'ble NCLT.

4. You have stated in the said Notice that the agenda for the proposed Board Meeting includes confirmation of the Minutes of the Meeting of the Board of Directors held on 10.10.2019. You are aware that the Hon'ble NCLT has directed In Its Order dated 25.10.2019 in connected case C.P/114/JOB/2019 that the decision taken in the Board Meeting dated 10.10.2019 as well as the resolutions to be passed during the AGM held on 31.10.2019 will be subject to the final orders of this Tribunal".

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I am, therefore, of the view that It will not be appropriate to discuss the decisions taken on 10.10.2019, when the matter Is under the scrutiny of the Hon'ble NCLT.

I am of the firm opinion that the said Notice is illegal and should be withdrawn immediately.

Yours Sincerely,
With Warm Regards

Mahesh Kumar Gupta”

58. Exhibit-P4 is the daily orders of the NCLT, Kochi dated 6.7.2020 and the same is extracted hereunder:

“NCLT, KOCHI

Daily Orders - Draft

In the Bench of: Shri Ashok Kumar Borah, member (Judicial)

Date: 6th July 2020

1. **CP/98/KOB/19**

XX XXX XXXXX

2. **CP/99/KOB/2019**

Learned counsel for the petitioners submitted an email to hear the matter through VC. Learned counsel for R1 to R3 submitted an email seeking adjournment stating that since all connected cases and parties being the same and inter-related they are to be heard together and due to the complexities involved it is not advisable to be heard the cases through VC and requested to hear the cases in the court whenever regular sitting starts. It is seen from records that Shri Justice (Retd) Ramachandran Nair, who has been appointed by this Tribunal as Mediator vide order dated 13.3.2020 to mediate between the leading family members regarding partition of family assets and businesses and explore the possibility of settlement in the matter s led a report stating that he had held several rounds of discussions with the parties and their advocates Jointly, severally and individually on several days However, as of now, no settlement could be arrived at. He has further stated that aice

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mediation should not delay the proceedings before the Tribunal, the Tribunal y proceed in the matter, He has also stated that the parties are free to approach him for mediation again if they so desire."

59. Exhibit-P6 is the letters dated 9.7.2020 sent by the learned counsel for the respondents 1 & 2 to the Deputy Registrar, NCLT, Kochi and the same is extracted hereunder:

"09-07-2020

The Deputy Manager,
National Company Law Tribunal, Kochi Bench,'
BMC Road, Thrikkakara, Ernakulam - 682021.

Ref:- (1) IA/83/KOB/2020 IN CP/114/KOB/19-SULOCHANA GUPTA Vs. RBG TRADING PVT. LTD & 3 OTHERS.

(2) IA/84/KOB/2020 IN CP/119/KOB/19-MINAKSHI GUPTA Vs. RBG TRADING CORPORATION PVT. LTD. & 3 OTHERS -for R3

(3) IA/85/KOB/2020 IN CP/125/KOB/19-MINAKSHI GUPTA Vs. RBG RETAIL PVT. LTD. & 3 OTHERS-for R3.

Sub:- Request for adjournment of the following case listed as item No.10-12 in the Cause List published for (Thursday) 09/07/2020.

Sir,

I am the counsel appearing for the respondent company and the Managing Director in the above cases. Due to my engagement before the Hon'ble High Court today w will not be able to attend the above cases on (Thursday) 09/07/2020. Therefore, I humbly request you to adjourn the above case to any other convenient date before the Hon'ble Tribunal itself.

Kindly note that these are matters connected to various other cases that came up on 06.07.2020 and are posted on 07.09.2020. Hence the above cases can also be posted on the same date.

Thanking you,
Yours truly,

Best regards,
P. Sanjay, Advocate,
............."

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"09-07-2020

The Deputy Manager,
National Company Law Tribunal, Kochi Bench,'
BMC Road, Thrikkakara, Ernakulam - 682021.

Sub:- Request for adjournment of the following case listed as item No.10-12 in the Cause List published for (Thursday) 09/07/2020.

Ref:- (1) IA/83/KOB/2020 IN CP/114/KOB/19-SULOCHANA GUPTA Vs. RBG TRADING PVT. LTD & 3 OTHERS - for R3

(2) IA/84/KOB/2020 IN CP/119/KOB/19-MINAKSHI GUPTA Vs. RBG TRADING CORPORATION PVT. LTD. & 3 OTHERS -for R3

(3) IA/85/KOB/2020 IN CP/125/KOB/19-MINAKSHI GUPTA Vs. RBG RETAIL PVT. LTD. & 3 OTHERS-for R3.

Sir,

Owing to unavoidable reasons, I will not be able to attend the above cases (Thursday) 09/07/2020. Therefore, humbly request you to adjourn the above case so as to enable me to appear for the Respondent (R3) as above, whom I am representing, either before the Actual Court by my personal presence or through Video Conferencing, if the said arrangement of Video Conferencing continues.

....

Regards,

............."

60. Exhibit-P7 is the order dated 9.7.2020 in I.A. No.83/KOB/2020 in Company Petition No.114/KOB/2019, which is impugned in W.P.(C) No.14341/2020, and the same reads thus:

"IN THE NATIONAL COMPANY LAW KOCHI BENCH, KOCHI
IA.83/KOB/2020
in
<u>COMPANY PETITION NO.114/KOB/2019</u>

(Under Section 130 & 241 and 242 of the Companies Act, 2013)

Date of order: 09.07.2020

In the matter of
M/S RBG Enterprises Private Limited

Sulochana Gupta & Anr.
Shareholder RBG Enterprises (P) Ltd.

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Residing at House No.CCVIII/2109,
Gujarati Road, Mattancherry,
Kochi-682002. : Applicants/Petitioners

Vs.

RBG Enterprises Pvt. Limited having
its Registered office at V1/93 Jew Town
Mattancherry PO, Kochi-682002 and others.

Respondents/Respondents

Appearance

For Petitioner : Mr. Sukumar Nainan Oommen Advocate

For Respondents : None present

ORDER

Heard the arguments made by the learned counsel for the applicant in the IA Shri Sukumar Ninan Oommen through VC. Learned counsel for respondents sought an adjournment through email. The reliefs sought in the IA include to restrain the 2nd Respondent from exercising the powers of the Managing Director of the Company, appoint an Advocate Commissioner to act as interim Managing Director of the company, etc. The Bench observed that the prayers in the IA and In the CP are one and the same Hence a decision can be taken only after going through the pleadings of the respondents. The respondents are therefore directed to file their counter to the IA within two weeks from today **positively** serving a copy to the applicant and the applicant is directed to file his rejoinder, if any, before the next date is fixed.

The respondents are directed not to conduct any board meeting of Respondent Company and no further financial transactions shall be made till 7.8.2020.

List on 7.8.2020 for final hearing in the IA.

Dated 9th day of July, 2020

Sd/-
(Ashok Kumar Member Borah)
Member (Judicial)”

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61. Exhibit-P13 email dated 15.07.2020 evidencing filing of an appeal by email before Registrar, NCLAT, is extracted hereunder:

"Date :15-07-2020

To:
The Registry

National Company Law Appellate Tribunal (Southern Bench }
2nd & 3rd Floor of Mahanagar Doorsanchar Sadan (M.T.N.L. Building),
9Lodhi Rd, CGO Complex, Pragati Vihar, New Delhi - 110003

Reg; Filing of Appeal in IA /83/KOB/2020 In No.CP/114/KOB/2019 (RBG Enterprises Private Limited and another V/s. Sulochang Gupta) under Section 421 of the Companies Act, 2013.read with Rules

Dear Sir,

With reference to the above we are submitting herewith Company Appeals under section 421 of the Companies Act, 2013 in triplicate in respect of Petitioner- RBG Enterprises Private Limited & Anr., which may kindly be taken on record and request your goodself to advise the date of hearing of the Company Appeal. I will be appearing for the same through Video Conferencing. Also filed is IA for stay (with necessary court fee) that may be posted at the earliest.

Copy of the above Appeal has also been forwarded to the Respondents today as per the address given below by Registered post and original of the postal receipts are attached to this Company Appeal. The Original of the Demand Draft is attached along with this letter. The details of the Demand draft drawn in favour of the Pay and Accounts Officer, Ministry of Corporate Affairs, Delhi are as follows .

Branch : Mattancherry

None of Issuing Bank : Dhanalakshmi Bank

Demand Draft : No.114840 for Rs.5000/- and No.114544 for Rs.1000/-

Date : 15-07-2020

Yours Faithfully"

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62. Cause list of the National Company Law Appellate Tribunal in the public domain disclosing cases to be heard on 16.07.2020 is reproduced:

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
2nd FLOOR, M.T.N.L BUILDING, NEAR SCOPE COMPLEX, CGO COMLPEX
NEW DELHI
DAILY CAUSE LIST DATED 16.07.2020 (THURSDAY)
COURT OF CHAIRPERSON (VIRTUAL MODE)
10:30 AM

In the Court of Hon'ble Mr. Justice Bansi Lal Bhat, the Acting Chairperson, Hon'ble Mr. Justice Anant Bijay Singh, Member (Judicial) and Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

For Orders

S. No.	Case No.	Name of the parties	Counsel for Appellants	Counsel for Respondents
1.	Comp. App. (AT) (Ins) No. 225 of 2020 & I.A. No. 1406 of 2020	Rajendra Kumar Tekriwal Vs. Bank of Baroda	Manoj Munshi	Amit Mahaliyan
2.	Comp. App (AT) (Ins) No. 43 of 2020	Comp. App (AT) (Ins) No. 43 of 2020	Abhishek Puri	Saikat Sarkar-R1 Neeraj Kr. Gupta IRP
3.	Comp. App. (AT) (Ins) No. 276 of 2020	Sanjay Lamba. Vs. Corporate Bank & Anr	Syed Abdul Haseeb	Bild Aali-R2(IRP)

For Admission (Fresh Case)

4.	Comp. App. (AT) (Ins) No. 510 of 2020	Elektronik Lab India Pvt. Ltd. Vs. Pinnacle (Air) Pvt. Ltd	Jaikriti S. Jadeja	

For Admission (After Notice)

5.	Comp. App (AT) (Ins) No. 426 of 2020	NCC Ltd. Vs. Golden Jubilee Hotels	Adhish Srivastava	Vijay Kaundal
6.	Comp. App (AT) (Ins) No. 430 of 2020	Consolidated Engineering Company Vs. Subodh Kumar Agarwal & Ors. With	Kumar Anurag Singh	Vijay Kaundal
7.	Comp. App. (AT) (Ins) No. 432 of	Infinity Interiors Pvt. Ltd. Vs.	Kumar Anurag Singh	Vijay Kaundal

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	2020	Subodh Kumar Agarwal & Ors.		
8.	Comp. App. (AT) (Ins) No. 438 of 2020	Laxmi Narayan Sharma Vs. Subodh Kumar Agrawal, Resolution Professional, Golden Jubilee Hotels Pvt. Ltd. & Ors.	Sumedha Chadha	Pankaj Vivek
9.	Comp. App. (AT) (Ins) No. 484 of 2020	Noble Resources International Pte. Ltd. Vs. Rajiv Chakraborty & Ors. (Resolution Professional of Uttam Galva Metallics)	Supriyo Mahapatra	Supriyo Mahapatra Anjali Anchayil-R1 Mahima Sareen-R2
10.	Comp. App. (AT) (Ins) No. 485 of 2020	Noble Resources International Pte. Ltd. Vs. Rajiv Chakraborty & Ors. (Resolution Professional of Uttam Galva Metallics)	Supriyo Mahapatra	Anjali Anchayil-R1 Mahima Sareen-R2
11.	**Comp. App. (AT) (Ins) No. 496 of 2020**	**C. Unnikrsihanan Vs. Kerala State Cashew Development Corpn. Ltd.**	**A. Karthik**	
12.	Comp. App. (AT) (Ins) No. 527 of 2020	MCC Concrete Vs. Northway Spaces Ltd	Malak Manish Bhatt	
13.	Comp. App. (AT) (Ins) No. 543 of 2020	Metro Cash & Carry India Pvt. Ltd. Vs. NWCC Supply Chain Solutions Pvt. Ltd. With	Aditya Bhat	
14.	Comp. App. (AT) (Ins) No. 545 of 2020	Metro Cash & Carry Pvt. Ltd. Vs. North West Carrying Company LLP	Aditya Bhat	Roopali Singh

For Hearing

15.	Competition. App. (AT) No.113 of	Ashok Suchde Vs. Competition	Sumit Jain	Niti Richhariya

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	2019	Commission of India		
16.	Comp. App. (AT) (Ins) No. 389 of 2018	Anil Kohli, R.P. for DunarFoods Ltd. Vs. Directorate of Enforcement & Anr.	Abhishek Anand	R.K. Mishra (R-DOE), Sandeep Bisht - (RNSE)

12:30 PM

In the Court of Hon'ble Mr. Justice Bansi Lal Bhat, the Acting Chairperson and Hon'ble Mr. Justice Venugopal M., Member (Judicial)

For Orders

S. No.	Case No.	Name of the parties	Counsel for Appellants	Counsel for Respondents
1.	I.A. No. 811 & 917 of 2020 in Comp. App. (AT) (Ins) No. 1434 of 2019	Action Barter Pvt. Ltd. Vs. Srei Equipment Finance Ltd & Anr.	Ankit Kohli	Saikat Sarkar

63. As rightly contended by the learned counsel for the appellants, a case from the State of Kerala is included in the list of cases scheduled for hearing on 16.07.2020.

64. Let us consider what the respondents 1 & 2/writ petitioners, in the statement of facts, have contended before the writ court, for filing the writ petitions, without availing the alternative remedy. Writ petitioners have stated that they can only challenge the impugned order by filing an appeal before the Appellate Tribunal situated outside the State of Kerala. In the present situation of lockdown, under the threat of Covid-19, neither the writ petitioners nor their counsel will be able to file an appeal and obtain orders. It was pointed out that in a similar situation, this court had stayed the operation of a judgment of the

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Tribunal, to enable the appeal to be filed. To substantiate the said submission, writ petitioners have produced the judgment dated 21.12.2017 passed in W.P. (C) No.41662 of 2017 (Exhibit-P8).

65. At ground 'J' in the writ petition, respondents 1 & 2 have contended that the impugned order of the NCLT in I.A. No.83/KOB/2020 in C.P. No.114/2019 dated 9.7.2020 can be challenged only by filing an appeal before the Appellate Tribunal. In the present situation, filing of an appeal by the writ petitioners or their counsel, travelling outside the State of Kerala is almost impossible. Writ petitioners, therefore, have no other alternate remedy, but to approach the writ court.

66. Perusal of the impugned judgment dated 22.07.2020 shows that submissions have been advanced before the writ court by the respondents/writ petitioners that though an attempt was made to file an appeal before the National Company Law Appellate Tribunal (NCLAT), there was no sitting at the Madras Bench of the NCLAT and that no e-filing was provided at the NCLAT, Principal Bench, New Delhi.

67. Before the writ court, submission seemed to have been made by the learned counsel for the respondents/writ petitioners that even though appeals have been prepared and sent by email, as well as by post, to the NCLAT, the writ petitioners have been informed by the official that there cannot be filing of appeals by email or post and that filing has to be done at the Principal Bench of the NCLAT, by an authorised person.

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68. Before the writ court, submission also seemed to have been made that the said course of action was a impossibility in the present scenario and that the writ petitioners may be permitted to carry on the essential day-to-day financial transactions of the company till, either an appeal can be filed before the NCLAT or the NCLT considers the matter on merits.

69. After considering the rival submissions and the inability to file an appeal before the NCLAT, by undertaking a travel to New Delhi, in the impugned judgment, the writ court has observed that an appeal before the NCLAT is practically not possible and till such time, in view of the present situation prevalent, writ court is of the opinion that the writ petitioners should be permitted to carry on the day-to-day financial transactions, as are necessary for the conduct of the companies. Thus, in the above circumstances, the writ court disposed of W.P.(C) No.14341/2020 and other connected cases by the impugned judgment.

70. Perusal of Annexure-R1(j) email dated 10.07.2020 would indicate that an email has been sent by Sulochana Gupta, appellant No.1, to the Branch Manager, Dhanlaxmi Bank, Mattancherry, Kochi-682002, enclosing a copy of the order made in I.A. No.83/KOB/2020 in C.P.No.114/2019 dated 9.7.2020 passed by the NCLT, Kochi Bench, wherein the respondents/writ petitioners have been restrained from making any financial transactions. The said email sent on 10.07.2020 by the 1st appellant to the Branch Manager, Dhanlaxmi Branch, has been forwarded to Rajkumar Gupta, Managing

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Director of RBG Enterprises Pvt. Ltd., who was arrayed as respondent No.2 in this appeal.

71. Though the respondents/writ petitioners have further contended that no e-filing was permitted by the NCLAT and that, they could not sent any representative, to submit an appeal and other documents, in person, due to the COVID-19 pandemic, perusal of the affidavit filed in support of I.A. No.1 of 2020 in W.P.(C) No.14341 of 2020 shows that an averment has been made therein to the effect that copies of the appeal, as well as the stay petition, have been served on the petitioners in the company petition/appellants, by way of email, proof of serving the copy of the appeal and stay petition, is sought to be substantiated by Exhibit-P12 email dated 15.07.2020. For brevity, Exhibit-P12 is extracted hereunder:

> "**Copy of Appeal in the case of RBG Enterprises (P) Ltd**.
> sanjayparvathi<advsanjayparvathi@gmail.com>
> To: Info@omegaalliance.in
>
> Sanjay parvathi <advsanjayparvathi@gmail.com>
> to. Info.
>
> Ref;- Copy of Appeal in RBG Enterprises (P) Ltd.
>
> Sir,
>
> Please find attached herewith copy of appeal being filed in the matter of RBG Enterprises (P) Ltd. Before the Hon'ble NCLAT. A hard copy of the same is being sent to you separately.
>
> Best regards,
>
> M/s. Sanjay & Parvathi,
> Advocates, Kochi-682018.
>
> **….RBG Enterprises NCLAT Appeal.doc**"

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72. Filing of appeal against order in I.A. No.83/KOB/2020 in C.P. No. 114/2019 dated 9.7.2020 (***RBG Enterprises (P) Ltd. And Another v. Sulochana Gupta & Ors.***) under Section 421 of the Companies Act, 2013 read with rules before the NCLAT, New Delhi, is evident from the covering letter dated 15.07.2020 (produced as Exhibit-P9 along with I.A. No.1/2020 in W.P.(C) No.14341/2020), as extracted above.

73. The authorised signatory of the 1st respondent company has also produced a copy of the appeal, sent through email to the Registrar of NCLAT, New Delhi, along with an email dated 15.07.2020 (Exhibit-P13). Respondents 1 & 2 in the supporting affidavit I.A. No.1 of 2020 in W.P.(C) No.14341 of 2020 have also stated that they have produced the above documents with an application to receive the same on the files of W.P.(C) No.14341 of 2020.

74. However, perusal of appeal dated 15.07.2020 sent to the Registry of NCLAT shows that as against Clause 10 in the appeal, which mandates that the appellant therein to make a statement or declaration to the effect as to whether, it had not previously filed any writ petition or suit regarding the matter, in respect of which this appeal is preferred, before any court or other authority, respondents/writ petitioners/respondents had made a specific declaration they had not previously filed any writ petition or suit. Clause 10 of the appeal which deals with the declaration and the answer to the declaration is reproduced:

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> "**10. Matters not previously filed or pending with any other court**
> The appellant further declares that the appellant had not previously filed any writ petition or suit regarding the matter in respect of which this appeal is preferred before any court of any other authority nor any such writ petition or suit is pending before any of them."

75. Thus, from the materials on record, two things can be seen. One is that when the writ petition was filed on 13.07.2020 praying to quash the order in I.A. No.83/KOB/2020 in C.P.No.114/2019 dated 9.7.2020 passed by the NCLT, Kochi Bench, there was no appeal before the NCLAT, New Delhi. Whereas, in the appeal preferred under Section 421 of the Companies Act, 2013 read with rules, before the NCLAT, the appellant/1st respondent herein made a declaration that the company had not previously filed any writ petition or suit regarding the matter in respect of which this appeal is preferred, before any court or any authority nor any such writ petition or suit is pending before any of them.

76. Thus, from Exhibit-P9 & P13, it is evident that on 15.07.2020, writ petitioners/respondents have sent the appeal and stay petition, filed against the order in I.A. No.83/KOB/2020 in C.P.No.114/2019 dated 9.7.2020, along with a covering letter, through email to the Registry of NCLAT, New Delhi, and later on 16.07.2020, by registered post. Further, Exhibit-P12 makes it clear that the writ petitioners have served a copy of the appeal and stay petition dated 15.07.2020 by email to the learned counsel appearing for the petitioners in the company petition also.

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77. Though the respondents/writ petitioners have contended that they came to know that the filing of the appeal by email will not be entertained by the Registry of NCLAT, New Delhi, there is absolutely no communication / document on record to show that the Registry of NCLAT had, either returned the appeal and stay petition dated 15.07.2020, sent by email, or informed the writ petitioners/respondents, by any letter or communication, that appeal sent by email by them would not be entertained. Equally, there is no letter or email from the respondents/writ petitioners confirming the conversation that no appeal sent by email is entertained or not.

78. On the contrary, while sending the appeal along with the stay petition on 15.07.2020 to NCLAT, New Delhi, through registered post, as well as by email, learned counsel for the respondents/writ petitioners have requested the Registry of NCLAT, New Delhi, to fix a date of hearing of the company appeal through video conferencing. That would make it clear that video conferencing was available for hearing the appeal, i.e. even after filing of instant writ petitions praying to quash the order in I.A.No.83/KOB/2020 in C.P.No.114/KOB/2019 dated 9.7.2020. At the risk of repetition, covering letter dated 15.07.2020 (Exhibit-P9) sent along with the appeal and stay petition reads thus:

> "Reg; Filing of Appeal in IA/83/KOB/2020 In No.CP/114/KOB/2019 (RBG Enterprises Private Limited and another V/s. Sulochang Gupta) under Section 421 of the Companies Act, 2013.read with Rules
>
> Dear Sir,

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With reference to the above we are submitting herewith Company Appeals under section 421 of the Companies Act, 2013 in triplicate in respect of Petitioner- RBG Enterprises Private Limited & Anr., which may kindly be taken on record and request your goodself to advise the date of hearing of the Company Appeal. I will be appearing for the same through Video Conferencing. Also filed is IA for stay (with necessary court fee) that may be posted at the earliest.

Copy of the above Appeal has also been forwarded to the Respondents today as per the address given below by Registered post and original of the postal receipts are attached to this Company Appeal. The Original of the Demand Draft is attached along with this letter. The details of the Demand draft drawn on favour of Pay and Account's Officer, Ministry of Corporate Affairs, Delhi are as follows.

Branch	: Mattancherry
None of Issuing Bank	: Dhanalakshmi Bank
Demand Draft	: No.114840 for Rs.5000/- and No.114544 for Rs.1000/-
Date	: 15-07-2020

Yours Faithfully"

79. Though Mr. P. Sanjay, learned counsel for the writ petitioners/ respondents 1 & 2, contended that he has received information from the Registry of NCLAT, New Delhi, that appeal sent through email cannot be entertained, and sought to substantiate the same, by placing reliance on some screen shot image dated 15.07.2020 at 3.19 p.m. on 17.07.2020, we are of the view that no reliance can be made on the said document with regard to telephonic conversation said to have been made between the official of NCLAT, New Delhi and the learned counsel for the writ petitioners.

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80. As rightly contended by Mr. Sukumar Nainan Oommen, learned counsel for the appellants, though writ petition has already been filed (on 13.07.2020-returned for curing defects), it was taken up for hearing only on 15.07.2020, on which date, appeal has been filed before the NCLAT, New Delhi, by the writ petitioners/respondents under Section 421 of the Companies Act, 2013, wherein the appellant has made a statement, in Clause 10 of the appeal memorandum, that no writ petition has been filed or pending before any court, which declaration is totally contrary to the material on record.

81. The contention before the writ court that the writ petitioners could not approach the NCLAT by filing an appeal in person, or travel to New Delhi and that, therefore, there was no other alternative or efficacious remedy warranting entertainment of writ petition under Article 226 of the Constitution of India cannot be countenanced, in the light of their admission, that appeals have been sent through email.

82. As rightly contended by Mr. Sukumar Nainan Oommen, learned counsel for the appellants, there is also a suppression in Clause 10 of the appeal memorandum filed before the NCLAT, that no such writ petition was filed and pending. Thus, it is *prima facie* evident that the respondents/writ petitioners were pursuing remedies before two forums. One before NCLAT, New Delhi, by filing an appeal, and the other, before this Court, by filing writ petitions challenging the order dated 9.7.2020 in I.A. No.83/2020 in C.P. No.114/KOB/2019

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83. In the above backdrop, let us consider the issues raised in the present appeal.

84. As stated above, in the case on hand, writ petition under Article 226 of the Constitution of India has been filed for a writ of certiorari to quash the order of the NCLT, Cochin dated 9.7.2020 in I.A. No.83/2020 in C.P. No.114/KOB/2019. In this context, let us consider Articles 226 and 227 of the Constitution of India, which read thus:

> "**226. Power of High Courts to issue certain writs**
>
> (1) Notwithstanding anything in article 32, every High Court shall have powers, throughout the territories in relation to which it exercise 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*, prohibitions, *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

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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 interrelated 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."

85. Firstly, on the issue as to whether a writ petition under Article 226 of the Constitution of India is not maintainable, as against an order passed by the National Company Law Tribunal, let us consider the decisions relied on by the appellants, as hereunder:

(i) In **T.C. Basappa v. T. Nagappa and Ors.** [AIR 1954 SC 440], the appeal before the Hon'ble Supreme Court was against the judgment of a Hon'ble Division Bench of Mysore High Court, granting an application presented under Article 226 of

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the Constitution of India and directed to issue a writ of certiorari, quashing the proceedings and the order of the Election Tribunal, Shimoga. Relevant paras are extracted hereunder:

> "**4. The substantial contention raised by Mr. Ayyangar, who appeared in support of the appeal, is that the learned Judges of the High Court misdirected themselves both on facts and law, in granting certiorari in the present case to quash the determination of the Election Tribunal. It is urged, that the Tribunal in deciding the matter in the way it did not act either without jurisdiction or in excess of its authority, nor was there any error apparent on the face of the proceedings which could justify the issuing of a writ to quash the same. It is argued by the learned counsel that, what the High Court has chosen to describe as errors of jurisdiction are really not matters which affect the competency of the Tribunal to enter or adjudicate upon the matter in controversy between the parties and the reasons assigned by the learned Judges in support of their decision proceed upon a misreading and misconception of the findings of fact which the Tribunal arrived at. Two points really arise for our consideration upon the contentions raised in this appeal. The first is, on what grounds could the High Court, in exercise of its powers under article 226 of the Constitution, grant a writ of certiorari to quash the adjudication of the Election Tribunal? The second is, whether such grounds did actually exist in the present case and are the High Court's findings on that point proper findings which should not be disturbed in appeal** ?
>
> 7. One of the fundamental principles in regard to the issuing of a writ of certiorari is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin L.J. thus summed up the law on this point in ***Rex v. Electricity Commissioners*** [1924] 1 K.B. 171 :
>
> > "Whenever any body or person having legal authority to determine questions affecting the rights of subject and having the duty to judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."
> >
> > The second essential feature of a writ of certiorari is that the control which is exercised through it over judicial or quasi-judicial Tribunals or bodies is not in an appellate but supervisory capacity.

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> In granting a writ of certiorari the superior Court does not exercise the powers of an appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior Tribunal. The offending order or proceedings so to say is put out of the way as one which should not be used to the detriment of any person (Vide Per Lord Cairns in **Walshall's Overseers v. London and North Western Railway Co.**, 4 A.C. 30, 39).

8. The supervision of the superior Court exercised through writs of certiorari goes on two points, as has been expressed by Lord Sumner in King v. Nat Bell Liquors Limited [1922] 2 A.C. 128, 156). One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

9. Certiorari may lie and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances (Vide Halsbury, 2nd edition, Vol. IX, page 880). When the jurisdiction of the Court depends upon the existence of some collateral fact, it is well settled that the Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess (Vide Banbury v. Fuller, 9 Exch. 111; R. v. Income Tax Special Purposes Commissioners, 21 Q.B.D. 313).

10. A Tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of certiorari may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision. The essential features of the remedy by way of certiorari have been stated with remarkable brevity and

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clearness by Morris L.J. in the recent case of Rex v. Northumberland Compensation Appellate Tribunal ([1952] 1 K.B. 338 at 357). The Lord Justice says :

> “It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the face of an order or decision or irregularity or absence of or excess of jurisdiction when shown."

11. In dealing with the powers of the High Court under article 226 of the Constitution this Court has expressed itself in almost similar terms (Vide **Veerappa Pillai v. Raman & Raman Ltd**. [1952] S.C.R. 583 at 594) and said :

> "Such writs as are referred to in article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate Tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."
>
> These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of certiorari under article 226 of the Constitution.

12. We will now proceed to examine the judgment of the High Court and see whether the learned Judges were right in holding that sufficient and proper grounds existed for the issue of certiorari in the present case.

23. Thus the finding is there and there is evidence in support of it. Whether it is right or wrong is another matter and it may be that the view taken by the dissenting member of the Tribunal was the more proper; but it cannot be said that the Tribunal exceeded its jurisdiction in dealing with this matter.”

(ii) In **Radhey Shyam and Ors. v. Chhabi Nath and Ors.** [(2015) 5 SCC 423], the Hon'ble Supreme Court explained the distinction and scope of jurisdiction

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between Articles 226 and 227 of the Constitution of India. Circumstances under which the case was considered is extracted hereunder:

> "This matter has been placed before the Bench of three Judges in pursuance of an order dated April 15, 2009 passed by the bench of two Hon'ble Judges to consider the correctness of the law laid down by this Court in **Surya Dev Rai v. Ram Chander Rai and Ors.** 2003 (6) SCC 675 that an order of civil court was amenable to writ jurisdiction Under Article 226 of the Constitution. The reference order, inter alia, reads:
>
> > **"30...Therefore, this Court unfortunately is in disagreement with the view which has been expressed in *Surya Dev Rai* insofar as correction of or any interference with judicial orders of civil court by a writ of certiorari is concerned.**
> >
> > **31. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law.**
> >
> > **32. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in Surya Dev Rai and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in Surya Dev Rai that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court Under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in Surya Dev Rai, is contrary to the ratio in Mirajkar and the ratio in Mirajkar has not been overruled in Rupa Ashok Hurra [2002 (4) SCC 388]."**
>
> **Thus, the question to be decided is whether the view taken in Surya Dev Rai that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view.**

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7. Before the Hon'ble Apex Court, Learned Counsel for the Appellant therein submitted that the view taken in the referring order deserves to be approved for the reasons given in the said order and contrary view in Surya Dev Rai may be overruled. Contentions were made that the bench of nine Judges in Mirajkar has categorically held that the order of the civil court was not amenable to writ jurisdiction Under Article 226 and the said view still holds the field. The reasons for not following the said view in Surya Dev Rai are not sound in law. This submission is supported by learned Counsel for the Petitioner appearing in SLP (Civil) No. 25828 of 2013 as also by the intervenor in person.

8. On the contrary, learned senior Counsel for the Respondent therein supported the view taken in Surya Dev Rai which is based on decisions of this Court relied upon therein. According to him, the scope of writ jurisdiction was wide enough to extend to an order of the civil court. There was no reason to exclude the civil courts from the expression "any person or authority" in Article 226 of the Constitution. Conceptually, a writ of certiorari could be issued by a superior court to an inferior court. He also pointed out that though the judgment in Surya Dev Rai is by a Bench of two judges, the same has been referred with approval in larger bench judgments in **Shail v. Manoj Kumar** 2004 (4) SCC 785, **Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy** [2005 (1) SCC 481] and **Salem Advocate Bar Assn(II) v. Union of India** [2005 (6) SCC 344] and on that ground correctness of the said view is not open to be considered by this Bench.

11. It is necessary to clarify that expression "judicial acts" is not meant to refer to judicial orders of civil courts as the matter before this Court arose out of the order of Election Tribunal and no direct decision of this Court, except Surya Devi Rai, has been brought to our notice where writ of certiorari may have been issued against an order of a judicial court. In fact, when the question as to scope of jurisdiction arose in subsequent decisions, it was clarified that orders of judicial courts stood on different footing from the quasi judicial orders of authorities or Tribunals.

The Hon'ble Apex Court, after considering several decisions, held as under:

> **“18. While the above judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that challenge to judicial orders could lie by way of appeal or revision or Under Article 227 and not by way of a writ Under Article 226 and 32.**

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19. In **Sadhana Lodh v. National Insurance Co. Ltd.** [(2003) 3 SCC 524], the Hon'ble Apex Court further considered the question whether remedy of writ will be available when remedy of appeal was on limited grounds, and held thus:

> "6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition Under Articles 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided Under Section 149(2) of the Act (see **National Insurance Co. Ltd. v. Nicolletta Rohtagi** (2002 (7) SCC 456). This being the legal position, the petition filed Under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition Under Article 227 of the Constitution. Even if a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court Under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court Under Section 115 Code of Civil Procedure has been expressly barred by a State enactment, only in such case a petition Under Article 227 of the Constitution would lie and not Under Article 226 of the Constitution. As a matter of illustration, where a trial court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision Under Section 115 Code of Civil Procedure, in such a situation a writ petition Under Article 227 would lie and not Under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition before the High Court

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> Under Section 115 Code of Civil Procedure, no petition Under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court Under Article 226 of the Constitution." (Emphasis added)

20. This Court in judgment dated 6th December, 1989 in Civil Appeal No. 815 of 1989 **Qamruddin v. Rasul Baksh and Anr.** which has been quoted in Allahabad High Court judgment in **Ganga Saran v. Civil Judge** (AIR 1991 All 114), considered the issue of writ of certiorari and mandamus against interim order of civil court, and held thus:

> "If the order of injunction is passed by a competent court having jurisdiction in the matter, it is not permissible for the High Court Under Article 226 of the Constitution to quash the same by issuing a writ of certiorari. In the instant case the learned Single Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. **A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject matter of writ of mandamus Under Article 226 of the Constitution**. The learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court Under Article 226 of the Constitution. There was no occasion or justification for issue of a writ of certiorari or mandamus. The High Court committed serious error of jurisdiction in interfering with the order of the District Judge."

21. Thus, it has been clearly laid down by this Court that an Order of civil court could be challenged Under Article 227 and not Under Article 226.

> "19. We may now come to the judgment in Surya Dev Rai. Therein, the Appellant was aggrieved by denial of interim injunction in a pending suit and preferred a writ petition in the High court stating that after Code of Civil Procedure amendment by Act 46 of 1999 w.e.f. 1st July, 2002, remedy of revision Under Section 115 was no longer available. **The High Court dismissed**

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the petition following its Full Bench judgment in Ganga Saran to the effect that a writ was not maintainable as no mandamus could issue to a private person. The Bench considered the question of the impact of Code of Civil Procedure amendment on power and jurisdiction of the High Court to entertain a writ of certiorari Under Article 226 or a petition Under Article 227 to involve power of superintendence. The Bench noted the legal position that after Code of Civil Procedure amendment revisional jurisdiction of the High Court against interlocutory order was curtailed. The Bench then referred to the history of writ of certiorari and its scope and concluded thus:

26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction Under Section 115 Code of Civil Procedure by Act 46 of 1999, jurisdiction of the High Court Under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and Anr. v. Amarnath and Anr. AIR 1954 SC 215 : 1954 SCR 565, Ouseph Mathai v. M. Abdul Khadir 2002 (1) SCC 319, Shalini Shyam Shetty v. Rajendra Shankar Patil 2010 (8) SCC 329 and Sameer Suresh Gupta v. Rahul Kumar Agarwal 2013 (9) SCC 374."

In ***Shalini Shyam Shetty***, this Court observed:

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in

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cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions Under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions Under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 Code of Civil Procedure has been curtailed. In our view, even if the scope of Section 115 Code of Civil Procedure is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either Under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either Under Article 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court

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for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly.

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari Under Article 226.

We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

29. Accordingly, we answer the question referred as follows:

(i) Judicial orders of civil court are not amenable to writ jurisdiction Under Article 226 of the Constitution;

(ii) Jurisdiction Under Article 227 is distinct from jurisdiction from jurisdiction Under Article 226.

Contrary view in *Surya Dev Rai* is overruled."

(iii) In **Alexander Correya and Ors. v. Dominic Savio and Ors.** [2017 (4) KLJ 650], the appellant therein filed appeal against an interim order dated 26.9.2017 passed by a learned single Judge in W.P.(C) No. 30895 of 2017, on an application filed by respondents 1 to 9 therein. Facts stated therein are reproduced hereunder:

"3. It appears that the 11th respondent therein is a Public Company limited by guarantee. All the parties in this proceeding, except respondent Nos. 17, 18 and 19, are members or claim to be members of the said company. The three appellants complaining oppression and mismanagement, filed applications before the NCLT, Chennai Bench. Among other reliefs, they sought for an order restraining the directors from transferring any immovable property of the company to respondent Nos. 17, 18 and 19 herein and also for restraining the directors from expelling the appellants from the membership of the company. Before the NCLT, the company, the managing director and four other directors were made parties. The NCLT by order dated 4.7.2017 in Company Petition No. 29 of 2017, passed an interim order firstly restraining the

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> directors/the respondents therein, from transferring any property. They then stayed the notice dated 19.5.2017 seeking to expel the appellants from the membership of the company. It is not in dispute that before the NCLT, the company, the managing director and four directors appeared and had filed their counter affidavits and were contesting the matter on merits. Notwithstanding the interim order of stay granted by NCLT, as the petitioners before the NCLT were expelled from the membership, contempt proceedings were initiated and are pending before the NCLT.
>
> 4. **It now appears that the writ petitioners, who also claim to be directors of the company, but not made parties before the NCLT, being aware of the proceedings as before the NCLT, filed the writ petition and challenged the interim order as passed by the NCLT and based thereon the learned single Judge has granted interim relief as noted above. We have heard the appellants as well as the respondents and have considered the matter. In our view, as the proceedings before the NCLT are pending and as the NCLT has assumed jurisdiction in the matter, to avoid multiplicity of proceedings, it would only be just and proper that respondents 1 to 9 herein who were the nine writ petitioners, approach the NCLT and raise their grievance. They are at liberty to raise the issue of jurisdiction as well, if they are so advised. But surely the orders of the NCLT cannot be assailed in this indirect manner. Let it be noted that under the provisions of the Companies Act, 2013 against any order of NCLT, an appeal lies to National Companies Appellate Tribunal. In such situation, we are of the view that the learned single Judge ought not to have entertained the writ petition nor passed the interim order**."

(iv) In **V. J. Paul Joseph v. National Law Company Tribunal** [O.P.(C) No.733/2020 dated 16th March, 2020, an original petition was filed challenging an order of the NCLT. A learned single Judge of this Court declined to entertain the writ petition on the ground of alternate remedy and held thus;

> "It has been submitted that the Tribunal had already passed an order on Ext.P1 on 11.03.2020. Since an order had been already passed, there is remedy by way of appeal under Section 421 of the Companies Act. Since there is provision for appeal, I am not inclined to entertain this Original Petition filed under Article 227 of the Constitution of India."

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(v) In **Super Sales India Ltd. v. The Customs, Excise and Service Tax Appellate Tribunal and Ors.** [2017-5-LW564], the point for consideration in the Writ Appeal was, whether the Writ Petition is maintainable under Article 226 of the Constitution of India, without exhausting the alternative remedy, under Section 35G of the Central Excise Act, 1944. On the aspect of availability of an alternative remedy and filing of a writ jurisdiction a Hon'ble Division Bench of Madras High Court considered the following decisions:

> (i) In **Union of India v. T.R. Verma** reported in AIR 1957 SC 882, the Hon'ble Supreme Court held that it is well settled that when an alternative and efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court, to issue a prerogative writ. Apex Court held that it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution, unless there are good grounds to do otherwise.
>
> (ii) In **C.A. Ibrahim v. ITO** reported in AIR 1961 SC 609, **H.B. Gandhi v. M/s. Gopinath & sons,** reported in 1992 (Suppl) 2 SCC 312 and **Karnataka Chemical Industries v. Union of India** reported in (2000) 10 SCC 13, the Hon'ble Supreme Court held that where there is a hierarchy of appeals provided by the statute, the party must exhaust the statutory remedy, before resorting to writ jurisdiction.
>
> (iii) In **A. Venkatasubbiah Naidu v. S. Chellappan** reported in (2000) 7 SCC 695, at Paragraph 22, the Hon'ble Supreme Court deprecated the practice of exercising the writ jurisdiction, when an efficacious alternative remedy is available.
>
> (iv) In **Sheela Devi v. Jaspal Singh** reported in AIR 1999 SC 2859 and **Punjab National Bank v. D.C. Krishna** reported in (2001) 6 SCC 569, the Hon'ble Supreme Court held that if the statute provides for remedy of revision or appeal, writ jurisdiction should not be invoked.
>
> (v) Further, in the case of **National Insurance Co. Ltd., v. Nicolletta Rohtagi** reported in (2002) 7 SCC 456, the Hon'ble Supreme Court held that appeal being a product of a statute, it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act. The said decision of the Hon'ble Supreme Court was followed, in the case of

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Sadhana Lodh v. National Insurance Co. Ltd., reported in (2003) 3 Supreme Court Cases 524 and held that the right of appeal, is a statutory right and where the law provides remedy by filing an appeal, on limited grounds, grounds of challenge cannot be enlarged, by filing a petition under Articles 226 of the Constitution of India."

7. In **Union of India v. Guwahati Carbon Ltd.,** reported in 2012 (11) SCC 651, after considering a catena of judgments and Section 35G of the Central Excise Act, 1944 and on the facts and circumstances of the case, relating to determination of the assessable value of the commodity in question, for the purpose of levy of duty, under the Central Excise Act, 1944, at Paragraphs 4, 15 and 16, held as follows:

"4. We reiterate that the High Court, under article 226 of the constitution of india, has vast powers as this Court has under article 32 of the constitution of india, but such powers can only be exercised in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

....

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent assessee.

16. In view of the above, we cannot sustain the judgment and order passed by the Division Bench of the High Court. Accordingly, we allow these appeals and set aside the impugned judgment."

It is also worthwhile to extract the judgments considered in **Guwahati Carbon Ltd.'s** case (cited supra),

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"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves of the observations made by this Court in **Munshi Ram v. Municipal Committee, Chheharta** [1979 (3) SCC 83]. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23)

> "23.... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded."

9. A Bench of three learned Judges of this Court in **Titaghur Paper Mills Co. Ltd. v. State of Orissa** [1983 (2) SCC 433], held: (SCC p. 440, para 11)

> "11.... The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed...."

10. In other words, existence of an adequate alternative remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (see **Rashid Ahmed v. Municipal Board, Kairana** [AIR 1950 SC 163]).

11. In **Whirlpool Corpn. v. Registrar of Trade Marks** [1998 (8) SCC 1], this Court held thus:

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ

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> petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

> 8. Lack of jurisdiction would be grounds for invoking the extraordinary remedy, under Article 226 of the Constitution of India, which is not the one pleaded in this case. In **Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement** reported in 2010-4-L.W.1: 2010 (253) ELT 3 (SC), the exceptions carved out are, where there is a lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal has acted under a provision of law, which is declared ultra vires and in such cases, notwithstanding the existence of such a Tribunal, the High Court can exercise its jurisdiction to grant relief. None of the exceptions is applicable to the case on hand.

> Saying so, the writ petition was rejected."

86. On the issue whether, while challenging a judicial act of the Courts or the Tribunal, as the case may be, a writ petition has to be filed under Articles 226 or 227 of the Constitution of India, appellants have relied on the decision in ***Radhey Shyam*** (cited supra), which we have already considered, wherein it is categorically held that the proper remedy to challenge judicial acts is, by way of filing writ petition under Article 227 of the Constitution of India and not under Article 226. That apart, in **AGDP. Ltd. v. Registrar of Companies** [(2019) 216 Comp. Case 360 (Mad.)], relied on by the learned counsel for the appellants, High Court of Madras has considered the scope of revision petition filed under Article 227 of the Constitution of India as under:

> "23. We deem it fit to consider the scope and power of the superintendence of the High Court, under Article 227 of the Constitution of India:

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(i) In **Jodhey v. State** reported in AIR 1952 All 788, after hearing the history of Article 227 of the Constitution of India, the Hon'ble Allahabad High Court held thus: (page 791):

> "9. A comparison of the above provision of law with analogous provisions of law prior to the Constitution of India brings into prominence some important features of the new state of law established by the constitution. The most important feature of article 227, Constitution of India, is that it has omitted any restriction on the power of the High Court to interfere in judicial matters, which was imposed by sub-section (2) of section 224, Government of India Act, 1935. In this way, it has enlarged the power of the High Court and restored the power, which was given to it under the Government of India Act, 1915. It is also significant that the words restricting the power of the superintendence of the High Courts for the time being subject to its appellate jurisdiction, a restriction which was contained not only in the Government of India Act, 1935 but also in the Government of India Act, 1915, as well as in the High Court Act, 1861, are also omitted from article 227 of the Constitution of India. The effect of this omission to my mind is to make it clear beyond doubt that all courts functioning within the territory in relation to which the High Court exercises its jurisdiction were subject to supervisory jurisdiction of High Court. Thus even Special Courts set up under the Acts of Legislature for specific purposes would also be subject to its jurisdiction. It seems to me that in this regard article 227 has vested the High Court with a greater power than that given to it even under the Government of India Act, 1915, or the High Court Act, 1861.
>
> It is also relevant in this connection to note that the Constitution of India has given this supervisory power to the High Court not only over all courts but also over all Tribunals throughout the territories in relation to which it exercises its jurisdiction. The word Tribunals' did not find a place either in the Government of India Act of 1935 or in the Government of India Act 1915 or in the High Courts Act, 1861. The purpose of the addition of the word Tribunals' to article 227, to my mind was to emphasis the fact that not only bodies which are courts within the strict definition of that term would be subject to the supervisory jurisdiction of the High Court but all bodies that perform the functions of courts and are akin to them are drawn within the purview of its supervision and cannot claim exemption from it merely by virtue of the fact that they do not come within the strict category of civil, revenue, or criminal courts as known under the ordinary law of the land. Certain other minor changes in this article are also noteworthy. A contrast of the marginal note appended to article 227 of the Constitution of India with the marginal notes of section 224, the Government of the India Act, 1935, section 107, Government of India Act 1915, and section 15, the High

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Courts Act, 1861, is instructive. The marginal note of article 227 of the Constitution of India is 'Power of superintendence over all courts by the High Courts'. This may be contrasted with the marginal note of section 224, Government of India Act, 1935, which was 'Administrative functions of the High Court' and the marginal note of section 107, Government of India Act, 1915, which was Towers of High Court with respect to subordinate courts'. Similarly, the marginal note of section 15, High Courts Act, 1861, was 'High Courts to superintend and to frame rules of practice for subordinate courts'. The alteration in this marginal note also emphasises the fact that the powers of the High Court under the Constitution extend not merely to administrative functions but embraces all functions, whether administrative or judicial. It also indicates that this power under the Constitution extends to all courts and is not confined to 'subordinate courts' as indicated by the marginal note of section 107, Government of India Act, 1915. A comparison of the draft Constitution with the enacted Constitution shows that the marginal notes were inserted under the authority of and with the knowledge of the Constituent Assembly. Under the above circumstances the view regarding the in admissibility of marginal notes expressed by the Privy Council in Tahkurain Balraj Kunwar v. Jagatpal Singh (L.R. 31 IA 132 (PC)) should be taken to have undergone change both in India as well as in England vide Iswari Prasad v. N.B. Sen (55 Cal. WN 719 [FB]). Marginal notes inserted in those circum-stances have been held to be admissible by a Full Bench decision of the Allahabad High Court in Ram Satan Das v. Bhagwat Prasad, AIR 1929 All. 53 [FB] by a Full Bench decision of the late Chief Court of Avadh in Emperor v. Mumtaz Husain, AIR 1935 Oudh 337 [FB] and by a Full Bench decision of the Bombay High Court in Emperor v. Ismail Sayadsaheb Mujawar, AIR 1933 Bom 417. In a recent decision of the Bombay High Court reported in State of Bombay v. Heman Santlal, AIR 1952 Bom 16, it was held by Chagla C.J. that the marginal notes of the Constitution may be referred to for the purpose of understanding the drift of the articles. In Suresh Chandra v. Bank of Calcutta Ltd. (54 Cal. WN 832 at page 836) the marginal notes of an Indian Act were compared with the corresponding marginal notes of the English Act to elucidate the meaning of the section. The contrary view expressed in CIT (Excess Profit Tax) v. Parasram Jethanand, AIR 1950 Mad 631 and Sutlej Cotton Mills Ltd. v. CIT [1950] 18 ITR 112 (Cal); AIR 1950 Cal 551 should not therefore, be accepted without qualification. The opinion which I, however, have formed is independently of the marginal notes and is based on the article itself viewed in the light of its historical background.

10. To emphasise and to clarify the plenary nature of power of superintendence vested in the High Court the provision of law

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relating to it has been split up into four clauses. The first clause enunciates the general power of supervision given to. High Court over all courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. It is couched in a language which would vest the High Court with a power that is not fettered with any restriction and must embrace all aspects of the functions exercised by every court and Tribunal. On a proper interpretation of this clause it is difficult to my mind to hold that the powers of superintendence are confined only to administrative matters. There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the; bodies mentioned therein. To fulfill this function it seems to me that the power of superintendence of the High Court over judicial matters is as necessary as over administrative matters. As a matter of fact judicial function of a court is not less, important than its administrative function. In fact it is more necessary to rectify lapses in judicial matters than defects in administrative matters. A judicial error might affect the rights, liberty and freedom of the subject whereas an administrative error might not do so. To my mind superintendence over judicial functions is a necessary complement of superintendence over administrative functions and it is sometimes very difficult to say where the one ends and the ether begins. If the High Court is to perform this function efficiently and effectively, it must act on both sides, otherwise the very power of superintendence will be crippled and what, has been achieved on the administrative side might be lost on the judicial side.

11. Clause (2) of article 227 seems to emphasise the administrative aspect over which the High Court can exercise power of superintendence and enumerates the various instances of superintendence in the administrative field. The use of words without prejudice to the generality of the foregoing provision' is not without significance. It seems to imply that the power of superintendence over administrative functions given to the High Court does not in any way derogate from the general power of superintendence given by clause (1).

12. Clause (a) of article 227 again enumerates certain specific matters which would fall on the administrative side of the work of a court.

13. Clause (4) shows that the only courts exempted from the superintendence of the High Court are courts or Tribunals constituted by or under any law relating to the Armed Force's. A mention of the solitary exemption also emphasises the clear

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> field of superintendence which is left within the jurisdiction of the High Court after exempting the prohibited area covered by the Military Courts or Tribunals mentioned therein.
>
> 14. A reading of the entire article 227 of the Constitution of India in the light of the antecedent law on the subject leads one to the irresistible conclusion that the purpose of the constitution makers was to make the High Court responsible for the entire administration of justice and to vest in the High Court an unlimited1 reserve of judicial power which could be brought into play at any time that the High Court considered it necessary to draw upon the same. Springing as it does from the Constitution, which is the parent of all Acts and Statutes in India, the fact that the judgment or order of a court or Tribunal has been made final by an Act or the fact that the body performing judicial functions is special tribunal constituted under a statute cannot be set up as a bar to the exercise of this power by the High Court. The prohibited area is to be found within the four corners of the constitution itself and nowhere else.
>
> 15. The fact that these unlimited powers are vested in the High Court should, however, make the High Court more cautious in its exercise. The self-imposed limits of these powers are established and laid down by the High courts themselves. It seems to me that these powers cannot be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by courts or a gross abuse of jurisdiction possessed by them or an unjustifiable refusal to exercise a jurisdiction vested in them by law. Apart from matters relating to jurisdiction, the High Court may be moved to act under it when there has been a flagrant abuse of the elementary principles of justice or a manifest error of law patent on the face of the record or an outrageous miscarriage of justice which calls for remedy. Under this power, the High Court will not be justified in converting itself into a court of appeal and subverting findings of fact by a minute scrutiny of evidence or interfering with the discretionary orders of court. Further, this power should not be exercised, if there is some other remedy open to a party. Above all, it should be remembered that this is a power possessed by the court and is to be exercised at its discretion and cannot be claimed as a matter of right by any party."

(ii) In **Trimbak Gangadhar Telang v. Ramchandra Ganesh Bhide** reported in AIR 1977 SC 1222, the Hon'ble Supreme Court held as follows: (page 1225):

> "It is a well-settled rule of practice of this court not to interfere with the exercise of discretionary power under articles 226 and 227 of the Constitution merely because two views are possible on the facts of a case. It is also well established that

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it is only when an order of a Tribunal is violative of the fundamental basic principles of justice and fair play or where the order passed results in manifest injustice, that a court can justifiably intervene under article 227 of the Constitution."

(iii) The Hon'ble Apex Court in **Surya Deo Rai v. Ram Chander Rai** reported in [2003] 6 SCC 675 held, a revision could be maintained under certain circumstances, invoking article 227 of the Constitution of India, and therefore, it is not possible to hold that no revision is maintainable under any provisions of law. In this view, when it is shown that the trial court has failed to exercise its jurisdiction, properly applying the provisions of law, or when it is so that the trial court has wrongly exercised its jurisdiction, offending the statute, then, invoking the supervisory jurisdiction of this court, can be interfered by this court. The hon'ble Supreme Court, at paragraphs 6 to 39, held as follows (page 683 to 696):

"6. According to ***Corpus Juris Secundum*** (Volume 14, page 121) certiorari is a writ issued from a superior court to an inferior court or Tribunal commanding the latter to send up the record of a particular case.

7. ***H.W.R. Wade and C.F. Forsyth*** define certiorari in these words : 'Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed--that is to say, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. This is the concern of the Crown, for the sake of orderly administration of justice, but it is a private complaint which sets the Crown in motion.' (Administrative Law, Eighth edition, page 591).

8. The learned authors go on to add that the problem arose on exercising control over justices of the peace, both in their judicial and their administrative functions as also the problem of controlling the special statutory body which was addressed to by the Court of King's Bench. The most useful instruments which the court found ready to hand were the prerogative writs. But not unnaturally the control exercised was strictly legal, and no longer political. Certiorari would issue to call up the records of justices of the peace and commissioners for examination in the King's Bench and for quashing if any legal defect was found. At first there was much quashing for defects of form on the record, i.e., for error on the face. Later, as the doctrine of ultra vires developed, that became the dominant principle of control.'(page 592)

9. The nature and scope of the writ of certiorari and when can it issue was beautifully set out in a concise passage, quoted

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hereafter, by Lord Chancellor Viscount Simon in ***Ryots of Garabandho v. Zamindar of Parlakimedi***, AIR 1943 PC 164 (ATR pages 165 and 166, paragraph (1):

> "The ancient writ of certiorari in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because, in its original Latin form, it required that the King should 'be certified' of the proceedings to be investigated, and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior Tribunal should be properly exercised. This writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior "courts" in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie. The remedy, in point of principle, is derived from the superintending authority which the Sovereign's superior courts, and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates, within certain limits, in British India."

10. Article 226 of the Constitution of India preserves to the High Court power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well-settled. It would suffice for our purpose to quote from the seven Judge Bench decision of this court, the Hon'ble Supreme Court in ***Hari Vishnu Kamath v. Ahmad Ishaque*** [1955] 1 SCR 1104; AIR 1955 SC 233. The four propositions laid down therein were summarized by the Constitution Bench in ***Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor*** [1961] 3 SCR 855; AIR 1961 SC 1087 as under (AIR page 1094, paragraph 15):

> "The High Court was not justified in looking into the order of December 2, 1952 as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this court in **Hari Vishnu Kamath v. Ahmad Ishaque** [1955] 1 SCR 1104; AIR 1955 SC 233 and the following four propositions were laid down--
>
> "**(1) Certiorari will be issued for correcting errors of jurisdiction;**

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(2) Certiorari will also be issued when the court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or Tribunal, even if they be erroneous;

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision"

11. In the initial years the Supreme Court was not inclined to depart from the traditional role of certiorari jurisdiction and consistent with the historical background felt itself bound by such procedural technicalities as were well-known to the English judges. In later years the Supreme Court has relaxed the procedural and technical rigours, yet the broad and fundamental principles governing the exercise of jurisdiction have not been given a go-by.

12. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a court which has jurisdiction over a subject-matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of, an appellate court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.

13. In Nagendra Nath Bora v. Commissioner of Hills Division and Appeals [1958] SCR 1240; AIR 1958 SC 398, the parameters for the exercise of jurisdiction, calling upon the issuance of writ of certiorari where so set out by the Constitution Bench (AIR pages 412-13, paragraphs 26-27):

“The common law writ, now called the order of certiorari, which has also been adopted by our Constitution, is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine,

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> **on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction. Where the errors cannot be said to, be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inference or in other words errors which a court sitting as a court of appeal only, could have examined and, if necessary, corrected and the Appellate Authority under a statute in question has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been shown that in exercising its powers the Appellate Authority disregarded any mandatory provisions of the law but what can be said at the most was that it had disregarded certain executive instructions not having the force of law, there is no case for the exercise of the jurisdiction under article 226.**”

14. The Constitution Bench in ***T.C. Basappa v. T. Nagappa***, AIR 1954 SC 440; [1955] 1 SCR 250, held that,- certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or Tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on 'clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari.

15. Any authority or body of persons constituted by law or having legal authority to adjudicate upon questions affecting the rights of a subject and enjoined with a duty to act judicially or quasi-judicially is amenable to the certiorari jurisdiction of the High Court. The proceedings of judicial courts subordinate to the High Court can be subjected to certiorari.

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16. While dealing with the question whether the orders and the proceedings of subordinate court are amenable to certiorari writ jurisdiction of the High Court, we would be failing in our duty if we do not make a reference to a larger Bench and a Constitution Bench decisions of this court and clear a confusion lest it should arise at some point of time. ***Naresh Shridhar Mirajkar v. State of Maharashtr***a [1966] 3 SCR 744; AIR 1967 SC 1, is a nine-Judges Bench decision of this court. A learned judge of the Bombay High Court sitting on the original side passed an oral order restraining the Press from publishing certain court proceedings. This order was sought to be impugned by filing a writ petition under article 226 of the Constitution before a Division Bench of the High Court which dismissed the writ petition on the ground that the impugned order was a judicial order of the High Court and hence not amenable to a writ under article 226. The petitioner then moved this court under article 32 of the Constitution for enforcement of his fundamental rights under article 19(1)(a) and (g) of the Constitution. During the course of majority judgment Chief Justice Gajendragadkar quoted the following passage from ***Halsbury laws of England*** (Volume 11, pages 129, 130) from the footnote:

> "In the case of judgments of inferior courts of civil jurisdiction) it has been suggested that certiorari might be granted to quash them for want of jurisdiction (Kemp v. Balne [1844] 1 Dow. & L. 885; (13 LJQB 149)), Dow & L at page 887, inasmuch as an error did not he upon that ground. But there appears to be no reported case in which the judgment of an inferior court of civil jurisdiction has been quashed on certiorari, either for want of jurisdiction or on any other ground."

His Lordship then said (AIR page 18, paragraph 63):

'The ultimate proposition is set out in terms :

> "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction".
>
> These observations would indicate that in England the judicial orders passed by civil courts of plenary jurisdiction in or in relation to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certiorari.'

17. A perusal of the judgment shows that the above passage has been quoted 'incidentally' and that too for the purpose of finding authority for the proposition that a judge sitting on the original side of the High Court cannot be called a court 'inferior or subordinate to High Court' so as to make his orders amenable to writ jurisdiction of the High Court. Secondly, the abovesaid passage has been quoted but nowhere the court has laid down as law by

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way its own holding that a writ of certiorari by High Court cannot be directed to court subordinate to it. And lastly the passage from **Halsbury** quoted in ***Naresh Shridhar Mirajkar v. State of Maharashtra*** [1966] 3 SCR 744; AIR 1967 SC 1 is from third edition of **Halsbury's Laws of England** (Simond's edition, 1955). The law has undergone a change in England itself and this changed legal position has been noted in a Constitution Bench decision of this court in ***Rupa Ashok Hurra v. Ashok Hurra*** [2002] 4 SCC 388. Justice S.S.M. Quadri speaking for the Constitution Bench has quoted the following passage from ***Halsbury's Laws of England*****,** 4th edition (Reissue), Volume 1(1):

> "103. Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court in the King's Bench for review or to remove indictments and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs...
>
> **109. Certiorari lies to bring decisions of an inferior court, Tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or Tribunal or public authority which forbids that court or Tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, Tribunals and public authorities**."

18. ***Naresh Shridhar Mirajkar v. State of Maharashtra*** [1966] 3 SCR 744; AIR 1967 SC 1 was cited before the Constitution Bench in ***Rupa Ashok Hurra v. Ashok Hurra*** [2002] 4 SCC 388 and considered. It has been clearly held : (i) that it is a well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme; (ii) that a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by superior court to an inferior court which certifies its records for examination; and (iii) that a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court; much less can writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in our constitutional scheme.

19. Thus, 'there is no manner of doubt that the orders and proceedings of a judicial court subordinate to High Court are amenable to writ jurisdiction of the High Court under article 226 of the Constitution.

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20. Authority in abundance is available for the proposition that an error apparent on face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in ***Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale*** [1960] 1 SCR 890; AIR 1960 SC 137. It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the Tribunal, authority or court but may not substitute its own findings or directions in lieu of one given in the proceedings forming the subject-matter of certiorari.

21. Certiorari jurisdiction though available is not to be exercised as a matter of course. The High Court would be justified in refusing the writ of certiorari if no failure of justice has been occasioned. In exercising the certiorari jurisdiction the procedure ordinarily followed by the High Court is to command the inferior court or Tribunal to certify its record or proceedings to the High Court for its inspection so as to enable the High Court to determine whether on the face of the record the inferior court has committed any of the preceding errors occasioning failure of justice.

Supervisory jurisdiction under Article 227:
22. Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces. Without prejudice to the generality of such power the High Court has been conferred with certain specifier powers by sub-articles (2) and (3) of article 227 with which we are not concerned here at. It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any, obstacles therein. The power under article 227 is wider than, the one conferred on the High Court by article 226 in the sense that the power of superintendence is not subject to those, technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. Else the parameters invoking the exercise of power are almost similar.

23. The history of supervisory jurisdiction exercised by the High Court, and how the jurisdiction has culminated into its present

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shape under article 227 of the Constitution, was traced in ***Waryam Singh v. Amarnath*** [1954] SCR 565; AIR 1954 SC 215. The, jurisdiction can be traced back to section 15 of the High Courts Act, 1861 which gave a power of judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. Section 107 of the Government of India Act 1915 and then section 224 of the Government of India Act 1935, were similarly worded and reproduced the predecessor provision. However, sub-section (2) was added in section 224 which confined the jurisdiction of the High Court to such judgments of the inferior courts which were not otherwise subject to appeal or revision. That restriction has not been carried forward in article 227 of the Constitution. In that sense article 227 of the Constitution has width and vigour unprecedented.

Difference between a writ of certiorari under Article 226 and supervisory jurisdiction under article 227:

24. The difference between articles 226 and 227 of the Constitution was well brought but in *Umaji Keshao Meshram v. Smt. Radhikabai* [1986] (Supp.) SCC 401. Proceedings under article 226 are in exercise of the original jurisdiction of the High Court While proceedings under article 227 of the Constitution are not original but only supervisory. Article 227 substantially reproduces the provisions of section 107 of the Government of India Act, 1915 excepting, that the power of superintendence has been extended by this article to Tribunals as well.

Though the power is akin to that of an ordinary court of appeal, yet the power under article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.

25. Upon a review of decided cases and a survey of the occasions wherein the High Courts have exercised jurisdiction to command a writ of certiorari or to exercise supervisory jurisdiction under article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labelling their petitions

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as one common under articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction the High Court may not only quash ON set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now, proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the Jurisdiction under article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well.

26. In order to safeguard against a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under article 227 of the Constitution, the courts have devised self-imposed rules of discipline on their power. Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. The High Court may have regard to legislative policy formulated on experience and expressed by enactments where the Legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision. So long as an error is capable of being corrected by a superior court in exercise of appellate or revisional jurisdiction though available to be exercised only at the conclusion of the proceedings, it would be sound exercise of discretion on the part of the High Court to refuse to exercise power of superintendence during the pendency of the

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proceedings. However, there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded.

27. In ***Chandrasekhar Singh v. Siya Ram Singh*** [1979] 3 SCC 118, the scope of jurisdiction under article 227 of the Constitution came up for the consideration of this court in the context of sections 435 and 439 of the Criminal Procedure Code which prohibits a second revision to the High Court against decision in first revision rendered by the Sessions Judge. On a review of earlier decisions, the three-Judges Bench summed up the position of law as under (SCC pages 121 and 122, paragraph 11):

(i) that the powers conferred on the High Court under article 227 of the Constitution cannot, in any way, be curtailed by the provisions of the Code of Criminal Procedure;

(ii) the scope of interference by the High Court under article 227 is restricted. The power of superintendence conferred by article 227 is to be exercised 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;

(iii) that the power of judicial interference under article 227 of the Constitution is not greater than the power under article 226 of the Constitution';

(iv) that the power of superintendence under article 227 of the Constitution cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as the court of appeal; the High Court cannot, in exercise of its jurisdiction under article 227, convert itself into a court of appeal.

28. Later, a two-judge Bench of this court in ***Baby v. Travancore Devaswom Board*** [1998] 8 SCC 310, clarified that in spite of the revisional jurisdiction being not available to the High Court, it still had powers under article 227 of the Constitution of India to quash the orders passed by the Tribunals if the findings of fact had been arrived at by non-consideration of the relevant and material documents, the consideration of which could have led to an opposite conclusion. This power of the High Court under the Constitution of India is always in addition to the revisional jurisdiction conferred on it.

Does the amendment in section 115 of the CPC have any impact on jurisdiction under articles 226 and 227?

29. The Constitution Bench in ***L. Chandra Kumar v. Union of India*** [1997] 228 ITR 725 (SC); [1997] 3 SCC 261, dealt with the nature of power of judicial review conferred by article 226 of the

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Constitution and the power of superintendence conferred by article 227. It was held that the jurisdiction conferred on the Supreme Court under article 32 of the Constitution and on the High Courts under articles 226 and 227 of the Constitution is part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tampered with much less taken away even by constitutional amendment, not to speak of a parliamentary legislation. A recent Division Bench decision by the Delhi High Court (Dalveer Bhandari and H.R. Malhotra JJ.) in Criminal Writ Petitions Nos. 758, 917 and 1295 of 2002 ***Govind v. State*** (Government of NCT of Delhi) decided on April 7, 2003 (reported as [2003] 6 ILD 468 (Delhi) makes an in-depth survey of decided cases including almost all the leading decisions by this court and holds:

> "The power of the High Court under article 226 cannot be whittled down, nullified, curtailed, abrogated, diluted or taken either by judicial pronouncement or by the legislative enactment or even by the amendment of the Constitution. The power of judicial review is an inherent part of the basic structure and it cannot be abrogated without affecting the basic structure of the Constitution.
>
> The essence of constitutional and legal principles, relevant to the issue at hand, has been correctly summed up by the Division Bench of the High Court and we record our approval of the same."

30. It is interesting to recall two landmark decisions delivered by High Courts and adorning the judicial archives. In ***Balkrishna Hari Phansalkar v. Emperor,*** AIR 1933 Bom 1, the question arose before a Special Bench : whether the power of superintendence conferred on the High Court by section 107 of Government of India Act 1915 can be controlled by the Governor-General exercising his power to legislate. The occasion arose because of the resistance offered by the State Government to the High Court exercising its power of superintendence over the Courts of Magistrates established under Emergency Powers Ordinance, 1932. Chief Justice Beaumont held that even if power of revision is taken away, the power of superintendence over the courts constituted by the ordinance was still available. The Governor-General cannot control the powers conferred on the High Court by an Act of Imperial Parliament. However, speaking of the care and caution to be observed while exercising the power of superintendence though possessed by the High Court, the learned Chief Justice held that the power of superintendence is not the same thing as the hearing of an appeal. An illegal conviction may be set aside under power of superintendence but we must exercise our discretion on judicial grounds, and only interfere if considerations of justice require us to do so'.

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31. In ***Manmatha Nath Biswas v. Emperor*** [1932-33] 37 CWN 201; AIR 1933 Cal 132, a conviction based on no legal reason and unsustainable in law came up for the scrutiny of the High Court under the power of superintendence in spite of right of appeal having been allowed to lapse. Speaking of the nature of power of superintendence, the Division Bench, speaking through Chief Justice Rankin, held that the power of superintendence vesting in the High Court under section 107 of the Government of India Act, 1915, is not a limitless power available to be exercised for removing hardship of particular decisions. The power of superintendence is a power of known and well-recognised character and should be exercised on those judicial principles which give it its character. The mere misconception on a point of law or a wrong decision on facts or a failure to mention by the courts in its judgment every element of the offence, would not allow the order of the Magistrate being interfered with in exercise of the power of superintendence but the High Court can and should see that no man is convicted without a legal reason. A defect of jurisdiction or fraud on the part of the prosecutor or error on the 'face of the proceedings' as understood in Indian practice, provides a ground for the exercise of the power of superintendence. The line between the two classes of case must be, however, kept clear and straight. In general words, the High Court's power of superintendence is a power to keep subordinate courts within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner.

32. **The principles deducible, well-settled as they are, have been well summed up and stated by a two-judges Bench of this court recently in *State v. Navjot Sandhu alias Afshan Guru* [2003] JT (4) 605; [2003] 6 SCC 641, SCC pages 656 and 657, paragraph 28. This court held thus:**

> **'(i) the jurisdiction under article 227 cannot be limited or fettered by any Act of the state Legislature;**
>
> **(ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with interlocutory order;**
>
> **(iii) the power must be exercised sparingly, only to move subordinate courts and Tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be 'exercised 'as the cloak of an appeal in disguise'.**

33. In **Shiv Shakti Co-operative Housing Society v. Swaraj Developers** [2003] 4 Scale 241; [2003] 6 SCC 659, another two-Judges Bench of this court dealt with section 115 of the CPC. The

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court at the end of its judgment noted the submission of learned counsel for a party that even if the revisional applications are held to be not maintainable, there should not be a bar on a challenge being made under article 227 of the Constitution for which an opportunity was prayed to be allowed. The court observed (SCC page 674, paragraph 36):

> 'If any remedy is available to a party... no liberty is necessary to be granted for availing the same'.

34. We are of the opinion that the curtailment of revisional jurisdiction of the High Court does not take away--and could not have taken away--the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court nor the power of superintendence conferred on the High Court under article 227 of the Constitution is taken away or whittled down. The power exists, untrammelled by the amendment in section 115 of the CPC, and is available to be exercised subject to rules of self discipline and practice which are well-settled.

35. We have carefully perused the Full Bench decision of the Allahabad High Court in ***Ganga Saran v. Civil Judge, Hapur***, AIR 1991 All 114 [FB] relied on by learned counsel for the respondent and referred to in the impugned order of the High Court. We do not think that the decision of the Full Bench has been correctly read. Rather, vide paragraph 11, the Full Bench has itself held that where the order of the civil court suffers from patent error of law and further causes manifest injustice to the party aggrieved then the same can be subjected to writ of certiorari. The Full Bench added that every interlocutory order passed in a civil suit is not subject to review under article 226 of the Constitution but if it is found from the order impugned that fundamental principle of law has been violated and further such an order causes substantial injustice to the party aggrieved the jurisdiction of the High Court to issue a writ of certiorari is not precluded. However, the following sentence occurs in the judgment of the Full Bench (AIR page 119):

> '**Where an aggrieved party approaches the High Court under article 226 of the Constitution against an order passed in civil suit refusing to issue injunction to a private individual who is not under statutory duty to perform public duty or vacating an order of injunction, the main relief is for issue of a writ of mandamus to a private individual and such a writ petition under article 226 of the Constitution would not be maintainable**."

36. It seems that the High Court in its decision impugned herein formed an impression from the above quoted passage that a prayer for issuance of injunction having been refused by trial court

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as well as the appellate court, both being subordinate to the High Court and the dispute being between two private parties, issuance of injunction by the High Court amounts to issuance of a mandamus against a private party which is not permissible in law.
37. The above quoted sentence from ***Ganga Saran v. Civil Judge, Hapur***, AIR 1991 All 114 [FB] cannot be read torn, out of the context. All that the Full Bench has said is that while exercising certiorari jurisdiction over a decision of the court below refusing to issue an order of injunction, the High Court would not, while issuing a writ of certiorari, also issue a mandamus against a private party. Article 227 of the Constitution has not been referred to by the Full Bench. Earlier in this judgment we have already pointed out the distinction between article 226 and article 227 of the Constitution and we need not reiterate the same. In this context, we may quote the Constitution Bench decision in T.C. Basappa v. T. Nagappa, AIR 1954 SC 440; [1955] 1 SCR 250 and Province of Bombay v. Khushaldas S. Advani [AIR 1950 SC 222], as also a three-Judge Bench decision in Dwarka Nath v. ITO [1965] 57 ITR 349 (SC); [1965] 3 SCR 536, which have held in no uncertain terms, as the law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine questions affecting the rights of subjects and obliged to act judicially. We are therefore of the opinion that the writ of certiorari is directed against the act, order of proceedings of the subordinate court, it can issue even if the lis is between two private parties.

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

> "**(1) Amendment by Act No. 46 of 1999 with effect from July 1, 2002 in section115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under articles 226 and 227 of the Constitution.**
>
> **(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.**
>
> **(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction--by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction--by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural**

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justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does'-have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

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(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under article 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where 'a stitch in time would save nine'. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge."

(iv) Following **Surya Dev Rai v. Ram Chander Rai** [2003] 6 SCC 675, cited supra, in **Jeya v. Sundaram Iyyar** reported in [2005] 4 MLJ 278 (Mad), this court held thus:

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"When it is shown that the trial court has failed to exercise its jurisdiction, properly applying the provisions of law, or when it is so that the trial court has wrongly exercised its jurisdiction, offending the statute, then, invoking the supervisory jurisdiction of this court, there can be interference by this court."

(v) In **Managing Director, Makkal Tholai Thodarpu Kuzhuman Ltd. v. V. Muthulakshmi** reported in [2007] 6 MLJ 1152 (Mad), at paragraph 28, this Court held thus:

"28. Therefore, the consistent judicial pronouncement by the Supreme Court as well as this court makes it very clear that in case where the lower court passes an order which cannot be accepted by any prudent sense, it is always open to the High Court under article 227 of the Constitution of India to correct the same by exercising the right of superintendence."

(vi) In **B.K. Muniraju v. State of Karnataka** reported in [2008] 4 SCC 451, the Hon'ble Supreme Court, at paragraphs 22 to 25, held as follows: (page 456):

"**22. It is settled law that a writ of certiorari can only be issued in exercise of extraordinary jurisdiction which is different from appellate jurisdiction. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals or authorities in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. In regard to a finding of fact recorded by an inferior tribunal or authority, a writ of certiorari can be issued only if in recording such a finding, the Tribunal/ authority has acted on evidence which is legally inadmissible, or has refused to admit an admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. It is needless to mention that a pure error of fact, however grave, cannot be corrected by a writ**."

23. It is useful to refer the decision of this court in **Surya Dev Rai v. Ram Chander Rai** [2003] 6 SCC 675 wherein, in paragraph 38, held as under:

"38. (3) Certiorari, under article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is

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> found to have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice."

24. It is clear that whether it is a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. It is also clear that the High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

25. As observed in **Surya Dev Rai v. Ram Chander Rai** [2003] 6 SCC 675, the exercise of jurisdiction under article 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. To put it clear though the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge."

(vii) In **Udhayabhanu v. Ranganayaki** reported in AIR 2009 Mad 91, 93, at paragraph 21, this Court held as follows:

"12. The court is of the opinion that it can interfere with an order passed by a court, which has patently usurped the jurisdiction exercisable by any other court and there is no impediment to interfere with the same, if the courts, subordinate to the High Court are allowed to transgress their powers by touching the subjects, which are not ear marked for them, the justice will not be rendered to the needy persons. Under supervisory jurisdiction, the High Court has got every power to correct the orders and decisions of the courts below, which are passed without jurisdiction, particularly when they are not specifically conferred with power to try a particular subject."

(viii) In ***World Wide Brands Inc. v. Smt. Dayavanthi Jhamnadas Hinduja*** [2009] 1 LW 658 (Mad), a Hon'ble Division

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Bench of the Madras High Court, at paragraphs 11 to 22, considered a catena of judgments and held as follows:

> "11. In ***Waryam Singh v. Amarnath*** [1954] SCR 565; AIR 1954 SC 215, the apex court has held that the power of superintendence conferred by article 227 of the Constitution is to be exercised more sparingly and only in appropriate case in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.
>
> 12. The above said law is again reiterated by the apex court in **San-gram Singh v. Election Tribunal**, AIR 1955 SC 425 and **Nagendra Nath Bora v. Commissioner of Hills Division and Appeals**, AIR 1958 SC 398."
>
> 13. In **T. Prem Sagar v. Standard Vacuum Oil Co.,** AIR 1965 SC 111, it has been held that in writ proceedings if an error of law apparent on the fact of the records is disclosed and the writ is issue, the usual course to' adopt is to correct the error and send the case back to the special Tribunal for its decision in accordance with law. It would be inappropriate for the High Court exercising its writ jurisdiction to consider the evidence for itself and reach its own conclusions in matters which have been left by the Legislature to the decisions of specially constituted Tribunals.
>
> 14. In **Joint Registrar of Co-operative Societies v. P.S. Rajagopal Naidu**, AIR 1970 SC 992, the apex court has held that the High Courts should not act as a court of appeal and reappraise and reexamine the relevant facts and circumstances which led to the making of order.
>
> 15. In **Muni Lal v. Prescribed Authority**, AIR 1978 SC 29, it has been held that the High Court cannot reappreciate the evidence and come to its own conclusion different from that of the prescribed Authority.
>
> 16. In **Ganpat Ladha v. Sashikant Vishnu Shinde,** AIR 1978 SC 955, the apex court has held that the High Courts cannot justify the exercise of its discretionary powers under article 227 of the Constitution as to the finding of fact; unless such finding of fact is clearly perverse and patently unreasonable.
>
> 17. In **Chandavarkar Sita Ratna Rao v. Ashalata S. Guram** [1986] 4 SCC 447, the Hon'ble Apex Court, at page 460, paragraph 4, has held thus:

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> "It is true that in exercise of jurisdiction under article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under articles 226 and 227 of the Constitution to look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice. Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under article 227 of the Constitution. On the first point, therefore, the High Court was in error."

18. In **Ouseph Mathai v. M. Abdul Khadir** [2002] 1 SCC 319, the Hon'ble Apex court, in paragraph 4, held thus:

> **'It is not denied that the powers conferred upon the High Court under articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt, article 227 confers a right of superintendence over all courts and Tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and Tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and Tribunals in accordance with law conferring**

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> **powers within the ambit of the enactments creating such courts and Tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.**'

19. In **State v. Navjot Sandhu alias Afshan Guru** [2003] 6 SCC 641, the Hon'ble Aex Court, at paragraph 28 held thus:

> "**Thus the law is that article 227 of the Constitution of India gives the High Court the power of superintendence over all courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeking that they obey the law. The powers under article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However, the power under article 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under article 227, must be exercised sparingly and only to keep subordinate court and tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under article 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under article 227 could not be exercised "as the cloak of an appeal in disguise**".

20. In **Surya Deo Rai v. Ram Chander Rai** [2003] 6 SCC 675, the Hon'ble Apex court has held that exercise of power under article 226 is available only to correct the error committed by the court or the authority and the error should be self-evidence. The Hon'ble Apex Court had also cautioned that such an error which needs to be established by lengthy and complicated arguments or by indulging in a long-drawn

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process of reasoning, cannot possibly be an error available for correction by writ of certiorari.

21. In Ranjeet Singh v. Ravi Prakash [2004] 3 SCC 682 the Hon'ble Apex court has held that unless, the High Court finds patent error in the order of the Tribunal or appellate board, it would not be proper to interfere in such order in exercise of jurisdiction under article 227 of the Constitution.

22. The Superintendence power of the High Court under article 227 of the Constitution of India, over all courts and Tribunals is basically to keep the subordinate courts/Tribunals/Appellate Authorities constituted under statutes within their bounds and not for correcting mere errors. The exercise of power is limited to want of jurisdiction, errors of law, perverse findings, gross violation of principles of natural justice and like the one. It may be exercised, if it is shown that grave injustice has been done to the person, who has invoked the jurisdiction with such grievance, the court does not act as an Appellate Authority to reappraise the evidence and come to a different conclusion. Even if two views are possible, in exercise of power, the court would not be justified in substituting its own reason for the reasons of the subordinate courts/Tribunals or appellate tribunals/boards. Of course, the power of this court is not taken away, where the statutory Appellate Tribunal/board brushes aside the evidence on conjunctures and without giving cogent reasons, which would result in error apparent on the face of the records. Unless, the errors questioned are apparently error, perverse and the findings are not supported by any materials, the exercise of power under article 227, of the Constitution to interfere with in such orders may not be available."

(ix) In **Ramesh Chandra Sankla v. Vikram Cement** reported in AIR 2009 SC 713, 729, at paragraph 81, held as follows:

"81. The power of superintendence under article 227 of the Constitution conferred on every High Court over all courts and Tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae, i.e., to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, power and also the duty of the

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> court to ensure that power of superintendence must 'advance the ends of justice and uproot injustice'."

87. On the question of alternative remedy and filing of a writ petition, Mr. P. Sanjay, learned counsel for the respondents/writ petitioners, relied on the following decisions:

(i) In **Rashid Ahmed v. Municipal Board, Kairana** (1950 SCR 566), the Hon'ble Supreme Court held that "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition, unless there are good grounds therefor. But, it should be remembered that the rule of exhaustion of statutory remedite before a writ is granted is a rule of self-imosed limitation, a rule of policy, and discretion rather than a rule of law and the court may therefore, in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted."

(ii) In **State of Uttar Pradesh v. Mohammed Nooh** reported in 1958 SCR 595, 605, the Hon'ble Supreme Court held thus:

> "............If, therefore, the existence of other adequate legal remedies is not per se a bar to the issue of a writ of certiorari and if in a proper case it may be the duty of the superior court to issue a writ of certiorari to correct the errors of an inferior court or tribunal called upon to exercise judicial or quasi-judicial functions and not to relegate the petitioner to other legal remedies available to him and if the superior court can in a proper case exercise its jurisdiction in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal ...."

(iii) In **Ramesh Ahluwalia v. State of Punjab** reported in (2012) 12 SCC 331, the Hon'ble Supreme Court held thus:

> "...................The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the Appellants on the maintainability of the

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> writ petition..............The aforesaid observations have been repeated and reiterated in numerous judgments of this Court including the judgment in ***Unni Krishnan and Zee Telefilms Ltd***."

88. *Per contra*, Mr. Sukumar Nainan Oommen, learned counsel for the appellants, relying on **Nivedita Sharma** (cited supra) and **New Saravana Stores Bramandamai** (cited supra), submitted that when there is an alternate remedy, writ petition is not maintainable. In **Nivedita Sharma** (cited supra), the question considered by the Hon'ble Supreme Court was whether the Hon'ble Division Bench of the Delhi High Court was justified in entertaining the writ petition filed by respondent No.1 and others against order dated 26.12.2006 passed by the State Consumer Disputes Redressal Commission (for short, 'the State Commission') ignoring that a statutory remedy of appeal was available to them under Section 19 of the Consumer Protection Act, 1986 (for short, 'the 1986 Act'). After considering various decisions, at paragraphs 15 and 16, the Hon'ble Supreme Court held thus:

> "15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar AIR 1969 SC 556, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.
>
> 16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Superintendent of Taxes (supra) and other similar judgments that the High Court will not entertain a petition under Art.226 of the Constitution if an effective alternative remedy is available to the aggrieved person

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> or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still hold field."

89. It is worthwhile to reproduce the decisions considered in **Nivedita Sharma** (cited supra) as hereunder:

> "11. We have considered the respective arguments / submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Art.226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation ***L. Chandra Kumar v. Union of India*** 1997 (3) SCC 261. However, it is one thing to say that in exercise of the power vested in it under Art.226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and / or its agency / instrumentality or any public authority or order passed by a quasi - judicial body / authority, and it is an altogether different thing to say that each and every petition filed under Art.226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
>
> 12. In **Thansingh Nathmal v. Superintendent of Taxes** AIR 1964 SC 1419, this Court adverted to the rule of self - imposed restraint that writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:
>
> "The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art.226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art.226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."
>
> 13. In ***Titaghur Paper Mills Co. Ltd. v. State of Orissa*** 1983 (2) SCC 433, this court observed:

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> "It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in ***Wolverhampton New Waterworks Co. v. Hawkesford*** (1859) 6 CBNS 336 : 141 ER 486 in the following passage:
>
> > "... There are three classes of cases in which a liability may be established founded upon a statute .... 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. The form given by the statute must be adopted and adhered to."
>
> The rule laid down in this passage was approved by the House of Lords in ***Neville v. London Express Newspapers Ltd.*** 1919 AC 368 : (1918-19) All ER Rep. 61 (HL) and has been reaffirmed by the ***Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.*** 1935 AC 532 and ***Secy. of State v. Mask and Co***. (1939-40) 67 IA 222 : AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."
>
> 14. In ***Mafatlal Industries Ltd. v. Union of India*** 1997 (5) SCC 536, B. P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:
>
> "So far as the jurisdiction of the High Court under Art.226 or for that matter, the jurisdiction of this Court under Art.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 Art.226 / Art.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."

90. In **New Saravana Stores Bramandamai v. The Assistant Commissioner** [W.A. Nos. 1360 to 1362 of 2017 and CMP No. 18806 to 18808 of 2017]**,** challenge was to the correctness of a common order directing the appellants therein to avail the alternate remedy provided under the Statute. While dismissing the writ petitions, writ court directed the appellants therein to

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prefer revision petitions under the Tamil Nadu Value Added Tax Act, 2006. Contentions of the learned counsel, as summarised in paragraph 5 of the judgment, are reproduced.

> "5. Instant writ appeals have been filed against the said orders. Inviting the attention of this Court to the preamble of the Tamilnadu Value Added Tax Act, 2006 that, it is an Act to consolidate and amend the law relating to the levy of tax on the sale or purchase of goods in the State of Tamilnadu, explanation (v) to Section 2(33) of the Tamilnadu Value Added Tax Act, 2006, which defines 'sale', details of the purchase of the cars and sale effected outside the state of Tamilnadu, extracted in the rectification order dated 16.06.2017 of the Assistant Commissioner (CT), Pondy Bazaar Assessment Circle, Chennai, and placing reliance on the decisions of this Court in W.P. No. 16576 of 2001 dated 21.11.2003, in the matter of M/s. V. Guard Industries Limited, Coimbatore v. Commercial Tax Officer, Coimbatore and another and another decision in Tax Case (Appeal) No. 125 of 2007 dated 13.02.2014 in the matter of M/s. CRN Investments (P) Limited v. the Commissioner of Income Tax, Chennai, Mrs. R. Hemalatha, learned counsel for the appellant submitted that there is an error apparent on the face of the record, when the appellant by mistake, submitted the returns and when State has no jurisdiction to levy tax for the sale effected outside the State of Tamilnadu, there being a jurisdictional error, writ petition can be maintained, and it is also her submission that when facts are not disputed, petitioner/appellant need not be driven to file a revision under Section 84 of the TANVAT Act, 2006 to the Joint Commissioner (CT), Chennai (Central)."

The Court passed the following order:

> "6. Though on the above said grounds and submissions Mrs. R. Hemalatha, learned counsel for the appellant prayed to entertain the writ appeals, this Court is not inclined to do so for the reason that on more than one occasion, Hon'ble Supreme Court as well as this Court, held that when there is an effective and alternate remedy, provided under the taxing laws, writ petitions, should not be entertained. Reference can be made to few decisions, in this regard.
>
> > "(i). In **Union of India v. T.R. Verma**, AIR 1957 SC 882, the Hon'ble Supreme Court held that it is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It will be a sound

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exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution, unless there are good grounds to do, otherwise.

(ii) In **C.A. Ibrahim v. ITO,** AIR 1961 SC 609, **H.B. Gandhi v. M/s. Gopinath & sons**, 1992 (Suppl) 2 SCC 312 and in **Karnataka Chemical Industries v. Union of India**, 1999 (113) E.L.T. 17(SC) : 2000 (10) SCC 13, the Hon'ble Supreme Court held that where there is a hierarchy of appeals provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction.

(iii) The general principles of law to be followed while entertaining a writ petition, when an alternative remedy is available, as per the decision of the Hon'ble Apex Court in **U.P. State Spinning Co. Ltd. v. R.S. Pandey and Another** (2005) 8 SCC 264, at para No. 11 are as follows:

> "Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the high Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction."

(iv) In **United Bank of India v. Satyawati Tondon and Others** {(2010) 8 SCC 110}, the Hon'ble Apex Court, at paragraph Nos. 43 to 45, held as follows:-

> "43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies

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with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they do not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the high Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision etc., and the particular legislation contains a detailed mechanism for redressal of his grievance."

(v) In **Nivedita Sharma v. Cellular Operators Association of India and Others** {(2011) 14 Supreme Court Cases 337}, the Hon'ble Apex Court held thus:-

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> "An alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute are under challenge. The Court has recognised some exceptions to the rule of alternative remedy. However, the high Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal or grievance still holds the field."

(vi) The Hon'ble Apex Court, after considering a catena of cases, in **Shauntlabai Derkar and Another v. Maroti Dewaji Wadaskar** [(2014) 1 Supreme Court Cases 602], at para Nos. 15 to 18, held as follows:-

> "15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal Case {Thansigh Nathmal v. Supt. of Taxes, AIR 1964 SC 1419}, Titaghur Paper Mills Case {Titaghur Paper Mills Co. Ltd. v. State of Orissa (1983) 2 SCC 433} and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
>
> 16. In the instant case, the Act provides complete machinery for the assessment/ reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not

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be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. v. State of Haryana (1985) 3 SCC 267, this Court has noticed that if an appeal is from "Caesar to Caesar's wife", the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act, as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of the instant case. In light of the same, we are of the considered opinion that the writ Court ought not to have entertained the writ petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the reassessment orders passed and the consequential demand notices issued thereon.

18. In view of the above, we allow this appeal and set aside the judgment and order passed by the High Court in Chhabil Dass Agarwal v. Union of India {W.P.(c) No. 44 of 2009, decided on 5/10/2010}. We grant liberty to the respondent, if he so desires, to file an appropriate petition/ appeal against the orders of reassessment passed under Section 148 of the Act within four weeks' time from today. If the petition is filed before the appellate authority within the time granted by this Court, the appellate authority within the time granted by this Court, the appellate authority shall consider the petition only on merits without any reference to the period of limitation. However, it is clarified that the appellate authority shall not be influenced by any observation made by the High Court while disposing of Writ Petition (Civil) No. 44 of 2009, in its judgment and order dated 5/10/2010."

(vii) After considering a plethora of judgments, in **Union of India and Others v. Major General Shri Kant Sharma**

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and Another [(2015) 6 SCC 773], at para 36, the Hon'ble Apex Court held as follows:-

> “The aforesaid decisions rendered by this Court can be summarised as follows:-
>
> (i). The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including the Armed Forces Tribunal Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India (Refer: *L. Chandrakumar v. Union of India (1997) 3 SCC 261 and S.N. Mukherjee v. Union of India (1990) 4 SCC 594*.
>
> (ii). The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act (Refer: *Mafatlal Industries Ltd., v. Union of India (1997) 5 SC 536)*.
>
> (iii). When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma v. Cellular Operators Assn. of India (2011) 14 SCC 337.
>
> (iv). The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma v. Cellular Operators Assn. of India (2011) 14 SCC 337.)"

(viii) In *Veerappa Pillai v. Raman & Raman Ltd. {1952 SCR 583}, CCE v. Dunlop India Ltd. {(1985) 1 SCC 260}, Ramendra Kishore Biswas v. State of Tripura {(1999) 1 SCC 472, Shivgonda Anna Patil v. State of Maharashtra {(1999) 3 SCC 5}, C.A. Abraham v. ITO {(1961) 2 SCR 765}, Titaghur Paper Mills Co Ltd., v. State of Orissa {(1983) 2 SCC 433}, H.B. Gandhi v. Gopi Nath & Sons {1992 Supp (2) SCC 312}, Whirlpool Corpn v. Registrar of Trade Marks {(1998) 8 SCC 1}, Tin Plate Co. of India Ltd., v. State of Bihar {(1998) 8 SCC 272}, Sheela Devi v. Jaspal Singh {(1999) 1 SCC 209}*

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> *and Punjab National Bank v. O.C. Krishnan {(2001) 6 SCC 569}*, this Court held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction."

91. Giving due consideration to the facts of this case and the decisions cited supra, we are of the view that the instant writ petition filed under Article 226 of the Constitution of India was not maintainable on the ground that there is an alternative remedy. Judicial orders of the Court/Tribunal can be challenged only under Article 227 of the Constitution of India and not under Article 226.

92. In the case on hand, admittedly, all parties in the writ petition are private parties. On the issue as to whether, a writ petition is maintainable under Article 226 of the Constitution of India, in a dispute between private parties, when they do not fall under the definition of State, authority, or instrumentality of the State, or a private person, not discharge public function or duty, let us consider a few decisions:

(i) In **Anandi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V.R. Rudani and** Ors.[(1989) 2 SCC 691], the Hon'ble Supreme Court considered, as to when a writ petition under Article 226 of the Constitution of India lies, as hereunder:

> "12. The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of the college being a trust registered under the Public Trust Act is not amenable to the writ jurisdiction of the High Court. The contention in other words, is that the trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel relied upon two decisions of this Court :

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(a) ***Executive Committee of Vaish Degree College, Shamli and Ors. v. Lakshmi Narain and Ors.*** 1976 [2] SCR 1006 and

(b) ***Deepak Kumar Biswas v. Director of Public Instructions*** (1987)ILLJ516SC.

In the first of the two cases, the respondent institution was a Degree College managed by a registered co-operative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Co-operative Societies Act and affiliated to the Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not a statutory body since not created by or under a statute. It was emphasised that an institution which adopts certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a non-statutory.

13. The decision in Vaish Degree College was followed in ***Deepak Kumar Biswas*** case. There again a dismissed lecturer of a private college was seeking reinstatement in service. The Court refused to grant the relief although it was found that the dismissal was wrongful. This Court instead granted substantial monetary benefits to the lecturer. This appears to be the preponderant judicial opinion because of the common law principle that a service contract cannot be specifically enforced.

14. But here the facts are quite different and, therefore, we need not go thus far. There is no plea for specific performance of contractual service. The respondents are not seeking a declaration that they be continued in service. They are not asking for mandamus to put them back into the college. They are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of mandamus ?

15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational

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institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. (See-*The Evolving Indian Administrative Law by M.P. Jain* (1983) p. 266). So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus can not be refused to the aggrieved party.

16.The Law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in pursuance of Section 3(1)(c) of the Law Commission Act, 1965, requested the Law Commission "to review the existing remedies for the judicial control of administrative acts and commissions with a view to evolving a simpler and more effective procedure." The Law Commission made their report in March 1976 (Law Com No. 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act 1981. It combined all the former remedies into one proceeding called Judicial Review. Lord Denning explains the scope of this "judicial review".

> “At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.
>
> The Statute is phrased in flexible terms, It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that the courts are not bound hand and foot by the previous law. They are to 'have regard to' it. So the previous law as to who are-and who are not- public authorities, is not absolutely binding.

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> Nor is the previous law as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing. (See-The Closing Chapter by Rt. Hon Lord Denning p. 122)."

17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them mean every body which is created by statute and whose powers and duties are defined by statute. So Government Departments local authorities, police authorities and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'.

Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226 writs can be issued to a 'any person or authority".

It can be issued "for the enforcement of any or the fundamental rights and for any other purpose".

18. Article 226 reads:

> "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, order or writs, including (writs 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.
>
> XXX XXX XXX XXX"

19. The scope of the this article has been explained by Subba Rao, J., in **Dwarkanath v. Income Tax Officer** [1965]57ITR349(SC) :

> "This article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of

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> prerogative writs as understood in England ; but the use of the expression 'nature" for the said expression does not equate the writs that can be issued in India with those in England, but only draws analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to set the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any parson or authority" used in Article 226 are. therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

(ii) In **Mohan Pandey and Ors. v. Usha Rani Rajgaria and Ors.** [(1992) 4 SCC 61], the Hon'ble Supreme Court dealt with a dispute relating to immovable property. Holding that remedy under Article 226 of the Constitution of India is special and extraordinary and should not be exercised casually or lightly, the Hon'ble Apex Court held thus:

> "6.............. There is no doubt that the dispute is between two private persons with respect to an immovable property. Further, a suit covering either directly a portion of the house-property which is in dispute in the present case or in any event some other parts of the same property is already pending in the civil court. The respondent justifies the step of her moving the High Court with a writ petition on the ground of some complaint made

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by the appellants and the action by the police taken thereon. We do not agree that on account of this development, the respondent was entitled to maintain a writ petition before the High Court. It has repeatedly been held by this Court as also by various High Courts that a regular suit is the appropriate remedy for settlement of disputes relating to property rights between private persons and that the remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of a statutory authority is alleged. And in such a case, the Court will issue appropriate direction to the authority concerned. If the real grievance of the respondent is against the initiation of criminal proceedings, and the orders passed and steps taken thereon, she must avail of the remedy under the general law including the Criminal Procedure Code. The High Court cannot allow the constitutional jurisdiction to be used for deciding disputes, for which remedies, under the general law, civil or criminal, are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The jurisdiction is special and extra-ordinary and should not be exercised casually or lightly. We, therefore, hold that the High Court was in error in issuing the impugned direction against the appellants by their judgment under appeal. The appeal is accordingly allowed, the impugned judgment is set aside and the writ petition of the respondents filed in the High Court is dismissed."

(iii) In **Federal Bank Ltd. v. Sagar Thomas and Ors.** [(2003) 10 SCC 733], the Hon'ble Supreme Court observed as under:

"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Govt); (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature (viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function."

93. Now, let us consider a few decisions on the aspect of the powers exercised under Articles 226 and 227 of the Constitution of India, as under:

(I) In **Hindustan Petroleum Corporation Ltd. and Ors. v. Dolly Das** [(1999) 4 SCC 450], when contractual rights were sought to be enforced

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by filing a writ petition under Article 226 of the Constitution of India, the Hon'ble Apex Court, at para 7, held thus:

> “7. In the absence of constitutional or statutory rights being involved a writ proceeding would not lie to enforce contractual obligations even if it is sought to be enforced against the State or to avoid contractual liability arising thereto. In the absence of any statutory right Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise. In the present case, the appellants have sought to exercise their powers under Section 7 of the Act and, therefore, though the other consequences may be contractual in nature, the exercise of the right being under a statute, it cannot be said that the respondent could not approach the writ court.”

(ii) In **Binny Ltd. and Ors. v. V. Sadasivan and Ors.** [(2005) 6 SCC 657], termination of the employees on the basis of an agreement was challenged under Article 226 of the Constitution of India. High Court set aside the termination, declined back wages, and directed the employees to work out their remedy. On appeal, the Hon'ble Apex Court, after considering the issue as to whether the company is discharging any “Public duty or Public function” and thus, fall under the definition of “State” within Article 12 of the Constitution of India, held that Writ Petition under Article 226 of the Constitution of India is not maintainable. Relevant paras are hereunder:

> “9. Superior Court's supervisory jurisdiction of judicial review is invoked by an aggrieved party in myriad cases. High Courts in India are empowered under Article 226 of the Constitution to exercise judicial review to correct administrative decisions and under this jurisdiction High Court can issue to any person or authority, any direction or order or writs for enforcement of any of the rights conferred by Part III or for any other purpose. The jurisdiction conferred on the High Court under Article 226 is very wide. However, it is an accepted principle that this is a public law remedy and it is available against a body or person performing public law function. Before considering the scope and ambit of public law remedy in the light of certain English decisions, it is worthwhile to remember the words of Subha Rao J. expressed in relation to the powers conferred on the High Court under Article 226 of the Constitution in **Dwarkanath v. Income Tax Office**r [1965] 57 ITR 349(SC) :

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> "This article is couched in comprehensive phraseology and it-ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution of India with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself...."

10. The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are

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statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the Administrative Law (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion is expressed:

> "A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions.

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It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

In a book on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24, it is stated thus:

> "A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing.
>
> Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognize the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is government."

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12. In **Regina v. Panel on Take-over and Merges, Ex parte Datafin Plc. and Anr.** (1987) 1 QBD 815, a question arose whether the Panel of Take-over and Mergers had acted in concert with other parties in breach of the City Code on Take-over and Mergers. The panel dismissed the complaint of the applicants. Though the Panel on Take-over and Mergers was purely a private body, the Court of Appeal held that the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, which was supported by public law sanctions and which was under an obligation to act judicially, but whose source of power was not simply the consent of those over whom it exercised that power; that although the panel purported to be part of a system of self-regulation and to derive its powers solely from the consent of those whom its decisions affected, it was in fact operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties, and was under a duty in exercising what amounted to public powers to act judicially; that, therefore, the court had jurisdiction to review the panel's decision to dismiss the applicants' complaint; but that since, on the facts, there were no grounds for interfering with the panel's decision, the court would decline to intervene.

13. Lloyd L.J., agreeing with the opinion expressed by Sir John Donaldson M.R. held :

> "I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If at the end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.

14. In that decision, they approved the observations made by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1985) A.C. 374 wherein it was held :

> "...for a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by

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> an authority endowed by law with executive powers which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of 'the prerogative.' Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank"

15. It is also pertinent to refer to Sir John Donaldson M.R. in that Take-Over Panel case :

> "In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to is jurisdiction."

16. The above guidelines and principles applied by English courts cannot be fully applied to Indian conditions when exercising jurisdiction under Article 226 or 32 of the Constitution. As already stated, the power of the High Courts under Article 226 is very wide and these powers have to be exercised by applying the constitutional provisions and judicial guidelines and violation, if any, of the fundamental rights guaranteed in Part III of the Constitution. In the matter of employment of workers by private bodies on the basis of contracts entered into between them, the courts had been reluctant to exercise the powers of judicial review and whenever the powers were exercised as against private employers, it was solely done based on public law element involved therein.

17. This view was expressly stated by this Court in various decisions and one of the earliest decisions is **The Praga Tools Corporation v. Shri C.A. Imanual and Ors.** (1969)IILLJ479SC. In this case, the appellant company was a company incorporated under the Indian Companies Act and at the material time the Union Government and the Government of Andhra Pradesh held 56 per

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cent and 32 per cent of its shares respectively. Respondent workmen filed a writ petition under Article 226 in the High Court of Andhra Pradesh challenging the validity of an agreement entered into between the employees and the company, seeking a writ of mandamus or an order or direction restraining the appellant from implementing the said agreement. The appellant raised objection as to the maintainability of the writ petition. The learned Single Judge dismissed the petition. The Division Bench held that the petition was not maintainable against the company. However, it granted a declaration in favour of three workmen, the validity of which was challenged before this Court. This Court held at pages 589-590 as under:

> "...that the applicant for a mandamus should have a legal and specific right to enforce the performance of those dues. Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or any inferior tribunal requiring him or them to do s particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities [Cf. Halsbury's Laws of England (3rd Ed.), Vol. II p 52 and onwards]. The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

18. It was also observed that when the High Court had held that the writ petition was not maintainable, no relief of a declaration as to invalidity of an impugned agreement between the company and its employees could be granted and that the High Court committed an error in granting such a declaration.

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19. In **VST Industries Limited v. VST Industries Workers' Union and Anr.** 2000 (8) SCALE 95, the very same question came up for consideration. The appellant-company was engaged in the manufacture and sale of cigarettes. A petition was filed by the first respondent under Article 226 of the Constitution seeking a writ of mandamus to treat the members of the respondent Union, who were employees working in the canteen of the appellant's factory, as employees of the appellant and for grant of monetary and other consequential benefits. Speaking for the Bench, Rajendra Babu, J., (as he then was), held as follows :

> "7. In de Smith, Woolf and Jowell's Judicial Review of Administrative Action, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law, e.g., the activities by private bodies may be governed by the standards of public when its decisions are subject to duties conferred by statute or when by virtue of the function it is performing or possible its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarized the position with the following propositions :
> (1) The test of a whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.
>
> (2) The principles of judicial review prima facie govern the activities of bodies performing public functions.
>
> (3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function.
>
> (a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

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> (b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

20. Applying the above principles, this Court held that the High Court rightly held that it had no jurisdiction.

21. Another decision on the same subject is **General Manager, Kisan Sahkar Chini Mills Limited, Sultanpur, UP v. Satrughan Nishad and Ors.** (2003)IIILLJ1108SC. The appellant was a cooperative society and was engaged in the manufacture of sugar. The respondents were the workers of the appellant and they filed various writ petitions contending that they had to be treated as permanent workmen. The appellant challenged the maintainability of those writ petitions and applying the principles enunciated in VST Industries' case (supra), it was held by this Court that the High Court had no jurisdiction to entertain an application under Article 226 of the Constitution as the mill was engaged in the manufacture and sale of sugar which would not involve any public function.

22. In **Federal Bank Limited v. Sagar Thomas and Ors.** (2004) ILLJ 161 SC, the respondent was working as a Branch Manager of the appellant Bank. He was suspended and there was a disciplinary enquiry wherein he was found guilty and dismissed from service. The respondent challenged his dismissal by filing a writ petition. The learned Single Judge held that the Federal Bank was performing a public duty and as such it fell within the definition of "other authorities" under Article 12 of the Constitution. The appellant bank preferred an appeal, but the same was dismissed and the decision of the Division Bench was challenged before this Court. This Court observed that a private company carrying on business as a scheduled bank cannot be termed as carrying on statutory or public duty and it was therefore held that any business or commercial activity, whether it may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money which do have an impact on the economy of the country in general, cannot be classified as one falling in the category of those

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discharging duties or functions of a public nature. It was held that that the jurisdiction of the High Court under Article 226 could not have been invoked in that case.

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution.

However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol. 30, page-682, "a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit." There cannot be any general definition of public authority or public action. The facts of each case decide the point.

30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or Government authorities at all levels is increasingly employing contractual techniques to achieve its regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce the contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

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31. The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in **State of U.P. v. Bridge & Roof Co.** AIR1996SC3515 and also in **Kerala State Electricity Board v. Kurien E. Kalathi**l AIR2000SC2573. In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.

32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties.

33. We are unable to perceive any public element in the termination of the employees by the appellant in Civil Appeal No. 1976 of 1998 and the remedy available to the respondents is to seek redressal of their grievance in civil law or under the labour law enactments especially in view of the disputed questions involved as regards the status of employees and other matters. So also, in the civil appeal arising out of SLP(Civil) No. 6016 of 2002, the writ petition has been rightly dismissed by the High Court. We see no merit in the contention advanced by the appellant therein. The High Court rightly held that there is no public law element and the remedy open to the appellant is to seek appropriate relief other than judicial review of the action taken by the respondent company."

(iii) In **U.P. State Spinning Co. Ltd. v. R.S. Pandey and Ors.** [(2005) 8 SCC 264], termination of employment was challenged by way of a Writ Petition under Article 226 of the Constitution of India, despite the availability of an alternative remedy under Industrial Tribunal. The Hon'ble

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Apex Court laid down the principle of law, as to when a Writ Petition can be entertained, at paragraphs 11, 16 and 17, hereunder;

> “11. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extra-ordinary jurisdiction.
>
> 16. If, as was noted in **Ram and Shyam Co. v. State of Haryana and Ors.**, AIR1985SC1147 the appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in **First Income-Tax Officer, Salem v. Short Brothers (P) Ltd.,** [1966]60ITR83(SC) and S**tate of U.P. and Ors. v. Indian Hume Pipe Co. Ltd.**, (1977)2SCC724. That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the

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> impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.
>
> 17. Where under, a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the" statute. It was noted by this Court in **L. Hirday Narain v. Income Tax Officer, Bareilly**, [1970]78ITR26(SC) that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.

(iv) In **City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala and Ors.** [(2009) 1 SCC 168], the Hon'ble Apex Court considered, as to whether the writ court should do while exercising the extraordinary jurisdiction under Article 226 of the Constitution of India, at paras 29 to 31, held thus:

> “29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex-parte writ of Mandamus, order or direction in a public law remedy. Further, while considering validity of impugned action or inaction the court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extra ordinary jurisdiction under Article 226 of the Constitution.
>
> 30. The court while exercising its jurisdiction under Article 226 is duty bound to consider whether :

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> (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
>
> (b) petition reveals all material facts;
>
> (c) the petitioner has any alternative or effective remedy for the resolution of the dispute;
>
> (d) person invoking the jurisdiction is guilty of unexplained delay and laches;
>
> (e) ex facie barred by any laws of Limitation;
>
> (f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the court and particularly in cases where public revenue and public interest are involved. Such directions always are required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public remedy to which he is not otherwise entitled to in law.

31. None of these parameters have been kept in view by the High Court while disposing of the Writ Petition and the Review Petition."

(v) In **Ram Kishan Fauji v. State of Haryana and Ors.** [(2017) 5 SCC 533], the issue considered by the Hon'ble Supreme Court was whether a letter patent appeal is maintainable against the judgement rendered in a writ petition. The Hon'ble Apex Court held as under:

"32. In this regard, reference to **Umaji Keshao Meshram and Ors. v. Radhikabai and Anr.** 1986 (Supp.) SCC 401 would be fruitful. In the said case, the controversy arose whether an appeal lies under Clause 15 of the Letters Patent of the Bombay High Court to a Division Bench of two judges of that High Court from the judgment of a Single Judge of that High Court in a petition filed Under Article 226 or 227 of the Constitution of India. The Court referred to the Letters Patent of Calcutta, Bombay and Madras High Courts which are pari materia in the same terms with minor variations that have occurred due to amendments made subsequently. The Court referred to the provisions of the

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Government of India Act, the Indian Independence Act, 1947 and the debates of the Constituent Assembly and observed that the historical evidence shows that our Constitution did not make a break with the past. It referred to some earlier authorities and, eventually, came to hold thus:

> "92. The position which emerges from the above discussion is that under Clause 15 of the Letters Patent of the Chartered High Courts, from the judgment (within the meaning of that term as used in that clause) of a Single Judge of the High Court an appeal lies to a Division Bench of that High Court and there is no qualification or limitation as to the nature of the jurisdiction exercised by the Single Judge while passing his judgment, provided an appeal is not barred by any statute (for example, Section 100A of the Code of Civil Procedure, 1908) and provided the conditions laid down by Clause 15 itself are fulfilled. The conditions prescribed by Clause 15 in this behalf are: (1) that it must be a judgment pursuant to Section 108 of the Government of India Act of 1915, and (2) it must not be a judgment falling within one of the excluded categories set out in Clause 15."

And again:

> "100. According to the Full Bench even were Clause 15 to apply, an appeal would be barred by the express words of Clause 15 because the nature of the jurisdiction under Articles 226 and 227 is the same inasmuch as it consists of granting the same relief, namely, scrutiny of records and control of subordinate courts and tribunals and, therefore, the exercise of jurisdiction under these articles would be covered by the expression "revisional jurisdiction" and "power of superintendence". We are afraid, the Full Bench has misunderstood the scope and effect of the powers conferred by these articles. These two articles stand on an entirely different footing. As made abundantly clear in the earlier part of this judgment, their source and origin are different and the models upon which they are patterned are also different. Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of

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> imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law (see ***State of Gujarat v. Vakhatsinghji Vajesinghji Vaghela*** AIR 1968 SC 1481 and ***Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand*** (1973) 1 SCR 185). The orders, directions and writs Under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power Under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these two processes are the same."

94. The said proposition has been considered by the Hon'ble Supreme Court in **Shalini Shyam Shetty v. Rajendra Shankar Patil** [(2010) 8 SCC 329] and held in the negative. In ***Shalini Shyam Shetty'****s* case (cited supra), the Hon'ble Apex Court explained the scope of Articles 226 & 227 of the Constitution of India, in civil matters/private disputes. Taking note of the Bombay High Court Rules, Bombay High Court Appellate Side Rules, 1960, Articles 226 and 227 of the Constitution of India, and after tracing the history as to how the provisions have been enacted, at paragraphs 24 to 68, the Hon'ble Apex Court held thus:

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"24. R.17 deals with applications under Art.227 and Art.228. If a comparison is made between R.1 of Chap.17 and R.17 of the same Chapter it will be clear that petitions under Art.226 and those under Art.227 are treated differently. Both these Rules are set out one after the other:

> "1. (i) Applications for issue of writs, directions, etc. under Art.226 of the Constitution.
>
> Every application for the issue of a direction, order or writ under Art.226 of the Constitution shall, if the matter in dispute is or has arisen substantially outside Greater Bombay, be heard and disposed of by a Division Bench to be appointed by the Chief Justice. The application shall set out therein the relief sought and the grounds on which it is sought, it shall he solemnly affirmed or supported by an affidavit In every such application, the applicant shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application has been disposed of.
>
> (ii) Applicant to inform Court, if during pendency of an application, the Supreme Court has been approached.
>
> If the applicant makes an application to the Supreme Court in respect of the same matter during the pendency of the application in the High Court, he shall forthwith bring this fact to the notice of the High Court filing an affidavit in the case and shall furnish a copy of such affidavit to the other side.
>
> (iii) Hearing may be adjourned pending decision by Supreme Court.
>
> The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter."
>
> "17. (i) Applications under Art.227 and Art.228
>
> An application invoking the jurisdiction of the High Court under Art.227 of the Constitution or under Art.228 of the Constitution, shall be filed on the Appellate Side of the High Court and be heard and disposed of by a Division bench to be appointed by the Chief Justice. The application shall set out therein the relief sought and the grounds on which it is sought. It shall be solemnly affirmed or supported by an affidavit. In every such application, the applicant shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application is disposed of.
>
> (ii) Application to inform Court, if, during pendency of an application, the Supreme Court is approached.

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> If the applicant makes an application to the Supreme Court in respect of the same matter during the pendency of the application in the High Court, he shall forthwith bring this fact to the notice of the High Court by filing an affidavit in the case and shall furnish a copy of such affidavit to the other side.
>
> (iii) Hearing may be adjourned pending decision by Supreme Court.
>
> The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter.
>
> (iv) R.2 to 16 to apply *mutatis mutandis.*
>
> Provision of R.2 to 16 above shall apply *mutatis mutandis* to all such applications."

25. The distinction between the two proceedings also came up for consideration before the Bombay High Court and in the case of ***Jhaman Karamsingh Dadlani v. Ramanlal Maneklal Kantawala***, AIR 1975 Bombay 182 the Bombay High Court held:

> "2. This High Court since its establishment in 1862 under the Letters Patent has been exercising original as well as appellate jurisdiction and its functioning is regulated by 'the Bombay High Court (Original Side) Rules, 1957' and 'Rules of the High Court of Judicature at Bombay, Appellate Side, 1960' (hereinafter referred to respectively as 'O. S. Rules' and 'A. S. Rules'). Rules also provide for disposal of petitions under Art.226 and Art.227 of the Constitution. Supervisory jurisdiction of the High Court under Art.227 of the Constitution is exclusively vested in a Bench on the Appellate Side and jurisdiction of either of the two wings of this Court under Art.226, however, depends upon whether "the matter in dispute" arises substantially in Greater Bombay or beyond it, the same being exercisable by the original Side in the former case and by the Appellate Side in the latter case. This is not made dependent on the matter being in fact of an original or appellate nature. The contention of the learned Advocate General and Mr. Desai is that the matter in dispute, on averments in the petition, must be said to have arisen at any rate, substantially within the limits of Greater Bombay and the petitioner cannot be permitted to avoid the impact of these Rules and choose his own forum by merely quoting Art.227 of the title and prayer clause of the petition, when it is not attracted or by merely making a pretence of the dispute having arisen beyond Greater Bombay by referring to non - existing facts to attract the Appellate Side jurisdiction under Art.226"

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26. In paragraph 4 of ***Jhaman*** (supra), the High Court further distinguished the nature of proceeding under Art.226 of the Constitution to which, depending upon the situs of the cause of action, R.623 of Bombay High Court original Side Rules will apply. The said rule is set out below:

> "623. Every application for the issue of a direction, order or writ under Art.226 of the Constitution other than an application for a writ of Habeas Corpus shall, if the matter in dispute is or has arisen substantially within Greater Bombay, be heard and disposed of by such one of the Judges sitting on the Original Side or any specially constituted Bench as the Chief Justice may appoint. The application shall be by petition setting out therein the relief sought and the grounds on which it is sought. The petition shall be supported by an affidavit. In every such petition the petitioner shall state whether he has made any other application to the Supreme Court or the High Court in respect of the same matter and how that application has been disposed of. The petitioner shall move for a Rule Nisi in open Court.
>
> If the Petitioner makes an application to the Supreme Court in respect of the same matter during the pendency of the petition in the High Court, he shall forthwith bring this fact to the notice of the High Court by filing an affidavit in the case and shall furnish a copy of such affidavit to the other side.
>
> The Court may adjourn the hearing of the application made to it pending the decision of the Supreme Court in the matter."

27. From a perusal of paragraph 4 of *Jhaman* (supra) it is clear that to a proceeding under Art.227 of the Constitution of India only the appellate side rules of the High Court apply. But to a proceeding under Art.226, either the original side or the appellate side rules, depending on the situs of the cause of action, will apply.

28. Therefore High Court rules treat the two proceedings differently in as much as a proceeding under Art.226, being an original proceeding, can be governed under Original Side Rules of the High Court, depending on the situs of the cause of action. A proceeding under Art.227 of the Constitution is never an original

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proceeding and can never be governed under Original Side Rules of the High Court.

29. Apart from that, writ proceeding by its very nature is a different species of proceeding.

30. Before the coming of the Constitution on 26th January, 1950, no Court in India except three High Courts of Calcutta, Bombay and Madras could issue the writs, that too within their original jurisdiction. Prior to Art.226 of the Constitution, under S.45 of the Specific Relief Act, the power to issue an order in the nature of mandamus was there. This power of Courts to issue writs was very truncated and the position has been summarized in the law of writs by V. G. Ramchandran, Volume 1 (Easter Book Company). At page 12, the learned author observed:

> "...The power to issue writs was limited to three High courts. The other High Courts in India, however, were created by the Crown under S.16 of the High Courts Act, 1861 but they had no such power. It is necessary to mention that under S.45 of the Specific Relief Act, 1877, even the High Courts of Madras, Calcutta and Bombay could not issue the writs of prohibition and certiorari or an order outside the local limits of their original civil jurisdiction."

31. The power to issue writs underwent a sea - change with the coming of the Constitution from 26th January, 1950. Now writs can be issued by High Courts only under Art.226 of the Constitution and by the Supreme Court only under Art.32 of the Constitution.

32. No writ petition can be moved under Art.227 of the Constitution nor can a writ be issued under Art.227 of the Constitution. Therefore, a petition filed under Art.227 of the Constitution cannot be called a writ petition. This is clearly the Constitutional position. No rule of any High Court can amend or alter this clear Constitutional scheme. In fact the rules of Bombay High Court have not done that and proceedings under Art.226 and Art.227 have been separately dealt with under the said rules.

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33. The High Court's power of superintendence under Art.227 of the Constitution has its origin as early as in Indian High Courts Act of 1861. This concept of superintendence has been borrowed from English Law.

34. The power of superintendence owes its origin to the supervisory jurisdiction of King's Bench in England. In the Presidency towns of the then Calcutta, Bombay, Madras initially Supreme Court was established under the Regulating Act of 1973. Those Courts were endowed with the power of superintendence, similar to the powers of Kings Bench under the English Law. Then the Indian High Courts in three Presidency towns were endowed with similar jurisdiction of superintendence. Such power was conferred on them under S.15 of the Indian High Courts Act, 1861.

35. S.15 of the Indian High Courts Act of 1861 runs as under:

> "15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its Appellate Jurisdiction, and shall have Power to call for Returns, and to direct the Transfer of any Suit or Appeal for any such Court to any other Court of equal or superior Jurisdiction, and shall have Power to make and issue General Rules for regulating the Practice and Proceedings of such Courts, and also to prescribe Forms for every Proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all Books, Entries, and Accounts to be kept by the officers, and also to settle Tables of Fees to be allowed to the Sheriff, Attorneys, and all Clerks and Officers of Courts, and from Time to Time to alter any such Rule or Form or Table; and the Rules so made, and the Forms so framed, and the Tables so settled, shall be used and observed in the said Courts, provided that such General Rules and Forms and Tables be not inconsistent with the Provisions of any law in force, and shall before they are issued have received the Sanction, in the Presidency of Fort William of the Governor General in Council, and in Madras or Bombay of the Governor in Council of the respective Presidencies."

36. Then in the Government of India Act, 1915 S.107 continued this power of superintendence with the High Court. S.107 of the Government of India Act, 1915 was structured as follows:

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"**107. Powers of High Court with respect to subordinate Courts**.-- Each of the High courts has superintendence over all High 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 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

(e) 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 any 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."

37. In the Government of India Act, 1935 the said S.107 was continued with slight changes in S.224 of the Act, which is as follows:

"**224. Administrative functions of High Courts**.-- (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 things, 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 provisions 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."

38. The history of this power has been elaborately traced by a Division Bench of Calcutta High Court in the case of ***Jahnabi Prosad Banerjee***

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and Another v. Basudeb Paul and Others reported in AIR 1950 Calcutta 536 and that was followed in a Division Bench Judgment of Allahabad High Court in ***Sukhdeo Baiswar v. Brij Bhushan Misra and Others*** reported in AIR 1951 Allahabad 667.

39. The history of Art.227 has also been traced by this Court in its Constitutional Bench judgment in ***Waryam Singh and Another v. Amarnath and Another***, AIR 1954 SC 215. In paragraph 13 at page 217 of the report this Court observed:

> "...The only question raised is as to the nature of the power of superintendence conferred by the article".

40. About the nature of the power of superintendence this Court relied on the Special Bench judgment delivered by Chief Justice Harries in **Dalmia Jain Airways Limited v. Sukumar Mukherjee**, (AIR 1951 Calcutta 193).

41. In paragraph 14 page 217 of ***Waryam Singh*** (supra), this Court neatly formulated the ambit of High Court's power under Art.227 in the following words:

> "This power of superintendence conferred by Art.227 is, as pointed out by Harries C.J., in 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1951 Cal. 193 (SB) (B), 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."

42. Chief justice Harries in the Full Bench decision in ***Dalmia*** (supra) stated the principles on which the High Court can exercise its power under Art.227 very succinctly which, we would better, quote:

> "6. Though this Court has a right to interfere with decisions of Courts and tribunals under its power of superintendence, it appears to me that that right must be exercised most sparingly and only in appropriate cases. The matter was considered by a Bench of this Court in ***Manmatha Nath v. Emperor***, AIR 1933 Cal. 132. In that case a Bench over which Sir George Rankin C. J. presided held that S.107, Government of India Act (which roughly corresponds to Art.227 of the Constitution), does not vest the High Court with limitless power which may be exercised at the Court's

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> discretion to remove the hardship of particular decisions. The power of superintendence it confers is a power of a known and well - recognised character and should be exercised on those judicial principles which give it its character. In general words, the High Court's power of superintendence is a power to keep subordinate Courts within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner." (page 193-194 of the report).

43. In stating the aforesaid principles, Chief Justice Harries relied on what was said by Chief Justice George Rankin in ***Manmatha Nath Biswas v. Emperor*** reported in AIR 1933 Calcutta 132. At page 134, the learned Chief Justice held:

> "...superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence but is as Norman, J., had said a term having a legal force and signification. The general superintendence which this Court has over all jurisdiction subject to appeal is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. It does not involve responsibility for the correctness of their decisions, either in fact or law.”

44. Justice Nasir Ullah Beg of Allahabad High Court in a very well considered judgment rendered in the case of ***Jodhey and Others v. State through Ram Sahai*** reported in AIR 1952 Allahabad 788, discussed the provisions of S.15 of the Indian High Courts Act of 1861, S.107 of the Government of India Act 1915 and S.224 of the Government of India Act 1935 and compared them with almost similar provisions of Art.227 of the Constitution.

45. The learned judge considered the power of the High Court under Art.227 to be plenary and unfettered but at the same time, in paragraph 15 at page 792 of the report, the learned judge held that High Court should be cautious in its exercise. It was made clear, and rightly so, that the power of superintendence is not to be exercised unless there has been an (a) unwarranted assumption of jurisdiction, not vested in Court or tribunal, or (b) gross abuse of jurisdiction or (c) an unjustifiable refusal to exercise jurisdiction vested in Courts or tribunals. The learned

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judge clarified if only there is a flagrant abuse of the elementary principles of justice or a manifest error of law patent on the face of the record or an outrageous miscarriage of justice, power of superintendence can be exercised. This is a discretionary power to be exercised by Court and cannot be claimed as a matter or right by a party.

46. This Court in its Constitution Bench decision in the case of ***Nagendra Nath Bora and Another v. Commissioner of Hills Division and Appeals, Assam and Others***, AIR 1958 SC 398 followed the ratio of the earlier Constitution Bench in ***Waryam Singh*** (supra) about the ambit of High Court's power of superintendence and quoted in ***Nagendra Nath*** (supra) the same passage, which has been excerpted above (See paragraph 30, page 413 of the report).

47. The Constitution Bench in ***Nagendra Nath*** (supra), unanimously speaking through Justice B.P. Sinha, (as his Lordship then was) pointed out that High Court's power of interference under Art.227 is not greater than its power under Art.226 and the power of interference under Art.227 of the Constitution is limited to ensure that the tribunals function within the limits of its authority. (emphasis supplied)

48. The subsequent Constitution Bench decision of this Court on Art.227 of the Constitution, rendered in the case of ***State of Gujarat etc. v. Vakhatsinghji Vajesinghji Vaghela (dead) his legal representatives and Others*** reported in AIR 1968 SC 1481 also expressed identical views. Justice Bachawat speaking for the unanimous Constitution Bench opined that the power under Art.227 cannot be fettered by State Legislature but this supervisory jurisdiction is meant to keep the subordinate tribunal within the limits of their authority and to ensure that they obey law.

49. So the same expression namely to keep the Courts and Tribunals subordinate to the High Court 'within the bounds of their authority' used

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in ***Manmatha Nath Biswas*** (supra), to indicate the ambit of High Court's power of superintendence has been repeated over again and again by this Court in its Constitution Bench decisions.

50. Same principles have been followed by this Court in the case of ***Mani Nariman Daruwala @ Bharucha (deceased) through Lrs. and Others v. Phiroz N. Bhatena and Others etc***. reported in (1991) 3 SCC 141, wherein it has been held that in exercise of its jurisdiction under Art.227, the High Court can set aside or reverse finding of an inferior Court or tribunal only in a case where there is no evidence or where no reasonable person could possibly have come to the conclusion which the Court or tribunal has come to. This Court made it clear that except to this 'limited extent' the High Court has no jurisdiction to interfere with the findings of fact (see para 18, page 149-150).

51. In coming to the above finding, this Court relied on its previous decision rendered in the case of ***Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*** reported in (1986) 4 SCC 447. The decision in ***Chandavarkar*** (supra) is based on the principle of the Constitution Bench judgments in ***Waryam Singh*** (supra) and ***Nagendra Nath*** (supra) discussed above.

52. To the same effect is the judgment rendered in the case of ***Laxmikant Revchand Bhojwani and Another v. Pratapsingh Mohansingh Pardeshi*** reported in (1995) 6 SCC 576. In paragraph 9, page 579 of the report, this Court clearly reminded the High Court that under Art.227 that it cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. Its exercise must be restricted to grave dereliction of duty and flagrant abuse of fundamental principle of law and justice (see page 579-580 of the report).

53. Same views have been taken by this Court in respect of the ambit of High Court's power under Art.227 in the case of ***Sarpanch, Lonand***

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Grampanchayat v. Ramgiri Gosavi and Another reported in AIR 1968 SC 222, (see para 5 page 222-234 of the report) and the decision of this Court in ***Jijabai Vithalrao Gajre v. Pathankhan and Others*** reported in (1970) 2 SCC 717. The Constitution Bench ratio in ***Waryam Singh*** (supra) about the scope Art.227 was again followed in ***Ahmedabad Manufacturing & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand and Others*** reported in (1972) 1 SCC 898.

54. In a rather recent decision of the Supreme Court in case of ***Surya Dev Rai v. Ram Chander Rai and Others*** reported in (2003) 6 SCC 675, a two judge Bench of this Court discussed the principles of interference by High Court under Art.227. Of course in ***Surya Dev Rai*** (supra) this Court held that a writ of Certiorari is maintainable against the order of a civil Court, subordinate to the High Court (para 19, page 668 of the report). The correctness of that ratio was doubled by another Division Bench of this Court in ***Radhey Shyam and Another v. Chhabi Nath and Others***, [(2009) 5 SCC 616 and a request to the Hon'ble Chief Justice for a reference to a larger Bench is pending. But in so far as the formation of the principles on the scope of interference by the High Court under Art.227 is concerned, there is no divergence of views.

55. In paragraph 38, sub-paragraph (4) at page 695 of the report, the following principles have been laid down in ***Surya Dev Rai*** (supra) and they are set out:

> "38 (4) Supervisory jurisdiction under Art.227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

56. Sub-paras (5), (7) and (8) of para 38 are also on the same lines and extracted below:

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"(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) xxxx xxxx xxxx

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and / or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re - appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character."

57. Art.226 and Art.227 stand on substantially different footing. As noted above, prior to the Constitution, the Chartered High Courts as also the Judicial Committee of the Privy Council could issue prerogative writs in exercise of their original jurisdiction. (See 1986 (suppl.) SCC 401 at page 469).

58. However, after the Constitution every High Court has been conferred with the power to issue writs under Art.226 and these are original proceeding. (*State of U.P. and Others v. Dr. Vijay Anand Maharaj, AIR 1963 SC 946, page 951*).

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59. The jurisdiction under Art.227 on the other hand is not original nor is it appellate. This jurisdiction of superintendence under Art.227 is for both administrative and judicial superintendence. Therefore, the powers conferred under Art.226 and Art.227 are separate and distinct and operate in different fields.

60. Another distinction between these two jurisdictions is that under Art.226, High Court normally annuls or quashes an order or proceeding but in exercise of its jurisdiction under Art.227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior tribunal should have made. (See Surya Dev Rai (supra), para 25 page 690 and also the decision of the Constitution Bench of this Court in *Hari Vishnu Kamath v. Ahmad Ishaque and Others, AIR 1955 SC 233, para 20 page 243*).

61. Jurisdiction under Art.226 normally is exercised where a party is affected but power under Art.227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Art.226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. Jurisdiction under Art.227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Art.226 of the Constitution can be claimed ex - debito justicia or as a matter of right. But in cases where the High Court exercises its jurisdiction under Art.227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Art.226, a Letters Patent Appeal or an intra Court Appeal is maintainable. But no such appeal is maintainable from an order passed by a Single Judge of a High Court in exercise of power under Art.227. In almost all High Courts, rules have been framed for regulating the exercise of jurisdiction

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under Art.226. No such rule appears to have been framed for exercise of High Court's power under Art.227 possibly to keep such exercise entirely in the domain of the discretion of High Court.

62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Art.227 of the Constitution may be formulated:

(a) A petition under Art.226 of the Constitution is different from a petition under Art.227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Art.227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Art.227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Art.227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals

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and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Art.227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar v. Union of India and Others reported in 1997 (3) SCC 261 and therefore abridgment by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like S.115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Art.227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Art.227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Art.227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Art.226 is meant for protection of individual grievance. Therefore, the power under Art.227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

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(o) **An improper and a frequent exercise of this power will be counter - productive and will divest this extraordinary power of its strength and vitality.**

63. In the facts of the present case we find that the petition has been entertained as a writ petition in a dispute between landlord and tenant amongst private parties.

64. It is well settled that a writ petition is a remedy in public law which may be filed by any person but the main respondent should be either Government, Governmental agencies or a State or instrumentalities of a State within the meaning of Art.12. Private individuals cannot be equated with State or instrumentalities of the State. All the respondents in a writ petition cannot be private parties. But private parties acting in collusion with State can be respondents in a writ petition. Under the phraseology of Art.226, High Court can issue writ to any person, but the person against whom writ will be issued must have some statutory or public duty to perform.

65. Reference in this connection may be made to the Constitution Bench decision of this Court in the case of Sohan Lal v. Union of India and Another reported in AIR 1957 SC 529.

66. The facts in Sohan Lal (supra) are that Jagan Nath, a refugee from Pakistan, filed a writ petition in the High Court of Punjab against Union of India and Sohan Lal alleging unauthorized eviction from his residence and praying for a direction for restoration of possession. The High Court directed Sohan Lal to restore possession to Jagan Nath. Challenging that order, Sohan Lal approached this Court. The Constitution Bench of this Court accepted the appeal and overturned the verdict of the High Court.

67. In paragraph 7, page 532 of the judgment, the unanimous Constitution Bench speaking though Justice Imam, laid down a few salutary principles which are worth remembering and are set out:

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"7. The eviction of Jagan Nath was in contravention of the express provisions of S.3 of the Public Premises (Eviction) Act. His eviction, therefore, was illegal. He was entitled to be evicted in due course of law and a writ of mandamus could issue to or an order in the nature of mandamus could be made against the Union of India to restore possession of the property to Jagan Nath from which he had been evicted if the property was still in the possession of the Union of India. The property in dispute, however, is in possession of the appellant. There is no evidence and no finding of the High Court that the appellant was in collusion with the Union of India or that he had knowledge that the eviction of Jagan Nath was illegal. Normally, a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty (Halsbury's Laws of England Vol. 11, Lord Simonds Edition, p. 84). If it had been proved that the Union of India and the appellant had colluded, and the transaction between them was merely colourable, entered into with a view to deprive Jagan Nath of his rights, jurisdiction to issue a writ to or make an order in the nature of mandamus against the appellant might be said to exist in a Court..."

68. These principles laid down by the Constitution Bench in Sohan Lal (supra) have not been doubted so far."

(emphasis supplied)

95. The above judgment is squarely applicable to the case on hand and we are of the view that the writ court ought not to have entertained W.P.(C) No.14341 of 2020, when the dispute is purely civil in nature.

96. In the foregoing paragraph, we have already expressed the view that the respondents/writ petitioners have prosecuted remedies before two forums. On the issue, as to whether writ petition is maintainable under Article 226 of the Constitution of India, when a party pursues multiple remedies, let us consider the decisions relied on by the appellants as hereunder.

(I) In **Satya Pal Anand v. State of M.P. and Ors.** [(2016)10 SCC 767], the appellant therein approached the Hon'ble High Court of Madhya Pradesh, Judicature at Jabalpur, by way of Writ Petition No.13505/2008 under Article 226 of the

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Constitution of India, to challenge the order passed by the Inspector General (Registration) dated 15th September 2008, as also the order passed by the Sub-Registrar (Registration) dated 28th June 2008. The appellant further prayed for a declaration that the Extinguishment Deed dated 9th August 2001 as well as the subsequent two deeds dated 21st April, 2004 and 11th July, 2006 are *void ab initio*, with a further direction to the Inspector General (Registration) and the Sub-Registrar (Registration) to record the cancellation of those documents.

The Hon'ble High Court of Madhya Pradesh dismissed the Writ Petition primarily on the ground that the appellant therein had already resorted to a remedy (a dispute) before the appropriate Forum under the Act of 1960, which was pending; and held that the declaration, as sought for can be considered in those proceedings after recording of the evidence and production of other material to be relied on by the parties therein. Accordingly, the Court held that since an alternative remedy before a competent Forum was available and was pending between the parties, it was not feasible to invoke the writ jurisdiction Under Article 226 of the Constitution of India. Indeed, the High Court adverted to the reported cases relied on by the parties to buttress their stand. Relevant paras are extracted hereunder:

> "20. The respondents, on the other hand, contend that the Writ Petition has been justly rejected by the High Court on the ground that the Appellant was pursuing remedy for the same reliefs in substantive proceedings by way of a dispute filed Under Section 64 of the Act of 1960 before the competent Forum. Besides the said proceedings, it was open to the Appellant to take recourse to other appropriate remedy before the Civil Court, to the extent necessary. The High Court in exercise of powers Under Article 226 of the Constitution of India not only exercises an equitable jurisdiction but also an extraordinary jurisdiction. The High Court in any case is not expected to enter upon the plea of declaring agreements and documents executed between private parties as illegal or for that matter void ab initio, which remedy is available before the cooperative Forum or the Civil Court. It was contended that if this contention is accepted, it may not be necessary to answer the other issue noted in the judgment of Justice Dipak Misra as the same can be considered in an appropriate proceedings, if and when the occasion arises. Alternatively, it was contended that the dictum of this Court in Thota Ganga Laxmi's case (supra) must be understood as applicable to the express procedure prescribed for registration of an Extinguishment Deed or cancellation deed in the State of Andhra Pradesh in terms of statutory Rules. Inasmuch as, in absence of any express provision about the procedure for registration of such

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> document, that requirement cannot be considered as mandatory. For, it is not possible to hold that no Extinguishment or cancellation deed can ever be executed by the party to the earlier concluded contract, considering the express provision in that behalf in Section 17(1)(b) of the Act of 1908 read with other enabling provisions in the same Act or other substantive law. According to the Respondents, the questions posed in the judgment of Justice V. Gopala Gowda would be relevant and can be conveniently answered in the substantive proceedings already resorted to by the Appellant, by way of a dispute Under Section 64 of the Act of 1960. The answer to the said questions may require adjudication of disputed facts and also application of settled legal position. It is not a pure question of law. Being disputed question of facts, the High Court was right in refusing to interfere and exercise its writ jurisdiction.
>
> **25. It is a well established position that the remedy of Writ Under Article 226 of the Constitution of India is extra-ordinary and discretionary. In exercise of writ jurisdiction, the High Court cannot be oblivious to the conduct of the party invoking that remedy. The fact that the party may have several remedies for the same cause of action, he must elect his remedy and cannot be permitted to indulge in multiplicity of actions. The exercise of discretion to issue a writ is a matter of granting equitable relief. It is a remedy in equity. In the present case, the High Court declined to interfere at the instance of the Appellant having noticed the above clinching facts. No fault can be found with the approach of the High Court in refusing to exercise its writ jurisdiction because of the conduct of the Appellant in pursuing multiple proceedings for the same relief and also because the Appellant had an alternative and efficacious statutory remedy to which he has already resorted to. This view of the High Court has found favour with Justice Dipak Misra. We respectfully agree with that view**."

(ii) In **Wayne Burt Petro Chemicals (P.) Ltd. v. Registrar of Companies** [2020]158SCL260(Madras)], the petitioners therein filed writ petition, praying to issue a Writ of Mandamus, directing the Registrar of Companies, 1st respondent therein, and respondents 3 to 6, to permit the petitioners, to induct more directors in the Board of Directors of the 2nd respondent Company viz., Cetex Petro Chemical, to have representation in proportionate to the equity shareholding of the petitioner holding 47.68% to the respondents holding 47.82%, as per the mandatory provisions of Sections 160 and 161(1) of the Indian Companies Act, 2013, and the rules framed thereunder, till then forbearing the respondents 3 to 6 from conducting and the Annual General Meeting on 31.12.2019, in any manner. The background facts, as given in the paragraph 4 of the said judgment, read as under:

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"(i) A company by name M/s. Udhyaman Investments Pvt. Ltd. which is the twelfth Respondent in the first of these three appeals, claiming to be a Financial Creditor, moved an application before the NCLT Chennai, under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the IBC, 2016), against M/s. Tiffins Barytes Asbestos & Paints Ltd., the Corporate Debtor (which is the fourth Respondent in the first of these three appeals and which is also the appellant in the next appeal).

(ii) By an Order dated 12.03.2018, NCLT Chennai admitted the application, ordered the commencement of the Corporate Insolvency Resolution Process and appointed an Interim Resolution Professional. Consequently, a Moratorium was also declared in terms of section 14 of the IBC, 2016.

(iii) At that time, the Corporate Debtor held a mining lease granted by the Government of Karnataka, which was to expire by 25.05.2018. Though a notice for premature termination of the lease had already been issued on 09.08.2017, on the allegation of violation of statutory rules and the terms and conditions of the lease deed, no order of termination had been passed till the date of initiation of the Corporate Insolvency Resolution Process (hereinafter referred to as CIRP).

(iv) Therefore, the Interim Resolution Professional appointed by NCLT addressed a letter dated 14.03.2018 to the Chairman of the Monitoring Committee as well as the Director of Mines & Geology informing them of the commencement of CIRP. He also wrote a letter dated 21.04.2018 to the Director of Mines & Geology, seeking the benefit of deemed extension of the lease beyond 25.05.2018 upto 31.3.2020 in terms of section 8A(6) of the Mines & Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as MMDR Act, 1957).

(v) Finding that there was no response, the Interim Resolution Professional filed a writ petition in WP No. 23075 of 2018 on the file of the High Court of Karnataka, seeking a declaration that the mining lease should be deemed to be valid upto 31.03.2020 in terms of section 8A(6) of the MMDR Act, 1957.

(vi) During the pendency of the writ petition, the Government of Karnataka passed an Order dated 26.09.2018, rejecting the proposal for deemed extension, on the ground that the Corporate Debtor had contravened not only the terms and conditions of the Lease Deed but also the provisions of Rule 37 of the Mineral Concession Rules, 1960 and Rule 24 of the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Rules, 2016.

(vii) In view of the Order of rejection passed by the Government of Karnataka, the Corporate Debtor, represented by the Interim Resolution Professional, withdrew the Writ Petition No. 23075 of 2018) on 28.09.2018, with liberty to file a fresh writ petition.

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(viii) However, instead of filing a fresh writ petition (in accordance with the liberty sought), the Resolution Professional moved a Miscellaneous Application No. 632 of 2018, before the NCLT, Chennai praying for setting aside the Order of the Government of Karnataka, and seeking a declaration that the lease should be deemed to be valid upto 31.03.2020 and also a consequential direction to the Government of Karnataka to execute Supplement Lease Deeds for the period upto 31.03.2020.

(ix) By an Order dated 11.12.2018, NCLT, Chennai allowed the Miscellaneous Application setting aside the Order of the Government of Karnataka on the ground that the same was in violation of the moratorium declared on 12.03.2018 in terms of section 14(1) of IBC, 2016. Consequently the Tribunal directed the Government of Karnataka to execute Supplement Lease Deeds in favour of the Corporate Debtor for the period upto 31.03.2020.

(x) Aggrieved by the order of the NCLT, Chennai, the Government of Karnataka moved a writ petition in WP No. 5002 of 2019, before the High Court of Karnataka. When the writ petition came up for hearing, it was conceded by the Resolution Professional before the High Court of Karnataka that the order of the NCLT could be set aside and the matter relegated to the Tribunal, for a decision on merits, after giving an opportunity to the State to respond to the reliefs sought in the Miscellaneous Application. It is relevant to note here that the Order of the NCLT dated 11.12.2018, was passed ex parte, on the ground that the State did not choose to appear despite service of notice.

(xi) Therefore, by an Order dated 22.03.2019, the High Court of Karnataka set aside the Order of the NCLT and remanded the matter back to NCLT for a fresh consideration of the Miscellaneous Application No. 632 of 2018.

(xii) Thereafter, the State of Karnataka filed a Statement of Objections before the NCLT, primarily raising two objections, one relating to the jurisdiction of the NCLT to adjudicate upon disputes arising out of the grant of mining leases under the MMDR Act, 1957, between the State Lessor and the Lessee and another relating to the fraudulent and collusive manner in which the entire resolution process was initiated by the related parties of the Corporate Debtor themselves, solely with a view to corner the benefits of the mining lease.

(xiii) Overruling the objections of the State, the NCLT Chennai passed an Order dated 03.05.2019 allowing the Miscellaneous Application, setting aside the order of rejection and directing the Government of Karnataka to execute Supplemental Lease Deeds.

(xiv) Challenging the Order of the NCLT, Chennai, the Government of Karnataka moved a writ petition in WP No. 41029 of 2019 before the High Court of Karnataka. When the writ petition came up for orders as to admission, the Corporate Debtor represented by the Resolution

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> Professional appeared through counsel and took notice and sought time to get instructions. Therefore, the High Court, by an Order dated 12.09.2019 adjourned the matter to 23.09.2019 and granted a stay of operation of the direction contained in the impugned Order of the Tribunal. Interim Stay was necessitated in view of a Contempt Application moved by the Resolution Professional before the NCLT against the Government of Karnataka for their failure to execute Supplement Lease deeds.
>
> (xv) It is against the said ad Interim Order granted by the High Court that the Resolution Applicant, the Resolution Professional and the Committee of Creditors have come up with the present appeals."

On the basis of the facts and the reliefs sought for, a Hon'ble Division Bench of the Madras High Court, observed thus:

> "11. As a matter of fact, in this connection, a Company Petition No. 20 of 2018 is pending before the NCLT at Chennai. It is also seen that in said Tribunal, the petitioners had also filed I.A. No. 421 of 2019 and a comparison of the petition therein and the affidavit filed in the present Writ Petition shows that the affidavit is practically a cut and paste of the said petition. The said petition had been filed seeking the following reliefs:
>
> > "i. to set aside the induction of the two Additional Director pursuant to the resolution passed by the Board of Directors on 01.11.2019 in violation of the order passed by this Honourable Tribunal.
> >
> > ii. to pass a direction that the Board of Directors shall have representation in proportion to the equity shareholding of the Petitioners with 47.68% and the respondents with 47.82%.
> >
> > iii. to extend the time for subscription to the rights issue dated 01.11.2019 by a period of 30 days for infusion of entire shortfall of funds Rs. 6.5 Cr.
> >
> > iv. or any other order or orders as this Honourable Tribunal deems fit in the circumstances of the case and thus render justice.
>
> 12. As a matter of fact, relief No. 2 above, namely, to have representation in proportion to the equity shareholding, is the same relief as sought in the present Writ Petition which has been filed for a direction to permit the petitioner to induct four more Directors in the Board of Directors. It is thus seen that the relief sought

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in the LA. No. 421 of 2019 is the very same relief sought in the present Writ Petition with words being interchangeably used. But the intention and the relief are the same. In the reliefs' sought in the Writ Petition and in the relief sought in the application filed before the NCLT, the petitioners have sought representation in proportion to the equity shareholding of the petitioners with 47.68% and the respondents with 47.82%. It is thus seen that it is a re-agitation of the issue which had been raised before the NCLT and which is pending before the said Tribunal.

13. This practice of re-agitation and re-litigating the same issue before two different forums has been very strongly commented by the Hon'ble Supreme Court [1998] 3 SCC 573, K.K. Modi v. K.M. Modi. The Hon'ble Supreme Court had stated as follows:--

> **"44. One of the examples cited as an abuse of the process of the court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of the court's discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding**."

16. In these circumstances, I hold that the Writ jurisdiction cannot be exercised to grant the relief sought by the petitioners, particularly since the Company

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> Petition No. 20 of 2018 is already pending before the NCLT with respect to the very same parties and with respect to the very same issue and I.A. No. 421 of 2019 has been filed for the very same relief, namely seeking representation in proportion with respect to the equity shareholding and re-agitation of the same issue is not permissible under law."

97. On the issue, as to whether writ petition is maintainable under Article 226 of the Constitution of India, when the writ petitioners/respondents 1 & 2 herein are guilty of suppression of crucial material, let us consider the decisions relied on by the appellants as hereunder.

(I) In **Jose M.G. and Ors. v. State of Kerala and Ors.** [W.A. No. 919 of 2020, dated 17.07.2020], appellants/writ petitioners therein are fishermen by occupation. They reside at Puthuvype, which forms part of Vypeen Island, a Ramsar site connected to Vembanad backwaters in Kochi taluk, Ernakulam district. An LPG terminal was proposed by the 3rd respondent - Indian Oil Corporation Ltd., in Puthuvypu, which led to widespread protest from the residents of the locality. They have contended that the terminal poses a real and imminent treat to the lives of the persons residing nearby, which is a thickly populated area. Appellants as well as the whole population of Puthuvype, are aggrieved by the issuance and extension of a prohibition order under Section 144 of the Criminal Procedure Code, 1973, prohibiting protest demonstrations, meetings, assembling and the conduct of any public functions. The order under Section 144 of the Cr.P.C. was issued first by the 2nd respondent-District Collector-District Magistrate, Kakkanad, Ernakulam, on 15.12.2019, for a period of two months. This was followed by another order dated 10.02.2020 issued by respondent No. 1- State of Kerala, represented by Secretary, Government of Kerala, Thiruvananthapuram, extending the prohibition for a further period of six months. Thus, Exhibit-P2 order extends the prohibition upto 15.08.2020. Appellants have contended that Exhibit-P1 order and the extension of the same by Exhibit-P2 order, under Section 144 of the Cr.P.C., are illegal and issued in violation of their fundamental rights as well as the whole of the population, numbering about

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65,000, residing in the locality covered by those orders. Being aggrieved, appellants filed W.P.(C) No. 10542 of 2020, seeking to call for the records leading to Exhibits-P1 and P2 orders dated 15.12.2019 and 10.02.2020 respectively, and to issue a writ of certiorari or any other writ, order or direction, in the nature of certiorari, to quash Exhibit-P2.

Writ court, after considering the submissions advanced and perusing the materials on record, by judgment dated 17.06.2020, disposed of W.P.(C) No. 10542/2020, holding that appellants/writ petitioners are free to take up the matter before the Government, by filing an application, as provided under Section 144(6) of the Cr.P.C. Writ court further held that if the appellants do so, the Government shall consider their representations and pass a speaking order, after hearing them or their representatives, by any convenient means, including video conferencing.

> "13. Before the writ court, learned counsel for the appellants had relied on the decisions of the Hon'ble Supreme Court in **Jagdishwaranand Avadhuta v. Commissioner of Police, Calcutta** [(1983) 4 SCC 522], Gulam Abbas v. State of U.P. [(1982) 1 SCC 71], **Anuradha Bhasin v. Union of India**, [W.P.(C) No: 1031/2019], **Gulam Nabi Azad v. Union of India** [W.P.(C) No. 1164/2019], **K.S. Puttaswamy v. Union of India** [(2017) 10 SCC 1], and **Mazdoor Kisan Shakti Sangathan v. Union of India & Ors.** [WP(C) No. 1153 of 2017].
>
> 14. However, it is the admitted case of the appellants that an application dated 30.05.2020, under sub-section (6) of Section 144 of the Cr.P.C. has been sent to the Home Secretary, Government of Kerala, on 02.06.2020. We have perused the copy of the same. Judgment in W.P.(C) No. 10542 of 2020 has been delivered on 17.06.2020. As rightly contended by the learned standing counsel for the Indian Oil Corporation Ltd., Ernakulam, respondent No. 3 herein, submission of an application under sub-section (6) of Section 144 of the Cr.P.C. has not been brought to the notice of the writ court. Thus, having sent an application under sub-section (6) of Section 144 of the Cr.P.C., availing the statutory remedy, the appellants ought to have brought to the notice of the writ court, before the impugned judgment was delivered.
>
> 15. Learned counsel for the appellants submitted that no acknowledgment has been received. At the risk of repetition, paragraph 11 of the impugned judgment is reproduced.
>
> > "11. In the above view of the matter, I am not inclined to entertain the writ petition. The petitioners are free to take up the matter before the Government by filing an application as

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> provided under sub-section 6 of Section 144 Cr.P.C. If they do so, the Government shall consider their representations and pass a speaking order after hearing the petitioners or their representatives by any convenient means, including video conferencing."

16. Conduct of the appellants in approaching the Government, by exercising their right under sub-section (6) of Section 144 of the Cr.P.C., even as early as on 02.06.2020, i.e., much before the judgment of the learned single Judge, suppressing the same, and making a submission before this Court, that the remedy provided under the Code of Criminal Procedure is not adequate and efficacious, is not appreciated. Suppression per se is apparent.

17. On the aspects of suppression, equitable remedy and clean hands, under Article 226 of the Constitution, we deem it fit to consider few decisions.

> “(i) In **Arunima Baruah v. Union of India** [(2007) 6 SCC 120], the Hon'ble Supreme Court, at Paragraphs 11 to 14, held as follows:
>
> > "11. The court's jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands; but to what extent such relief should be denied is the question.
> >
> > 12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

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13. In **Moody v. Cox** [(1917) 2 Ch. 71: (1916-17) All ER Rep 548 (CA)], it was held: (All ER pp. 555 I-556 D)

> "It is contended that the fact that Moody has given those bribes prevents him from getting any relief in a court of equity. The first consequence of his having offered the bribes is that the vendors could have rescinded the contract. But they were not bound to do so. They had the right to say? no, we are well satisfied with the contract; it is a very good one for us; we affirm it". The proposition put forward by counsel for the defendants is: "It does not matter that the contract has been affirmed; you still can claim no relief of any equitable character in regard to that contract because you gave a bribe in respect of it. If there is a mistake in the contract, you cannot rectify it, if you desire to rescind the contract, you cannot rescind it, for that is equitable relief." With some doubt they said: "We do not think you can get an injunction to have the contract performed, though the other side have affirmed it, because an injunction may be an equitable remedy." When one asks on what principle this is supposed to be based, one receives in answer the maxim that anyone coming to equity must come with clean hands. I think the expression "clean hands" is used more often in the textbooks than it is in the judgments, though it is occasionally used in the judgments, but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the courts of equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in Dering v. Earl of Winchelsea [(1787) 1 Cox Eq Cas 318: 2 Bos & P 270], which has been referred to, shows that equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bribe has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bribe.

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Therefore that point, which was argued with great strenuousness by counsel for the defendant, Hatt, appears to me to fail, and we have to consider the merits of the case."

14. In ***Halsbury's Laws of England***, 4th Edn., Vol. 16, pp. 874-76, the law is stated in the following terms:

"1303. He who seeks equity must do equity. "In granting relief peculiar to its own jurisdiction a court of equity acts upon the rule that he who seeks equity must do equity. By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record. The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked. In a court of law it is otherwise: when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed.

* * * 1305. He who comes into equity must come with clean hands. "A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim "he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.

The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to

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> the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff's demerits."

(ii) In **Prestige Lights Ltd., v. State Bank of India** [(2007) 8 SCC 449], at paragraphs 33, 34 and 35, the Hon'ble Apex Court held as follows:

> "33. It is thus clear that though the appellant-Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.
>
> 34. The object underlying the above principle has been succinctly stated by Scrutton, L.J., in R v. Kensington Income Tax Commissioners, [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136], in the following words: "(I)t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should made a full and fair disclosure of all the material facts, not law. He must not misstate the law if he can help the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it

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has taken on the faith of the imperfect statement". (emphasis supplied)

35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

(iii) In **Udyami Evam Khadi Gramodyog Welfare Sanstha and another v. State of Uttar Pradesh** [(2008) 1 SCC 560], at paragraphs 16 and 17, the Hon'ble Apex Court, held as follows:

"16. A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. In Advocate General, State of Bihar v. M.P. Khair Industries [(1980) 3 SCC 311], this Court was of the opinion that such a repeated filing of writ petitions amounts to criminal contempt.

17. For the reasons aforementioned, there is not merit in this appeal which is dismissed accordingly with costs. Counsel's fee quantified at Rs.50,000."

(iv) In **Amar Singh v. Union of India & Others** reported in (2011) 7 SCC 69, on the aspect of a litigant approaching the court, with unclean hands, at, paragraphs 53 to 57, and at, paragraph 59, considered several judgments. Finally, at paragraph No. 60, extracted a paragraph from Dalip Singh v. State of U.P. and others, [(2010) 2 SCC 114]:

"53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without

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full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.

54. In **Dalglish v. Jarvie** [2 Mac. & G. 231, 238], the Court, speaking through Lord Langdale and Rolfe B., laid down:

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward."

55. In **Castelli v. Cook** [1849 (7) Hare, 89, 94], Vice Chancellor Wigram, formulated the same principles as follows:

"A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as has broken faith with the Court, the injunction must go."

56. In the case of **Republic of Peru v. Dreyfus Brothers & Company** [55 L.T. 802, 803], Justice Kay reminded us of the same position by holding thus:

"...If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made."

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in **R. v. Kensington Income Tax Commissioner** [1917 (1) K.B. 486] Lord Justice Scrutton formulated as under:

"........ and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair

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disclosure of all the material facts-facts, now law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement."

59. The aforesaid requirement of coming to Court with clean hands has been repeatedly reiterated by this Court in a large number of cases. Some of which may be noted, they are: ***Hari Narain v. Badri Das - AIR 1963 SC 1558, Welcome Hotel and others v. State of A.P. and others - (1983) 4 SCC 575, G. Narayanaswamy Reddy (Dead) by LRs. and another v. Government of Karnataka and another - (1991) 3 SCC 261, S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. and others (1994) 1 SCC 1, A.V. Papayya Sastry and others v. Government of A.P. and others - (2007) 4 SCC 221, Prestige Lights Limited v. SBI - (2007) 8 SCC 449, Sunil Poddar and others v. Union Bank of India - (2008) 2 SCC 326, K.D. Sharma v. SAIL and others - : 2008) 12 SCC 481, G. Jayashree and others v. Bhagwandas S. Patel and others - (2009) 3 SCC 141, Dalip Singh v. State of U.P. and others - (2010) 2 SCC 114.***

60. In the last noted case of ***Dalip Singh*** (supra), this Court has given this concept a new dimension which has a far reaching effect. We, therefore, repeat those principles here again:

"For many centuries Indian society cherished two basic values of life i.e. "satya"(truth) and "ahimsa (non-violence), Mahavir, Gautam Budha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence

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period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

(v) In **Kishore Samrite v. State of U.P. & Others** [(2013) 2 SCC 398], at paragraphs 32 to 36, the Hon'ble Apex Court held as follows:

"32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to

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anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

33. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer: ***Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [(1969) 1 SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) 1 SCC 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)***].

34. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

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> 35. No litigant can play "hide and seek" with the courts or adopt "pick and choose". True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. {***K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481***]}.
>
> 36. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. [***Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530)***]."

98. Applying the principles of law laid down by the Hon'ble Supreme court, as regards suppression, equitable remedy and clean hands under Article 226 of the Constitution of India, to the case on hand, we are of the view that there is suppression of material facts in the writ petition.

99. On the issue as to whether, the Tribunal should be made a party in a petition filed under Article 226 of the Constitution of India, let us consider the decisions relied on by the appellants. It is also their contention that the ***Udit Narain Singh Malpaharia's*** case (cited supra) is decided by a Larger Bench of the Hon'ble Supreme Court than **Kasi S. v. State, Through The Inspector of Police** (cited supra) decided in the year 2020. Hence, the former will prevail over the latter.

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(I) In **Udit Narain Singh Malpaharia v. Additional Member, Board of Revenue, Bihar** [AIR 1963 SC 786], appellant therein filed special leave against the order of the High Court of Judicature at Patna rejecting an application for a writ of certiorari filed under Art. 226 of the Constitution as *in limine*. The facts giving rise to this appeal can be briefly stated as under.

> "There is a country liquor shop in Dumka Town. Originally one Hari Prasad Sah was the licensee of that shop, but his licence was cancelled by the Excise Authorities. Thereupon a notice was issued inviting applications for the settlement of the shop. One Jadu Manjhi, along with others, applied for the licence. On March 22, 1961, for the settlement of the shop lots were drawn by the Deputy Commissioner, Santal Parganas, and the draw was in favour of Jadu Manjhi. But Hari Prasad Sah, that is the previous licensee, filed an appeal against the order of the Deputy Commissioner, before the Commissioner of the Santal Parganas and as it was dismissed, he moved the Board of Revenue, Bihar, and obtained a stay of the settlement of the said shop. On July 13, 1961, the Board of Revenue dismissed the petition filed by Hari Prasad Sah. Meanwhile Jadu Manjhi died and when the fact was brought to the notice of the Deputy Commissioner, he decided to hold a fresh lot on June 19, 1961 and the lot was drawn in favour of the appellant. Hari Prasad Sah filed a petition in the revenue court and obtained a stay of the settlement of the shop in favour of the appellant. Meanwhile one Basantilal Bhagat filed an application under Art. 226 of the Constitution in the High Court at Patna and obtained an interim stay; but he withdrew his application on September 8, 1961. The petition filed by Hari Prasad Sah was dismissed by the Board of Revenue on July 13, 1961. On September 11, 1961, the appellant furnished security and the shop was settled on him and a licence was issued in his name.
>
> The appellant filed a petition under Art. 226 of the Constitution in the High Court at Patna to quash the said orders. Neither Phudan Manjhi nor Bhagwan Rajak in whose favour the Board of Revenue decided the petition, was made a party. It is represented to us that pursuant to the orders of the Board of Revenue the Deputy Commissioner made an enquiry, came to the conclusion that Phudan Manjhi was not fit to be selected for the grant of a licence, and that he has not yet made a fresh settlement in view of the pendency of the present appeal."

After considering the above facts, the Hon'ble Apex Court observed thus:

> "6. The question is whether in a writ in the nature of certiorari filed under Art. 226 of the Constitution the party or parties in

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whose favour a tribunal or authority had made an order, which is sought to be quashed, is or are necessary party or parties. While learned Additional Solicitor General contends that in such a writ the said tribunal or authority is the only necessary party and the parties in whose favour the said tribunal or authority made an order or created rights are not necessary parties but may at best be only proper parties and that it is open to this Court, even at this very late stage, to direct the impleading of the said parties for a final adjudication of the controversy, learned counsel for the respondents contends that whether or not the authority concerned is necessary party, the said parties would certainly be necessary parties, for otherwise the High Court would be deciding a case behind the back of the parties that would be affected by its decision.

7. To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding.

The law on the subject is well settled : it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

8. The next question is, what is the nature of a writ of certiorari ? What relief can a petitioner in such a writ obtain from the Court ? Certiorari lies to remove for the purpose of quashing the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functions. It is not necessary for the purpose of this appeal to notice the distinction between a writ of certiorari and a writ in the nature of certiorari : in either case the High Court directs an inferior tribunal or authority to transmit to itself the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. It is well settled law that a certiorari lies only in respect of a judicial or quasi-judicial act as distinguished from an administrative act. The following classic test laid down by Lord Justice Atkin, as he then was, in The King v. The Electricity Commissioner [1924] 1 K.B. 171, and followed by this Court in more than one decision clearly brings out the meaning of the concept of judicial act :

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to

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> the controlling jurisdiction of the King's Bench Division exercised in these writs."

Lord Justice Slesser in The King v. London County Council [1931] 2 K.B. 215, dissected the concept of judicial act laid down by Atkin, L J., into the following heads in his judgment : "wherever any body of persons (1) having legal authority (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially (4) act in excess of their legal authority - a writ of certiorari may issue". It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A tribunal, therefore, exercising a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of certiorari will be granted to remove the record of proceedings of an inferior tribunal or authority exercising judicial or quasi-judicial acts, ex hypothesi it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it. It is implicit in such a proceeding that a tribunal or authority which is directed to transmit the records must be a party in the writ proceedings, for without giving notice to it, the record of proceedings cannot be brought to the High Court. It is said that in an appeal against the decree of a subordinate court, the court that passed the decree need not be made a party and on the same parity of reasoning it is contended that a tribunal need not also be made a party in a writ proceeding. But there is an essential distinction between an appeal against a decree of a subordinate court and a writ of certiorari to quash the order of a tribunal or authority : in the former, the proceedings are regulated by the Code of Civil Procedure and the court making the order is directly subordinate to the appellate court and ordinarily acts within its bounds, though sometimes wrongly or even illegally, but in the case of the latter, a writ of certiorari is issued to quash the order of a tribunal which is ordinarily outside the appellate or revisional jurisdiction of the court and the order is set aside on the ground that the tribunal or authority acted without or in excess of jurisdiction. If such a tribunal or authority is not made party to the writ, it can easily ignore the order of the High Court quashing its order, for, not being a party, it will not be liable to contempt. In these circumstances whoever else is a necessary party or not the authority or tribunal is certainly a necessary party to

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such a proceeding. In this case, the Board of Revenue and the Commissioner of Excise were rightly made parties in the writ petition.

9.The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a tribunal. As we have seen, a tribunal or authority performs a judicial or quasi-judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it. In a writ of certiorari the defeated party seeks for the quashing of the order issued by the tribunal in favour of the successful party. How can the High Court vacate the said order without the successful party being before it ? Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the tribunal's order would be quashed but the right vested in that party by the wrong order of the tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of certiorari without making him a party or without impleading him subsequently, if allowed by the court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a necessary party.

10. In addition, there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may suo motu approach the court for being impleaded therein.

11. The long established English practice, which the High Courts in our country have adopted all along, accepts the said distinction between the necessary and the proper party in a writ of certiorari. The English practice is recorded in Halsbury's Laws of England, Vol. 11, 3rd Edn. (Lord Simonds') thus in paragraph 136 :

> "The notice of motion or summons must be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any act in relation to the proceedings

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> or to quash them or any order made therein, the notice of motion or summons must be served on the clerk or registrar of the court, the other parties to the proceedings, and (where any objection to the conduct of the judge is to be made) on the judge ....".

In paragraph 140, it is stated :

> "On the hearing of the summons or motion for an order of mandamus, prohibition or certiorari, counsel in support begins and has a right of reply. Any person who desires to be heard in opposition, and appears to the Court or judge to be a proper person to be heard, is to be heard not withstanding that he has not been served with the notice or summons, and will be liable to costs in the discretion of the Court or judge if the order should be made ....".

So too, the Rules made by the Patna High Court require that a party against whom relief is sought should be named in the petition. The relevant Rules read thus :

> “Rule 3. Application under Article 226 of the Constitution shall be registered as Miscellaneous Judicial Cases or Criminal Miscellaneous Cases as the case may be.
>
> Rule 4. Every application shall, soon after it is registered, be posted for orders before a Division Bench as to issue of notice to the respondents. The Court may either direct notice to issue and pass such interim order as it may deem necessary or reject the application.
>
> Rule 5. The notice of the application shall be served on all persons directly affected and on such other persons as the Court may direct.”

Both the English rules and the rules framed by the Patna High Court lay down that persons who are directly affected or against whom relief is sought should be named in the petition, that is all necessary parties should be impleaded in the petition and notice served on them. In "The Law of Extraordinary Legal Remedies" by Ferris, the procedure in the matter of impleading parties is clearly described at p. 201 thus:

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> "Those parties whose action is to be reviewed and who are interested therein and affected thereby, and in whose possession the record of such action remains, are not only proper, but necessary parties. It is to such parties that notice to show cause against the issuance of the writ must be given, and they are the only parties who may make return, or who may demur. The omission to make parties those officers whose proceedings it is sought to direct and control, goes to the very right of the relief sought. But in order that the court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondent."

This passage indicates that both the authority whose order is sought to be quashed and the persons who are interested in maintaining the regularity of the proceeding of which a review is sought should be added as parties in a writ proceeding. A division Bench of the Bombay High Court in **Ahmedalli v. M. D. Lalkaka** AIR1954Bom33 , laid down the procedure thus :

> "I think we should lay down the rule of practice that whenever a writ is sought challenging the order of a Tribunal, the Tribunal must always be a necessary party to the petition. It is difficult to understand how under any circumstances the Tribunal would not be a necessary party when the petitioner wants the order of the Tribunal to be quashed or to be called in question. It is equally clear that all parties affected by that order should also be necessary parties to the petition."

A Full Bench of the Nagpur High Court in ***Kanglu Baula v. Chief Executive Officer*** A.I.R. 1955 Nag. 49, held that though the elections to various electoral divisions were void the petition would have to be dismissed on the short ground that persons who were declared elected from the various constituencies were not joined as parties to the petition and had not been given an opportunity to be heard before the order adverse to them was passed. The said decisions also support the view we have expressed.

12. To summarize : in a writ of certiorari not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the court to add or implead

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proper parties for completely settling all the questions that may be involved in the controversy either suo motu or on the application of a party to the writ or an application filed at the instance of such proper party.

13. In the present case Phudan Manjhi and Bhagwan Rajak were parties before the Commissioner as well as before the Board of Revenue. They succeeded in the said proceedings and the orders of the said tribunal were in their favour. It would be against all principles of natural justice to make an order adverse to them behind their back; and any order so made could not be an effective one. They were, therefore, necessary parties before the High Court. The record discloses that the appellant first impleaded them in his petition but struck them out at the time of the presentation of the petition. He did not file any application before the High Court for impleading them as respondents. In the circumstances, the petition filed by him was incompetent and was rightly rejected."

(ii) In **Jogendrasinhji Vijaysinghji v. State of Gujarat and Ors.** [(2015) 9 SCC 1], the challenge was to the legal substantiality of the judgment/order dated 26.12.2013 passed by the Special Bench of the High Court of Gujarat in a bunch of Letters Patent Appeals preferred under Clause 15 of the Letters Patent. The Hon'ble Supreme Court held thus;

"26. The next facet pertains to the impleadment of the Court or Tribunal as a party. The special Bench has held that even if application is described as one not only under Art.226 of the Constitution, but also under Art.227, the Court or Tribunal whose order is sought to be quashed, if not arrayed as a party, the application would not be maintainable as one of the relief of certiorari, in the absence of the concerned Tribunal or Court as a party, cannot be granted. It has also been held that if the Court or Tribunal has not been impleaded as party - respondent in the main writ petition, then by merely impleading such Court or Tribunal for the first time in letters patent appeal would not change the nature and character of the proceeding before the learned Single Judge and, therefore, intra - Court appeal would not be maintainable. To arrive at the said conclusion, the High Court has referred to ***Messrs. Ghaio Mal & Sons v. State of Delhi and Others***, 1959 KHC 455 : AIR 1959 SC 65, Hari Vishnu Kamath v. Ahmad Ishaque and Others AIR 1955 SC 233 and relied upon a four - Judge Bench judgment in ***Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue***, AIR 1963 SC 786.

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29. In ***Udit Narain Singh Malpaharia*** (supra), as the facts would demonstrate the counsel for the respondent therein raised a preliminary objection that the persons in whose favour the Board decided the petition had not been made parties before the High Court. Be it noted, in the said case a country liquor shop was settled in favour of the appellant therein. After expiry of the said licence, it was renewed in his favour in 1962 which was called in question by one Phudan Manjhi before the Deputy Commissioner for substituting his name in place of his father on the basis of the lot drawn in favour of his father. The Deputy Commissioner rejected the same which was assailed by Phudan Manjhi before the Commissioner of Excise who remanded the case to the Deputy Commissioner to consider the fitness of Phudan Manjhi to get the license and to consider his claim on certain parameters. One Bhagwan Rajak, who was not an applicant before the Deputy Commissioner, filed an application before the Commissioner alleging that there should have been fresh advertisement for the settlement of the shop. The Commissioner allowed his application and directed the Deputy Commissioner to take steps for fresh settlement of the shop in accordance with the rules. The said order was assailed before the Board of Revenue which dismissed the petition and directed that unless the Deputy Commissioner came to a definite conclusion that Phudan Manjhi was unfit to hold licence, he should be selected as a licensee in accordance with rules. As a result of the said proceedings, the appellant's licence stood cancelled and the Deputy Commissioner was directed to hold a fresh settlement giving preferential treatment to Phudan Manjhi. A writ petition was filed under Art.226 of the Constitution before the High Court for quashment of the said orders and before the writ Court neither Phudan Manjhi nor Bhagwan Rajak in whose favour the Board of Revenue had decided was made a party. During the pendency of an appeal before this Court, the Deputy Commissioner had conducted an enquiry and come to the conclusion that Phudan Manjhi was not fit to be selected for grant of licence and he was waiting for making a fresh settlement. In course of hearing of the appeal, a preliminary objection was raised by the learned counsel for the respondent that as Phudan Manjhi and Bhagwan Rajak who were necessary parties to the writ petition were not made parties, the High Court was justified in dismissing the writ petition in limini. This Court accepted the preliminary objection holding that the law on the subject is well settled that a person who is a necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but his presence is necessary for complete and final decision on the question involved in the proceeding. After so stating, the four - Judge Bench proceeded to deal with the nature of writ of certiorari and reproduced a passage from King v. Electricity Commissioners, 1924 (1) KB, which is as follows:

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> "8. "....Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Lord Justice Slesser in King v. London County Council, 1931 (2) KB 215, (243 dissected the concept of judicial act laid down by Atkin, L. J., into the following heads in his judgment: "Wherever any body of persons (1) having legal authority (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially (4) act in excess of their legal authority - a writ of certiorari may issue." It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A Tribunal, therefore, exercising a judicial or quasi - judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of certiorari will be granted to remove the record of proceedings of an inferior Tribunal or authority exercising judicial or quasi - judicial acts, ex hypothhesi it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it. It is implicit in such a proceeding that a Tribunal or authority which is directed to transmit the records must be a party in the writ proceedings, for, without giving notice to it, the record of proceedings cannot be brought to the High Court. It is said that in an appeal against the decree of a subordinate Court, the Court that passed the decree need not be made a party and on the same parity of reasoning it is contended that a Tribunal need not also be made a party in a writ proceeding. But there is an essential distinction between an appeal against a decree of a subordinate Court and a writ of certiorari to quash the order of a Tribunal or authority: in the former, the proceedings are regulated by the Code of Civil Procedure and the Court making the order is directly subordinate to the Appellate Court and ordinarily acts within its bounds, though sometimes wrongly or even illegally, but in the case of the latter, a writ of certiorari is issued to quash the order of a Tribunal which is ordinarily outside the appellate or revisional jurisdiction of the Court and the order is set aside on the ground that the Tribunal or authority acted without or in excess of jurisdiction. If such a Tribunal or authority is not made party to the writ, it can easily ignore the order of the High Court quashing its order, for, not being a party, it will not be liable to contempt. In these circumstances whoever else is a necessary party or not the authority or Tribunal is certainly a necessary party to such a proceeding. In this case, the Board of Revenue and the Commissioner of Excise were rightly made parties in the writ petition."

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Thereafter, the Court proceeded to lay down thus:

"9. The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a Tribunal. As we have seen, a Tribunal or authority performs a judicial or quasi - judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it. In a writ of certiorari the defeated party seeks for the quashing of the order issued by the Tribunal in favour of the successful party. How can the High Court vacate the said order without the successful party being before it? Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the Tribunal's order would be quashed but the right vested in that party by the wrong order of the Tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of certiorari without making him a party or without impleading him subsequently, if allowed by the Court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a necessary party.

10. In addition, there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order, but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a parry or such a party may *suo motu* approach the Court for being impleaded therein."

After so stating, the four - Judge Bench referred to English practice as recorded in Halsbury's Laws of England, Vol. 11, 3rd Edn. (Lord Simonds') and a Division Bench judgment of the Bombay High Court in ***Ahmedalli v. M. D. Lalka***ka, AIR 1954 Bom. 33, 34 and a Full Bench decision of Nagpur High Court in ***Kanglu Baula v. Chief Executive Officer***, AIR 1955 Nag. 49 and summarised thus:

> "To summarise: in a writ of certiorari not only the Tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the Court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either suo motu or on the application of a party to the writ or an application filed at the instance of such proper party."

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30. The High Court, as we find, relied on the aforesaid decision to form the foundation that unless a Court or a Tribunal is made a party, the proceeding is not maintainable. What has been stated in Hari Vishnu Kamath (supra), which we have reproduced hereinbefore is that where plain question on issuing directions arises, it is conceivable that there should be in existence a person or authority to whom such directions could be issued. The suggestion that non - existence of a Tribunal might operate as a bar to issue such directions is not correct as the true scope of certiorari is that it merely demolishes the offending order and hence, the presence of the offender before the Court, though proper is not necessary for the exercise of the jurisdiction or to render its determination effective.

31. In ***Udit Narain Singh*** (supra), the fulcrum of the controversy was non - impleadment of the persons in whose favour the Board of Revenue had passed a favourable order. There was violation of fundamental principles of natural justice. A party cannot be visited with any kind of adverse order in a proceeding without he being arrayed as a party. As we understand in ***Hari Vishnu Kamath*** (supra), the seven - Judge Bench opined that for issuance of writ of certiorari, a Tribunal, for issue of purpose of calling of record, is a proper party, and even if the Tribunal has ceased to exist, there would be some one in - charge of the Tribunal from whom the records can be requisitioned and who is bound in law to send the records. The larger Bench has clearly stated that while issuing a writ of certiorari, the Court merely demolishes the defending order, the presence of the offender before the Court though proper but is not necessary for exercise of jurisdiction. The said finding was recorded in the context of a Tribunal.

32. In this context, we may profitably refer to the decision in ***Savitri Devi*** (supra) wherein a three - Judge Bench, though in a different context, had observed thus:

> "Before parting with this case, it is necessary for us to point out one aspect of the matter which is rather disturbing. In the writ petition filed in the High Court as well as the special leave petition filed in this Court, the District Judge, Gorakhpur and the 4th Additional Civil Judge (Junior Division), Gorakhpur are shown as respondents and in the special leave petition, they are shown as contesting respondents. There was no necessity for impleading the judicial officers who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court; nor is there any justification for impleading them as parties in the special leave petition and describing them as contesting respondents. We do not approve of the course adopted by the petitioner which would cause unnecessary disturbance to the functions of the judicial officers concerned. They cannot be in any way equated to the officials of the Government. It is high time that the practice of impleading

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> judicial officers disposing of civil proceedings as parties to writ petitions under Art.226 of the Constitution of India or special leave petitions under Art.136 of the Constitution of India was stopped. We are strongly deprecating such a practice."

33. The High Court after referring to the controversy involved in ***Savitri Devi*** (supra) has opined thus:

> "In our opinion, the observations of the Supreme Court pertained to the judicial officers being made parties in the proceedings as against a person, authority or a State being made a party in a petition under Art.226 and a Court or a Tribunal not being so required in a petition under Art.227 of the Constitution of India."

After so stating, the High Court has proceeded to express the view that it is not a binding precedent and thereafter opined:

> "We are of the opinion that although in ***Hari Vishnu Kamath*** (supra), the Supreme Court may have observed that the presence of the Tribunal would be proper yet may not be necessary for the exercise of the jurisdiction or to render its determination effective, but the said principle has been more elaborately explained and made clear by the Supreme Court in ***Udit Narain*** (supra) laying down as an absolute proposition of law that no writ could be issued under Art.226 of the Constitution without the Tribunal, whose order is sought to be impugned, is made a party respondent."

34. As we notice, the decisions rendered in ***Hari Vishnu Kamath*** (supra), ***Udit Narain Singh*** (supra) and ***Savitri Devi*** (supra) have to be properly understood. In ***Hari Vishnu Kamath*** (supra), the larger Bench was dealing with a case that arose from Election Tribunal which had ceased to exist and expressed the view how it is a proper party. In ***Udit Narain Singh*** (supra), the Court was really dwelling upon the controversy with regard to the impleadment of parties in whose favour orders had been passed and in that context observed that Tribunal is a necessary party. In ***Savitri Devi*** (supra), the Court took exception to Courts and Tribunals being made parties. It is apposite to note here that propositions laid down in each case has to be understood in proper perspective. Civil Courts, which decide matters, are Courts in the strictest sense of the term. Neither the Court nor the Presiding Officer defends the order before the superior Court it does not contest. If the High Court, in exercise of its writ jurisdiction or revisional jurisdiction, as the case may be, calls for the records, the same can always be called for by the High Court without the Court or the Presiding Officer being impleaded as a party. Similarly, with the passage of time there have been many a Tribunal which only adjudicate and they have nothing to do with the lis. We may cite few examples; the Tribunals constituted under the Administrative Tribunals Act, 1985, the Custom, Excise & Service

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Tax Appellate Tribunal, the Income Tax Appellate Tribunals, the Sales Tax Tribunal and such others. Every adjudicating authority may be nomenclatured as a Tribunal but the said authority(ies) are different that pure and simple adjudicating authorities and that is why they are called the authorities. An Income Tax Commissioner, whatever rank he may be holding, when he adjudicates, he has to be made a party, for he can defend his order. He is entitled to contest. There are many authorities under many a statute. Therefore, the proposition that can safely be culled out is that the authorities or the Tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and if they are not arrayed as parties, the writ petition can be treated to be not maintainable or the Court may grant liberty to implead them as parties in exercise of its discretion. There are Tribunals which are not at all required to defend their own order, and in that case such Tribunals need not be arrayed as parties. To give another example: in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior Court, that is the High Court, even if required to call for the records, the District Judge need not be a party. Thus, in essence, when a Tribunal or authority is required to defend its own order, it is to be made a party failing which the proceeding before the High Court would be regarded as not maintainable.

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36. In view of the aforesaid analysis, we proceed to summarise our conclusions as follows:

(A) Whether a letters patent appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other Tribunals or authorities, would depend upon many a facet. The court - fee payable on a petition to make it under Art.226 or Art.227 or both, would depend upon the rules framed by the High Court.

(B) The order passed by the Civil Court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Art.227 of the Constitution of India which is different from Art.226 of the Constitution and as per the pronouncement in ***Radhey Shyam*** (supra), no writ can be issued against the order passed by the Civil Court and, therefore, no letters patent appeal would be maintainable.

(C) The writ petition can be held to be not maintainable if a Tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.

(D) Tribunal being or not being party in a writ petition is not determinative of the maintainability of a letters patent appeal.”

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(iii) In **M.S. Kazhi v. Muslim Education Society and Others** [(2016) 9 SCC 263], relied on by the writ petitioners/respondents, the issue whether a Tribunal or Court, whose order is challenged in a proceedings under Articles 226 and 227 of the Constitution, is a necessary party to the proceedings has been considered by the Hon'ble Apex Court and held thus:

> “8. The Tribunal is not required to defend its orders when they are challenged before the High Court in a Special Civil Application under Art.226 and Art.227. The lis is between the management and a member of its teaching or non - teaching staff, as the case may be. It is for the person aggrieved to pursue his or her remedies before the Tribunal. An order of the Tribunal is capable of being tested in exercise of the power of judicial review under Art.226 and Art.227. When the remedy is invoked, the Tribunal is not required to step into arena of conflict for defending its order. Hence, the Tribunal is not a necessary party to the proceedings in a Special Civil Application.
>
> 9. The Appellant instituted a proceeding before the Tribunal to challenge an order of dismissal passed against him in disciplinary proceedings. Before the Tribunal, the legality of the order of dismissal was in question. The lawfulness of the punishment imposed upon the Appellant was a matter for the employer to defend against a challenge of illegality in the Special Civil Application. The Tribunal was not required to defend its order in the writ proceedings before the learned Single Judge. Even if the High Court was to require the production of the record before the Tribunal, there was no necessity of impleading the Tribunal as a party to the proceedings. The Tribunal not being required in law to defend its own order, the proceedings under Art.226 and Art.227 of the Constitution were maintainable without the Tribunal being impleaded.”

(ii) In **Motilal S/o. Khamdeo Rokade & Ors. v. Balkrushna Baliram Lokhande** [2020 AIR Bom. 39]**,** the Hon'ble Bombay High Court held thus:

> ".................In our view, it depends upon the facts and circumstances of each case as to whether the tribunal or the authority which passed an order is a necessary party, without which the petition under Article 226 or 227 of the Constitution of India seeking a writ of certiorari is required to be dismissed. When a tribunal or an authority is required to defend its order, it is to be made a party, failing which the proceedings before the High Court would be regarded as not maintainable. Obviously, in such a case also, the party can be given an opportunity to join such court/ tribunal/ authority as a party respondent."

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100. Though the Larger Bench of the Hon'ble Supreme Court in ***Udit Narain Singh Malpaharia's*** case (cited supra) held that the Tribunal has to be added as a party, in the latter decisions, the Hon'ble Apex Court clarified that the Tribunal not being required to defend the proceedings under Article 226 or 227 of the Constitution of India, and hence, writ petition is maintainable, without the Tribunal being impleaded. In view of the subsequent decisions of the Hon'ble Apex Court, we are not inclined to accept the contention of the learned counsel for the appellants.

101. One of the contentions raised before us is that the judgment in W.P.(C) No.41662/2017 dated 21.12.2017 passed by one of us (Hon'ble Mr. Justice Shaji P. Chaly), is a precedent, which enables the writ petitioners/respondents 1 & 2 to file instant writ petitions and on the contrary, relying on the decisions in **Kasi S. v. State, Thr. the Inspector of Police, Samayanallur Police Station, Madurai District** [2020 (4) KLT 174], **Sundarjas Kanyalal Bhathija and Others v. The Collector, Thane, Maharashtra and Others** [(1989) 3 SCC 396] and **Ehvees v. The District Collector, Malappuram and Ors.** (W.A. No. 706 of 2020 dated 08.06.2020), learned counsel for the appellants submitted that the above said judgment is not a precedent.

102. In **Sundarjas Kanyalal Bhathija** (cited supra), the Hon'ble supreme Court, at paragraphs 17 to 20 held thus:

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"17. It would be difficult for us to appreciate the judgment of the High Court. One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.

18. Deprecating this kind of tendency of some judges, Das Gupta, L, in ***Mahadeolal Kanodia v. The Administrator General of West Bengal***, AIR 1960 SC 936 said (at p. 941) :

> "We have noticed with some regret that when the earlier decision of two Judges of the same High Court in Deorajin's case, 58 Cal WN 64 : AIR 1954 Cal. 119 was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decision."

19. The attitude of Chief Justice, Gajendragadkar, in ***Lala Shri Bhagwan v. Ram Chand***, AIR 1965 SC 1767 was not quite different (at p. 1773) :

> "It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

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20. The Chief Justice Pathak, in a recent decision stressed the need for a clear and consistent enunciation of legal principle in the decisions of a Court. Speaking for the Constitution Bench (***Union of India v. Raghubir Singh*** 1989 (2) SCC 754: (AIR 1989 SC 1933) learned Chief Justice said (at p. 766) (of SCC) (at p. 1939 of AIR):

> "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court."

Cardozo propounded a similar thought with more emphasis :

> "I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly by some consideration of history or custom or policy of justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another" (The Nature of the Judicial Process by Benjamin N. Cardozo p. 33).
>
> In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of judges of superior Courts and Tribunals to make the law more predictable. The question of law directly arising In the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within, the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute."

103. In **Kasi S.** (cited supra), the Hon'ble Supreme Court, at paragraphs 31 to 33, held thus:

> "31. Learned Single Judge in the impugned judgment has taken a contrary view to the earlier judgment of learned Single Judge in ***Settu v. The State (supra)***. It is well settled that a coordinate Bench cannot take a contrary view and in event there was any doubt, a coordinate Bench only can refer the matter for consideration by a Larger Bench. The judicial discipline ordains so. This Court in *State of Punjab and Another v. Devans Modern Breweries Ltd. and Another* [(2004) 11 SCC 26, in paragraph 339 laid down following:

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"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, 2002 KHC 231 followed in Union of India v. Hansoli Devi, 2003 KHC 221. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K. K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

32. Learned Single Judge did not follow the judicial discipline while taking a contrary and diagonally opposite view to one which have been taken by another learned Single Judge in **Settu v. The State (supra)**. The contrary view taken by learned Single Judge in the impugned judgment is not only erroneous but also sends wrong signals to the State and the prosecution emboldening them to act in breach of liberty of a person.

33. We may further notice that learned Single Judge in the impugned judgment had not only breached the judicial discipline but has also referred to an observation made by learned Single Judge in **Settu v. The State** as uncharitable. All Courts including the High Courts and the Supreme Court have to follow a principle of Comity of Courts. A Bench whether coordinate or Larger, has to refrain from making any uncharitable observation on a decision even though delivered by a Bench of a lesser coram. A Bench sitting in a Larger coram may be right in overturning a judgment on a question of law, which jurisdiction a Judge sitting in a coordinate Bench does not have. In any case, a Judge sitting in a coordinate Bench or a Larger Bench has no business to make any adverse comment or uncharitable remark on any other judgment. We strongly disapprove the course adopted by the learned Single Judge in the impugned judgment."

104. In **Ehvees** (cited supra), this Court considered a few decisions on the aspect of ***precedents***, which are reproduced hereunder:

"(i) ***Halsbury's Laws of England*** sets out only three exceptions to the rule of precedents and the following passage is found in paragraph 578 of Vol. 26, Fourth Edition.

"...There are, however, three and only three, exceptions to this rule; thus (1) the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) it is

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> bound to refuse to follow a decision of its own which although not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords and (3) the Court of Appeal is not bound to follow a decision of its own if given per incuriam."

(ii) In **M. Subbarayudu v. State** [AIR 1955 Andhra 87], a Hon'ble Full Bench of the Andhra Pradesh High Court held that, the binding nature of the precedents of one Court on another depends upon the fact whether such Courts are Courts of co-ordinate jurisdiction or not and co-ordinate Jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction. The connotation of the word 'co-ordination' is not the same as that of the words 'concurrence or simultaneity'. Simultaneity or coexistence is not a necessary ingredient of coordination. Co-ordination is more comprehensive and takes in successive acts of the same status or level.

(iii) In **Anand Municipality v. Union of Indi**a reported in AIR 1960 Guj. 40, a Hon'ble Full Bench of the Gujarat High Court applied the principles of binding effect, declared in *M. Subbarayudu's case* (cited supra).

(iv) A Full Bench of the Gujarat High Court in **State of Gujarat v. Gordhandas Keshavji Gandhi** reported in AIR 1962 Guj. 128, has considered the question as to binding nature of judicial precedents. K. T. Desai, CJ., in his judgment, observed:

> "Judicial precedents are divisible into two classes, those which are authoritative and those which are persuasive. An authoritative precedents is one which judges must follow whether they approve of it or not. It is binding upon them. A persuasive precedent is one which the Judges are under no obligation to follow, but which they will take into consideration and to which they will attach such weight as they consider proper. A persuasive precedent depends for its influence upon its own merits.... A decision of a High Court Judge of a State is regarded as binding on all the subordinate courts in that State. A decision of a Division Bench of a High Court is regarded as binding on Judges of the same High Court sitting singly in the High Court. A decision of a Full Bench, i. e. a Bench of at least 3 Judges of a High Court is considered binding on all Division Benches of the same High Court... A

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> decision of a High Court Judge sitting singly is not legally binding on another Judge of the same High Court sitting singly. So also a decision of a Division Bench of a High Court is not legally binding on another Division Bench of the same High Court. A decision of a Full Bench is not legally binding on another Full Bench of the same Court. One Judge of a High Court has however, no right to overrule the decision of another Judge of the same High Court nor has one Division Bench of a High Court the legal right to overrule another decision of a Division Bench of the same High Court.... The rule that a court should follow the decision of another Court of coordinate jurisdiction is subject however to several exceptions which have been dealt with in Salmond's jurisprudence, 11th Edn. at page 199 to 217.
>
> (1) A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.
>
> (2) A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute.
>
> (3) A precedent loses its binding force if court that decided it overlooked an inconsistent decision of higher court.
>
> (4) xx xx xx xx xx
>
> (5) Precedents sub silentio are not regarded as authoritative.
>
> A decision passed sub silentio when the particular point of law involved in the decision is not perceived by the Court or present to its mind."

(v) In **State of Orissa v. Sudhansu Sekar Misra**, reported in AIR 1968 SC 647, the Hon'ble Supreme Court explained as to when a decision can be taken as a precedent, and held as follows:-

> "A decision is only an authority for what it actually decides. What is of the essence of a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic, this is what Earl of Halsbury LC said in ***Quinn v. Leathem***, reported in 901 AC 495.
>
> > "Now before discussing the case of Allen v. Flood, reported in 1898 AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be

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> expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.
>
> It is not profitable task to extract a sentence here and there from a judgment and to build upon it....."

(vi) In **Eknath Shankarrao Mukhawar v. State of Maharashtra** reported in AIR 1977 SC 1177, it was held that judicial discipline as well as decorum suggested only one course when a Bench wanted to differ from the decision of a co-ordinate court and that was to refer to a larger Bench.

(vii) In **Sonal Sihimappa v. State of Karnataka and Ors.**, reported in AIR 1987 SC 2359, it was observed, In a precedent-bound judicial system, binding authorities have got to be respected and the procedure for developing the law has to be one of evolution.

(viii) The Hon'ble Chief Justice Pathak, speaking for the Constitution Bench, in **Union of India v. Raghubir Singh** reported in AIR 1989 SC 1933, said:

> “The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court.”

(ix) In **Sundaradas Knyalal Bhathija v. The Collector**, **Thane** reported in AIR 1991 SC 1893, the law is stated thus:

> “17. It would be difficult for us to appreciate the judgment of the High Court. One must remember the pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when

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> there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter shall be referred to a larger Bench. It is subversion of judicial process not to follow this procedure."

(x) In **Philip Jeyasingh v. The Jt. Regr. of Co-op. Societies** reported in 1992 (2) MLJ 309, a Full Bench of the Hon'ble Madras High Court, held as follows:

> "49. The ratio decidendi of a decision may be narrowed or widened by the judges before whom it is cited as a precedent. In the process the ratio decidendi which the judges who decided the case would themselves have chosen may be even different from the one which has been approved by subsequent judges. This is because Judges, while deciding a case will give their own reasons but may not distinguish their remarks in a right way between what they thought to be the ratio decidendi and what were their obiter dicta, things said in passing having no binding force, though of some persuasive power. It is said that "a judicial decision is the abstraction of the principle from the facts and arguments of the case". A subsequent judge may extend it to a broader principle of wider application or narrow it down for a narrower application."

(xi) A Hon'ble Division Bench of Bombay High Court in **CIT v. Thana Electricity Supply Ltd.**, reported in (1994) 206 ITR 727 (Bombay), held as follows:

> "(a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.
>
> (b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.
>
> (c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court may be summed up as follows:

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(i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see ***Food Corporation of India v. Yadav Engineer and Contractor*** AIR 1982 SC 1302).

(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.

(iii) Where there are conflicting decisions of courts of coordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best have only persuasive effect."

(xii) In **Union of India v. Dhanwanti Devi**, reported in (1996) 6 SCC 44, the Hon'ble Supreme Court explained, what constitutes a precedent, and held as follows:-

"Before adverting to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that Union of India v. Hari Krishan Khosla reported in (1993) Suppl. 2 SCC 149, is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and is per se per incuriam. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi According to the well-settled theory of precedents, every decision contains three basic postulates--(i) findings of material facts, direct and

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inferential. A inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi. ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.

Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents."

(xiii) In **Government of W.B v. Tarun Roy and others**, reported in (2004) 1 SCC 347, as regards binding precedent of a judgment, the Hon'ble Supreme Court at paragraph 26, observed as follows:-

"26.......... If rule of law is to be followed, judicial discipline demands that the court follows its earlier binding

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precedent. The Calcutta High Court itself has rejected such a plea. The matter is pending in appeal. An order passed to the contrary by another learned Single Judge in ignorance of the earlier binding precedent by itself would not constitute a binding precedent and may be held to have been rendered per incuriam."

(xiv) In **State of Punjab v. Devans Modern Breweries Ltd.**, reported in (2004) 11 SCC 26, the Hon'ble Supreme Court explained the doctrine of precedents and when a judgment becomes per incuriam. Paragraphs 334 to 336, 339 and 343 of the judgment are relevant and they are as follows:-

"334. The doctrine of precedent is a well-accepted principle. A ruling is generally considered to be binding on lower courts and courts having a smaller bench structure:

"A precedent influences future decisions. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee the precise situation that will arise, so the rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and 'malleable'... No word has one proper meaning, nor can anyone seek to fix the meaning of words for others, so the interpretation of the rule remains flexible and open-ended. (See Dias Jurisprudence, 5th Edn., p. 136.)"

335. However, although a decision has neither been reversed nor overruled, it may cease to be "law" owing to changed conditions and changed law. This is reflected by the principle "cessante ratione cessat ipsa lex".

".. It is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law; the other is where a case, which is acknowledged to have been the law at the time, has ceased to have that character owing to altered circumstances. (See Dias Jurisprudence, 5th Edn., pp. 146- 47.)"

336. It is the latter situation which is often of relevance. With changes that are bound to occur in an evolving society, the judiciary must also keep abreast of these changes in order that the law is considered to be good law. This is extremely pertinent especially in the current era of globalisation when

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> the entire philosophy of society, on the economic front, is undergoing vast changes. 339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a larger Bench. (See ***Pradip Chandra Parija v. Pramod Chandra Patnaik***, reported in (2003) 7 SCC 01, SCC at paras 6 and 7; followed in ***Union of India v. Hansoli Devi***, reported in 2002 (7) SCC 01, SCC at para 2.) But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. ***Kalyani Stores v. State of Orissa and Others***, reported in AIR 1966 SC 1686 and ***Krishan Kumar Narula v. State of J. and K.*** reported in AIR 1967 SC 1368, both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority. 343. It is also trite that the binding precedents which are authoritative in nature and are meant to be applied should not be ignored on application of the doctrine of sub silentio or per incuriam without assigning specific reasons therefor. I, for one, do not see as to how ***Kalyani Stores*** (cited supra) and ***K.K. Narula*** (cited supra) read together can be said to have been passed sub silentio or rendered per incuriam."

(xv) In **Raman Gopi v. Kunju Raman Uthaman** reported in 2011 (4) KLT 458, a Hon'ble Full Bench of the Kerala High Court held that,- "when a Bench of higher number of judges of the concerned court decided a question on the subject, then that is binding on the Bench of co-equal judges or lesser number of judges of that court. Further, it is settled law that, if a decision has been rendered by the same High Court, then any decision rendered by any other High Court is not binding on the other High Court but it has got only persuasive value."

105. Keeping in mind the pronouncement of law on precedents, let us consider, what is decided in W.P.(C) No.41662 of 2017 dated 21.12.2017, which the writ petitioners/respondents 1 & 2 claim as a precedent for entertaining a writ petition. The judgment dated 21.12.2017 in W.P.(C) No.41662 of 2017 is reproduced:

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"This writ petition is filed by the petitioner seeking the following reliefs.

> "i) direct the status quo as on date of Ext.P4 be maintained till the National Company Law Appellate Tribunal considers the Appeal and Stay application proposed to be filed by the petitioners herein against Ext.P4 Order of the 4th respondent Tribunal.
>
> ii) stay the operation and implementation of all further proceedings pursuant to Ext.P4 and P5 Notice pending hearing and final disposal of the present writ petition."

The sum and substance of the contention advanced in the writ petition is that the order passed by the 4th respondent is without taking into consideration the contentions put forth by the petitioner in the appeal pending before the 4th respondent Tribunal. It is also submitted by the learned Senior Counsel for the petitioner that even though Ext.P4 is an appealable order, the same is creating a lot of legal consequences in the petitioners functioning as the Managing Director as well as the Director of the company causing innumerable difficulties. Thereafter, Ext.P5 notice is issued directing to implement the directives contained under Ext.P4.

2. Taking into account the submission made by the learned Senior Counsel for the petitioner, I think it is only appropriate that some time is provided to the petitioners to file an appeal in accordance with the Companies Act and Rules,2013. Therefore, I leave open the liberty of the petitioner to prefer the appeal within the time permitted under law, which according to the petitioner is 45 days and the petitioner has sought time till 26.1.2018. Therefore, it is only appropriate that the proceedings pertaining to Exts.P4 and P5 is directed to be deferred for a period of one month from today. Accordingly, I do so.

The writ petition is disposed of accordingly."

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106. Perusal of the above said judgment shows that the writ court has only considered filing of an appeal, and till such time, deferred further proceedings on the basis of Exhibits-P4 and P5 therein. Writ court has not addressed any issue as to whether a writ petition is maintainable against an order of the NCLT or not. Giving due consideration to the decisions considered by us, as to what constitutes a precedent, we are of the view that the decision in W.P.(C) No.41662 of 2017 dated 21.12.2017, cannot be treated as a precedent, to hold that a writ petition is maintainable. On the contrary, the decision of a Hon'ble Division Bench in **Alexander Correya** (cited supra), is squarely applicable to the case on hand. In the said decision, the Hon'ble Division Bench held thus:

> “3. ……....The NCLT by order dated 4.7.2017 in Company Petition No.29 of 2017, passed an interim order firstly restraining the directors / the respondents therein, from transferring any property. They then stayed the notice dated 19.5.2017 seeking to expel the appellants from the membership of the company. It is not in dispute that before the NCLT, the company, the managing director and four directors appeared and had filed their counter affidavits and were contesting the matter on merits. Notwithstanding the interim order of stay granted by NCLT, as the petitioners before the NCLT were expelled from the membership, contempt proceedings were initiated and are pending before the NCLT.
>
> 4. It now appears that the writ petitioners, who also claim to be directors of the company, but not made parties before the NCLT, being aware of the proceedings as before the NCLT, filed the writ petition and challenged the interim order as passed by the NCLT and based thereon the learned single Judge has granted interim relief as noted above.
>
> 5. We have heard the appellants as well as the respondents and have considered the matter. In our view, as the proceedings before the NCLT are pending and as the NCLT has assumed jurisdiction in the matter, to avoid multiplicity of proceedings, it would only be just and proper that respondents 1 to 9 herein who were the nine writ petitioners, approach the NCLT and raise their grievance. They are

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> at liberty to raise the issue of jurisdiction as well, if they are so advised. But surely the orders of the NCLT cannot be assailed in this indirect manner. Let it be noted that under the provisions of the Companies Act, 2013 against any order of NCLT, an appeal lies to National Companies Appellate Tribunal. In such situation, we are of the view that the learned single Judge ought not to have entertained the writ petition nor passed the interim order. We accordingly vacate the interim order and dismiss the writ petition with liberty to the parties to move the NCLT in the matter for whatever relief they may seek. This appeal is accordingly allowed."

107. W.P.(C) No.14341 of 2020 was filed on 13.07.2020 under Article 226 of the Constitution of India, to set aside the interim order made in I.A. No.83/2020 in C.P. No.114/KOB/2019 dated 9.7.2020, on the file of the National Company Law Tribunal, Kochi Bench. Rule 49 of the National Company Law Tribunal Rules, 2016, extracted above, deals with *ex parte* hearing. Admittedly, the writ petitioners/respondents 1 & 2 have not chosen to file an application under Rule 49(2) to set aside the *ex parte* interim order. Whereas, they have chosen to file a writ petition under Article 226 of the Constitution of India, on 13.07.2020. However, after curing the defects, the writ petition has been listed for admission on 15.07.2020. At this juncture, it is to be noted that the entire cause papers have not been served on the appellants. However, oral submissions have been made, objecting to the maintainability of the writ petition on the grounds of availability of an alternative remedy.

108. Writ petitioners, in I.A.No.2 of 2020 filed in W.P(C) No.14341 of 2020, have contended that they were told by the learned Single Judge that the writ petition will not be entertained unless appeals are filed before the NCLAT, New Delhi. Appeals have been filed on 15.07.2020, but claims that appeals

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through email are not entertained, which argument has already been addressed by us.

109. First of all, there is an alternative remedy under Rule 49(2) of the NCLT Rules, 2016, to set aside an *ex parte* order. As stated above, writ petitioners/respondents 1 & 2 herein have not chosen to approach the NCLT under the said rule. Having directed the writ petitioners/respondents to avail a right of appeal, before NCLAT, writ court ought not to have entertained the writ petition for the reason that, it would be amounting to allowing the writ petitioners/respondents to prosecute their challenge to the interim order passed in I.A. No.83/2020 in C.P. No.114/KOB/2019 in two different forums; one before NCLAT, New Delhi and by way of filing a writ petition under Article 226 of the Constitution of India.

110. In the foregoing paragraphs, we have clearly held that a writ petition under Article 226 of the Constitution of India, against the order of the Tribunal is not maintainable in law. On the issue as to whether an order of the Tribunal can be challenged by filing a writ petition under Article 226 or 227 of the Constitution of India, we have already considered the Radhey **Shyam** case (cited supra).

111. In **AGDP. Ltd. v. Registrar of Companies** (cited supra), during the course of hearing of a Civil Revision Petition filed against an order made in C.P.No.178 of the National Company Law Board, Chennai, an Hon'ble Division Bench of the Madras High Court rejected an application filed under Sec.252(3)

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of the Companies Act, 2013, to set aside an order striking off the company from the register of companies. To that effect, publication was effected. The court upon perusal of files found that no such order under Sec.248(6) was passed and thus, there was a jurisdictional error. In such circumstances, though the order of rejection can be challenged by way of an appeal, placing reliance on the decisions on the scope of revision petition filed under Article 227 of the Constitution of India, the Hon'ble High Court of Madras interfered with the publication and granted liberty to the petitioner to take appropriate recourse.

112. One of the contentions raised by the learned counsel for the appellants is that the appellants were not furnished with the full cause papers in W.P.(C) No.14341 of 2020 & other connected cases, so as to enable them to file a counter affidavit and thus, there is denial of reasonable opportunity. In this context, let us have a look at Rule 153A of the Rules of the High Court of Kerala, 1971, which reads thus:

> "**153A. Exchange of copies of pleadings etc**.- Copies of pleadings, petitions, applications and affidavits, counter affidavits, reply affidavits and rejoinders shall be served on all the parties appearing in the case, through counsel or otherwise, except when the Court, by order exempts from doing so."

113. In the case on hand, writ petition has been filed on 13.07.2020, and certain defects noticed by the Registry, were cured. Thereafter, the writ petition was taken up on 15.07.2020. Though, before the writ court, learned

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counsel for the appellants submitted that a caveat has been filed, based on the Kerala High Court Act, 1971 and the rules framed thereunder, writ court has rightly observed that there is no caveat in writ petitions. However, there is nothing on record, to come to the conclusion that, writ court has considered as to whether, the entire cause papers, as contemplated under Rule 153A of the Rules, have been furnished to the appellants or not. Thereafter, the matter has been adjourned to 17.07.2020. But, the fact remains that the entire cause papers have not been furnished to the appellants, so as to enable them to file a counter affidavit. Nevertheless, the appellants, by citing settled propositions of law, seemed to have made oral submissions on the maintainability of the writ petition. The abovesaid fact of not furnishing the entire cause papers is also fortified by the Registry's objection at the time of entertaining the Writ Appeal, with an office note that the entire cause papers have not been filed along with the appeal memorandum, which note was also sustained by us, at the time, when the Writ Appeal was listed before this Court, with the office note on defects.

114. Writ Appeal has been re-presented, after curing the defect. Thus, from the above, it could be deduced that the writ court ought to have granted sufficient time for the appellants to file counter affidavit, which, in our view, amounts to violation of the principles of natural justice.

115. In this context, let us consider as to what jurisdictional fact/ jurisdictional error/lack of jurisdiction etc., as explained by the Hon'ble

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Supreme Court, and thereafter, to decide as to whether, the interim order passed by the Tribunal (Exhibit-P1) can be interfered with, in exercise of powers under Article 226 of the Constitution of India, in the following decisions:

(i) In **Ujjam Bai v. State of Uttar Pradesh** [AIR 1962 SC 1621], the Hon'ble Supreme Court held as under:

> "19………………………..Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the inquiry'. (Rex v. Bolten [1841] I Q.B. 66. Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determine any of those questions incorrectly but it has no jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters.
>
> A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e.) had jurisdiction to determine.
>
> The strength of this theory of jurisdiction lies in its logical consistency. But there are other cases where Parliament when it empowers an inferior tribunal to enquire into certain facts intend to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and with in the

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> other area impeachable. "The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constitution them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess." (***Halsbury's Laws of England***, 3rd Edn. Vol. 11 page 59).
>
> The characteristic attribute of judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts stricto sensu but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal…………………………"

(ii) In **Anisminic Ltd. v. The Foreign Compensation Commissioner,** (1969) 1 All ER 208, Lord Reid, at pages 213 and 214 of the Report, stated as under:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the words "jurisdiction has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or

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failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in had faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to if for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

(iii) In Union **of India v. Tarachand Gupta and Brothers,** [(1971) 1 SCC 486], the Hon'ble Supreme Court, at paragraph 22, held thus:-

"22. ....The word "jurisdiction" has both a narrow and a wider meaning. In the sense of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction."

(iv) In **Shri. M.L. Sethi v. Shri R.P. Kapur,** reported in (1972) 2 SCC 427, the Hon'ble Supreme Court, at paragraph 12, held thus:-

"12. ...The "jurisdiction" is a verbal coat of many colours. Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an enquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denean in R. v. Bolton. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In ***Anisminic Ltd.*** case (supra), Lord Reid said:

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> "But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

In the same case, Lord Pearce said:

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or, in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference 'between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction it the decision is right in law

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but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the, case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will, give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (see H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case", Law Quarterly Review, Vol. 85, 1969, p. 198). Why is it that a wrong decision on a question of limitation or res judicata 'was treated as a jurisdictional error and liable to be interfered with in revision ? It is a it difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

(v) In **Raza Textiles Ltd. v. Income Tax Officer, Rampur** reported in (1973) 1 SCC 633, the Hon'ble Supreme Court held as follows:

"No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assesses was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion the Appellate Bench is wholly wrong in opining that the Income-tax Officer can "decide either way".

(vi) In **Shrisht Dhawan (SMT.) v. M/s. Shaw Brothers**, [(1992) 1 SCC 534], the Hon'ble Supreme Court, at paragraph 19, held thus:-

"19....What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-

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> existence of which depends assumption or refusal to assume jurisdiction by a Court, tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad. In Raza Textiles it was held that a court or tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly."

(vii) After considering **Anisminic's** case (cited supra) and several decisions, a learned single Judge of this Court has explained the word "Jurisdiction", in **Malayala Manorama Co. Ltd. v. Asstt. Commissioner (KGST)** [2006 (3) KLT 581], wherein the concept of jurisdiction has been drastically expanded after the decision of the House of Lords in *Anisminic v. The Foreign Compensation Commission (1967 (2) AER 986)*. Now, every error of law if a jurisdictional error. If a decisive fact is wrongly understood, even then, the decision will be outside jurisdiction. This concept is best explained by K.S. Paripoornan, J., in his Lordship's separate Judgment in Mafatlal Industries v. Union of India (1997 (5) SCC 536). The relevant portion of the said Judgment reads as follows:

> "Opinions may differ as to when it can be said that in the 'public law' domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void (referred to in Illuri Subbayya Chetty case and approved in Dhulabhai case). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact-situation obtaining in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or tribunal, makes the decision rendered ultra vires or a nullity or one without jurisdiction? If the decision is without jurisdiction,

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notwithstanding the provisions for obtaining reliefs contained in the Act and the 'ouster clauses', the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in Anisminic Ltd. v. Foreign Compensation Commission, the legal world seems to have accepted that any 'jurisdictional error' as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the 'ouster clauses' are construed restrictively and such provisions whatever their stringent language be, have been held, not to prevent challenge on the ground that the decision is ultra vies and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired 'new dimensions'. The original or pure theory of jurisdiction means 'the authority to decide' and it is determinable at the commencement and not at the conclusion of the enquiry. The said approach has been given a go-by in Anisminic case as we shall see from the discussion hereinafter (See De Smith, Woolf and Jowell - Judicial Review of Administrative Action (1995 Edn.) p.238, Halsbury's Laws of England (4th Edn.) p. 114, para 67, footnote (9). As Sir William Wade observes in his book, Administrative Law (7th Edn.), 1994, at p.229:

> “The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task.”

The decision in *Animinic case* has been cited with approval in a number of cases by this Court: citation of a few such cases - Union of India v. Tarachand Gupta & Bros (AIR 1971 SC 1558 at p.1565, A.R. Antulay v. R.S. Nayak (1988 (2) SCC 602 at p.650), 'R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) (1989 (1) SCC 628 at p.634), N. Parthasararhy v. Controller of Capital Issues (1991 (3) SCC 153 at p.195), Associated Engineering Co. v. Govt. of A.P. (1991 (4) SCC 93), Shiv Kumar Chadha v. Municipal Corpn. of Delhi (1993 (3) SCC 161 at p.173). Delivering the Judgment of a two member Bench in M.L. Sethi v. R.P. Kapur (AIR 1972 SC 2379), Mathew, J., in paras 10 and 11 of the Judgment explained the legal position after Anisminic case to the following effect:

> “10. The word 'jurisdiction is a verbal cost of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign. Compensation Commission, namely, the entitlement 'to enter upon the enquiry in question. If

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there was an entitlement to enter upon an enquiry into the question, then, any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Dennan in 'R. v. Boltan. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd., Lord Reid said:

> 'But there are many cases, where, although the tribunal had jurisdiction to enter on the enquiry, it has done for failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith, have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

In the same case, Lord Pearce said:

> 'Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may, at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may, depart from the rules of natural justice, or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby, it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decisions to be a nullity.'

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> 11. The dicta of the majority of the House of Lords, in the above case, would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of 'jurisdiction'. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as 'basing their decision n a matter with which they have no right to deal', 'imposing an unwarranted condition' or 'addressing themselves to a wrong question'. The majority opinion in the case leaves a court or tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the court is prepared to allow...........”

(viii) In **Hari Prasad Mulshanker Trivedi v. V.B. Raju** (AIR 1973 SC 2602), a Constitution Bench of the Hon'ble Supreme Court, stated thus: (SCC pp 423-24, para 28).

> “Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic case, we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word 'jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context (see per Diplock, J. at p.394 in the Anisminic case). Whereas the 'pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lost something of its logical symmetry. 'At bottom, the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic'. (S.A. Smith 'Judicial Review of Administrative Action, 2nd Edn., p.98. (1968) Edn.)
>
> The observation of the learned author (S.A.De Smith) was continued in its 3rd Edn. (1973) at p.98 and in its 4th Edn.(1980) at p.112 of the book. The observation aforesaid was based on

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the then prevailing academic opinion only as is seen from the footnotes. It should be stated that the said observation is omitted form the latest edition of the book De Smith, Woolf and Jowell -Judicial Review of Administrative Action - 5th Edn. (1995) as is evident from p.229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

335. After 1980, the decision in Anisminic case came up for further consideration before the House of lords, Privy Council and other courts. The three leading decisions of the House of Lords wherein Animinic principle was followed and explained, are the following: Racal Communications Ltd., In re (1981 AC 374), O' Reilly v. Mackman [1983 (2) AC 237], Re. v. Hull University Visitor (1993 AC 682). It should be noted that Racal, In re cae, the Anisminic principle was held to be inapplicable in the case of (superior) court where the decision of the court is made final and conclusive by the statute. (The superior court referred to in this decision is the High Court) (1981 AC 374 (383, 384, 386, 391)). In the meanwhile, the House of Lords, in Council of Civil Service Unions v. Minister for the Civil Service (1985 AC 374), enunciated three broad grounds for judicial review, as 'legality', 'procedural propriety' and 'rationality' and this decision had its impact on the development of the law in post-Anisminic period. In the light of the above four important decisions of the House of Lords, other decisions of the court of appeal, Privy Council etc., and the later academic opinion in the matter, the entire case-law on the subject has been reviewed in leading text books. In the latest edition of De Smith on Judicial Review of Administrative Action - edited by Lord Woolf and Jowell, Q.C. (Professor of Public Law, 5 Edn. - 1995) in Chapter 5, titled as 'Jurisdiction, Vires, Law and Fact' (pp-223-204), there is exhaustive analysis about the concept 'Jurisdiction' and its ramifications. The authors have discussed the pure theory of jurisdiction, the innovative decision in Anisminic case, the development of the law in the post-Anisminic period, the scope of the 'finality' clauses (exclusion of jurisdiction of courts) in the statutes and have laid down a few propositions at pp-250, 256 which could be advanced on the subject. The authors have concluded the discussion thus at p.256:

'After Anisminic virtually every error of law is a jurisdictional error, and the only place left for non-jurisdictional error is where the components of the decision made by the inferior body included matters of fact and policy as well as law or where the error was evidential (concerning for example, the burden of proof or admission of evidence). Perhaps the most precise indication

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of jurisdictional error is that advanced by Lord Diplock in Raccal Communications, when he suggested that a tribunal is entitled to make an error when the matter 'involves, as many do interrelated questions of law, fact and degree'. Thus, it was for the county court judge in Pearlman, to decide whether the installation of central heating in a dwelling amounted to a 'structural alternation, extension or addition'. This was a typical question of mixed law, fact and degree which only a scholiast would think it appropriate to dissect into two separate questions, one for decision by the superior court, viz., the meaning of these words, a question which must entail considerations of degree and the other for decision by a country court viz., the application of words to the particular installation, a question which also entails considerations of degree.

It is however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful.'

336. The jurisdictional control exercised by superior courts over subordinate courts, tribunals or other statutory bodies and the scope and content of such power has been pithily stated in Halsbury's Laws of England - 4th Edn. (Reissue), 1989 Vol. 1(1), p.113 to the following effect:

The inferior court or tribunal lacks jurisdiction if it has no power to enter upon an enquiry into a matter at all and it exceeds jurisdiction if it nevertheless enters upon such an enquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior court or tribunal or other body, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly.

A tribunal lacks jurisdiction if (1) it is improperly constituted or (2) the proceedings have been improperly instituted or (3) authority to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject-matter, the value of that subject-matter, or the non-existence of any other prerequisite of a valid adjudication. Excess of jurisdiction is

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not materially distinguishable from lack of jurisdiction and the expression may be used interchangeably.

Where the jurisdiction of tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional.

There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question.

The presumption that error of law goes to jurisdiction may be rebutted on the construction of a particular statute, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously the courts were more likely to find that errors of law were within jurisdiction; but with the modern approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases. The courts will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament.(p.120)

Errors of law include misinterpretation of statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duly to give reasons and misdirecting oneself as to the burden of proof.(pp. 121-122).

337. H.W.R.Wade and C.F.Forsyth in their book-Administrative Law 7th Edn.(1994) discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head 'jurisdiction over Fact and Law' in Chapter 9, pp.284 to 320. The decisions before Anisminic and those in the post-Anisminic period have been discussed in detail. At pp.319-320,

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the authors give the Summary of Rules thus:

'Jurisdiction over fact and law: Summary

At the end of a chapter which is top-heavy with obsolescent material it may be useful to summarise the position as shortly as possible. The overall picture is of an expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly absolute and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together with the simpler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:

Errors of fact

Old rule: The court would quash only if the erroneous fact was jurisdictional.

New rule: The court will quash if an erroneous and decisive fact was -

(a) jurisdictional
(b) found on the basis of no evidence; or

(c) wrong, misunderstood or ignored.

Errors of law

Old rule: The court would quash only if the error was-

(a) jurisdictional

(b) on the face of the record.

New rule: The court will quash for any decisive error, because all errors of law are now jurisdictional.

(ix) In **Arun Kumar v. Union of India** reported in (2007) 1 SCC 732, the Hon'ble Supreme Court, at Paragraphs 74, 80 to 84, held as follows:

"74. A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or

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non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses.

....

80. The Court relied upon a decision in White & Collins v. Minister of Health (1939) 2 KB 838: 108 LJ KB 768, wherein a question debated was whether the court had jurisdiction to review the finding of administrative authority on a question of fact. The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure-ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was a part of park. The Minister directed public inquiry and on the basis of the report submitted, confirmed the order.

81. Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated:

> "The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory." [See also Rex v. Shoredich Assessment Committee; (1910) 2 KB 859: 80 LJ KB 185].

82. A question under the Income Tax Act, 1922 arose in Raza Textiles Ltd., v. Income Tax Officer, Rampur, (1973) 1 SCC 633. In that case, the ITO directed X to pay certain amount of tax rejecting the contention of X that he was not a

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non-resident firm. The Tribunal confirmed the order. A single Judge of the High Court of Allahabad held X as non-resident firm and not liable to deduct tax at source. The Division Bench, however, set aside the order observing thus:

> "ITO had jurisdiction to decide the question either way. It cannot be said that the Officer assumed jurisdiction by a wrong decision on this question of residence".

X approached this Court.

83. Allowing the appeal and setting aside the order of the Division Bench, this Court stated:

> "The Appellate Bench appears to have been under the impression that the Income-tax Officer was the sole judge of the fact whether the firm in question was resident or nonresident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assesses was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi- judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen." (emphasis supplied)

84. From the above decisions, it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

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(x) In **Carona Ltd. v. M/s. Parvathy Swaminathan & Sons,** reported in (2007) 1 SCC 559, the Hon'ble Supreme Court, at paragraph Nos. 21 to 24 and 31, held thus:-

> 21. Stated simply, the fact or facts upon which the jurisdiction of a Court, a Tribunal or an Authority depends can be said to be a 'jurisdictional fact'. If the jurisdictional fact exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It is also well settled that a Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not posses.
>
> 22. In Halsbury's Laws of England, (4th Edn.), Vol. 1, para 55, p.61; Reissue, Vol. 1(1), para 68, pp. 114- 15, it has been stated: "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive".
>
> 23. The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court or Tribunal.
>
> JURISDICTIONAL FACT AND ADJUDICATORY FACT
>
> 24. But there is distinction between 'jurisdictional fact' and 'adjudicatory fact' which cannot be ignored. An 'adjudicatory fact' is a 'fact in issue' and can be determined by a Court, Tribunal or Authority on 'merits', on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish 'jurisdictional fact' and 'fact in issue' or 'adjudicatory fact'. Nonetheless the difference between the two cannot be overlooked.
>
> ....
>
> 31. It is thus clear that for assumption of jurisdiction by a Court or a Tribunal, existence of jurisdictional fact is a

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condition precedent. But once such jurisdictional fact is found to exist, the Court or Tribunal has power to decide adjudicatory facts or facts in issue."

(xi) In **Harpal Singh v. State of Punjab** [(2007) 13 SCC 387], the Hon'ble Supreme Court held as under;

"9. At this stage it will be useful to refer to the dictionary meaning of the word 'Jurisdiction':

Black's Law Dictionary: "Court's power to decide a case or issue a decree".

Words and Phrases - Legally defined - Third Edition (p.497) : "By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by similar means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction extends."
Law Lexicon by P. Ramanatha Aiyar - 2nd Edn. Reprint 2000 : "An authority or power, which a man has to do justice in causes of complaint brought before him (Tomlin's Law Dic). The power to hear and determine the particular case involved; the power of a Court or a judge to entertain an action, petition, or other proceeding; the legal power of hearing and determining controversies. As applied to a particular claim or controversy, jurisdiction is the power to hear and determine the controversy.

Jurisdiction, therefore, means the authority or power to entertain, hear and decide a case and to do justice in the case and determine the controversy. In absence of jurisdiction the court has no power to hear and decide the matter and the order passed by it would be a nullity."

(xii) In **Ramesh Chandra Sankla v. Vikram Cement,** [(2008) 14 SCC 58], the Hon'ble Supreme Court, at paragraphs 68 to 70, held thus:-

"68. A 'jurisdictional fact' is one on existence of which depends jurisdiction of a Court, Tribunal or an Authority. If the jurisdictional fact does not exist, the Court or Tribunal

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cannot act. If an inferior Court or Tribunal wrongly assumes the existence of such fact, a writ of certiorari lies. The underlying principle is that by erroneously assuming existence of jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

69. The counsel referred to a recent decision of this Court in Arun Kumar v. Union of India. Speaking for the Court, one of us (C.K. Thakker, J.) observed: (SCC p.758, para 74)

> "74. A 'jurisdictional fact' is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses".
>
> It was further observed: (SCC p.759, para 76)
>
> 76. "The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction".

70. Drawing the distinction between 'jurisdictional fact' and 'adjudicatory fact', the Court stated: (Arun Kumar case, SCC p.761, para 84)

> "84.... it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the

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> decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present".

> The principle was reiterated in ***Carona Ltd. v. Parvathy Swaminathan & Others***, (2007) 1 SCC 559."

116. Material on record discloses that the dispute between the first respondent company and its shareholders, under challenge, is purely a civil dispute. The remedy under Article 226 of the Constitution of India is available against a State or authority or instrumentality of the State, falling within the ambit of the definition “State” under Article 12 of the Constitution of India.

117. Writ petition filed under Article 226 of the Constitution of India, can be for the enforcement of fundamental rights or for any other purpose, as envisaged under Article 226 of the Constitution. There is no pleadings or materials to substantiate that the appellants are discharging public duties or public functions, and thus, amenable to writ jurisdiction under Article 226 of the Constitution of India.

118. On a scrutiny of the decisions extracted above, it is clear that insofar as challenge to the judicial acts of the Courts or the Tribunals, in exercise of the powers under Article 227 of the Constitution of India, the High Court exercises overall superintendence on such Tribunals under Article 227. Orders by Courts or Tribunals, as the case may be, can be challenged by way of filing a writ petition under Article 227 of the Constitution of India, and the administrative orders passed by the Courts, or the Tribunals, as the case may be, can be challenged under Article 226 of the Constitution. Administrative

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orders passed by the State, authority or instrumentality of the State, can be challenged by way of a writ petition under Article 226 of the Constitution of India, as they do not fall under the ambit of superintendence and control, in exercise of Article 227 of the Constitution of India.

119. Difference between the exercise of powers under Articles 226 and 227 of the Constitution of India has been explained in the foregoing paragraphs. Thus, in the case on hand, when none of the parties, State or authority or instrumentality of the State, or any private body, discharging public functions, have been arrayed as respondents, when the writ petition has been filed under Article 226 of the Constitution of India, having regard to the roster followed in listing the cases, writ court ought to have directed the respondents/writ petitioners to make necessary amendments, to the provisions under which the writ petition ought to have been filed, or in the alternative, directed that the writ petition be placed before the concerned court, dealing with the challenges made to the orders passed by Courts, or Tribunals, as the case may be. Admittedly, the order impugned in the writ petition (Exhibit-P1) is not an administrative order, passed by the National Company Law Tribunal.

120. Writ court, without drawing a distinction between a writ petition filed under Articles 226 and 227 of the Constitutions of India, has erroneously proceeded to entertain the writ petition under Article 226 against an interim order passed by the NCLT, Kochi Bench, in I.A. No.83/2020 in C.P.No.114/KOB/2019 dated 9.7.2020. In ***Maharashtra Chess Association***

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v. Union of India & Ors. reported in ***2019 SCC Online SC 932***, the Hon'ble Supreme Court has considered, as to what the High Court should consider before entertaining a writ petition under Article 226 of the Constitution of India, and held as under:

> "22. This brings us to the question of whether Clause 21 itself creates a legal bar on the Bombay High Court exercising its writ jurisdiction. As discussed above, the writ jurisdiction of the High Court is fundamentally discretionary. Even the existence of an alternate adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked contradistinction to the jurisdiction of a civil court which is governed by statute. [Section 9. Courts to try all civil suits unless barred - The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred]. In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of the injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of constitutional interpretation. These factors are not exhaustive and we do not propose to enumerate what factors should or should not be taken into consideration. It is sufficient for the present purposes to say that the High Court must take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each unique case.
>
> 23. At this juncture, it is worth discussing the decision of this Court in ***Aligarh Muslim University v. Vinay Engineering*** [(1994) 4 SCC 710]. In that case, the contract between the parties contained a clause conferring jurisdiction on the courts at Aligarh. When the High Court of Calcutta exercised its writ jurisdiction over the matter, this Court held:
>
> "2. We are surprised, not a little, that the High Court of Calcutta should have exercised jurisdiction in a case where it had absolutely no jurisdiction. The contracts in question were executed at Aligarh, the construction work was to be carried out at Aligarh, even the contracts provided that in the event of dispute the Aligarh Court alone will have jurisdiction. The arbitrator was from Aligarh and was to function there. Merely because the respondent was a Calcutta-based firm, the High Court of Calcutta seems to have exercised jurisdiction where it

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had none by adopting a queer line of reasoning. We are constrained to say that this is a case of abuse of jurisdiction and we feel that the respondent deliberately moved the Calcutta High Court ignoring the fact that no part of the cause of action had arisen within the jurisdiction of that Court. It clearly shows that the litigation filed in the Calcutta High Court was thoroughly unsustainable."

24. The court examined the facts holistically, noting that the contract was executed and to be performed in Aligarh, and the arbitrator was to function at Aligarh. It did consider that the contract conferred jurisdiction on the courts at Aligarh, but this was one factor amongst several considered by the court in determining that the High Court of Calcutta did not have jurisdiction.

25. In the present case, the Bombay High Court has relied solely on Clause 21 of the Constitution and Bye Laws to hold that its own writ jurisdiction is ousted. The Bombay High Court has failed to examine the case holistically and make a considered determination as to whether or not it should, in its discretion, exercise its powers under Article 226. The scrutiny to be applied to every writ petition under Article 226 by the High Court is a crucial safeguard of the rule of law under the Constitution in the relevant territorial jurisdiction. It is not open to a High Court to abdicate this responsibility merely due to the existence of a privately negotiated document ousting its jurisdiction.

26. It is certainly open to the High Court to take into consideration the fact that the Appellant and the second Respondent consented to resolve all their legal disputes before the courts at Chennai. However, this can be a factor within the broader factual matrix of the case. The High Court may decline to exercise jurisdiction under Article 226 invoking the principle of forum non conveniens in an appropriate case. The High Court must look at the case of the Appellant holistically and make a determination as to whether it would be proper to exercise its writ jurisdiction. We do not express an opinion as to what factors should be considered by the High Court in the present case, nor the corresponding gravity that should be accorded to such factors. Such principles are well known to the High Court and it is not for this Court to interfere in the discretion of the High Court in determining when to engage its writ jurisdiction unless exercised arbitrarily or erroneously. The sole and absolute reliance by the Bombay High Court on Clause 21 of the Constitution and Bye Laws to determine that its jurisdiction under Article 226 is ousted is however one such instance.

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> 27. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 25 September 2018. Writ Petition No. 7770 of 2017 is accordingly restored to the file of the High Court for being considered afresh. No costs."

121. Applying the above said decision to the case on hand, we are of the view that the writ court, while entertaining the writ petition, has not considered or examined the facts holistically.

122. Giving due consideration to the decisions on jurisdiction, we are of the view that there is an error in exercising the jurisdiction under Article 226 of the Constitution of India.

123. It is the contention of the writ petitioners/respondents 1 & 2 herein that the judgment passed by the learned single Judge dated 22.07.2020 in W.P.(C) No.14341 of 2020 is only to make a temporary arrangement, i.e., to ensure that the functioning of the companies is not affected till 07.08.2020, and the moment the matter is remitted back to the National Company Law Tribunal and when the Tribunal has proceeded to pass further orders on I.A. No.83/2020, instant Writ Appeal has become infructuous.

124. In **Union of India (UOI) and Ors. v. Narender Singh** [(2005) 6 SCC 106], dismissal of the respondent therein was set aside by the Central Administrative Tribunal. Writ petition was filed by the appellant. During the pendency of the writ petition, the Tribunal's order was implemented. Later, the writ petition was dismissed as infructuous. Assailing the correctness of the dismissal as infructuous, Union of India has approached the Hon'ble Apex

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court. Considering the meaning of the word "infructuous", the Hon'ble Apex Court reversed the decision of the High Court and, at paragraphs 3 to 6, held as under:

> "3. Stand of the appellants in the present appeal is that the view taken by the High Court is clearly untenable. Merely because the respondent employee had been reinstated in service pursuant to the impugned orders that did not render the petition infructuous.
>
> 4. In response, learned counsel for the respondent employee submitted that the Tribunal's order is without blemish and even on merits there is no scope for interference with the said order. Even otherwise as has been rightly held by the High Court after the order of reinstatement the writ petition had really become infructuous.
>
> 5. The High Court's order is clearly indefensible. A writ petition questioning the Tribunal's order on merits does not become infructuous by giving effect to the Tribunal's order. Merely because the order of reinstatement had been implemented by the appellant, that did not render the writ petition infructuous as has been observed by the High Court. This position was clearly stated in ***Union of India v. G.R. Prabhavalkar*** [(1973) 4 SCC 183]. In para 23 of the decision, it was observed as follows:
>
>> "23. Mr Singhvi, learned counsel, then referred us to the fact that after the judgment of the High Court the State Government has passed an order on 19-3-1971, the effect of which is to equate the Sales Tax Officers of the erstwhile Madhya Pradesh State with the Sales Tax Officers, Grade III, of Bombay. This order, in our opinion, has been passed by the State Government only to comply with the directions given by the High Court. It was made during a period when the appeal against the judgment was pending in this Court. The fact that the State Government took steps to comply with the directions of the High Court cannot lead to the inference that the appeal by the Union of India has become infructuous."

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> 6. The expression infructuous means ineffective, unproductive and unfruitful. It is derived from the Latin word "fructus" (fruit). By implementing an order, the challenge to the validity of the order is not wiped out and is not rendered redundant."

125. Reverting to the case on hand, it could be seen that when the Writ Appeal has been filed challenging the very maintainability of the writ petition, filed against an interim order of the NCLT, on the grounds of suppression of material facts, including remedy under Rule 49(2) of the NCLT Rules, 2016, error in exercising jurisdiction under Article 226 of the Constitution of India, and not under Article 227, availability of alternative remedy, writ petition filed under Article 226 of the Constitution of India for enforcing civil rights *inter se* the parties, who do not fall within the ambit of Article 12 of the Constitution of India, contention of the respondents that the matter has become infructuous, cannot be accepted. An order passed without jurisdiction is void and the same cannot be allowed to stand. In that context, let us consider a few decisions.

(i) In **Ex parte Seidel, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001), Ex parte Spaulding, 687 S.W.2d at 745 (Teague, J., concurring).** "A void judgment is a nullity from the beginning, and is attended by none of the consequences of a valid judgment. It is entitled to no respect whatsoever because it does not affect, impair, or create legal rights".

(ii) In **VALLEY v. NORTHERN FIRE & MARINE INS. CO.,** [1920 SCC Online US SC 188 : 254 US 348 (1920) : 41 S.Ct. 116 : 65 L.Ed. 297], the Hon'ble Supreme Court of U.S opined as under:

> "5. Of the construction of the statute there can be no controversy; what answer shall be made to the questions

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> turns on other considerations, turns on the effect of the conduct of the company as an estoppel. That it has such effect is contended by the trustee, and there is an express concession that if objection had been made the company would have been entitled to a dismissal of the petition. It is, however, insisted that it is settled 'that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate,' and that section 4 does not relate to the jurisdiction of the court over the subject-matter. 'It does not, therefore,' is the further contention, 'create or limit jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition,' and that 'the valid exercise of jurisdiction does not depend upon the correctness of the decision.' And again, if the court in the exercise of its jurisdictional power, 'reached a wrong conclusion, the judgment is not void, it is merely error to be corrected on appeal or by motion to vacate, timely made, but as long as it stands it is binding on every one.' There is plausibility in the propositions taken in their generality, but there are opposing ones. Courts are constituted by authority and they cannot beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. ***Elliott v. Peirsol**, 1 Pet. 328, 340, 7 L. Ed. 164; **Old Wayne Life Ass'n v. McDonough**, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345.*

(iii) In **CHARLES A. WILLIAMSON AND Other v. JOSEPH BERRY.**, [49 US 495 (1850) : 8 How. 495 : 12 L.Ed. 1170], the Hon'ble Supreme Court of U.S opined as under:

> "Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities; they are not voidable, but simply void, and this even prior to reversal."

(iv) In **Margaret KLUGH v. UNITED STATES of America,** [US District Court for the District of South Carolina - 620 F. Supp. 892 (D.S.C. 1985), September 6, 1985], while considering the Fed. Rules

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Civ. Proc., Rule 60(b)(4), 28 U.S.C.A., U.S.C.A. Const. Amend. 5, the court opined as under:

> "This cannot be ignored, its fact recorded! Judgment is a void judgment if court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process,"

(v) A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. A void judgment which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, or lacks inherent power to enter the particular judgment, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court. [See ***Long v. Shorebank Development Corp.,*** [182 F.3d 548 (C.A. 7 Ill. 1999)].

(vi) In **Krishnadevi Malchand Kamathia & Ors., v. Bombay Environmental Action Group & Ors.,** [(2011) 3 SCC 363], the Hon'ble Apex Court held thus:

> "16. It is a settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. In ***State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) and Ors***. (AIR 1996 SC 906); ***Tayabbhai M. Bagasarwalla and Anr. v. Hind Rubber Industries Pvt. Ltd. etc.*** (AIR 1997 SC 1240); ***M. Meenakshi and Ors. v. Metadin Agarwal (dead) by L.Rs. and Ors.*** [(2006) 7 SCC 470]; and ***Sneh Gupta v. Devi Sarup and Ors.*** [(2009) 6 SCC 194], this Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.
>
> 17. In **State of Punjab and Ors. v. Gurdev Singh, Ashok Kumar** AIR 1991 SC 2219, this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While

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deciding the said case, this Court placed reliance upon the judgment in **Smith v. East Ellore Rural District Council** (1956) 1 All ER 855 wherein Lord Radcliffe observed:

> "An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

18. In **Sultan Sadik v. Sanjay Raj Subba and Ors.** [AIR 2004 SC 1377], this Court took a similar view observing that once an order is declared non-est by the Court only then the judgment of nullity would *operate erga omnes* i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and latent invalidity.

19. Thus, from the above, it emerges that even if the order/notification is void/ voidable, the party aggrieved by the same cannot decide that the said order / notification is not binding upon it. It has to approach the Court for seeking such a declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the Court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

(vii) In **Inderjit Singh Grewal v. State of Punjab & Anr**. [(2011) 12 SCC 588], at paras 18 to 21, the Hon'ble Apex Court held as under:

> "18. However, the question does arise as to whether it is permissible for a party to treat the judgment and order as null and void without getting it set aside from the competent court.
>
> The issue is no more res integra and stands settled by a catena of decisions of this Court. For setting aside such an order, even if void, the party has to approach the appropriate forum. [Vide: ***State of Kerala v. M.K.Munhikannan Nambiar Manjeri Manikoth, Naduvil***

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(dead) & Ors., (AIR 1996 SC 906); and ***Tyabbhai M. Bagasarwalla & Anr. V. Hind Rubber Industries Pvt. Ltd.***, (AIR 1997 SC 1240)].

19. In ***Sultan Sadik v. Sanjay Raj Subba & Ors***. (AIR 2004 SC 1377), this court held that there cannot be any doubt that even if an order is void or voidable, the same requires to be set aside by the competent court.

20. In ***M. Meenakshi & Ors. V. Metadin Agarwal (dead) by Lrs. & Ors.,*** [(2006) 7 SCC 470], this Court considered the issue at length and observed that if the party feels that the order passed by the court or a statutory authority is non-est/void, he should question the validity of the said order before the appropriate forum resorting to the appropriate proceedings. The Court observed as under:-

> "It is a well settled principle of law that even a void order is required to be set aside by a competent Court of law, inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non-est. An order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof."

A Similar view has been reiterated by this Court in ***Sneh Gupta v. Devi Sarup & Ors***. [(2009) 6 SCC 194].

21. From the above, it is evident that even if a decree is void ab initio, declaration to that effect has to be obtained by the person aggrieved from the competent court. More so, such a declaration cannot be obtained in collateral proceedings."

(viii) In **Central Potteries Ltd. v. State of Maharashtra and Ors.** [AIR 1966 SC 932], at para 7, the Hon'ble Apex Court observed thus:

> "7. In this connection it should be remembered that there is a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction, and that whereas an order passed by an authority with respect to a mattar over which it has no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise than in the mode prescribed by law, is not a

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> nullity. It may be liable to be questioned in those very proceedings, but subject to that it is good, and not open to collateral attack...........”

(ix) In **S. Balasubramaniyam v. P. Janakaraju and Ors.** [AIR Kant R 2099], at paragraphs 18 & 19, the Hon'ble High Court of Karnataka held as under:

> “18. There is a clear difference between orders which are 'void' and orders which are 'voidable'. The term 'void' is used referring to contracts or orders which can be ignored with impunity by those who are parties to it. The term 'voidable' is used referring to contracts or orders which may be enforced until set aside. No order of Court wears the brand 'null and void' on its forehead. The law on the matter is put succinctly by the Court of Appeal in ***HADKINSON v. HADKINSON, 1952(2) ALL E. R. 567*** thus:
>
> > "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of Competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. LORD COTTENHAM L C said in CHUCK v. CREMER (1846 [471 ER 820).
> >
> > A party, who knows of an order, whether null or valid regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-- whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed."
>
> The said principle was approved by a Division Bench of this Court in ***D.M. SAMYULLA v. COMMISSIONER, CORPORATION OF CITY OF BANGALORE***, [1990 [1] Kar. L.J Pg.352] as under:

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> "The principle laid down in the said decision is that a party who knows an order, whether it is null or valid, regular or irregular, cannot be permitted to disobey it and it would be dangerous to allow the party to decide as to whether an order was null or valid and whether it was regular or irregular. In our opinion, such a principle would be attracted in cases where there has been an order of the Court against any particular person or authority and that person or authority takes the stand that the order of the Court is illegal or it is bad for not following any mandatory procedure or takes upon himself or itself to disobey the order of the Court."

> 19. Orders of Courts have to be obeyed unless and until they are set aside in appeal/revision. Alternatively in any proceedings for execution or in a collateral proceedings where an order is sought to be enforced or relied on, it is possible for a party to establish that the order is null and void. Then the Court considering the matter, if satisfied, will hold that the order is null and void and therefore not executable or enforceable......................"

126. On the facts and circumstances of the case, the issues raised for consideration are answered in favour of the appellants.

In the result, this Writ Appeal is allowed. Impugned judgment in W.P.(C) No.14341 of 2020 dated 22.07.2020 is set aside.

Sd/-
S.MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P. CHALY
JUDGE

Krj

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APPENDIX

PETITIONER'S/S EXHIBITS:

ANNEXURE A1 NCLT ORDER DATED 03/10/2019 IN CP/99/KOB/2019.

ANNEXURE A2 NCLT ORDER DATED 25/10/2019 IN IA 49/2019 IN CP/99/KOB/2019.

ANNEXURE A3 IA 58/2019 IN CP/114/KOB/2019.

ANNEXURE A4 REJOINDER IN CP/114/KOB/2019.

ANNEXURE A5 ORDER OF THE HON'BLE SUPREME COURT ON 10/07/2020 IN THE MATTER OF M/S. MARATHE HOSPITALITY VS MAHESH SUREKHA AND ORS.

ANNEXURE A6 CAUSE LIST OF THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL IN THE PUBLIC DOMAIN DISCLOSING CASES TO BE HEARD ON 16/07/2020.

RESPONDENTS' EXHIBITS:-

R1(A):- COPY OF THE MEMORANDUM OF UNDERSTANDING DATED 15.09.2020

R1(B):- COPY OF THE PLAINT IN O.S. NO.310/2019 BEFORE THE HON'BLE MUNSIFF'S COURT, KOCHI.

R1(C):- COPY OF ORDER DATED 08.08.2019 IN I.A. NO.2023/2019 IN O.S. NO.310/2019 BEFORE THE MUNSIFF'S COURT, KOCHI.

R1(D):- COPY OF THE INTERIM ORDER ATED 03.10.2019 IN C.P. NO.99/2019 OF NCLT, KOCHI.

R1(E):- COPY OF I.A. NO.49/2019 IN C.P. NO.99/2019 BEFORE NCLT, KOCHI.

R1(F):- COPY OF ORDER IN I.A. NO.49/2019 IN C.P. NO.99/2019 BEFORE NCLT, KOCHI DATED 25.10.2019.

R1(G):- COPY OF THE OBJECTION FILED IN I.A. NO.49/2019 IN C.P. NO.99/2019 BEFORE NCLT, KOCHI.

R1(H):- COPY OF I.A. NO.58/2019 IN C.P. NO.114/2019 BEFORE NCLT, KOCHI.

R1(I):- COPY OF THE OBJECTION IN I.A. NO.58/2019 IN C.P. NO.114/2019 BEFORE NCLT, KOCHI.

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R1(J):- COPY OF EMAIL DATED 10.07.2020 OF SULOCHANA GUPTA.

R1(K):- SCREESHOT OF MESSAGE RECEIVED BY COUNSEL FOR PETITIONERS ON 17.07.2020.

R1(L):- SCREEN SHOT OF CALL REGISTER EVIDENCING CALL IMAGE TO COUNSEL FOR APPELLANTS ON 17.07.2020.

R1(M):- COPY OF OBJECTION IN I.A. NO.83/2020 IN C.P. NO.114/2019 IN NCLT, KOCHI.

R1(N):- COPY OF REPORT OF SCRUTINIZER DATED 31.10.2019.

R1(O):- COPY OF UNNUMBERED I.A. FILED BY APPELLANTS IN NCLT, KOCHI, IN C.P. NO.114/2019.

//TRUE COPY//

P.A. TO C.J.