IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

TUESDAY, THE 29TH DAY OF SEPTEMBER 2020 / 7TH ASWINA, 1942

WP(C).No.34097 OF 2015(R)

PETITIONER:

M.P.CHOTHY, AGED 65 YEARS
S/O. KALAMBAN PAINKAN, MACHERIKKUDY HOUSE,
IRINGOLE KARA, PERUMBAVOOR VILLAGE,
IRINGOLE P.O, PIN 683548.

BY ADV. M.P.CHOTHY (PARTY-IN-PERSON)

RESPONDENTS:

1 STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
GOVT. SECRETARIAT,
THIRUVANANTHAPURAM-695 001.

2 THE REGISTRAR,
STATE SC/ST COMMISSION, AYYANKALI BHAVAN,
KANAKA NAGAR, VELLAYAMBALAM, KAUDIAR P.O,
THIRUVANANTHAPURAM-695 003.

3 REGISTRAR GENERAL,
HIGH COURT OF KERALA, ERNAKULAM

4 UNION OF INDIA,
REPRESENTED BY ITS SECRETARY,
MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT,
SHASTRI BHAVAN, NEW DELHI-110001.

R1 & R2 BY SRI. PRAKASHAN K.V., SPECIAL GOVT. PLEADER .
R3 BY ADV. SRI.B.UNNIKRISHNA KAIMAL
R4 BY ADV. SMT.SINDHUMOL.T.P., CGC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18-09-2020, THE COURT ON 29-09-2020 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

Dated this the 29th day of September, 2020

Manikumar, CJ

Aggrieved by the inaction on the part of the respondents in honouring a claim made by the petitioner for reimbursement of travel allowances which he had to incur, in connection with the hearings before the State Scheduled Castes/Scheduled Tribes Commission at Thiruvananthapuram, instant writ petition has been filed for the following reliefs:

> A) Issue a writ of mandamus or any other writ or order or direction to the State Government, to allot the necessary funds forthwith under Annexure to the Schedule of the Atrocities Rules and all other provisions, including Rules 11, 12 and 15, with necessary information to all concerned.
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> B) Issue a writ of mandamus or any other writ, order, or direction, directing the first respondent - State of Kerala represented by the Chief Secretary, Govt. Secretariat, Thiruvananthapuram, to pay Rs. 23,867/-, being the amount involved in six T.A. Bills, along with 9% interest, till the date of payment.
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> C) Issue a writ of mandamus or any other writ, order, or direction to the 1st respondent, to issue necessary direction to the District Magistrates, to co-ordinate the related work, and to ensure that the facilities and payments provided are made to victims, witnesses, dependents, and attendants, as prescribed under Rules 11, 12 and 15 and other rules, within the time frame stipulated therein.
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> D) Declare the enactment i.e. Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007 and the rules framed thereunder as unconstitutional.

E) Issue a writ of mandamus or any other writ or order or direction to the Subordinate Courts, to implement speedy trial, provided in Section 14 of the Atrocities Act, by taking up the Atrocity cases and related matters immediately after the custody and bail cases, and also conduct the cases on day-today basis, avoiding long postings.

2. Facts leading to filing of instant writ petition are that, petitioner claims to be a retired Class I Officer and a practicing lawyer, belonging to Scheduled Caste Community. He has alleged that he was a victim of several atrocity offences. Hence, he filed complaints before the police, Courts and the 2nd respondent viz., the Registrar, State SC/ST Commission, Ayyankali Bhavan, Thiruvananthapuram, which was numbered as Case No.5088/2018 and the other, as 1771/2015, by the SC/ST Commission. On receipt of the complaints, the State SC/ST Commission conducted hearings on 20.01.2015, 20.04.2015, 23.06.2015, 09.09.2015 14.12.2015 and 04.03.2015, at the Head Office at Ayyankali Bhavan, Thiruvananthapuram, for which, the petitioner was required to be present. He took his wife, a dependent, along with him, who was a witness, as per Rule 11 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995. Petitioner has further stated that for the hearings, he had to spend substantial amounts. Hence, he submitted six travelling allowance bills amounting to Rs.23,867/-, in accordance with Rule 11 of the SC/ST (Prevention of Atrocities) Rules, 1995, before the Registrar, State SC/ST Commission, Thiruvananthapuram, respondent No.2, requesting for payment, but the 2nd respondent did not accede to his request.

3. Petitioner has contended that as per the State List or the Concurrent List of Schedule V11 of the Constitution of India, the State is not vested with the powers to enact any law on the subject as contained the Kerala State SC/ST Commission Act, 2007 and the rules framed thereunder.

4. Petitioner has further contended that since it was informed by the Registrar, State SC/ST Commission, Thiruvananthapuram, 2nd respondent, that there was no budget allotment for paying TA/DA etc., he made a representation dated 02.02.2015 (Exhibit-P3) to the Finance Ministry, with a request to allocate Rs.100 Crores under Rule 11 of the rules framed under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, in the budget for 2015-2016. Admittedly, the petitioner had to take up the matter with the Government, because the concerned officials in the Secretariat did not do their duty.

5. Petitioner has further stated that as a matter of fact, the Central Government have framed Rule 11 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, prescribing that “every victim of atrocity or his/her dependent and witnesses shall be paid to and fro rail fare by second class in express/ mail/passenger train or actual bus or taxi fare from his/ her place of residence or actual bus or taxi fare from his/her place of residence or place of stay to the place of investigation or hearing of trial of an offence under the Act". In the sub rules under Rule 11, the Government has detailed other expenses. In nutshell, the victims, their dependents, witnesses

and attendants are entitled for all the expenses involved for attending any enquiry, hearing or trial. As this is prescribed by the Central Government, it is binding on the State Government and it is the right of the victims of atrocity, dependents, attendants and witnesses, whereas, the State Government and its various organs have culpably neglected to translate the Act, 1989 and the Rules, 1995 into practice, even after more than long 20 years of vibrant existences of Rules 14 and 15, wherein specific directions for making provisions, in the annual budgets are given.

6. Petitioner has further stated that since Exhibit-P3 representation did not yield any result, he took up the matter with the then Hon'ble Chief Minister vide representation dated 4.5.2015, with a prayer to allot at least Rs.150 Crores under Rules 11 and 14. Further, on seeing certain pages of the budget papers, he understood that the budget paper lacks clarity, that Scheduled Castes, Scheduled Tribes, Other Backward Communities and Minorities are all clubbed together, in the allotment. According to the petitioner, there is no allotment of funds under Rules 11, 12 and 15. Hence, it is prayed that the allotment of SC/ST may be made separately.

7. Petitioner has further contended that the rules framed by the Central Government are binding on the State Government. Moreover, whatever provided in the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the rules framed thereunder by the Central Government, are the rights of persons belonging to SC/ST community. The

State Government cannot abridge the rights of SC/ST people. It is obligatory on the part of the State Government to comply with the Central Rules and that the State Government is required to make adequate provision in the annual State Budget, which, according to the petitioner, they did not do. Hence, he seeks redressal and raised the following points for consideration, whether:-

i) The State Government can frame rules departing from Central rules and thereby, deny the rights conferred by the Central Government.

ii) The State Government can disobey the rules framed by the Central Government for the benefit of the Scheduled Castes and Scheduled Tribes and decline to make provisions in the budgets and thereby, cause hardships to the poor people.

iii) The Subordinate Courts can violate the law to the disadvantage of the Scheduled Castes and the Scheduled Tribes by denying speedy trial though provided in Section 14 of the Act.

8. On the above pleadings, petitioner has raised the following grounds:

(a) The Central Act viz., the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the rules framed thereunder are binding on the State Government and accordingly, it is obligatory on the part of the State Government to abide by all the provisions in the SC/ST (Prevention of Atrocities) Act, 1989 and the rules, including Rules 11, 12 and 15, in addition to Annexure in the Schedules thereunder, whereas, the rules framed by the State Government do not contain the matters specified in the Rules 11, 12 and 15 of the the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995.

(b) Petitioner has further contended that Rule 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules,

1995 is a directive to the State Government to make necessary provisions in the annual budget, but the State Government have not made provisions under Rules 11, 12 and 15 of the said rules.

(c) Petitioner has also contended that the State has no jurisdiction to enact any law on the subject or frame any rules, which, according to him, is inconsistent. According to the petitioner, the Kerala State SC/ST Commission Act, 2007 and the the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 are liable to be declared as unconstitutional.

(d) Petitioner has further contended that the District Magistrates and other similarly responsible officers, callously neglected the duties prescribed for providing facilities and for making payments under the Schedule and the rules.

(e) The lower courts do not implement speedy trials, as provided in Section 14 of the SC/ST (Prevention of Atrocities) Act, 1989, thereby causing hardship to the atrocity victims, witnesses etc.

9. On behalf of the 1st respondent - State of Kerala, Joint Secretary, SC/ ST Development Department, Government Secretariat, Thiruvananthapuram,, has filed a counter affidavit, wherein it is contended that, the enquiry made by the 1st respondent revealed that the petitioner has filed complaints before the Kerala State SC/ST Commission, and that they are pending consideration. Petitioner has submitted TA/DA claims, including Traveling Bill, Hotel bill, Room rent etc. to the Commission for payment.

10. As per the Kerala State Commission for the Scheduled Castes and Scheduled Tribes Act, 2007 and the rules framed thereunder, there is no provision for paying TA and DA to the victims and witnesses, who appear

before the Commission, for the purpose of enquiry into the complaints. The Commission has no such fund to consider the claim. Cases under Sections 3(1) and 3(2) of Prevention of Atrocities Act are registered in Police Stations, Special Cells constituted for that purpose, and the accused are charge sheeted before the concerned trial courts.

11. As mentioned in the SC/ST (Prevention of Atrocities) Rules, 1995, the District Magistrate, Sub Divisional Magistrate or other Executive Magistrate is the authority, liable for payment of such allowances to the victims of atrocity/dependent in the matter of investigation and trial. Even though the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes has the powers of a Civil Court, with regard to its function under Section 9, Rule 11 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, is not applicable to the Commission.

12. First respondent has further contended that, in response to the various representations submitted by the petitioner for allocation of Rs.100 Crores, for the purpose of paying TA/DA to the SC/ST Commission, Government have informed that Kerala State Commission for the Scheduled Castes and the Scheduled Tribes is a Grant-in-Aid institution set up, consequent to the enactment of the Kerala State Commission for Scheduled Castes and Scheduled Tribes Act, 2007 and the rules. The Commission is a statutory body, constituted under the said Act. There are no provisions in the Kerala State Commission for SCs & STs Rules, 2011, to pay TA/DA to the

victims/witnesses of atrocity, who appear before the Commission. The Commission conducts an enquiry into cases, where there are allegations of miscarriage of justice during investigation and hence, the SC/ST complainants, who register complaints/petition before the State Commission, are not entitled to get TA/DA, when they appear before the Commission under any of the provisions of the Kerala State Commission for Scheduled Castes and Scheduled Tribes Act, 2007 and the rules framed thereunder.

13. First respondent has further contended that as regards the averments in paragraph 7 of the Writ Petition, it is stated that National Commission for Scheduled Castes is constituted as per the Central Act and rules whereas, the State Commission for Scheduled Castes/Scheduled Tribes was constituted as per the State Legislation. The State Commission for Scheduled Castes and Scheduled Tribes is not an exact replica of the Central Commission. The rules framed by the State Government are in consonance with the State Act, and, therefore, the rules need not be consistent with the Central Act. Hence, the said contention is devoid of merits.

14. Referring to sub-rules (1) & (2) of Rule 11 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, the 1st respondent has contended that the above said provisions are applicable only to investigation and trial in courts. In such cases, they have funds earmarked for the said purpose viz., Criminal Court Deposit or Civil Court Deposit, as the case may be. The District Magistrates have no role when complaints are

enquired into by the Kerala State Commission for SCs & STs, and in granting traveling allowances, for the complaints enquired into by the Kerala State Commission for Scheduled Castes and Scheduled Tribes. The Kerala State Commission for SC & ST is a Grant-in-Aid institution set up, pursuant to the enactment of the Act, 2007 and the rules, and it is not a trial court.

15. In the additional counter affidavit, it is further contended by the 1st respondent that the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 provides for Special Courts, for speedy trial of the offences punishable under this Act. According to the 1st respondent, the State Government is not liable to allot funds, for the purpose of meeting the TA claim of the petitioner, who appears before the Kerala State Commission for SC and ST, for hearing.

16. It is further contended that the State Government have taken various steps to discharge its constitutional obligation, to protect the interest of Scheduled Castes and Scheduled Tribes, and necessary financial allocation has been made by the Government, as required under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, especially, under Rules 14 and 15. The steps taken by the Government, in that regard can be generally categorised as under:

1. Formulation of appropriate schemes for providing compensation and rehabilitation of the victims of atrocities.
2. Providing legal aid to the victims of atrocities.

3. Functions of the Special mobile police squad in Wayanad district.
4. Payment of travelling allowance to victims/witnesses of registered/charged cases under POA Act.

17. In addition to the above, the 1st respondent has further contended that the State Government (Home Department) have constituted a High Power State Level Vigilance and Monitoring Committee, and District Level Vigilance and Monitoring Committees for reviewing the progress in the trial of cases under the Prevention of Atrocities Act. The High Power State Level Vigilance and Monitoring Committee consist of the following persons:

1.	Chief Minister	Chairman
2.	Secretary in charge of SC/ST	
3.	Development Department	Convenor
4.	Home Minister	Member
5.	Finance Minister	Member
6.	Welfare Minister, SC/ST	Member
7.	All SC/ST M.Ps and M.L.As of the	
8.	State	Members
9.	Chief Secretary	Member
10.	Home Secretary	Member
11.	Director General of Police	Member
12.	Director/Deputy Director,	
13.	National Commission for SC/STs	Members

District Level Vigilance and Monitoring Committee comprise the following members

1.	District Magistrate	Chairman
2.	District Social Welfare Officers	Convenor
3.	All M.P.s and M.L.As of the District	Members
4.	Superintendent of Police	Member
5.	Three group “A” offices of the State	
6.	Government belonging to SC/STs	Member
7.	5 Non-official members belonging to	
8.	SC/ST	Member
9.	3 members other than SC/STs having	
10.	Association with non-Government	
11.	Organisations	Member

18. It is further contended that the above committees meet regularly and review the progress therein. The State Government has also established Special Courts for SC/ST cases in Kottarakkara, Manjeri, Mananthavady, and Mannarkkad, for speedy trial of the cases. Scheduled Caste Development Department has disbursed a total sum of Rs.1,273,87626 lakhs during last six years viz., from 2012-13 to 2017-18 for relief and rehabilitation of victims, as detailed below:

Year	Amount Disbursed	No. of Victims benefited
2012-13	107,20246	491
2013-14	124.2038	350
2014-15	132.04	351
2015-16	146.75	245
2016-17	251.69	267
2017-18	511.99	397

19. So also, the Scheduled Tribes Development Department has made a budget allocation of Rs.2,1368,000/- for the last 6 years, as shown below.

Sl. No.	Year	Budget	Allotment	Expenditure	Beneficiary
1	2012-13	33,00,000	32,98,995	28,66,792	16
2	2013-14	30,00,000	29,80,000	29,80,000	82
3	2014-15	80,68,000	78,49,250	45,52,750	111
4	2015-16	10,00,000	9,80,850	24,93,750	44
5	2016-17	30,00,000	29,90,000	29,90,000	42
6	2017-18	30,00,000	30,00,000	30,00,000	35

20. As regards grounds (v) and (vi) raised in the writ petition, respondent No.1 has contended that SC/ST Development Department has addressed a letter to the Home Department asking for the required details. In turn, the Additional Chief Secretary to the Government (Home Department) had written a letter No.C5/ 298/2018-Home dated 16.10.2018 to the Registrar (Subordinate Judiciary), High Court of Kerala, Ernakulam. However, no reply

has been received from the Registrar General, High Court of Kerala, 3rd respondent, so far.

21. In reply to the counter affidavit of the 1st respondent, petitioner has stated that respondent No.1 is the Government and that too, in charge of the SC/ST Development Department. Thus, the 1st respondent is vested with dual duty of protecting the Scheduled Caste citizens from any attack and also to protect the interest of the Government. This dual performance has to go hand-in-hand, without causing any injury to any side, whereas, in the case on hand, the 1st respondent has acted like a private person, suppressing the Constitutional provisions and the relevant judicial pronouncements which is highly improper.

22. The 1st respondent ought to have kept in mind that such unsustainable and irrelevant contentions would cause only loss of precious time of this Court.

23. Petitioner has further contended that basically the 1st respondent has no jurisdiction to pass an Act on the subject of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), as the same is not mentioned, either in the State List or in the Concurrent List of Seventh Schedule of the Constitution of India. As per Article 35 of the Constitution of India, Parliament shall have, and the Legislature of a State shall not have, power to make laws:-

> (i) with respect to any of the matters which under clause(3) of Article 16, clause(3) of Articles 32, 33 and 34 may be provided for by law made by Parliament, and

> (ii) for prescribing punishment for those acts which are declared to be offences under this Part: etc.

24. In his reply affidavit, petitioner has further stated that in Part III of the Constitution of India, the practice of untouchability is the only act, which is declared as an offence under Article 17 of the Constitution of India. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, flows from Article 17. As such, the 1st respondent has no jurisdiction to pass a law on this subject.

25. He has further contended that India is a Federal State. The Act and the rules made by the Central Government are binding on the State Government. In this context, he has contended that reading of Article 254 of the Constitution of India would make it clear that the State has no power to make laws repugnant to or inconsistent with the Central law or rule, as the Central Laws and rules are binding on the State Governments. Placing reliance on the decisions of Hon'ble Supreme Court in **T. Barai v. Henry Ah Hoe and another** [(1983) 1 SCC 177] and **Thirumuruga Hirupananda Variar Thavathiru Sundara Swamigal Medical Educational & Charitable Trust v. State of Tamil Nadu and others** [(1996) 3 SCC 15], petitioner has contended that the Hon'ble Apex Court has categorically ruled on the subject. According to the petitioner, in view of the above, the very Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007 and the rules framed thereunder are liable to be declared as unconstitutional.

26. Petitioner has further contended that when the very Act and the rules are to be declared as unconstitutional, it may not be necessary to enumerate the unsustainable contentions raised in para 3 of the counter affidavit. The 1st respondent ought to have read Rule 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, which says about the specific responsibility of the State Government.

27. The petitioner had to make the representation, because there was no official action to allocate funds. Even after receipt of a representation also, the 1st respondent has not allotted any funds. The budget papers prove the fact that such allotments are not done.

28. Petitioner has further stated that the 1st respondent is required to act as per the provisions of Central Act and the rules framed thereunder. According to the petitioner, the 1st respondent is not empowered to curtail or abrogate the benefits provided to the persons belonging to Scheduled Castes and Scheduled Tribes under the Central rules. The 1st respondent ought to have acted in a balanced manner while discharging the dual duty, whereas, the acts of the 1st respondent resemble the acts of a bitter enemy of the Scheduled Castes reminding as a SC/ST Destruction Department and not as SC/ST Development Department.

29. Petitioner has further stated that in paragraph 5 of the counter, the 1st respondent has reproduced the Central Rules extensively. This is not required. What is required to be considered is whether the 1st respondent is

acting in accordance with the rules laid down by the Central Government or not. It can be seen that the 1st respondent has found shelter under the unsustainable Act and the rules made by the State. The acts of the 1st respondent have no legal sanction. Citing the reasons in the counter affidavit as unsustainable, the petitioner has prayed to reject the counter affidavit of the 1st respondent and allow the writ petition.

30. That apart, petitioner has filed a reply affidavit to the additional counter affidavit of the 1st respondent, wherein he has reiterated the above said contentions. In addition, he has submitted that the 1st respondent has given certain generalizations. The specific question is, what was the amount allotted in the annual budget, in compliance of Rule 14, to meet the expenditures of relief and rehabilitation of Atrocity victims. As per the information furnished to the petitioner, under Right to Information Act, 2005, the budget estimate for 2015-2016, under Sub Major and Minor Head No.2225-02-800-68 for prevention of Atrocities, the amount estimated was Rs. 10001- and under Sub Major and Minor Head No.2225-01-800-86, the amount estimated for implementation of Protection of Civil Rights Act was Rs.1,10,000/- and that too the 50% of Central Sponsored Scheme, as evident from Annexure -1.

31. Petitioner has further stated that the amounts cited in the counter affidavit for 2015-2016 are Rs.145.75 lakhs and Rs.10 lakhs. There is substantial variation in the amounts. Moreover, it is not clearly stated as to

whether those amounts are under Rule 14 or not. If the amounts are not under Rule 14, the statement is not relevant. As such, it has become necessary to ascertain the truth. In view of the above, this Court may be pleased to direct the deponent to produce the original budget papers for the concerned years showing the allotment under Rule 14.

32. Petitioner has further stated that in paragraph 6 of the counter affidavit, the 1st respondent has stated about the Vigilance and Monitoring Committees. It is reliably learnt that those are namesake Committees and do not function in the required manner. As far as the Ernakulam District is concerned, there are only 3 members in the place of at least 15 in the committee and as such it cannot be called as a committee at all.

33. Petitioner has further contended that in paragraph 7 of the counter affidavit, the 1st respondent has furnished huge amounts as disbursed to victims of Atrocities. During 2015-2016, the amount allotted is given as Rs.9,80,850 and the amount spent is given as Rs.24,93,750/-. This needs a clarification, whether the expenditure can be many times more than the allotment.

34. Petitioner has further contended that in paragraph 8 of the counter affidavit, the 1st respondent referring to grounds (v) and (vi) in the Writ Petition, has contended that the 3rd respondent did not respond. Going by their own statement, the Additional Chief Secretary has written a letter dated 16.10.2018 to the Registrar (Subordinate Judiciary). Perhaps, that may be the reason why,

no reply has been sent. Further, ground (v) is relating to the coordination of the work by District Magistrates. It appears that the 1st respondent can give directions to the District Magistrates to coordinate the work, which remained neglected for 23 years from 1995. Similarly, ground (vi) relates to the speedy trial of Atrocity offences, as provided in Section 14 of the Act. In the absence of appropriate action by the 1st respondent, in the interest of justice, this Court may be pleased to reject the averment and issue the appropriate writs or orders or directions in respect of both the grounds (v) and (vi). In view of the above petitioner has prayed to reject the additional counter affidavit and allow the prayers in the writ petition.``

35. The 3rd respondent - Registrar General, High Court of Kerala, has filed a counter, as well as additional counter affidavit, wherein it is contended that, as per G.O(Rt) No.622/90/Home dated 29.01.1990 [Ext-R3(a)], Government of Kerala have notified all the Principal District and Session Courts to be Special Courts for trial of the offences under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Subsequently, the Government, by Exhibit-R3(b) G.O (MS) No.611/2010/ Home dated 18.02.2010 and Exhibit-R3(c) G.O (MS) No.136/2013/Home dated 28.05.2013, have granted sanction for establishing two Special Courts at Manjeri and Mananthavady, exclusively for the trial of offences under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 under. The said Special Courts commenced functioning with effect from

23.02.2013 and 06.04.2013 respectively. Thereafter, Government of Kerala, by Exhibit-R3(d)-G.O(MS) No.85/2014/Home dated 05.05.2014 and Exhibit-R3(e)-G.O(MS) No.100/2015/Home dated 22.05.2015, accorded sanction for establishment of two more Special Courts at Kollam and Palakkad districts, for trial of offences under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The Special Court sanctioned for Kollam District was located at Kottarakkara and commenced functioning from 06.06.2015.

36. The 3rd respondent has further contended that with regard to the Special Court sanctioned for Palakkad district, Full Court of this Court has decided that the same be established at Mannarkkad and by G.O(MS) No.04/2016/Home dated 05.01.2016 [Exhibit-R3(f)], Government have accorded sanction for the same. In this connection, it is submitted that the District Judge, Palakkad, has proposed a date for commencement of the said Special Court at Mannarkkad, which is under the consideration.

37. It is further contended that this Court had issued directions for expeditious disposal of cases relating to atrocities on SC/ST vide High Court Circular No.17/80 dated 22.09.1980 [Exhibit R-3(2)]. Vide Office Memorandum No.D1(B)-318/2007 dated 18.01.2007 [Exhibit R-3(h)], the District Judges in the State were further directed to give top priority to cases pertaining to atrocities on Scheduled Castes and Scheduled Tribe, so as to bring down the pendency and to ensure speedy trial of such cases. By High Court OM No.D1(B)-95287/20101D3 dated 29-6-2011 [Exhibit R-3(i)], all the District

Judges and Chief Judicial Magistrates were subsequently directed to take earnest efforts to liquidate pendency of cases especially those relating to senior citizens, minors and disabled and other marginalized groups. Thereafter, as per Exhibit-R3(i) Office Memorandum No.D3-45286/2015 dated 8-6-2015 of the High Court of Kerala, all the Subordinate Judicial Officers in the State were directed to take necessary steps to identify matters pending before their respective courts relating to offences against women, children, differently abled persons, senior citizens, marginalized sections of society and prevention of corruption cases and to take steps to facilitate the disposal of such matters on a top priority basis.

38. It is further contended that Section 14(3) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (No.1 of 2016) contains necessary safeguards to ensure speedy trial of cases relating to atrocities against the Scheduled Castes and Scheduled Tribes as per which in every trial in the Special Court or in the exclusive Special Court, the proceedings shall be continued from day to day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing. It is further provided therein that when the trial relates to an offence under this Act, the trial shall as far as possible be completed within a period of two months from the date of filing of the charge sheet.

39. As regards the contentions of the petitioner that the cases relating to atrocities on Scheduled Caste and Scheduled Tribes are getting least preferences, the 3rd respondent contended that the Chief Justices' conference held in the year 2016, it was resolved to prioritize the disposal of cases relating to crime against women, children, differently abled persons, senior citizens, marginalized sections of society and Prevention of Corruption cases. This Court, in tune with the above resolution issued Exhibit R3(k) official memorandum No.D3-42835/2016(3) dated 05.10.2016, directing all Subordinate Judicial Officers in the State to ensure prompt compliance of the above resolution, so as to prioritize the disposal of the cases relating to crime against women, children, differently abled persons, senior citizens, marginalized sections of society and Prevention of Corruption cases.

40. It is further contended that Four Special Courts for the trial of offences under the SC/ST (POA) Act Cases, 1989 have been established, viz., at Manjeri, Mananthavady (Kalpetta), Kottarakkara (Kollam) and Mannarkkad (Palakkad). The special Court established at Mannarkkad in Palakkad district was the last one. The work turn-out in the four Special Courts for the trial of offences under SC/ST(POA) Act cases are being monitored on a monthly basis by the Hon'ble Judges holding the administrative charges of the respective districts and necessary directions and guidelines are being issued for the speedy trial and disposal of those cases. It is further submitted that as per the direction issued in the Chief Justices' Conference 2016, the statistics

pertaining to cases of marginalized sections is uploaded on the server of the Hon'ble Supreme Court on a quarterly basis and the same is being monitored by the Apex Court as well.

41. After taking into consideration of the pendency of SC/ST (POA) Act Cases in all the districts, this Court had decided to establish one Special Court each, in all the districts of the State, for the trial of offences under the SC/ST(POA) Act cases, and requested the State Government, to take necessary steps to establish Special Courts in all the remaining districts where the same is not yet established. Vide Exhibit-R3(m) letter dated 16.12.2015 sent by the Registrar (Subordinate Judiciary) to the Government of Kerala. However, it did not invoke any response from the Government and this Court, by Exhibit-R3(n) letter dated 28.03.2017 again addressed the Government for establishing Special Courts and emphasized the urgency of establishing the Special Courts, since the Principal District/Sessions Judge being the administrative heads are already burdened with administrative work, in addition to judicial work. The Government is the ultimate authority to take a decision and issue notification establishing the Special Courts. In view of the above, the 3rd respondent has contended that there is no merit in the contentions of the petitioner and prayed for dismissal of the writ petition.

42. Controverting to the above said contentions of the 3rd respondent, the petitioner has filed a reply affidavit, wherein it is stated that the 3rd respondent out of the eleven exhibits, Exhibit-R3(h) issued on 18.01.2017 is

the only exhibit directing the District Courts, to give top priority to the cases pertaining to atrocities on Scheduled Castes and Scheduled Tribes, to bring down pendency and to ensure speedy trial. He has stated that this was done at the instance of the Parliamentary Committee.

43. Petitioner has further stated that there was no direction in Exhibit-R3(h) to confirm that the District Courts have started working according to the direction. The result is that even today, the lower courts call the Atrocity case as the last item in the list of the day which conclusively proves that those Courts have ignored the direction as usual. On the other hand, it is stated that all the lower courts obey Rule 12(3) of the Criminal Rules of Practice and Rule 140(3) of the Civil Rules of Practice in examining the medical witness, irrespective of the pendency of the cases in those Courts, because it is a rule issued by the High Court. The very same courts give scant regard for Section 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, though it is a substantive law.

44. Petitioner has further stated that though there is a law, which clearly provides for a speedy trial of the atrocity cases, the lower judiciary ordinarily tend to ignore the prescription in law and compel the victims and witnesses of atrocity offences, to undergo the torture of waiting, till the last item, if it reaches or wait for the next posting, repeating the same course. It has to be inevitably remembered the fundamental duty of Court as per Section 20 of the IPC that the words “Courts of Justice” denote a Judge who is empowered by law to act

judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially. But, there are subordinate Courts, which ignore the prescription of law, i.e. the act is not judicial, thereby denying the legitimate right of the victims and witnesses of atrocity offences and hence, his prayer for issuance of a writ to the lower courts is essential to the above circumstances.

45. Heard the learned counsel for the respective parties and perused the material available on record.

46. Record of proceedings shows that by an order dated 14.11.2017, a learned Single Judge of this court has directed the 1st respondent - State of Kerala, represented by the Chief Secretary, Government Secretariat, Thiruvananthapuram, to take up, consider and pass orders on the request made by the petitioner for payment of T.A. Bills submitted by him, taking note of the amendment to the Act, within two months from the date of receipt of the copy of the order. In view of the nature of prayers sought for in the writ petition, registry was directed to place the writ petition before the then Hon'ble Acting Chief Justice.

47. When the writ petition came up for consideration on 29.08.2019, a Hon'ble Division Bench of this Court ordered thus:

> "The petitioner appears in person but has expressed difficulty since he is without his hearing aid device. In his turn, Sri. B. Prakashan K.V, the learned Government Pleader refers to the Courts order dated 14.11.2017 to point out that the competent authority of

the State was directed to take a decision, on the six T.A. bills (Rs.23,867/-) of the petitioner. A decision was then taken rejecting the T.A. claim, which was then challenged through a separate Writ Petition but that case was dismissed by this Court. Accordingly, he prays for time to bring on record these subsequent developments.

2. In view of the above, the matter be posted after four weeks, as prayed for."

48. Insofar as the 2nd prayer is concerned, pursuant to the interim directions, Government have issued G.O(Rt.) No.723/2018/SCSTDD dated 25.06.2018, rejecting the claim of the petitioner. Government order dated 25.06.2018 reads thus:

"GOVERNMENT OF KERALA
Abstract

Scheduled Tribes Development Department - Compliance of the Order of the Hon'ble High Court dated 14.11.2017 in WP(C) No.34097/15 filed by Shri M.P.Chothy for the payment of TA/DA - Request Rejected - Orders issued.

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SCHEDULE CASTES/SCHEDULED TRIBES DEVELOPMENT (E) DEPARTMENT

G.O.(Rt.) No.723/2018/SCSTDD Dated, Thiruvananthapuram: 25/06/2018

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Read:- 1. Interim Order of Hon'ble High Court on 14.11.2017 in WP(C) No.34097/15.

2. Letter No.W.P(C) 34097 dated 07.06.2018 from Advocate General, Kerala, Ernakulam.

3. Request from Shri M.P.Chotty, dated 16/02/2018 addressed to Chief Secretary, Govt. of Kerala.

ORDER

Shri M.P. Chothy filed W.P(C) No.34097/2015 before the Hon'ble High Court praying to allot necessary funds for paying TA/DA to victims who appear for hearing before the Kerala State Commission for Scheduled Castes and Scheduled Tribes.

As per reference 1" cited, the Hon'ble High Court has passed an interim order on 14th November 2017 directing the Government to take up, consider and

pass orders on the request made by the petitioner for payment of the TA bill submitted by the petitioner taking note of the Amendment of the Scheduled Castes and Tribes (Prevention of Atrocities) Act and it was also directed that the orders shall be passed within two months. As per reference 2 cited, the Advocate General, Kerala further informed that the Hon'ble High Court had directed Government to take up consider and pass orders especially in view of the introduction of Chapter IVA in the SC & ST Prevention of Atrocities Act on the request made by the petitioner for the payment of TA bills submitted by him to the tune of Rs.23,867/- being the amount of his travel to Thiruvananthapuram with his wife on being summoned by the State SC & ST Commission and the Order of the Court is not to pay the TA bills but to consider and pass orders on his request especially in view of the amended chapter IV A of Scheduled Castes and Tribes (Prevention of Atrocities) Act.

As per the reference 3rd cited Shri M.P. Chothy submitted request for the payment of TA/DA for having attended for hearing before the Kerala State SC & ST Commission. The Kerala State Commission for SCs & STs is a statutory body constituted under the Kerala State Commission for the Scheduled Castes and Scheduled Tribes Act, 2007 and as per section 11 of the said Act, the Commission while performing its functions under section 9 have all the powers of a civil court trying a suit. But there is no provisions in the Kerala State Commission for SCs & STs Rules, 2011 to pay TA/DA to the victims/witnesses of atrocity who appear before the Commission. The Commission only conduct enquiry into cases where there are allegations of miscarriage of justice during investigations. Hence, the SC/ST complainants, who register complaints/petition before the State Commission are not entitled to get TA/DA when they appear before the Commission under any of the provisions of the Act & Rules for the purpose and functioning of the Scheduled Caste & Scheduled Tribes Commission. Even though the Commission has powers of civil court with regard to its function under section 9, the Chapter IV A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not applicable to the Commission. The said provision is applicable to the victim of atrocities or their dependents for the purpose of attending the investigation or hearing of trial connected with the atrocities. The above mentioned allowances are not application to those who are attending before the Commission. SC/ST

Complainants who register complaints/petition before the State Commission are not entitled to get TA/DA when they appear before the Commission under any of the provisions of Act & Rules for the purpose and functioning of the SC & ST Commission or under any of the provisions of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.

In the Circumstances, the request submitted by Shri M.P.Chothy for the payment of TA/DA to victims for having appeared for hearing before the Kerala State SC & ST Commission is hereby rejected. The Interim Order of Hon'ble High Court read as 1st paper above is complied with accordingly.

(By order of the Governor)
RAJESH KUMAR. M
JOINT SECRETARY"

49. Said Government order has been challenged in W.P.(C) No.29649 of 2018, and the same was dismissed by a learned Single Judge of this Court by judgment dated 28.05.2019.

50. Pursuant to the above rejection of the petitioner's request for payment of TA/DA to the victims, and dismissal of the writ petition, learned Special Government Pleader (SC/ST) has filed a memo dated 16.09.2019, along with the judgment in W.P.(C) No.29649 of 2018 dated 28.06.2019 passed by a learned single Judge of this Court and other documents. Judgment dated 28.06.2019 in W.P.(C) No.29649/2018 reads thus:

"3. The paramount contention advanced by the petitioner appearing in person is that, the claim for travelling allowance and allied expenses preferred by the petitioner is legitimate right as per Chapter IV-A of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 along with Rule 11 of the Rules, 1995. It is the case of the petitioner that, as per Rule 11 of Rules, 1995, petitioner can take his wife also with him as a witness. Therefore, petitioner is

entitled to get the amounts as is claimed before the 1st respondent and declining the same is violative of the provisions of the Act, 1989 and the Rules, 1995.

4. A detailed counter affidavit is filed by the 1st and 3rd respondents, refuting the allegations and claims and demands raised by the petitioner, and justifying the stand adopted by the 1st respondent in Ext.P11 order.

5. I have heard the petitioner appearing in person and the learned Special Government Pleader appearing for the respondents, and perused the pleadings and the documents on record.

6. The sole question to be considered is, whether any interference is warranted to Ext.P11 order passed by the 1st respondent dated 25.06.2018. On a reading of the said order, it is clear that petitioner has appeared before the Kerala State Scheduled Castes and Scheduled Tribes Commission in accordance with the provisions of the Act, 2007, and the allied Rules. There is no provision under the said Act and the Rules for payment of any TA/DA to the petitioner or any witness. However, the case of the petitioner is that, as per the provisions of Act, 1989 and the Rules, 1995, there are provisions for payment of TA/DA and other amounts to the victims as well as witnesses appearing before the authorities. However, fact remains, the provisions of Act, 1989 as well as the Rules, 1995 cannot be taken into account for the purpose of payment of any TA/DA to the petitioner for appearing before the Kerala State SC & ST Commission, which is functioning under an entirely different Act. Moreover, petitioner could not point out nor have I come across any provisions under the State SC & ST Commission Act so as to rely upon the provisions of Act, 1989 and the Rules, 1995 to pay TA/DA to the petitioner, or vice versa.

> 7. In that view of the matter, I do not think there is any illegality or arbitrariness in Ext.P11 order, that too, passed after providing opportunity of hearing and participation to the petitioner, and taking into account the factual as well as legal circumstances, justifying interference of this Court under Article 226 of the Constitution of India.
>
> The writ petition fails, and accordingly it is dismissed."

51. Reading of the above said judgment in W.P.(C) No.29649 of 2018 dated 28.06.2019, makes it clear that the learned Single Judge has considered, as to whether the petitioner can rest his claim, on the basis of Rule 11 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, against the Commission. Learned Single Judge has categorically held that the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the rules framed thereunder, would not confer any right to claim TA/DA from the Commission.

52. It is submitted that as against the judgment dated 28.06.2019 in W.P.(C) No.29649 of 2018, no appeal has been filed.

53. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is an Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and the Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

54. Section 21 of the Act, 1989 speaks about the duty of Government to ensure effective implementation of the Act and it reads thus:

> "1. Subject to such rules as the Central Government may make in this behalf, the State Government shall take such measures as may be necessary for the effective implementation of this Act.
>
> 2. In particular, and without prejudice to the generality of the foregoing provisions, such measures may include -
>
> (i) the provision for adequate facilities, including legal aid to the persons subjected to atrocities to enable them to avail themselves of justice;
>
> (ii) the provision for travelling and maintenance expenses to witnesses, including the victims of atrocities, during investigation and trial of offences under this Act;
>
> (iii) the provision for the economic and social rehabilitation of the victims of the atrocities:
>
> (iv) the appointment of officers for initiating or exercising supervision over prosecutions for the contravention of the provisions of this Act;
>
> (v) the setting up of committees at such appropriate levels as the State Government may think fit to assist that Government in formulation or implementation of such measures;
>
> (vi) provision for a periodic survey of the working of the provisions of this Act with a view to suggesting measures for the better implementation of the provision of this Act;
>
> (vii) the identification of the areas where the members of the Scheduled Castes and the Scheduled Tribes are likely to be subjected to atrocities and adoption of such measures so as to ensure safety for such members
>
> 3. The Central Government shall take such steps as may be necessary to co-ordinate the measures taken by the State Governments under sub-section (1).
>
> 4. The Central Government shall, every year, place on the table of each House of Parliament a report on the measures taken by itself and by the State Governments in pursuance of the provisions of this section."

55. Reading of Section 21 of the SC/ST (Prevention of Atrocities) Act, 1989, makes it clear that the State Government shall take such measures for effective implementation of the Act, 1989.

56. In exercise of the powers conferred by sub-Section (1) of Section 23 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989), the Central Government have framed the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995. As per Rule 2(b) of the Rules, dependent, with its grammatical variations and cognate expressions, includes wife, children, whether married or unmarried, dependent parents, widowed sister, widow and children of the predeceased son of a victim of atrocity.

57. Rule 11 of the said rules deals with travelling allowances, daily allowance, maintenance expenses and transport facilities to the victim of atrocity, his or her dependent and witnesses and the same reads thus:

> "(1) Every victim of atrocity or his/her dependent and witnesses shall be paid to and for rail fare by second class in express / mail/ passenger train or actual bus of taxi fare from his / her place of residence or actual bus or taxi fare from his /her place of residence or place of stay **to the place of investigation or hearing of trial of an offence under the Act**.
>
> (2) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make necessary arrangements for providing transport facilities or reimbursement of full payment thereof to the victims of atrocity and witnesses for **visiting the investigating officer, Superintendent of Police/Deputy Superintendent of Police, District Magistrate or any other Executive Magistrate**.
>
> (3) Every woman witness, the victim of atrocity or her dependent being a woman or a minor, a person more than sixty years of age

and a person having 40 per cent or more disability shall be entitled to be accompanied by an attendant of her/his choice. The attendant shall also be paid travelling and maintenance expenses as applicable to the witness or the victim of atrocity when called upon **during hearing, investigation and trial of an offence under the Act**.

(4) The witness, the victim of atrocity or his/her dependent and the attendant shall be paid daily maintenance expenses for the days he/she is away from the place of his/her residence or stay during **investigation, hearing and trial of an offence**, at such rates but not less than the minimum wages, as may be fixed by the State Government for the agricultural laborers.

(5) In additional to daily maintenance expenses, the witness, the victim of atrocity (or his/her dependent), and the attendant shall also be paid diet expenses at such rates, as may be fixed by the State Government from time to time.

(6) The payment of travelling allowance, daily allowance, maintenance expenses and reimbursement of transport facilities shall be made immediately or not later than three days by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to the victims, their dependents/attendant and witnesses for the days **they visit the investigating officer or in-charge police station or hospital authorities or Superintendent of Police, Deputy Superintendent of Police or District Magistrate or any other officer concerned or the Special Court**.

(7) When an offence has been committed under Sec. 3 of the Act, the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall reimburse the payment of medicines, special medical consultation, blood transfusion, replacement of essential clothing, meals and fruits provided to the victim(s) of atrocity."

58. Rule 12 speaks about the measures to be taken by the District Administration and the same reads thus:

"(1) The District Magistrate and the Superintendent of Police shall visit the place or area where the atrocity has been committed to assess the loss of life and damage to the property and draw a list of victims, their family members and dependents entitled for relief.

(2) Superintendent of Police shall ensure that the First Information Report is registered in the book of the concerned police station and effective measures for apprehending the accused are taken.

(3) The Superintendent of Police, after spot inspection, shall immediately appoint an investigation officer and deploy such police force in the area and take such other preventive measures as he may deem proper and necessary.

(4) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make arrangements for providing immediate relief in cash or in kind or both to the victims of atrocity, their family members and dependents according to the scale as in the schedule annexed to these Rules (Annexure-I read with Annexure-II). Such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items necessary for human beings.

(5) The relief provided to the victim of the atrocity or his /her dependent under sub-rule (4) in respect of death, or injury to, or damage to property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force.

(6) The relief and rehabilitation facilities mentioned in sub-rule (4) above shall be provided by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate in accordance with the scales provided in the Schedule annexed to these rules.

(7) A report of the relief and rehabilitation facilities provided to the victims shall also be forwarded to the Special Court by the District Magistrate or the Sub-Divisional Magistrate or the Executive Magistrate or Superintendent of Police. In case the Special Court is satisfied that the payment of relief was not made to the victim or his/her dependent in time or the amount of relief or compensation was not sufficient or only a part of payment of relief or compensation was made, it may order for making in full or part the payment of relief or any other kind of assistance."

59. Rule 13 of the rules speaks about the selection of officers and other State Members for completing the work relating to atrocity and it reads thus:

"(1) The State Government shall ensure that the administrative officers and other staff members to be appointed in an area prone to atrocity shall have the right aptitude and understanding of the problems of the Scheduled Castes and posts and police station.

(2) It shall also be ensured by the State Government that persons from the Scheduled Castes and the Scheduled Tribes are adequately represented in the administration and in the

> police force at all levels, particularly at the level or police posts and police station."

60. Rule 14 of the Rules speaks about the specific responsibility of the State Government and the same reads thus:

> "The State Government shall make necessary provisions in its annual budget for providing relief and rehabilitation facilities to the victims of atrocity. It shall review at least twice in a calendar year, in the month of January and July the performance of the Special Public Prosecutor specified or appointed under Sec. 15 of the Act, various reports received, investigation made and preventive steps taken by the District Magistrate, Sub-Divisional Magistrate and Superintendent of Police, relief and rehabilitation facilities provided to the victims and the reports in respect of lapses on behalf of the concerned officers."

61. Reading of the preamble and the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, as well as the rules made thereunder, make it clear that the Act, 1989 is an Act **to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special courts and the Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto**. The Act deals with prevention of offences, setting up of Special Courts for trial and rehabilitation of victims of such offences and matters incidental thereto.

62. The Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007 is an Act to constitute a Commission for the Scheduled Castes and the Scheduled Tribes in the State of Kerala and to

provide for matters connected therewith or incidental thereto. Section 2(a) defines "Commission" to mean the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes constituted under Section 3 of Act 33 of 1989.

63. Chapter II of the Kerala State Commission for SC/ST Act, 2007 deals with the State Commission for the Scheduled Castes and the Scheduled Tribes. Section 3 speaks about constitution of the Commission for the Scheduled Castes and the Scheduled Tribes, and the same reads thus:

> "(1) The State Government shall, as soon as may be, after the commencement of the Act constitute a body to be known as "the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes" to exercise the powers conferred on, and to perform the functions assigned to it under this Act.
>
> (2) The Commission shall consist of the following members, namely:-
>
> (a) a Chairperson, from among the Scheduled Castes-Scheduled Tribes, who has special knowledge in matters relating to the Scheduled Castes and the Scheduled Tribes, to be nominated by the Government;
>
> (b) two members who have special knowledge in matters relating to the Scheduled Castes and the Scheduled Tribes, to be nominated by the Government; and
>
> (c) the Secretary to Government of the Scheduled Castes and Scheduled Tribes Development Department of the Government, ex-officio, who shall be Member Secretary of the Commission."

64. Chapter III of the Act, 2007 deals with the functions and powers of the Commission. Section 9 - Functions of the Commission, reads thus:

> "The Commission shall have the following functions, namely:-
>
> **(a) to investigate and examine the working of various safeguards provided in the Constitution of India or under any other law for the time being in force or under any order of the**

> **Government for the welfare and protection of the Scheduled Castes and the Scheduled Tribes of Kerala;**
>
> **(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes and the Scheduled Tribes of Kerala and to take up such matters with the appropriate authorities;**
>
> **(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and the Scheduled Tribes and to evaluate the progress of their development in the State;**
>
> **(d) to make recommendations as to the measures that should be taken by the Government for the effective implementation of safeguards and other measures for the protection, welfare and socio economic development of the Scheduled Castes and the Scheduled Tribes and to make report to the Government annually and at such other time, as the Commission may deem fit;**
>
> **(e) to discharge such other functions in relation to the protection, welfare, development and advancement of the Scheduled Castes and the Scheduled Tribes, as may be prescribed:**
>
> **Provided that if any matter specified in this section is dealt with by the National Commission for Scheduled Castes and the Scheduled Tribes established under article 338 of the Constitution of India, the State Commission for the Scheduled Castes and the Scheduled Tribes shall cease to have jurisdiction on such matter.**"

65. Section 11 of the Act, 2007 speaks about powers of the Commission and the same reads thus:

> "The Commission shall, while performing its functions under Section 9, have all the powers of a civil court trying a suit and in particular, in respect of the following matters, namely:-
>
> (a) summoning and enforcing the attendance of any person from any part of the State and examining him on oath;
>
> (b) requiring the discovery and production of any document;
>
> (c) receiving evidence on affidavits;
>
> (d) requisitioning any public record or copy thereof from any court or office;
>
> (e) issuing commissions for the examination of witnesses and documents; and

(f) any other matter which may be prescribed."

66. Section 16 of the Act, 2007 deals with the power to make rules and the same reads thus:

"(1) The Government may, by notification in the Gazette, make rules for carrying out the purposes of this Act, either prospectively or retrospectively.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

(a) salary and allowances payable to, and the other terms and conditions of service of the Chairperson and the members under sub-section (5) of section 4 and of the officers and other employees under sub-section (2) of section 5;

(b) the form in which the annual report shall be prepared under clause (d) of section 9;

(c) the form, in which the annual statement of accounts shall be maintained under sub-section (1) of section 13; and

(d) any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this Act, shall be laid, as soon as may be after it is made, before the Legislative Assembly while it is in session for a total period of fourteen days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly makes any modification in the rule or decides that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

67. Contention has been made by the petitioner that the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, is repugnant to the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

68. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is an Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and the Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto. Whereas, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007 is an Act for constituting a Commission for the Scheduled Castes and the Scheduled Tribes, in the State of Kerala, and to provide for matters connected therewith or incidental thereto. As per the rules framed thereunder, the SC/ST Commission is empowered to inquire into specific complaints with respect to deprivation of rights and safeguards of the Scheduled Castes and the Scheduled Tribes of Kerala and to take up such matters with the appropriate authorities; to participate and advise on the planning process of socio-economic development of the Scheduled Castes and the Scheduled Tribes and to evaluate the progress of their development in the State; to make recommendations as to the measures that should be taken by the Government for the effective implementation of safeguards and other

measures for the protection, welfare and socio-economic development of the Scheduled Castes and the Scheduled Tribes and to make report to the Government annually and at such other time, as the Commission may deem fit; and to discharge such other functions in relation to the protection, welfare, development and advancement of the Scheduled Castes and the Scheduled Tribes, as may be prescribed. Provided that, if any matter specified in this section is dealt with by the National Commission for Scheduled Castes and the Scheduled Tribes established under article 338 of the Constitution of India, the State Commission for the Scheduled Castes and the Scheduled Tribes shall cease to have jurisdiction on such matter.

69. Before venturing further, let us consider a few decisions on repugnancy.

(i) In **Zaverbhai Amaidas v. The State of Bombay** [(1955) 1 SCR 799], the Hon'ble Apex Court laid down the various tests to determine the inconsistency between two enactments and observed as follows:

> “The important thing to consider with reference to this provision is whether the legislation is 'in respect of the same matter'. If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254 (2) will have no application. The principle embodied in Section 107 (2) and Article 254 (2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.
>
> It is true, as already pointed out, that on a question Under Article 254 (1) whether an Act of Parliament prevails against a law of the State, no question of repeal

> arises, but the principle on which the Rule of implied repeal rests, namely, that if subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question Under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. "

(ii) In **Ch. Tika Ramji and Ors. v. The State of Uttar Pradesh and Ors**. [1956 SCR 393], the question which arose for consideration was, as to whether there existed a repugnancy between the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, enacted in terms of Entry 33 of List III of the Seventh Schedule of the Constitution and the notifications issued thereunder vis-a-vis the Industries (Development and Regulation) Act, 1951. Referring to the decision in Nicholas's Australian Constitution, 2 Ed. Page 303, the Hon'ble Supreme Court held in the following terms :

> "(1) There may be inconsistency in the actual terms of the competing statutes (***R. V. Brisbane Licensing Court***, (1920 28 CLR 23).
>
> (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code [***Clyde Engineering Co. Ltd. v. Cowburn***, (1926) 37 C.L.R. 466].
>
> (3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter [***Victoria v. Commonwealth***, (1937) 58 C.L.R. 618; Wenn v. Attorney-General (Vict.), (1948) 77 C.L.R. 84]."

This Court also relied on the decisions in the case of ***Hume v. Palmer*** as also the case of Ex Parte Mclean (supra) referred to above. This Court also endorsed the observations of Sulaiman, J. in the case of ***Shyamakant Lal v. Rambhajan Singh*** [(1939) FCR 188] where Sulaiman, J. observed as follows:

> "When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its

> repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other, and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility."

(iii) While examining the repugnancy between the two Statutes, the following principles were enunciated in the case of **Deep Chand v. State of U.P.** [AIR 1959 SC 648], wherein the Hon'ble Supreme Court observed thus:

> "(1) There may be inconsistency in the actual terms of the competing statutes;
>
> (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and
>
> (3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."

(iv) In **State of Orissa v. M.A. Tulloch & Co**. [(1964) 4 SCR 461] Ayyangar J. speaking for the Court, observed as follows:

> "Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed

> comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation. "

(v) In **T.S. Balliah v. T.S. Rangachari** [(1969) 3 SCR 65], the Hon'ble Supreme Court held as under:

> "On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:
>
> 1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
>
> 2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
>
> 3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
>
> 4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field. (at pages 272-278)" (Emphasis Supplied)

(vi) In **Fatehchand Himmatlal v. State of Maharashtra** [(1977) 2 SCC 670], while dealing with repugnancy, the Hon'ble Apex Court held thus:

> "It has been held that the rule as to predominance of Dominion legislation can only be invoked in case of absolutely conflicting legislation in pari materia when it will be an impossibility to give effect to both the Dominion and provincial enactments. There must be a real conflict between the two Acts i.e. the two enactments must come into collision. The doctrine of Dominion paramountcy does not operate merely because the Dominion has legislated on the same subject-matter. The doctrine of "occupied field" applies only where there is a clash between Dominion Legislation and Provincial Legislation within an area common to both. Where both can co-exist peacefully, both reap their respective harvests (Please see: ***Canadian Constitutional Law by Laskin*** -- pp. 52-54, 1951 Edn)."

(vii) In the case of **M. Karunanidhi v. Union of India** [(1979) 3 SCC 431], the test for determining repugnancy has been laid down by the Hon'ble Supreme Court as under:

> "24. It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:
>
> 1. That there is a clear and direct inconsistency between the Central Act and the State Act.
>
> 2. That such an inconsistency is absolutely irreconcilable.
>
> 3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

(viii) In **Hoechst Pharmaceuticals Ltd. v. State of Bihar** [(1983) 3 SCR 130], the Hon'ble Apex Court, after referring to the earlier judgments, held as under:

> 67.Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal Rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general Rule laid down in Clause (1), Clause (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two,

and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to Clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together. [See: *Zaverbhai Amaidas v. State of Bombay (1955) 1 SCR 799), M. Karunanidhi v. Union of India (1979) 3 SCR 254) and T. Barai v. Henry Ah Hoe and Anr. (1983) 1 SCC 177)*]

68. We may briefly refer to the three Australian decisions relied upon. As stated above, the decision in ***Clyde Engineering Company's*** case (supra), lays down that inconsistency is also created when one statute takes away rights conferred by the other. In Ex Parte McLean's case, supra, Dixon J. laid down another test viz., two statutes could be said to be inconsistent if they, in respect of an identical subject-matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties. In Stock Motor Ploughs Limited's case, supra, Evatt, J. held that even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. As already stated the controversy in these appeals falls to be determined by the true nature and character of the impugned enactment, its pith and substance, as to whether it falls within the legislative competence of the State Legislature Under Article 246(3) and does not involve any question of repugnancy Under Article 254(1).

69. We fail to comprehend the basis for the submission put forward on behalf of the Appellants that there is

repugnancy between Sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and paragraph 21 of the Control order issued by the Central Government Under Sub-section (1) of Section 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore Sub-section (3) of Section 5 of the Act which is a law made by the State Legislature is void Under Article 254(1). The question of repugnancy Under Article 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non-obstante Clause in Article 246(1) read with the opening words "Subject to" in Article 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as "List I". But if Article 254(1) is read as a whole, it will be seen that it is expressly made subject to Clause (2) which makes reference to repugnancy in the field of Concurrent List-in other words, if Clause (2) is to be the guide in the determination of scope of Clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law.

There was a controversy at one time as to whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (a) and (b) or (b) alone. It is now settled that the words "with respect to" qualify both the clauses in Article 254(1) viz.

a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The under lying principle is that the question of repugnancy arises only when both the Legislatures are competent to legislate in the same field i.e. with respect to one of the matters enumerated in the Concurrent List. Hence, Article 254(1) can not apply unless both the Union and the State laws relate to a subject specified in the Concurrent List, and they occupy the same field.

70. This construction of ours is supported by the observations of Venkatarama Ayyar, J. speaking for the Court in ***A.S. Krishna's case***, supra, while dealing with Section 107(1) of the Government of India Act, 1935 to the effect:

> "For this Section to apply, two conditions must be fulfilled: (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void."

(ix) In V**ijay Kumar Sharma and Ors. Etc v. State of Karnataka** [(1990) 2 SCC 562], the Hon'ble Supreme Court held as under:

> "Ranganath Misra, J., in a concurring judgment, posed the question as to whether when the State law is under one head of legislation in the Concurrent List and the Parliamentary legislation is under another head in the same list, can there be repugnancy at all? The question was answered thus:
>
> 13. In Clause (1) of Article 254 it has been clearly indicated that the competing legislations must be in respect of one of the matters enumerated in the Concurrent List. The seven Judge Bench examining the vires of the Karnataka Act did hold that the State Act was an Act for acquisition and came within Entry 42 of the Concurrent List. That position is not disputed before us. There is unanimity at the bar that the Motor Vehicles Act is a legislation coming within Entry 35 of the Concurrent List. Therefore, the Acquisition Act and the 1988 Act as such do not relate to one common head of legislation

enumerated in the Concurrent List and the State Act and the parliamentary statute deal with different matters of legislation.

19. A number of precedents have been cited at the hearing and those have been examined and even some which were not referred to at the bar. There is no clear authority in support of the stand of the Petitioners -- where the State law is under one head of legislation in the Concurrent List, the subsequent Parliamentary legislation is under another head of legislation in the same list and in the working of the two it is said to give rise to a question of repugnancy."

(x) In **Girnar Traders v. State of Maharashtra** [(2007) 7 SCC 555], the Hon'ble Supreme Court held as under:

"173. The doctrine of pith and substance can be applied to examine the validity or otherwise of a legislation for want of legislative competence as well as where two legislations are embodied together for achieving the purpose of the principal Act. Keeping in view that we are construing a federal Constitution, distribution of legislative powers between the Centre and the State is of great significance. Serious attempt was made to convince the Court that the doctrine of pith and substance has a very restricted application and it applies only to the cases where the court is called upon to examine the enactment to be ultra vires on account of legislative incompetence.

174. We are unable to persuade ourselves to accept this proposition. The doctrine of pith and substance find its origin from the principle that it is necessary to examine the true nature and character of the legislation to know whether it falls in a forbidden sphere. This doctrine was first applied in India in ***Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna*** [AIR 1947 PC 60] The principle has been applied to the cases of alleged repugnancy andwe see no reason why its application cannot be extended even to the cases of present kind which ultimately relates to statutory interpretation founded on source of legislation.

175. In ***Union of India v. Shah Gobardhan L. Kabra Teachers' College*** [(2002) 8 SCC 228], this Court held that in order to examine the true character of the

enactment, the entire Act, its object and scope is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. The doctrine of pith and substance has to be applied not only in cases of conflict between the powers of two legislatures but also in any case where the question arises whether a legislation is covered by a particular legislative field over which the power is purported to be exercised. In other words, what is of paramount consideration is that the substance of the legislation should be examined to arrive at a correct analysis or in examining the validity of law, where two legislations are in conflict or alleged to be repugnant.

176. An apparent repugnancy upon proper examination of substance of the Act may not amount to a repugnancy in law. Determination of true nature and substance of the laws in question and even taking into consideration the extent to which such provisions can be harmonised, could resolve such a controversy and permit the laws to operate in their respective fields. The question of repugnancy arises only when both the legislatures are competent to legislate in the same field i.e. when both, the Union and the State laws, relate to a subject in List III (***Hoechst Pharmaceuticals Ltd. v. State of Bihar*** [(1983) 4 SCC 45)]).

178. On the contrary, it is contended on behalf of the respondent that the planned development and matters relating to management of land are relatable to Entry 5/18 of the State List and acquisition being an incidental act, the question of conflict does not arise and the provisions of the State Act can be enforced without any impediment. This controversy need not detain us any further because the contention is squarely answered by the Bench of this Court in ***Bondu Ramaswamy v. Bangalore Development Authority*** [(2010) 7 SCC 129] where the Court not only considered the applicability of the provisions of the Land Acquisition Act vis-a-vis the Bangalore Act, but even traced the source of legislative competence for the State law to Entry 5 of List II of Schedule VII and held as under:

> “92, Where the law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is

> repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law. This Court in ***Munithimmaiah v. State of Karnataka*** [(2002) 4 SCC 326] has held that the BDA Act is an Act to provide for the establishment of a Development Authority to facilitate and ensure planned growth and development of the city of Bangalore and areas adjacent thereto, and that acquisition of any lands, for such development, is merely incidental to the main object of the Act, that is, development of Bangalore Metropolitan Area. This Court held that in pith and substance, the BDA Act is one which squarely falls under Entry 5 of List II of the Seventh Schedule and is not a law for acquisition of land like the LA Act, traceable to Entry 42 of List III of the Seventh Schedule, the field in respect of which is already occupied by the Central Act, as amended from time to time. This Court held that if at all, the BDA Act, so far as acquisition of land for its developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same will not be considered to be a part of the LA Act. The fallacy in the contention of the appellants is that it assumes, erroneously, that the BDA Act is a law referable to Entry 42 of List III, while it is a law referable to Entry 5S of List II. Hence the question of repugnancy and Section 6 of the LA Act prevailing over Section 19 of the BDA Act would not at all arise."

179. The Court has to keep in mind that function of these constitutional lists is not to confer power, but to merely demarcate the legislative heads or fields of legislation and the area over which the appropriate legislatures can operate. These entries have always been construed liberally as they define fields of power which spring from the constitutional mandate contained in various clauses of Article 246. The possibility of overlapping cannot be ruled out and by advancement of law this has resulted in formulation of, amongst others, two principal doctrines i.e. doctrine of pith and substance and doctrine of incidental encroachment. The implication of these doctrines is, primarily, to protect the legislation and to construe both

the laws harmoniously and to achieve the object or the legislative intent of each Act. In the ancient case of ***Muthuswami Goundan v. Subramanyam Chettiar*** [1940 FCR 188], Sir Maurice Gwyer, C.J. supported the principle laid down by the Judicial Committee as a guideline i.e. pith and substance to be the true nature and character of the legislation, for the purpose of determining as to which list the legislation belongs to.

181. The primary object of applying these principles is not limited to determining the reference of legislation to an entry in either of the Lists, but there is a greater legal requirement to be satisfied in this interpretative process. A statute should be construed so as to make it effective and operative on the principle expressed in the *maxim ut res magis valeat quam pereat*. Once it is found that in pith and substance, an Act is a law on a permitted field then any incidental encroachment, even on a forbidden field, does not affect the competence of the legislature to enact that law. [***State of Bombay v. Narottamdas Jethabhai*** [1951 SCR 51]].

182. To examine the true application of these principles, the scheme of the Act, its object and purpose, the pith and substance of the legislation are required to be focused at, to determine its true nature and character. The State Act is intended only to ensure planned development as a statutory function of the various authorities constituted under the Act and within a very limited compass. An incidental cause cannot override the primary cause. When both the Acts can be implemented without conflict, then the need for construing them harmoniously arises.

187. Even if fractional overlapping is accepted between the two statutes, then it will be saved by the doctrine of incidental encroachment, and it shall also be inconsequential as both the constituents have enacted the respective laws within their legislative competence and, moreover, both the statutes can eloquently coexist and operate with compatibility. It will be in consonance with the established canons of law to tilt the balance in favour of the legislation rather than invalidating the same, particularly, when the Central and State Law can be enforced symbiotically to achieve the ultimate goal of planned development."

(xi) In **Rajiv Sarin v. State of Uttarakhand** [(2011) 8 SCC 708], the Hon'ble Supreme Court examined the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 vis-à-vis the Forest Act, 1927 and found that there was no repugnancy between the two. The Hon'ble Apex Court held thus:

> 52. The aforesaid position makes it quite clear that even if both the legislations are relatable to List III of the Seventh Schedule of the Constitution, the test for repugnancy is whether the two legislations "exercise their power over the same subject-matter..." and secondly, whether the law of Parliament was intended "to be exhaustive to cover the entire field". The answer to both these questions in the instant case is in the negative, as the Indian Forest Act, 1927 deals with the law relating to forest transit, forest levy and forest produce, whereas the KUZALR Act deals with the land and agrarian reforms.
>
> 53. In respect of the Concurrent List under Seventh Schedule to the Constitution, by definition both the legislatures viz. the Parliament and the State legislatures are competent to enact a law. Thus, the only way in which the doctrine of pith and substance can and is utilised in determining the question of repugnancy is to find out whether in pith and substance the two laws operate and relate to the same matter or not. This can be either in the context of the same Entry in List III or different Entries in List III of the Seventh Schedule of the Constitution. In other words, what has to be examined is whether the two Acts deal with the same field in the sense of the same subject matter or deal with different matters."
>
> (Emphasis Supplied)

(xii) In **Innoventive Industries Ltd. v. ICICI Bank and Ors.** [(2018) 1 SCC 407], the Hon'ble Supreme Court observed as under:

> "50. The case law referred to above, therefore, yields the following propositions:
>
> i) Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.
>
> ii) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and

whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

iii) The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

iv) Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy - care should be taken to see whether the two do not really operate in different fields qua different subject matters.

v) Repugnancy must exist in fact and not depend upon a mere possibility.

vi) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.

vii) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or

> obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.
>
> viii) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the Rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the Rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.
>
> ix) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.
>
> x) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso."

70. What is investigation envisaged in the Act, 1989, is an investigation, as defined in Section 2(h) of the Code of Criminal Procedure, 1973, and the same reads thus:

"(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

71. That apart, the word "trial" is defined as under:

(i) "Trial, the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. 'Trial' is to find out by due examination the truth of the point in issue or question between the parties, whereupon judgment may be given' (Co.Litt.124 b).

(ii) Trial, is used in the sense of reference to a stage after the inquiry, ***State of Bihar v. Ram Naresh Pandey***, [AIR 1957 SC 589 : 1957 SCC 282].

(iii) Trial, is the examination by a competent court of the facts or laws in dispute, or put in issue in a case. It is the judicial examination of issues between the parties, whether they are of law or of fact, ***Sajjan Singh V. Bhagilal Pandya***, [AIR 1958 Raj. 307].

(iv) The word 'trial' in s. 98 of the Representation of People Act, 1951 means the entire proceeding before the tribunal from the reference to it by the Election Commission to the conclusion, ***Om Prabha Jain v. Gain Chand,*** [AIR 1959 SC 837; 1959 Supp (2) SCR 516]. (Representation of the People Act, 1951 s. 98).

(v) Trial, is understood as referring to the stage of the proceeding in a criminal case after the charge had been framed against the accused, **Vijay Kumar v. State**, [1977 CLR J&K 37 (41) : 1977 FAJ 526].

(vi) In ***Gandharv Lal v. State of Himachal Pradesh*** reported in (1980 Crl.L.J. 1189), the Hon'ble Himachal Pradesh High Court, at paragraph 8, held as follows:

> "8. The term 'trial' has of course not been defined anywhere in the Code. Its import can, however, be ascertained by reference to various provisions of the Code. We find reference to four types of trials in the Code. They are-
>
> (1) trial before a Court of Session,
>
> (2) trial of warrant cases by Magistrate,
>
> (3) trial of summons cases by Magistrates, and
>
> (4) summary trials."

(vii) In ***Union of India v. Major General Madan Lal Yadav*** reported in [(1996) 4 SCC 127], the Hon'ble Supreme Court held as under:

> "The word 'trial' according to Collins English Dictionary means:
>
> "the act or an instance of trying or proving; test or experiment...Law. a. the judicial examination of the issues in a civil or criminal cause by a competent tribunal and the determination of these issues in accordance with the law of the land. b. the determination of an accused person's guilt or innocence after hearing evidence for the prosecution and nor the accused and the judicial examination of the issues involved".
>
> According to *Ballentine's Law Dictionary* [2nd ed.] 'trial' means:
>
> "an examination before a competent tribunal according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue of fact or law for the purpose of determining the right of the parties, it may be considered a trial"
>
> *In Black's Law Dictionary [Sixth Edition] Centennial Edition, the word 'trial' is defined thus:*
>
> "A judicial examination and determination of issues between parties to action, whether they be issues of

> law or of fact, before a court that has jurisdiction... A judicial examination, in accordance with law of the land, of a cause, either civil or Criminal, of the issues between the parties, whether of law or facts, before a court that has proper jurisdiction".
>
> *In Webster's Comprehensive Dictionary International Edition, at page 1339, the word 'trial' is defined thus:*
>
> "....The examination, before a tribunal having assigned jurisdiction, of the facts or law involved in all issue in order to determine that issue. A former method of determining guilt or innocence by subjecting the accused to physical tests of endurance, as by ordeal or by combat with his accuser... In the process of being tried or tested... Made or performed in the course of trying or testing...."

(viii) Trial, though the word 'trial' is not defined either in the Code or in the Act, it is clearly distinguishable from inquiry. The word 'inquiry' is defined in s. 2(g) of the Code as 'every inquiry, other than a trial, conducted under this Code by a Magistrate or Court". So trial is distinct from inquiry and inquiry must always be a forerunner to the trial, ***Vidyadharan v. State of Kerala***, [(2004) 1 SCC 215 (222)] [Criminal Procedure Code, 1973, s. 2(g)].

(ix) Trial, inquiry, the word 'trial' is not defined either in the Code or in the Act it is clearly distinguishable from inquiry. The word 'inquiry' is defined in s. 2(g) of the Code as 'every inquiry, other than a trial, conducted under this Code by a Magistrate or Court." So the trial is distinct from inquiry and inquiry must always be a forerunner to the trial, ***Moly v. State of Kerala*** [(2004) 4 SCC 584 (587)] [Criminal PC, 1973, S. 2(g)]."

72. Now, let us consider the meaning of "inquiry", as defined under Section 2(g) of the Code of Criminal Procedure, 1973, which reads thus:

> *"inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;*

73. Inquiry, as defined under Section 2(g) of the Code of Criminal Procedure, relates to a proceeding held by a Court or a Magistrate, whereas, investigation relates to the steps taken by a police officer, a person other than a Magistrate. Inquiry, as defined under Section 2(g) of the Code, is the second stage of a criminal proceeding and is always to be conducted by a learned Magistrate and not by a police officer. The term 'trial' is not defined in the Cr.P.C. It is to be distinguished as an original judicial proceeding in a criminal case, which ends either in conviction or acquittal, of the accused.

74. While the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, speaks about the prevention of offence relating to atrocities, to provide for Special Courts for trial of such offences and rehabilitation of the victims of such offences, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, speaks about inquiry and examination of complaints by the Commission.

75. Giving due consideration to the definitions of 'investigation' and 'trial', as extracted *supra*, and the purposes of the SC/ST (POA) Act, 1989, for prevention of offences relating to atrocities, trial in courts, rehabilitation, in contradistinction to inquiry and examination into the complaints, by the Kerala State SC/ST Commission, under Act, 2007, and the decisions on repugnancy, on the facts and circumstances of the case, we are of the view that the

proceedings before the SC/ST Commission cannot be equated to court proceedings, nor do they partake the character of a trial or inquiry, as envisaged in the Code of Criminal Procedure, 1973, and there is no repugnancy between the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, in the matter of providing TA/DA, to the victims/witnesses, required to be present for investigation, as completed in respect of an offence and trial.

76. As regards, competence of the State to enact the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, we deem it fit to consider the constitutional provisions.

77. Part III of the Constitution of India deals with Fundamental Rights. Article 17 speaks about abolition of untouchability and the same reads thus:

> *"17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law."*

78. Article 31C of the Constitution of India deals with saving of laws giving effect to certain directive principles and the same reads thus:

> "**31C**. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy*.

> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

79. Article 35 of the Constitution of India speaks about the Legislation to give effect to the provisions of this Part and the same reads thus:

> "Notwithstanding anything in this Constitution,—
>
> (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—
>
> (i) **with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament;** and
>
> (ii) for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);
>
> (b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.
>
> Explanation.— In this article, the expression "law in force" has the same meaning as in article 372."

80. At this juncture, it is relevant to extract Articles 16(3), 32(3) and 34 of the Constitution of India. Article 16(3) is extracted hereunder:

> **"16. Equality of opportunity in matters of public employment.**
>
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of

> employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment."

81. Article 32(3) of the Constitution of India is extracted hereunder:

> **"32. Remedies for enforcement of rights conferred by this Part.**
>
> (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)."

82. Article 34 of the Constitution of India is extracted hereunder:

> **"34. Restriction on rights conferred by this Part while marital law is in force in any area**
>
> Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area."

83. Part IV of the Constitution of India deals with directive principles of State Policy. Article 37 speaks about the application of the principles contained in this Part and the same reads thus:

> "37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

84. Article 38 of the Constitution speaks about State to secure a social order for the promotion of welfare of the people and the same reads thus:

> "38.(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social

> order in which justice, social, economic and political, shall inform all the institutions of the national life.
>
> (2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

85. Article 46 speaks about promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections and the same reads thus:

> "46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

86. A conjoint reading of the above articles of the Constitution of India, makes it clear that the enforcement of any disability arising out of any untouchability shall be an offence punishable in accordance with law. No law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

87. Having regard to the Constitutional provisions, we are of the view that it cannot be contended that the State Legislature has no power to legislate. Though, heading of Article 46 of the Constitution of India states

about promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections, it obligates the State that it shall protect them from social injustice and all forms of exploitation.

88. Though, there was no material on record, let us also consider as to how, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, came to be enacted.

89. Government of Kerala has issued Ordinance No. 50 of 2006 dated 30.10.2006, which reads thus:

"ORDINANCE NO. 50 OF 2006

THE KERALA STATE COMMISSION FOR THE SCHEDULED CASTES AND THE SCHEDULED TRIBES ORDINANCE, 2006

Promulgated by the Governor of Kerala in the Fifty-seventh Year of the Republic of India

AN

ORDINANCE

to constitute a Commission for the Scheduled Castes and the Scheduled Tribes in the State of Kerala and to provide for matters connected therewith or incidental thereto.

Preamble.- WHEREAS the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (5 of 2006) was promulgated by the Governor of Kerala on the 6th day of January, 2006:

AND WHEREAS a Bill to replace the said Ordinance by an Act of the Legislature could not be introduced in, and passed by, the Legislative Assembly of the State of Kerala during its session which commenced on the 3rd day of February, 2006 and ended on the 21st day of February, 2006 and its session which commenced on the 14th day of March, 2006 and ended on the 15th day of March, 2006;

AND WHEREAS in order to keep alive the provisions of the said Ordinance the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (25 of 2006) was promulgated by the Governor of Kerala on the 17th day of March, 2006;

AND WHEREAS a Bill to replace Ordinance No.25 of 2006 by an Act of the Legislature could not be introduced in, and passed by, the Legislative Assembly of the State of Kerala, during its session which commenced on the 24th day of May, 2006 and ended on the 30th day of June, 2006;

AND WHEREAS in order to keep alive the provisions of the said Ordinance, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (40 of 2006) was promulgated by the Governor of Kerala on the 5th day of July, 2006;

AND WHEREAS a Bill to replace Ordinance No.40 of 2006 by an Act of the Legislature could not be introduced in, and passed by, the Legislative Assembly of the State of Kerala, during its session which commenced on the 18th day of September, 2006 and ended on the 26th day of October, 2006;

AND WHEREAS under sub-clause (a) of clause (2) of article 213 of the Constitution of India, the said Ordinance will cease to operate on the 30th day of October, 2006.

AND WHEREAS difficulties will arise if the provisions of the said Ordinance are not kept alive;

AND WHEREAS the Legislative Assembly of the State of Kerala is not in session and the Governor of Kerala is satisfied that circumstances exist which render it necessary for him to take immediate action.

Now, THEREFORE, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India, the Government of Kerala is pleased to promulgate the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006."

90. The statement of objects and reasons of the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007 are extracted hereunder:

"**STATEMENT OF OBJECTS AND REASONS**

The National Commission for the Scheduled Castes and the Scheduled Tribes on their visit to Kerala during September, 2000, had recommended the State Government to set up a State Level Commission for the Scheduled Castes and the Scheduled Tribes on the lines of the National Commission. Moreover, the submission made by the State Government to the effect that the constitution of a State Commission for the Scheduled Castes and the Scheduled Tribes in Kerala, is under the active consideration of the Government, has been taken note of by the Honourable High Court of Kerala, in its judgement pronounced on 25-9-2001 in O.P. No.12743/2001. It was, therefore, decided by the State Government to constitute a State Commission for the Scheduled Castes and the Scheduled Tribes, not in conflict with the powers of the National Commission, by effectively discharging its legislative power to enact a legislation for the purpose, on the lines of the Karnataka State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2002.

2. Accordingly, though the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Bill, 2004 was published by the Eleventh Kerala Legislative Assembly as Bill number 240, the same could not be introduced in the Legislative Assembly. As the Legislative Assembly of the State was not in session and Government was satisfied that the said legislation has to be done immediately, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (5 of 2006) was promulgated by the Governor on the 6th day of January,

2006 and the same was published in the Kerala Gazette Extraordinary No. 35 dated the 6th January, 2006.

3. Since, a Bill to replace the said Ordinance by an Act of the State Legislature could not be introduced in, and passed by the Legislative Assembly of the State of Kerala during its sessions which commenced on the 3rd day of February, 2006 and ended on the 21st day of February, 2006 and which commenced on the 14th day of March, 2006 and ended on the 15th day of March, 2006, the Governor promulgated the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (25 of 2006) on the 17th day of March, 2006 and was published in the Kerala Gazette Extraordinary No. 601 dated the 17th March, 2006.

4. A Bill to replace the Ordinance No. 25 of 2006, by an Act of the Kerala State Legislature could not be introduced in, and passed by the Twelfth Kerala Legislative Assembly during its session which commenced on the 24th day of May, 2006 and ended on the 30th day of June, 2006. Therefore, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (40 of 2006) was promulgated by the Governor on the 5th day of July, 2006 and the same was published in the Kerala Gazette Extraordinary No. 1134 dated the 5th July, 2006.

5. A Bill to replace Ordinance No. 40 of 2006 by an Act of the State Legislature could not be introduced in, and passed by the Legislative Assembly of the State of Kerala during its session which commenced on the 18th day of September, 2006 and ended on 26th day of October, 2006. Therefore the Governor has promulgated the Kerala State Commission for Scheduled Castes and the Scheduled Tribes Ordinance, 2006 (50 of 2006) on the 30th day of October, 2006 and published in the Kerala Gazette Extraordinary No. 1714 dated the 30th October, 2006.

6. Since a Bill to replace Ordinance No. 50 of 2006 by an Act of the State Legislature could not be introduced in, and passed by the Legislative Assembly of the State of Kerala during its session which commenced on the 27th day of December, 2006 and ended on the 29th day of the December, 2006, the Governor promulgated the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2007 (9 of 2007) on the 4th day of February, 2007 and published in the Kera1a Gazette Extraordinary No. 207 on the 5th February 2007.

7. A Bill to replace Ordinance No. 9 of 2007 by, an Act of State Legislature could not be introduced in, and passed by the Legislative Assembly of the State of Kerala during its session which commenced on the 2nd day of March, 2007 and ended on the 29th day of March, 2007 the Governor promulgated the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2007 (35 of 2007) on the 30th day of March, 2007 and published in the Kerala Gazette Extraordinary No. 640 on the 2nd April, 2007.

8. A Bill to replace Ordinance No. 35 of 2007 by an Act of State Legislature could not be introduced in, and passed by the Legislative Assembly of the State of Kerala during its session which commenced on the 19th day of June 2007 and ended on the 26th day of July 2007. Therefore, the Governor promulgated the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Ordinance, 2007 (56 of 2007) on the 30th day of July 2007 and published in the Kerala Gazette Extraordinary No. 1416 on the 30th July, 2007.

9. The Bill seeks to replace the said Ordinance by an Act of Legislature."

91. Needless to state, as per Article 13 of the Constitution of India, Ordinance has the effect of laws. Article 13(3) of the Constitution reads thus:

"13. Laws inconsistent with or in derogation of the fundamental rights.-

(1) xxxx xxxxxx xxxxxx

(2) xxxx xxxxxx xxxxxx

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

92. Thus, on 06.09.2007, the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Bill, 2007 has been laid and passed in the Kerala Legislative Assembly. The notification dated 6.09.2007 is extracted hereunder:

"**SECRETARIAT OF THE KERALA LEGISLATURE**
NOTIFICATION

No.3149/Legn. 1/2007/Leg.

Dated, Thiruvananthapuram, 6th September, 2007

The Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Bill—Authoritative Text together with the Statement of Objects and Reasons, the Financial Memorandum and the Momorandum regarding Delegated Legislation is published, under Rule 69 of the Rules of Procedure and Conduct of Business in the Kerala Legislative Assembly."

Sd/-
Dr. N. K. JAYAKUMAR
Secretary
Legislative Assembly"

93. From the above, it could be deduced that the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, has been enacted on the recommendations of the National Commission for Scheduled Castes and the Scheduled Tribes and taking note of the decision of this Court in O.P. No.12743 of 2001 dated 25.09.2001. When reference has been made to a decision in O.P. No.12743 of 2001 dated 25.09.2001, we collected the file relating to the said original petition from the Registry.

94. O.P. No.12743 of 2001 has been filed as a Public Interest Petition under Article 226 of the Constitution of India, by one N.T.Prabhakaranan, who claimed to be a social activist working for the welfare of downtrodden community, especially the Scheduled Castes and Scheduled Tribes, in the country, and a retired Central Government servant, for the following reliefs:

i) Issue a writ in the nature of a Mandamus or such other appropriate writ, order or direction, directing the respondents 1 to 3 therein, viz., State of Kerala, represented by the Chief Secretary to Government, Government Secretariat, Thiruvananthapuram; The Secretary, Scheduled Caste & Scheduled Tribe Development Department, Thiruvananthapuram; and the Principal Secretary, Social Welfare Department, Government of Kerala, Thiruvananthapuram, respectively, to consider and dispose of Exhibits-P3 and P4 representations dated 21.03.2001 and 8.3.2001 sent by the petitioner therein to the 2nd respondent therein, expeditiously.

ii) Declare that the 1st respondent therein is duty bound to constitute a State Commission for Scheduled Castes and Scheduled Tribes.

95. The grounds raised by the petitioner therein in the above said original petition are extracted hereunder:

A. The Hon'ble Governor in his speech was declaring the Government's policy before the Legislature. However, till date, no action has been taken pursuant to the declaration made by the Hon'ble governor as reported in Exhibit-P1. This is after a lapse of 4 years as the declaration was made in 1997.

B. The need for a Commission exclusively to protect the members of the Scheduled Caste and Scheduled Tribe communities exists in the State of Kerala. Various incidents of atrocities against members of the SC and ST which go out of the public eye after being in newspapers for a few days in common.

C. The petitioner therein respectfully avers that the constitutional mandate under Article 338 of the Constitution of India also casts a duty upon the Government and its officials to initiate necessary steps for the protection of the SC and ST community. It is for that purpose, a National Commission for Scheduled Castes and Scheduled Tribes was constituted in 1992. Though the State Government declared its intent in 1997, no steps have been taken for the past 4 years. Hence, the petitioner therein is constrained to approach this Court for a writ of Mandamus.

96. On behalf of respondents 1 and 2 in O.P. No.12743 of 2001, a statement has been filed, wherein it was stated as follows:

(i) The constitution of State Level Statutory Commission for Scheduled Castes and Scheduled Tribes on the pattern of National Commission for Scheduled Castes and Scheduled Tribes is under the active consideration of the State Government. In fact, there was a mention in the Budget Speech of 1997 about the constitution of a

State Level Commission for Scheduled Castes and Scheduled Tribes. Similarly, in the revised budget speech of this financial year, there is a mention regarding the said aspect.

(ii) For the formation of the State Level Statutory Commission, Legislation is required and as such, it will take much time for a detailed examination at various levels of Government and Legislative Secretariat. The matter is under serious consideration of the Government and it is respectfully submitted that urgent steps are being taken for the formation of a Statutory State Level Commission. It is also submitted that it is ascertained from the State Unit of the National Commission that a similar Commission is existing in the State of Tamil Nadu.

97. In view of the statement filed by respondents 1 & 2 therein, a Hon'ble Division Bench of this Court by judgment dated 25.09.2001, dismissed O.P.No.12743 of 2001, as withdrawn. Said judgment is extracted hereunder:

> "In view of the statement filed on behalf of respondents 1 and 2 to the effect that matter with regard to the constitution of Commission for Scheduled Castes and Scheduled Tribes in Kerala is under "active consideration of the Government", the petition is allowed to be withdrawn and dismissed as such."

98. As stated supra, the constitutional provisions empower the State to make laws, in order to protect the Scheduled Castes and Scheduled Tribes from social injustice and all forms of exploitation.

99. In the light of the above discussion, we hold that the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007

has been validly enacted by the State Government and reject the prayer of the petitioner to declare the said Act, as unconstitutional.

100. Going through the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the rules framed thereunder, we are of the view that, neither the Commission nor the State Government, is obligated to create a specific fund for reimbursement of the expenses, incurred by the complainant/witnesses, for their appearance, in relation to inquiry and examination of a complaint by the Commission constituted under Section 3 of the Kerala State Commission for the Scheduled Castes and the Scheduled Tribes Act, 2007, and such fund is required to be created by the State Government, only in the case of investigation or trial. At the risk of repetition, we deem it fit to consider, as to when the expenses incurred by the complainant, have to be reimbursed.

(a) Every victim of atrocity or his/her dependent and witnesses shall be paid to and for rail fare by second class in express / mail/ passenger train or actual bus of taxi fare from his / her place of residence or actual bus or taxi fare from his /her place of residence or place of stay **to the place of investigation or hearing of trial of an offence under the Act**.

(b) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make necessary arrangements for providing transport facilities or reimbursement of full payment thereof to the victims of atrocity and witnesses **for visiting the investigating officer, Superintendent of Police/Deputy Superintendent of Police, District Magistrate or any other Executive Magistrate**.

(c) Every woman witness, the victim of atrocity or her dependent being a woman or a minor, a person more than sixty years of age and a person having 40 per cent or more disability shall be

entitled to be accompanied by an attendant of her/his choice. The attendant shall also be paid travelling and maintenance expenses as applicable to the witness or the victim of atrocity when called upon **during hearing, investigation and trial of an offence under the Act**.

(d) The witness, the victim of atrocity or his/her dependent and the attendant shall be paid daily maintenance expenses for the days he/she is away from the place of his/her residence or stay during **investigation, hearing and trial of an offence**, at such rates but not less than the minimum wages, as may be fixed by the State Government for the agricultural laborers.

(e) In additional to daily maintenance expenses, the witness, the victim of atrocity (or his/her dependent), and the attendant shall also be paid diet expenses at such rates, as may be fixed by the State Government from time to time.

(f) The payment of travelling allowance, daily allowance, maintenance expenses and reimbursement of transport facilities shall be made immediately or not later than three days by the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate to the victims, their dependents/attendant and witnesses for the days **they visit the investigating officer or in-charge police station or hospital authorities or Superintendent of Police, Deputy Superintendent of Police or District Magistrate or any other officer concerned or the Special Court**.

(g) When an offence has been committed under Sec. 3 of the Act, the District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall reimburse the payment of medicines, special medical consultation, blood transfusion, replacement of essential clothing, meals and fruits provided to the victim(s) of atrocity."

101. Government of Kerala, in its counter affidavit, has categorically stated that in terms of sub-rules (1) and (2) of Rule 11 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, applicable to investigation and trial of offences relating to atrocities, they have funds earmarked for the said purpose, viz., Criminal Court deposit or Civil Court deposit, as the case may be, for payment of travelling allowance to the

victims/witnesses of registered/charged cases under the Act.

102. Giving due consideration to the definition of investigation, in terms of Section 2(h) of the Code of Criminal Procedure, 1973 and trial, we are of the view that the expression “inquiry and examination” of a complaint preferred to the State SC/ST Commission, is different and distinct. Complaint made to the Commission cannot be treated as investigation, as defined in Section 2(h) of the Cr.P.C.

103. One of the prayers made in the writ petition is for issuance of a writ of mandamus, directing the State Government to allot necessary funds forthwith under the Annexure in the Schedule of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, and all other provisions, including Rules 11, 12 and 15, with necessary information to all concerned, when there is a provision in the Scheduled Castes and the Scheduled Tribes Act, 1989, to reimburse the TA/DA expenses, incurred by a complainant or the witnesses, for appearance before the Commission. The prayer sought cannot be granted, and mandamus cannot be issued to the State Government to legislate, for providing funds for the above purpose. In this context, we deem it fit to consider a few decisions, as to whether the Court can issue directions to legislate.

(i) In **Mallikarjuna Rao and Ors. v. State of Andhra Pradesh and Ors.** [(1990) 2 SCC 707], the Hon'ble Supreme Court held as under:

> “13. The Special Rules have been framed under Article 309 of the Constitution. The power under Article 309 of the

> Constitution to frame rules is the legislative power. This power under the Constitution has to be exercised by the President or the Governor of a State as the case may be. The High Courts or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution. The Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making power in any manner. The Courts cannot assume to itself a supervisory role over the rule making power of the executive under Article 309 of the Constitution."

(ii) In **Suresh Seth v. Commissioner, Indore Municipal Corporation and Ors.** [(2005) 13 SCC 287], the Hon'ble Apex Court held as under:

> "5. Learned counsel for the appellant has also submitted that this Court should issue directions for an appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely that of a member of the Legislative Assembly and also of Mayor of a Municipal Corporation. In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the court. That apart this Court cannot issue any direction to the Legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In **Supreme Court Employees Welfare Association v. Union of India**, [(1989) IILLJ 506 SC], it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in **State of J & K v. A.R. Zakki,** [AIR 1992 SC 1546]. In **A.K. Roy v. Union of India,** [1982 CriLJ 340], it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature. Therefore, the submission made by the learned counsel for the appellant cannot be accepted."

(iii) In **Municipal Committee, Patiala v. Model Town Residents Asson. and Ors.** [(2007) 8 SCC 669], while dealing with a prayer to

enact a law on taxation and that the same can be made applicable to the case on hand, to understand the power of the court to issue a writ of mandamus to legislate, the Hon'ble Supreme Court, observed as under:

> "20. Before concluding, we have serious objections to the manner in which direction has been given by the Division Bench of the High Court to the Legislature. In this connection, we quote the last paragraph of the impugned judgment, which is as follows:
>
> > "...Sections 3(1)(b) and 3(8aa) of the Act are declared unconstitutional and struck down.... The State shall be free to suitably amend Section 3(1) to provide for levy of house tax by adopting a uniform criteria for determination of annual value of similarly situated properties. The State shall also be free to amend Section 3(1) and lay down a uniform criteria for determination of annual value of properties occupied by the tenants as well as the owners in the light of the judgment of the Supreme Court in **Sachidanand Kishore Prasad Sinha's case** [1995]1 SCR 256 and observations made in this order. It is, however, made clear that any such enactment shall not effect the assessments made prior to the amendment of Section 3 by Punjab Act No. 11 of 1994 and the old cases, if any pending shall be decided in accordance with the unamended provision...." (emphasis supplied)
>
> In the above judgment, the High Court directs the State Legislature to amend the law relating to determination of annual value by classifying that any such amendment shall not be retrospective. We have serious reservations regarding such a direction. It is not open to the High Court under Article 226 of the Constitution, particularly in the matter of taxation directing it not to amend the law retrospectively. Such a direction is unsustainable, particularly in a taxing statute. It is always open to the State Legislature, particularly in tax matters, to enact validation laws which apply retrospectively. The High Court cannot take away the power of the State Legislature to amend the tax law retrospectively. The basis of the law can always be altered retrospectively.
>
> B. Sudershan Reddy, J.(concurring)-- While I entirely agree with my esteemed brother Kapadia, J. in the judgment proposed to be delivered by him, I wish to add particularly to supplement what he has said to the topic of separation of powers.

24.The Constitution is filled with provisions that grant Parliament or to State legislatures specific power to legislate in certain areas. These granted powers are of course subject to constitutional limitations that they may not be exercised in a way that violates other specific provisions of the Constitution. Nothing in the text, history or structure of the Constitution remotely suggests the High Courts jurisdiction under Article 226 of the Constitution should differ in this respect - that invocation of such power should magically give the High Court a free ride through the rest of the Constitutional document. If such magic were available the High Court could structure, restructure legislative enactments. The possibilities are endless. The Constitution makers cannot be charged with having left open a path to such total obliteration of Constitutional enterprise.

25. In **Narinder Chand Hem Raj and Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors**. [1972]1 SCR 940, a writ of mandamus was sought by the petitioners from enforcing levy of sales tax on the sale of liquor. This Court held that the appellants were liable to pay tax imposed under the law. The appellants in reality wanted a mandate from court to the competent authority to delete the certain entry from Schedule A and include the same in Schedule B. The court proceeded to hold:

> "The power to impose a tax is undoubtedly a legislative power, that power can be exercised by the Legislature directly or subject to certain conditions the Legislature may delegate that power to some other authority. But the exercise of that power , whether by the Legislature by its delegate is an exercise of a legislative power. The fact that the power was delegated to the executive does not convert that power into an executive or administrative power. No court can issue a mandate to a Legislature to enact a particular law. Similarly no court can direct a subordinated legislative body to enact or not to enact a law which it may be competent to enact. The relief as framed by the applicant in his Writ Petition does not bring out the real issue calling for determination. In reality he wants this Court to direct the Government to delete the entry in question from Schedule A and include the same in Schedule B. Article 265 of the Constitution lays down that no tax can be levied and collected except by authority of law. Hence the levy of a tax can only be done by the authority of law and not by any executive order. Unless the executive is specifically empowered by law to give any exemption, it cannot say that it will not enforce

> the law as against a particular person. No court can give a direction to a Government to refrain from enforcing a provision of law."
>
> [Emphasis supplied]

26. In **T. Venkata Reddy and Ors. v. State of Andhra Pradesh** [1985] 3 SCR 509, a Constitution Bench of this Court while considering the question as to whether it is permissible to strike down an Ordinance which has the same force and effect or an Act of Parliament or an. Act of State Legislature on the ground of non-application of mind or malafides or that the prevailing circumstances did not warrant the issue of an Ordinance held that the validity of an Ordinance cannot be decided on grounds similar to those on which an executive or judicial action is decided. It is observed:

> "Any law made by the Legislature, which it is not competent to pass, which is violated of the provisions in Part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the Legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motive of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts."

27. It is so well settled and needs no restatement at our hands that the legislature is supreme in its own sphere under the Constitution subject to the limitations provided for in the Constitution itself. It is for the legislature to decide as to when and in what respect and of what subject matter the laws are to be made. It is for the legislature to decide as to the nature of operation of the statutes.

28. In **State of Himachal Pradesh v. A Parent of a student of Medical College, Simla and Ors.** [1985] 3 SCR 676, the High

Court of Himachal Pradesh required the State Government to initiate legislation against ragging in educational institutions and for this purpose time of six weeks was granted to the State Government. The decision was challenged before this Court. This court was of the opinion that the direction given by the division bench was nothing short of an attempt to compel the State Government to initiate legislation with a view to curb the evil of ragging. It is held:

> "...It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. That it is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. If the executive is not carrying out any duty laid upon it by the Constitution or the law, the court can certainly require the executive to carry out such duty and this is precisely what the court does when it entertains public interest litigation. Where the court find, or being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continued to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the court certainly can and must intervene and compel the executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realize their social and economic rights. When the court passes any orders in public interest litigation, the court does so not with a view to mocking at legislative or executive authority or in a spirit of confrontation but with a view to enforcing the constitution and the law, because it is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with a feeling that the Constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large members of half-clad,

> half-hungry people of this country. That is a feeling which should never be allowed to grow. But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature."
>
> [Emphasis supplied]

30. The court cannot usurp the functions assigned to the legislative bodies under the Constitution and even indirectly require the legislature to exercise its power of law making in particular manner. The court cannot assume to itself a supervisory role for the law making power of the legislature under the provisions of the Constitution. The High Court must ensure that while exercising its jurisdiction which is supervisory in nature it should not over step the well recognized bounds of its own jurisdiction.

31. In **Chandigarh Administrator and Ors. v. Manpreet Singh and Ors.** [AIR1992 SC 435], the High Court while disposing of a petition under Article 226 of the Constitution changed the categorization and order of priority specified in the Rule framed by the University for giving admissions to engineering colleges. The Supreme Court while reversing the decision observed:

> "...if the High Court thought that this categorization was discriminatory and bad it ought to have struck down the categorization to that extent and directed the authority to reframe the rule. It would then have been upon the rule making authority either to merge these two categories or delete one or both of them, depending upon the opinion they would have formed on a review of the situation. We must make it clear again that we express no opinion on the question of validity or otherwise of the rule.
>
> We are only saying that the High court should not have indulged in the exercise of 'switching' the categories - and that too without giving any reasons thereafter. Thereby, it has practically assumed the role of rule making authority, or, at any rate, assumed the role of an appellate authority. That is clearly not the function of the High Court acting under Article 226 of the Constitution of India."

32. The High Court's directions to make the law in a particular manner are clearly unsustainable."

(iv) In **Indian Soaps and Toiletries Makers Association v. Ozair Husain and Ors.** [(2013) 3 SCC 641], the Hon'ble Apex Court held thus:

> "37. The question arises as to whether in facts and circumstances noted above, the High Court was justified in issuing a writ of mandamus calling upon the Central Government to discharge its duty by amending rules.
>
> 38. In **A.K. Roy v. Union of India and Ors.** [(1982) 1 SCC 271], this Court considered the question whether the Court should issue a mandamus calling upon the Central Government to discharge its duty without any further delay and held:
>
> > "51.....The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive,...."
>
> 39. The aforesaid decision was noticed and reiterated by this Court in **Supreme Court Employees' Welfare Association v. Union of India and Anr.** (1989) 4 SCC 187, and held:
>
> > "51. There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority."
>
> 40. In **Bal Ram Bali and Anr. v. Union of India** [(2007) 6 SCC 805], this Court discussed the separation of powers while dealing with the question of total ban on slaughter of cows, horses, buffaloes and chameleon. This Court held that it is a matter of policy on which decision can be taken by the appropriate Government and the Court cannot issue any direction to Parliament or to the State Legislature to enact a particular kind of law. The writ petition was held to be not maintainable with the following observation:
>
> > "3. It is not within the domain of the Court to issue a direction for ban on slaughter of cows, buffaloes and horses as it is a matter of policy on which decision has to

be taken by the Government. That apart, a complete ban on slaughter of cows, buffaloes and horses, as sought in the present petition, can only be imposed by legislation enacted by the appropriate legislature. Courts cannot issue any direction to the Parliament or to the State legislature to enact a particular kind of law. This question has been considered in **Union of India v. Prakash P. Hinduja and Anr.** (2003) 6 SCC 195, wherein in para 30 of the reports it was held as under:

> "30. Under our constitutional scheme Parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India (1989) 4 SCC 187, it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in State of J and K v. A.R. Zakki (1992) Supp. 1 SCC 548. In A.K. Roy v. Union of India (1982) 1 SCC 271, it has been held that no mandamus can be issued to enforce an Act which has been passed by the legislature...."

4. In view of the aforesaid legal position, we are of the opinion that this Court cannot grant any relief to the Petitioners, as prayed for, in the writ petition. The writ petition is accordingly dismissed."

41. Learned Counsel for the Respondent-writ Petitioner relied on the decision of this Court in **Union of India v. Association for Democratic Reforms and Anr. (**2002) 5 SCC 294, and submitted that the "field has remained unoccupied this Court can issue such direction under Article 32 of the Constitution of India", but such submission cannot be accepted as it cannot be said that field has remained unoccupied as under the Drugs and Cosmetic Rules it is the Central Government which in consultation with the Drug Technical Advisory Board is empowered to decide whether any amendment is to be made in the relevant Rules showing the ingredients of vegetarian or non-vegetarian origin or to provide a symbol. In fact the issue in question was deliberated by the Central Government when such matter was referred to the Drug Technical Advisory Board which in its 48th Meeting on 8th July, 1999 rejected such suggestion.

> 42. In view of the discussions above, we hold that the High Court under Article 226 of the Constitution of India has no jurisdiction to direct the Executive to exercise power by way of subordinate Legislation pursuant to power delegated by the Legislature to enact a law in a particular manner, as has been done in the present case. For the same reason, it was also not open to the High Court to suggest any interim arrangement as has been given by the impugned judgment. The writ petition filed by Respondent being not maintainable for issuance of such direction, the High Court ought to have dismissed the writ petition in limine."

(v) In **Mangalam Organics Ltd. v. Union of India (UOI)** [(2017) 7 SCC 221], the appellants therein filed an appeal, aggrieved by the judgment of the High Court rendered in the writ petition, wherein the appellant wanted the High Court to exercise its powers Under Article 226 of the Constitution of India and issue a writ of mandamus directing the Central Government to issue a notification under Section 11C of the Central Excise Act, 1944, to the effect that duty payable by the appellant on the goods manufactured by it shall not be paid. After considering the rival submissions, the Hon'ble Supreme Court observed thus:

> "35. Issuance of a notification Under Section 11C of the Act is in the nature of subordinate legislation. Directing the Government to issue such a notification would amount to take a policy decision in a particular manner, which is impermissible. This Court dealt with this aspect recently in the case of **Census Commissioner and Ors. v. R. Krishnamurthy**[2015 ALL SCR 83]. Following discussion from the said judgment is useful and worth a quote:
>
> > "25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts

are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in **Suresh Seth v. Commr., Indore Municipal Corporation**: (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held:

> "In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In **Supreme Court Employees' Welfare Assn. v. Union of India** (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in **State of J & K v. A.R. Zakki** 1992 Supp (1) SCC 548. In **A.K. Roy v. Union of India** (1982) 1 SCC 271 it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

29. In this context, it is fruitful to refer to the authority in **Rusom Cavasiee Cooper v. Union of India** (1970) 1 SCC 248, wherein it has been expressed thus:

> "It is again not for this Court to consider the relative merits of the different political theories or economic policies..."

This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".

36. As can be seen from the extracted portion of the said judgment, in Supreme Court Employees Welfare Association v. Union of India, it was categorically held that no court can direct a legislature to enact a particular law. Similarly when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact the law which it has been empowered to do under the delegated legislative authority.

37. We may also refer to the judgment of this Court in the case of **Common Cause v. Union of India and Ors.**. [AIR2016SC1672] In that case, though the legislature had made amendments in the Delhi Rent Act, it was left to the Government to notify the date of coming into force the said amendments. Government did not notify any date. A writ was filed seeking issuance of mandamus to the Government to notify the date, which was dismissed by the High Court. While approving the said decision in the aforesaid judgment, the Court referred to various earlier judgments on the subject. It was held that not only Parliament is empowered to give such a power to the executive to decide when the Act is to be brought into force, but also held that mandamus cannot be issued to the Government to notify the amendments. In the process, the Court also made the following observations which are relevant in the present context:

> "27. From the facts placed before us it cannot be said that Government is not alive to the problem or is desirous of ignoring the will of the Parliament. When the legislature itself had vested the power in the Central Government to notify the date from which the Act would come into force, then, the Central Government is entitled to take into consideration various facts including the facts set out above while considering when the Act should be brought into force

> or not. No mandamus can be issued to the Central Government to issue the notification contemplated Under Section 1(3) of the Act to bring the Act into force, keeping in view the facts brought on record and the consistent view of this Court."

39. The matter can be looked into from another angle as well. When 'power' is given to the Central Government to issue a notification to the effect not to recover duty of excise or recover lesser duty than what is normally payable under the Act, for deciding whether to issue such a Notification or not, there may be various considerations in the mind of the Government. Merely because conditions laid in the said provisions are satisfied, would not be a reason to necessarily issue such a notification. It is purely a policy matter. No doubt, the principle against arbitrariness has been extended to subordinate legislation as well (See: **Indian Express Newspapers, Bombay v. Union of India**[(1985) 1 SCC 641]). At the same time, the scope of judicial review in such cases is very limited. Where the statute vests a discretionary power in an administrative authority, the Court would not interfere with the exercise of such discretion unless it is made with oblique end or extraneous purposes or upon extraneous considerations, or arbitrarily, without applying its mind to the relevant considerations, or where it is not guided by any norms which are relevant to the object to be achieved.

Taking note of the decisions and accepting the reasons for not issuing a notification under section 11(c) of the Central Excise Act, 1944, the Hon'ble Apex Court dismissed the appeal."

(vi) In **State of Himachal Pradesh and Ors. v. Satpal Saini** [(2017) 11 SCC 42], the Hon'ble Supreme Court observed as under:

> "5. The State Government is aggrieved by the mandamus which has been issued by the High Court to amend the provisions of law. The submission of the State is that the above directions trench upon the sovereign legislative power of the state legislature.
>
> 6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review Under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the state legislatures Under Articles 245 and 246 of the Constitution. The

legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court Under Article 226 (or this Court Under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law-as did the Himachal Pradesh High Court-is a plain usurpation of a power entrusted to another arm of the state. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review Under Article 226 by issuing the above directions to the state legislature to amend the law. The government owes a collective responsibility to the state legislature. The state legislature is comprised of elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject.

7. In **Mallikarjuna Rao v. State of Andhra Pradesh** (AIR 1990 SC 1251) and in **V.K. Sood v. Secretary, Civil Aviation** (AIR 1993 SC 2285), this Court held that the court Under Article 226, has no power to direct the executive to exercise its law-making power.

8. In **State of Himachal Pradesh v. A Parent of a Student of Medical College, Shimla** (AIR 1985 SC 910), this Court deprecated the practice of issuing directions to the legislature to enact a law:

> "4.....The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging..."

The same principle was followed in **Asif Hameed and Ors. v. State of Jammu & Kashmir** (AIR 1989 SC 1899), where this Court observed that:

> "19....The Constitution does not permit the Court to direct or advice the Executive in matter of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or Executive".

In **Union of India v. Association for Democratic Reforms (**AIR 2002 SC 2112), this Court observed that:

> "19....it is not possible for this Court to give any direction for amending the Act or the statutory rules. It is for the parliament to amend the Act and the Rules.

9. Similarly, in **Supreme Court Employees' Welfare Association v. Union of India** [(1989) 4 SCC 187], this Court held that a court cannot direct the legislature to enact a particular law. This is because under the constitutional scheme, Parliament exercises a sovereign power to enact law and no other authority can issue directions to frame a particular piece of legislation. This principle was reiterated in **State of Jammu & Kashmir v. A.R. Zakki and Ors.** (AIR 1992 SC 1546), where this Court observed that:

> "10...A writ of mandamus cannot be issued to the legislature to enact a particular legislation. Same is true as regards the executive when it exercises the power to make rules, which are in the nature of subordinate legislation. Section 110 of the J & K Constitution, which is on the same lines as Article 234 of the Constitution of India, vests in the Governor, the power to make Rules for appointment of persons other than the District Judges to the Judicial Service of the State of J & K and for framing of such rules, the Governor is required to consult the Commission and the High Court. This power to frame Rules is legislative in nature. A writ of mandamus cannot, therefore, be issued directing the State Government to make the Rules in accordance with the proposal made by the High Court."

In **V.K. Naswa v. Union of India** [(2012) 2 SCC 542], this Court referred to a large number of decisions and held that:

> "18. Thus, it is crystal clear that the court has a very limited role and in exercise of that, it is not open to have judicial legislation. Neither the court can

> legislate, nor has it any competence to issue directions to the legislature to enact the law in a particular manner."

10. A discordant note had been struck by a Bench of two judges in **Gainda Ram v. MCD** [(2010) 10 SCC 715]. A direction was issued to the legislature to amend legislation before a particular date. The Constitution Bench in **Manoj Narula v. Union of India** [(2014) 9 SCC 1], held that this direction by a Bench of two judges was contrary to the law laid down earlier by three judges. In that context, the Constitution Bench has conclusively enunciated the legal position thus:

> "127. The law having been laid down by a larger Bench than in Gainda Ram it is quite clear that the decision, whether or not Section 8 of the Representation of the People Act, 1951 is to be amended, rests solely with Parliament."

12. The judiciary is one amongst three branches of the State; the other two being the executive and the legislature. Each of the three branches is co-equal. Each has specified and enumerated constitutional powers. The judiciary is assigned with the function of ensuring that executive actions accord with the law and that laws and executive decisions accord with the Constitution. The courts do not frame policy or mandate that a particular policy should be followed. The duty to formulate policies is entrusted to the executive whose accountability is to the legislature and, through it, to the people. The peril of adopting an incorrect policy lies in democratic accountability to the people. This is the basis and rationale for holding that the court does not have the power or function to direct the executive to adopt a particular policy or the legislature to convert it into enacted law. It is wise to remind us of these limits and wiser still to enforce them without exception.

13. For these reasons, we hold that the directions issued by the High Court for amending the provisions of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 and the Rules were manifestly unsustainable. The directions are accordingly set aside. The appeal filed by the State shall stand allowed in these terms."

(vii) In **Rajesh Sharma and Ors. v. State of U.P. and Ors.** [(2018) 10 SCC 472], the Hon'ble Supreme Court observed thus:

> "16. Function of this Court is not to legislate but only to interpret the law. No doubt in doing so laying down of norms is

> sometimes unavoidable. Just and fair procedure being part of fundamental right to life, interpretation is required to be placed on a penal provision so that its working is not unjust, unfair or unreasonable. The court has incidental power to quash even a non-compoundable case of private nature, if continuing the proceedings is found to be oppressive5. While stifling a legitimate prosecution is against public policy, if the proceedings in an offence of private nature are found to be oppressive, power of quashing is exercised."

(viii) In **Ashwani Kumar v. Union of India (UOI) and Ors** [2019 (12) SCALE 125], the applicant therein had filed a Writ Petition (Civil) No. 738 of 2016 under Article 32 of the Constitution of India for an effective and purposive legislative framework/law based upon the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' ("UN Convention", for short) adopted by the United Nations General Assembly and opened for signature, ratification and accession on 10th December 1984. India had signed the UN Convention on 14th October 1997. However, India has not ratified the UN Convention. After considering the rival submissions, the Hon'ble Apex Court observed thus;

> "8. At the outset, we must clarify that by the present order, we would be deciding a very limited controversy, viz. the prayer of the Applicant that this Court should direct Parliament to enact a standalone and comprehensive legislation against custodial torture based on the UN Convention. The prayer made requires the Court to examine and answer the question that whether within the constitutional scheme, this Court can and should issue any direction to the Parliament to enact a new law based on the UN Convention.
>
> 9. Classical or pure theory of rigid separation of powers as advocated by Montesquieu which forms the bedrock of the American Constitution is clearly inapplicable to parliamentary form of democracy as it exists in India and Britain, for the executive and legislative wings in terms of the powers and functions they exercise are linked and overlap and the personnel they equip are to an extent common. However, unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State-the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the

Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the Rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles. Modern theory of separation of powers does not accept that the three branches perform mutually isolated roles and functions and accepts a need for coordinated institutional effort for good governance, albeit emphasises on benefits of division of power and labour by accepting the three wings do have separate and distinct roles and functions that are defined by the Constitution. All the institutions must act within their own jurisdiction and not trespass into the jurisdiction of the other. Beyond this, each branch must support each other in the general interest of good governance. This separation ensures the Rule of law in at least two ways. It gives constitutional and institutional legitimacy to the decisions by each branch, that is, enactments passed by the legislature, orders and policy decisions taken by the executive and adjudication and judgments pronounced by the judiciary in exercise of the power of judicial review on validity of legislation and governmental action. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths. Secondly, and somewhat paradoxically, it creates a system of checks and balances as the Constitution provides a degree of latitude for interference by each branch into the functions and tasks performed by the other branch. It checks concentration of power in a particular branch or an institution.

11. The legislature as an elected and representative body enacts laws to give effect to and fulfill democratic aspirations of the people. The procedures applied are designed to give careful thought and consideration to wide and divergent interests, voices and all shades of opinion from different social and political groups. Legislature functions as a deliberative and representative body. It is directly accountable and answerable to the electorate and citizens of this country. This representativeness and principle of accountability is what gives legitimacy to the legislations and laws made by Parliament or the state legislatures. Article 245 of the Constitution empowers Parliament and the state legislatures to enact laws for the whole or a part of the territory of India, and for the whole or a part of

the State respectively, after due debate and discussion in Parliament/the state assembly.

12. The executive has the primary responsibility of formulating government policies and proposing legislations which when passed by the legislature become laws. By virtue of Articles 73 and 162 of the Constitution, the powers and functions of the executive are wide and expansive, as they cover matters in respect of which Parliament/state legislature can make laws and vests with the executive the authority and jurisdiction exercisable by the Government of India or the State Government, as the case may be. As a delegate of the legislative bodies and subject to the terms of the legislation, the executive makes second stage laws known as 'subordinate or delegated legislation'. In fields where there is no legislation, the executive has the power to frame policies, schemes, etc., which is co-extensive with the power of Parliament or the state legislature to make laws. At the same time, the political executive is accountable to the legislature and holds office till they enjoy the support and confidence of the legislature. Thus, there is interdependence, interaction and even commonality of personnel/members of the legislature and the executive. The executive, therefore, performs a multi-functional role and is not monolithic. Notwithstanding this multifunctional and pervasive role, the constitutional scheme ensures that within this interdependence, there is a degree of separation that acts as a mechanism to check interference and protect the non-political executive. Part XIV of the Constitution relates to "Services under the Union and the States", i.e., recruitment, tenure, terms and conditions of service, etc., of persons serving the Union or a State and accords them a substantial degree of protection. "Office of profit" bar, as applicable to legislators and prescribed vide Articles 102 and 191, is to ensure separation and independence between the legislature and the executive.

13. The most significant impact of the doctrine of separation of powers is seen and felt in terms of the institutional independence of the judiciary from other organs of the State. Judiciary, in terms of personnel, the Judges, is independent. Judges unlike members of the legislature represent no one, strictly speaking not even the citizens. Judges are not accountable and answerable as the political executive is to the legislature and the elected representatives are to the electorate. This independence ensures that the judges perform the constitutional function of safeguarding the supremacy of the Constitution while exercising the power of judicial review in a fair and even-handed manner

without pressure and favours. As an interpreter, guardian and protector of the Constitution, the judiciary checks and curbs violation of the Constitution by the Government when they overstep their constitutional limits, violate the basic structure of the Constitution, infringe fundamental rights or act contrary to law. Power of judicial review has expanded taking within its ambit the concept of social and economic justice. Yet, while exercising this power of judicial review, the courts do not encroach upon the field marked by the Constitution for the legislature and the executive, as the courts examine legality and validity of the legislation or the governmental action, and not the wisdom behind the legislative measure or relative merits or demerits of the governmental action. Neither does the Constitution permit the courts to direct, advise or sermonise others in the spheres reserved for them by the Constitution, provided the legislature or the executive do not transgress their constitutional limits or statutory conditions. Referring to the phrase "all power is of an encroaching nature", which the judiciary checks while exercising the power of judicial review, it has been observed1 that the judiciary must be on guard against encroaching beyond its bounds since the only restraint upon it is the self-imposed discipline of self-restraint. Independence and adherence to constitutional accountability and limits while exercising the power of judicial review gives constitutional legitimacy to the court decisions. This is essence of the power and function of judicial review that strengthens and promotes the Rule of law.

14. Constitutional Bench judgments in **His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.**(1973) 4 SCC 225, **State of Rajasthan and Ors. v. Union of India and Ors.** (1977) 3 SCC 592, **I.R. Coelho (Dead) by L.Rs. v. State of Tamil Nadu** (2007) 2 SCC 1 and **State of Tamil Nadu v. State of Kerala** (2014) 12 SCC 696 have uniformly ruled that the doctrine of separation of powers, though not specifically engrafted, is constitutionally entrenched and forms part of the basic structure as its sweep, operation and visibility are apparent. Constitution has made demarcation, without drawing formal lines, amongst the three organs with the duty of the judiciary to scrutinise the limits and whether or not the limits have been transgressed. These judgments refer to the constitutional scheme incorporating checks and balances. As a sequitur, the doctrine restrains the legislature from declaring the judgment of a court to be void and of no effect, while the legislature still possesses the legislative competence of enacting a validating law which remedies the defect pointed out in the

judgment. However, this does not ordain and permit the legislature to declare a judgment as invalid by enacting a law, but permits the legislature to take away the basis of the judgment by fundamentally altering the basis on which it was pronounced. Therefore, while exercising all important checks and balances function, each wing should be conscious of the enormous responsibility that rests on them to ensure that institutional respect and comity is maintained.

15. In **Binoy Viswam v. Union of India and Ors.** [(2017) 7 SCC 59], this Court referring to the Constitution had observed that the powers to be exercised by the three wings of the State have an avowed purpose and each branch is constitutionally mandated to act within its sphere and to have mutual institutional respect to realise the constitutional goal and to ensure that there is no constitutional transgression. It is the Constitution which has created the three wings of the State and, thus, each branch must oblige the other by not stepping beyond its territory.

16. In **Kalpana Mehta and Ors. v. Union of India and Ors.** [(2018) 7 SCC 1], Mr. Justice Dipak Misra, the then Chief Justice of India, under the headings 'Supremacy of the Constitution', 'Power of judicial review' and 'Doctrine of separation of powers', has held that the Constitution is a supreme fundamental law which requires that all laws, actions and decisions of the three organs should be in consonance and in accord with the constitutional limits, for the legislature, the executive and the judiciary derive their authority and jurisdiction from the Constitution. Legislature stands vested with an exclusive authority to make laws thereby giving it a supremacy in the field of legislation and law-making, yet this power is distinct from and not at par with the supremacy of the Constitution, as:

> “41. This Court has the constitutional power and the authority to interpret the constitutional provisions as well as the statutory provisions. The conferment of the power of judicial review has a great sanctity as the constitutional court has the power to declare any law as unconstitutional if there is lack of competence of the legislature keeping in view the field of legislation as provided in the Constitution or if a provision contravenes or runs counter to any of the fundamental rights or any constitutional provision or if a provision is manifestly arbitrary.”

17. Having said so, Dipak Misra, CJ went on to observe:

> "42. When we speak about judicial review, it is also necessary to be alive to the concept of judicial restraint. The duty of judicial review which the Constitution has bestowed upon the judiciary is not unfettered; it comes within the conception of judicial restraint. The principle of judicial restraint requires that Judges ought to decide cases while being within their defined limits of power. Judges are expected to interpret any law or any provision of the Constitution as per the limits laid down by the Constitution."

18. Earlier, Dipak Misra, CJ had observed:

> "39. From the above authorities, it is quite vivid that the concept of constitutional limitation is a facet of the doctrine of separation of powers. At this stage, we may clearly state that there can really be no straitjacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to know in matters relating to candidates contesting election. There can be many an example where this Court has issued directions to the executive and also formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualisation and fructification of statutory rights."

19. D.Y. Chandrachud, J., in his separate and concurring judgment for himself and A.K. Sikri, J. in ***Kalpana Mehta*** (supra) had referred to the nuanced 'doctrine of functional separation' that finds articulation in the articles/books by Peter A. Gerangelos in his work titled "The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations", 23 M.J.C. Vile's book titled 'Constitutionalism and the Separation of Powers' 24, Aileen Kavanagh in her work 'The Constitutional Separation of Powers' 25 and Eoin Carolan in his book titled 'The New Separation of Powers-A Theory for the Modern State' 26. These authors in the context of modern administrative State have reconstructed the doctrine as consisting of two components: 'division of labour' and 'checks and balances', instead of isolated compartmentalisation, by highlighting the need of interaction and interdependence amongst the three organs in a way that each branch is in cooperative engagement but at the same time acts, when necessary, to check on the other and that no single group of

people are able to control the machinery of the State. Independent judiciary acts as a restraining influence on the arbitrary exercise of power.

20. Referring to the functional doctrine, D.Y. Chandrachud, J., had cited the following judgments:

> "249. In ***State of U.P. v. Jeet S. Bish***t, the Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of Government. However, even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The Court recognised that fundamentally, the purpose of the doctrine is to act as a scheme of checks and balances over the activities of other organs. The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning. S.B. Sinha, J. addressed the need for the doctrine to evolve, as administrative bodies are involved in the dispensation of socio-economic entitlements: (SCC p. 619, para 83)
>
> > "83. If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable social and economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation.
> >
> > (emphasis in original)"
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> xx xx xx
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> 251. In Supreme Court Advocates-on-Record Assn. v. Union of India, Madan B. Lokur, J. observed that separation of powers does not envisage that each of

the three organs of the State -- the legislature, executive and judiciary -- work in a silo. The learned Judge held: (SCC p. 583, para 678)

> "678. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision-making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed--whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence."

21. Thereafter, D.Y. Chandrachud, J. had observed:

> "254. While assessing the impact of the separation of powers upon the present controversy, certain precepts must be formulated. Separation of powers between the legislature, the executive and the judiciary is a basic feature of the Constitution. As a foundational principle which is comprised within the basic structure, it lies beyond the reach of the constituent power to amend. It cannot be substituted or abrogated. While recognising this position, decided cases indicate that the Indian Constitution does not adopt a separation of powers in the strict sense. Textbook examples of exceptions to the doctrine include the power of the executive to frame subordinate legislation, the power of the legislature to punish for contempt of its privileges and the authority entrusted to the Supreme Court and the High Courts to regulate their own procedures by framing rules. In making subordinate legislation, the executive is entrusted by the legislature to make delegated legislation, subject to its control. The rule-making power of the higher judiciary has trappings of a legislative character. The power of the legislature to punish for contempt of its privileges has a judicial character. These exceptions indicate that the separation doctrine has not been adopted in the strict

form in our Constitution. But the importance of the doctrine lies in its postulate that the essential functions entrusted to one organ of the State cannot be exercised by the other. By standing against the usurpation of constitutional powers entrusted to other organs, separation of powers supports the Rule of law and guards against authoritarian excesses.

255. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally ultra vires can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be ultra vires there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation

> doctrine. That indeed is the basis on which validating legislation is permitted.
>
> 256. This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognise that while the essential functions of one organ of the State cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute."

22. Having elucidated the doctrinal basis of separation of powers and mutual interaction between the three organs of the State in the democratic set-up, it would be important to draw clear distinction between interpretation and adjudication by the courts on one hand and the power to enact legislation by the legislature on the other. Adjudication results in what is often described as judge made law, but the interpretation of the statutes and the rights in accordance with the provisions of Articles 14, 19 and 21 in the course of adjudication is not an attempt or an act of legislation by the judges. Reference in this regard can be made to the opinion expressed by F.M. Ibrahim Kalifulla, J. in **Union of India v. V. Sriharan alias Murugan and Others** [(2016) 7 SCC 1], who had, in the context of capital punishment for offences Under Section 302 of the Indian Penal Code ("IPC", for short), held that the lawmakers have entrusted the task of weighing and measuring the gravity of the offence with the institution of judiciary by reposing a very high amount of confidence and trust. It requires a judge to apply his judicial mind after weighing the pros and cons of the crime committed in the golden scales to ensure that the justice is delivered. In a way, therefore, the legislature itself entrusts the judiciary to lay down parameters in the form of precedents which is oft-spoken as judge made law. This is true of many a legislations. Such law, even if made by the judiciary, would not infringe the doctrine of

separation of powers and is in conformity with the constitutional functions. This distinction between the two has been aptly expressed by Aileen Kavanagh in the following words:

> "In general, the ability and power of the courts to make new law is generally more limited than that of the legislators, since courts typically make law by filling in gaps in existing legal frameworks, extending existing doctrines incrementally on a case-by-case basis, adjusting them to changing circumstances, etc. Judicial lawmaking powers tend to be piecemeal and incremental and the courts must reason according to law, even when developing it. By contrast, legislators have the power to make radical, broad-ranging changes in the law, which are not based on existing legal norms...."

23. Seven Judges of this Court in **P. Ramachandra Rao v. State of Karnataka** (2002) 4 SCC 578 had, while interpreting Articles 21, 32, 141 and 142 of the Constitution, held that prescribing period at which criminal trial would terminate resulting in acquittal or discharge of the Accused, or making such directions applicable to all cases in present or in future, would amount to judicial law-making and cannot be done by judicial directives. It was observed that the courts can declare the law, interpret the law, remove obvious lacuna and fill up the gaps, but they cannot entrench upon the field of legislation. The courts can issue appropriate and binding directions for enforcing the laws, lay down time limits or chalk out a calendar for the proceeding to follow to redeem the injustice and for taking care of the rights violated in the given case or set of cases depending on the facts brought to the notice of the court, but cannot lay down and enact the provisions akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973. Drawing distinction between legislation as the source of law which consists of declaration of legal Rules by a competent authority and judicial decisions pronounced by the judges laying down principles of general application, reference was made to Salmond on Principles of Jurisprudence (12th Edition) which says:

> "We must distinguish law-making by legislators from law-making by the courts. Legislators can lay down Rules purely for the future and without reference to any actual dispute; the courts, insofar as they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of

the legislator."

24. Reference was also made to Professor S.P. Sathe's work on "Judicial Activism in India--Transgressing Borders and Enforcing Limits," evaluating the legitimacy of judicial activism, wherein it was observed:

> "Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court. (p. 242)
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> In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law ... through directions ... is not a legitimate judicial function. (p. 250)"

25. From the above, it is apparent that law-making within certain limits is a legitimate element of a judge's role, if not inevitable. A judge has to adjudicate and decide on the basis of legal provisions, which when indeterminate on a particular issue require elucidation and explanation. This requires a judge to interpret the provisions to decide the case and, in this process, he may take recourse and rely upon fundamental rights, including the right to life, but even then he does not legislate a law while interpreting such provisions. Such interpretation is called 'judge made law' but not legislation. Aileen Kavanagh, in explaining the aforesaid position, had observed:

> "...If there has not been a case in point and the judge has to decide on the basis of legal provisions which may be indeterminate on the issue, then the judge cannot decide the case without making new law...This is because Parliament has formulated the Act in broad terms, which inevitably require elaboration by the courts in order to apply

> it to the circumstances of each new case. Second, even in cases where judges apply existing law, they cannot avoid facing the question of whether to change and improve it.... Interpretation has an applicative and creative aspect."

26. Legislating or law-making involves a choice to prioritise certain political, moral and social values over the others from a wide range of choices that exist before the legislature. It is a balancing and integrating exercise to give expression/meaning to diverse and alternative values and blend it in a manner that it is representative of several viewpoints so that it garners support from other elected representatives to pass institutional muster and acceptance. Legislation, in the form of an enactment or laws, lays down broad and general principles. It is the source of law which the judges are called upon to apply. Judges, when they apply the law, are constrained by the Rules of language and by well identified background presumptions as to the manner in which the legislature intended the law to be read. Application of law by the judges is not synonymous with the enactment of law by the legislature. Judges have the power to spell out how precisely the statute would apply in a particular case. In this manner, they complete the law formulated by the legislature by applying it. This power of interpretation or the power of judicial review is exercised post the enactment of law, which is then made subject matter of interpretation or challenge before the courts.

27. Legislature, as an institution and a wing of the Government, is a microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity and accountability. Legislature uses in-built procedures carefully designed and adopted to bring a plenitude of representations and resources as they have access to information, skills, expertise and knowledge of the people working within the institution and outside in the form of executive. Process and method of legislation and judicial adjudication are entirely distinct. Judicial adjudication involves applying Rules of interpretation and law of precedents and notwithstanding deep understanding, knowledge and wisdom of an individual judge or the bench, it cannot be equated with law making in a democratic society by legislators given their wider and broader diverse polity. The Constitution states that legislature is supreme and has a final say in matters of legislation when it reflects on alternatives and choices with inputs from different quarters, with a check in the form of democratic accountability and a further check by the courts which exercise the power of judicial review. It is not for the

judges to seek to develop new all-embracing principles of law in a way that reflects the stance and opinion of the individual judges when the society/legislators as a whole are unclear and substantially divided on the relevant issues[[1993] AC 789 (p. 879-880)]. In **Bhim Singh v. Union of India** [(2010) 5 SCC 538], while observing that the Constitution does not strictly prohibit overlapping of functions as this is inevitable in the modern parliamentary democracy, the Constitution prohibits exercise of functions of another branch which results in wresting away of the regime of constitutional accountability. Only when accountability is preserved, there will be no violation of principle of separation of powers. Constitution not only requires and mandates that there should be right decisions that govern us, but equal care has to be taken that the right decisions are made by the right body and the institution. This is what gives legitimacy, be it a legislation, a policy decision or a court adjudication.

28. It is sometimes contended with force that unpopular and difficult decisions are more easily grasped and taken by the judges rather than by the other two wings. Indeed, such suggestions were indirectly made. This reasoning is predicated on the belief that the judges are not directly accountable to the electorate and, therefore, enjoy the relative freedom from questions of the moment, which enables them to take a detached, fair and just view. The position that judges are not elected and accountable is correct, but this would not justify an order by a court in the nature of judicial legislation for it will run afoul of the constitutional supremacy and invalidate and subvert the democratic process by which legislations are enacted. For the reasons stated above, this reasoning is constitutionally unacceptable and untenable.

30. It can be argued that there have been occasions when this Court has 'legislated' beyond what can be strictly construed as pure interpretation or judicial review but this has been in cases where the constitutional courts, on the legitimate path of interpreting fundamental rights, have acted benevolently with an object to infuse and ardently guard the rights of individuals so that no person or citizen is wronged, as has been observed in paragraph 46 of the judgment of Dipak Misra, CJ in ***Kalpana Mehta's*** case. Secondly, these directions were given subject to the legislature enacting the law and merely to fill the vacuum until the legislative takes upon it to legislate. These judgments were based upon gross violations of fundamental rights which were noticed and in view of the vacuum or absence of

law/guidelines. The directions were interim in nature and had to be applied till Parliament or the state legislature would enact and were a mere stop-gap arrangement. These guidelines and directions in some cases as in the case of **Vishaka** (supra) had continued for long till the enactment of 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' because the legislature (it would also include the executive) impliedly and tacitly had accepted the need for the said legislation even if made by the judiciary without enacting the law. Such law when enacted by Parliament or the state legislature, even if assumably contrary to the directions or guidelines issued by the Court, cannot be struck down by reason of the directions/guidelines; it can be struck down only if it violates the fundamental rights or the right to equality Under Article 14 of the Constitution. These are extraordinary cases where notwithstanding the institutional reasons and the division of power, this Court has laid down general rules/guidelines when there has been a clear, substantive and gross human rights violation, which significantly outweighed and dwarfed any legitimising concerns based upon separation of powers, lack of expertise and uncertainty of the consequences. Same is the position in cases of gross environmental degradation and pollution. However, a mere allegation of violation of human rights or a plea raising environmental concerns cannot be the 'bright-line' to hold that self-restraint must give way to judicial legislation. Where and when court directions should be issued are questions and issues involving constitutional dilemmas that mandate a larger debate and discussion (see observations of Frankfurter J. as quoted in ***Asif Hameed and Ors. v. State of Jammu & Kashmir and Ors.*** (1989 AIR 1899).

31. Such directions must be issued with great care and circumspection and certainly not when the matter is already pending consideration and debate with the executive or Parliament. This is not a case which requires Court's intervention to give a suggestion for need to frame a law as the matter is already pending active consideration. Any direction at this stage would be interpreted as judicial participation in the enactment of law. This Court in **Supreme Court Employees' Welfare Association v. Union of India and Anr.** [(1989) 4 SCC 187] had directed that no court can direct the legislature to enact a particular law. Similarly, when an executive authority exercises the legislative power by way of subordinate legislation pursuant to delegatory authority of the legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under delegated authority. Again, we would

quote from Dipak Misra, CJ in ***Kalpana Mehta's*** case, in which it was observed:

> "44. Recently, in **Census Commr. v. R. Krishnamurthy**, the Court, after referring to **Premium Granites v. State of T.N., M.P. Oil Extraction v. State of M.P., State of M.P. v. Narmada Bachao Andolan and State of Punjab v. Ram Lubhaya Bagga,** held: (R. Krishnamurthy case, SCC p. 809, para 33)
>
> > "33. From the aforesaid pronouncement of law, it is clear as noonday that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions (sic) but the court is not expected to sit as an appellate authority on an opinion.

32. In **V.K. Naswa v. Home Secretary, Union of India and Ors.** [(2012) 2 SCC 542], this Court in clear and categoric terms had observed that we do not issue directions to the legislature directly or indirectly and any such directions if issued would be improper. It is outside the power of judicial review to issue directions to the legislature to enact a law in a particular manner, for the Constitution does not permit the courts to direct and advice the executive in matters of policy. Parliament, as the legislature, exercises this power to enact a law and no outside authority can issue a particular piece of legislation. It is only in exceptional cases where there is a vacuum and non-existing position that the judiciary, in exercise of its constitutional power, steps in and provides a solution till the legislature comes forward to perform its role.

33. In **State of Himachal Pradesh and Ors. v. Satpal Saini** [(2017) 11 SCC 42], this Court had overturned the directions given by the High Court to amend provisions of the state enactment after what was described as the plight of large population of non-agriculturist himachalis. Reference was made to **Supreme Court Employees' Welfare Association** (supra) that no writ of mandamus can be issued to the legislature to enact a particular legislation nor can such direction be issued to the executive which exercises the powers to make Rules in the nature of subordinate legislation. Reference was also made to **V.K. Naswa** (supra) wherein several earlier judgments were

considered and it was held that the courts have a very limited role and, in its exercise, it is not open to make judicial legislation. Further, the courts do not have competence to issue directions to the legislature to enact a law in a particular manner. Reference was also made to the constitutional bench judgment in **Manoj Narula v. Union of India** [(2014) 9 SCC 1], in which a discordant note struck by two judges in **Gainda Ram and Ors. v. Municipal Corporation of Delhi and Ors.** [(2010) 10 SCC 715] was held to be contrary to the Constitution by observing that the decision whether or not Section 8 of the Representation of the People Act, 1951 should be amended is solely within the domain of Parliament and, therefore, no directions can be issued by this Court. It was observed:

> "6. The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review Under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures Under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court Under Article 226 (or this Court Under Article 32) on the ground that the law lacks in legislative competence or has been enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy. The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law -- as did the Himachal Pradesh High Court -- is a plain usurpation of a power entrusted to another arm of the State. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review Under Article 226 by issuing the above directions to the State Legislature to amend the law. The Government owes a collective responsibility to the State Legislature. The State Legislature is comprised of elected representatives. The law

enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject.

7. In ***Mallikarjuna Rao v. State of A.P.*** and in ***V.K. Sood v. Deptt. of Civil Aviation***, this Court held that the court Under Article 226 has no power to direct the executive to exercise its law-making power.

8. In ***State of H.P. v. Parent of a Student of Medical College***, this Court deprecated the practice of issuing directions to the legislature to enact a law: (SCC p. 174, para 4)

> "4. ... The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging...."

The same principle was followed in ***Asif Hameed v. State of J&K***, where this Court observed that: (SCC p. 374, para 19)

> "19. ... The Constitution does not permit the court to direct or advise the executive in matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or executive...."

In ***Union of India v. Assn. for Democratic Reforms***, this Court observed that: (SCC p. 309, para 19)

> "19. ... it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules."

xx xx xx

12. The judiciary is one amongst the three branches of the State; the other two being the executive and the legislature. Each of the three branches is co-equal. Each has specified and enumerated constitutional powers. The judiciary is assigned with the function of ensuring that

executive actions accord with the law and that laws and executive decisions accord with the Constitution. The courts do not frame policy or mandate that a particular policy should be followed. The duty to formulate policies is entrusted to the executive whose accountability is to the legislature and, through it, to the people. The peril of adopting an incorrect policy lies in democratic accountability to the people. This is the basis and rationale for holding that the court does not have the power or function to direct the executive to adopt a particular policy or the legislature to convert it into enacted law. It is wise to remind us of these limits and wiser still to enforce them without exception."

34. Even more direct on the facts of the present case would be judgment by one of us, (Mr. Justice Ranjan Gogoi, the Chief Justice), in Common Cause: A **Registered Society v. Union of India** [(2017) 7 SCC 158] to the following effect:

"18. There can be no manner of doubt that the parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the province of the Court to express any opinion on the exercise of the legislative prerogative in this regard. The framing of the Amendment Bill; reference of the same to the Parliamentary Standing Committee; the consideration thereof by the said Committee; the report prepared along with further steps that are required to be taken and the time-frame thereof are essential legislative functions which should not be ordinarily subjected to interference or intervention of the Court. The constitutional doctrine of separation of powers and the demarcation of the respective jurisdiction of the Executive, the Legislature and the Judiciary under the constitutional framework would lead the Court to the conclusion that the exercise of the amendment of the Act, which is presently underway, must be allowed to be completed without any intervention of the Court. Any other view and any interference, at this juncture, would negate the basic constitutional principle that the legislature is supreme in the sphere of law-making. Reading down a statute to make it workable in a situation where an exercise of amendment of the law is pending, will not be justified either. A perception, however strong, of the imminent need of the law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will not permit the Court to overstep its jurisdiction. Judicial discipline must caution the Court against such an approach."

> 35. When the matter is already pending consideration and is being examined for the purpose of legislation, it would not be appropriate for this Court to enforce its opinion, be it in the form of a direction or even a request, for it would clearly undermine and conflict with the role assigned to the judiciary under the Constitution. In this connection, we may refer to the observation of Lord Bingham in **Regina (Countryside Alliance) and Ors. v. Attorney General and Anr.** (2008) 1 AC 719, though made in a different context, to the following effect:
>
> > "...The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."
>
> 36. Confronted with the present situation, Mr. Colin Gonsalves, learned amicus curiae, had submitted that directions can be given to the executive to ratify the UN Convention. We do not think that any such direction can be issued for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention, a power which we do not 'possess', while exercising power of judicial review.
>
> 43. We have no hesitation in observing that notwithstanding the aforesaid directions in ***D.K. Basu*** (supra) and the principles of law laid down in ***Prithipal Singh and Ors. v. State of Punjab and Anr.*** [(2012) 1 SCC 10] and ***S. Nambi Narayanan*** (supra), this Court can, in an appropriate matter and on the basis of pleadings and factual matrix before it, issue appropriate guidelines/directions to elucidate, add and improve upon the directions issued in D.K. Basu (supra) and other cases when conditions stated in paragraph 27 supra are satisfied. However, this is not what is urged and prayed by the applicant. The contention of the Applicant is that this Court must direct the legislature, that is, Parliament, to enact a suitable standalone comprehensive legislation based on the UN Convention and this direction, if issued, would be in consonance with the Constitution of India. This prayer must be rejected in light of the aforesaid discussion."

104. In the light of the above, prayer (i) sought for by the petitioner cannot be granted. Contention of the petitioner that the State Government have disobeyed the rules framed by the Central Government, declining benefit to the Scheduled Castes and the Scheduled Tribes, and failed to make

provisions in the budget, and thereby, caused hardship to the people, cannot be countenanced, as the Central rules do not provide for reimbursement for appearance before the Commission.

105. In the counter affidavit, as well as the additional counter affidavit, the Registrar General, High Court of Kerala, respondent No.3, has given the details regarding creation of the Special Courts for trial of offences, the instructions periodically issued by the High Court, and the steps taken for monitoring, besides prescribing a time limit for the trial of cases, pending before such courts. Contention of the petitioner that cases are not given preference and taken up only at the end of the day, and that the lower courts do not implement Section 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, causing hardship, cannot be countenanced for the reason that the averments are not supported by any materials or details. That apart, with respect to speedy trial, appropriate instructions issued by the High Court, detailed in the foregoing paragraphs, are already in place and there is no need to issue any mandamus, as prayed for by the petitioner.

106. Government of Kerala - respondent No.1, in its counter affidavit, have also furnished the details of the High Power State Level Vigilance and Monitoring Committee and District Level Vigilance and Monitoring Committee, for reviewing the progress regarding trial of cases under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Taking note of

the above, we are of the view that there is no need to issue any writ of mandamus to the 1st respondent, to issue necessary directions to the District Magistrates, to coordinate the related work and to ensure that the facilities and payments provided are made to victims, witnesses, dependents, and attendants, as prescribed under Rules 11, 12 and 15 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, and other rules, within the time frame stipulated therein.

For the foregoing discussion and decisions, we are of the considered view that the prayers sought for by the petitioner in this public interest writ petition cannot be granted. Accordingly, the writ petition fails and is dismissed. No costs.

Sd/-
S.MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P. CHALY
JUDGE

krj

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1: CERTIFICATE TO PROVE THE CASTE OF THE PETITIONER.

EXHIBIT P2: PHOTOCOPIES OF 4 TRAVELLING ALLOWANCE BILLS ISSUED BY THE PETITIONER TO 2ND RESPONDENT.

Exhibits-P2(a): P2(b) TRUE COPIES OF 5TH AND 6TH TA BILLS

EXHIBIT P3: PHOTOCOPY OF REPRESENTATION DATED 2-2-15 ISSUED BY PETITIONER TO 1ST RESPONDENT

EXHIBIT P4: PHOTOCOPY OF ANNEXURE A RULE 11 TO 15 OF SC/ST ATROCITIES RULES

EXHIBIT P5: PHTOOCOPY OF REPRESENTATION DATED 4-5-15 ISSUED BY PETITIONER TO 1ST RESPONDENT

EXHIBIT P6: PHOTOCOPY OF STATE SC/ST COMMISSION ACT AND RULES

EXHIBIT P7: PHOTCOPY OF SECTION 14 OF ATROCITIES ACT

ANNEXURE-1: RELEVANT PAGE OF BUDGET PAPER FOR 2015-16.

RESPONDENTS' EXHIBITS:-

R3(A):- COPY OF THE G.O(RT) NO.699/90/HOME DATED 29TH JANUARY, 1990.

R3(B):- COPY OF THE G.O.(MS) NO.611/2020 HOME DATED 18TH FEBRUARY, 2020.

R3(C):- COPY OF THE G.O.(MS) NO.136/2013/HOME DATED 28TH MAY, 2013.

R3(D):- COPY OF THE G.O(MS) NO.85/2014/HOME DATED 5-5-2014.

R3(E):- COPY OF THE GO(MS) NO.100/2015/HOME DATED 22.05.2015.

R3(F):- COPY OF THE GO(MS) NO.04/2016/HOME DATED 5-1-2016.

R3(G):- COPY OF CIRCULAR NO.17/80 DATED 22-09-1980 ISSUED BY THE HIGH COURT OF KERALA.

R3(H):- COPY OF THE OFFICE MEMORANDUM NO.D1(B)-318/2007 DATED 18.1.2007 ISSUED BY THE HIGH COURT OF KERALA.

R3(I):- COPY OF OM NO.D1(B)-95287/2020/D3 DATED 29-6-2011 ISSUED BY THE HIGH COURT OF KERALA.

R3(J):- COPY OF OFFICE MEMORANDUM NO. D3-45286/2015 DATED 8-6-2015 ISSUED BY THE HIGH COURT OF KERALA.

R3(K):- COPY OF THE OFFICIAL MEMORANDUM NO.D3-42835/2016(3) DATED 5-10-2016 ISSUED BY THE HIGH COURT OF KERALA.

R3(L):- COPY OF THE GAZETTE NOTIFICATION GO(P) NO.60/2016/HOME DATED 26-2-2016.

R3(M):- COPY OF THE LETTER DATED 16-12-2015 SENT BY THE REGISTRAR (SUBORDINATE JUDICIARY) TO THE GOVERNMENT OF KERALA.

R3(N):- COPY OF THE LETTER DATED 28.03.2017 FROM THE REGISTRAR (SUBORDINATE JUDICIARY) TO THE ADDITIONAL CHIEF SECRETARY TO GOVERMENT.

//TRUE COPY//

P.A. TO C.J.