

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS.6249-6250 OF 2001

STATE OF WEST BENGAL & ORS. - APPELLANTS

VERSUS

THE COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS, WEST BENGAL & ORS. - RESPONDENTS

WITH

W.P. (CRL.) 24 OF 2008,
SLP (CRL.) NO.4096 OF 2007 AND
W.P. (C) NO.573 OF 2006

J U D G M E N T

D.K. JAIN, J.:

1.The issue which has been referred for the opinion of the Constitution Bench is whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can direct the Central Bureau of Investigation (for short "the CBI"), established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act"), to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government.

2. For the determination of the afore-stated important legal issue, it is unnecessary to dilate on the facts obtaining in individual cases in this bunch of civil appeals/special leave petitions/writ petitions and a brief reference to the facts in Civil Appeal Nos.6249-6250 of 2001, noticed in the referral order dated 8th November, 2006, would suffice. These are:

One Abdul Rahaman Mondal (hereinafter referred to as, "the complainant") along with a large number of workers of a political party had been staying in several camps of that party at Garbeta, District Midnapore, in the State of West Bengal. On 4th January, 2001, the complainant and few others decided to return to their homes from one such camp. When they reached the complainant's house, some miscreants, numbering 50-60, attacked them with firearms and other explosives, which resulted in a number of casualties. The complainant managed to escape from the place of occurrence, hid himself and witnessed the carnage. He lodged a written complaint with the Garbeta Police Station on 4th January, 2001 itself but the First Information Report ("the FIR" for short) for offences under Sections 148/149/448/436/364/302/201 of the Indian Penal Code, 1860 (for short "the IPC") read with Sections 25/27 of the Arms Act, 1959 and Section 9 (B) of the Explosives Act, 1884 was registered only on 5th January, 2001. On 8th

January, 2001, Director General of Police, West Bengal directed the C.I.D. to take over the investigations in the case. A writ petition under Article 226 of the Constitution was filed in the High Court of Judicature at Calcutta by the Committee for Protection of Democratic Rights, West Bengal, in public interest, *inter alia*, alleging that although in the said incident 11 persons had died on 4th January, 2001 and more than three months had elapsed since the incident had taken place yet except two persons, no other person named in the FIR, had been arrested; no serious attempt had been made to get the victims identified and so far the police had not been able to come to a definite conclusion whether missing persons were dead or alive. It was alleged that since the police administration in the State was under the influence of the ruling party which was trying to hide the incident to save its image, the investigations in the incident may be handed over to the CBI, an independent agency.

3. Upon consideration of the affidavit filed in opposition by the State Government, the High Court felt that in the background of the case it had strong reservations about the impartiality and fairness in the investigation by the State police because of the political fallout, therefore, no useful purpose would be served in continuing with the investigation by the State Investigating Agency.

Moreover, even if the investigation was conducted fairly and truthfully by the State police, it would still be viewed with suspicion because of the allegation that all the assailants were members of the ruling party. Having regard to all these circumstances, the High Court deemed it appropriate to hand over the investigation into the said incident to the CBI.

4. Aggrieved by the order passed by the High Court, the State of West Bengal filed a petition for special leave to appeal before this Court. On 3rd September, 2001 leave was granted. When the matter came up for hearing before a two-Judge Bench on 8th November, 2006, taking note of the contentions urged by learned counsel for the parties and the orders passed by this Court in *The Management of Advance Insurance Co. Ltd. Vs. Shri Gurudasmal & Ors.*¹ and *Kazi Lhendup Dorji Vs. Central Bureau of Investigation & Ors.*², the Bench was of the opinion that the question of law involved in the appeals was of great public importance and was coming before the courts frequently and, therefore, it was necessary that the issue be settled by a larger Bench. Accordingly, the Bench directed that the papers of the case be placed before the Hon'ble Chief Justice of India for passing appropriate orders for placing the matter before a larger Bench. When the matter came up before a three-Judge Bench,

¹ 1970 (1) SCC 633

² 1994 Supp (2) SCC 116

headed by the Hon'ble Chief Justice of India, on 29th August, 2008, this batch of cases was directed to be listed before a Constitution Bench. This is how these matters have been placed before us.

The Rival Contentions:

5. Shri K.K. Venugopal, learned senior counsel appearing on behalf of the State of West Bengal, referring to Entry 80 of List I of the Seventh Schedule to the Constitution of India; Entry 2 of List II of the said Schedule as also Sections 5 and 6 of the Special Police Act strenuously argued that from the said Constitutional and Statutory provisions it is evident that there is a complete restriction on Parliament's legislative power in enacting any law permitting the police of one State to investigate an offence committed in another State, without the consent of that State. It was urged that the Special Police Act enacted in exercise of the powers conferred under the Government of India Act, 1935, Entry 39 of List I (Federal Legislative List) of the Seventh Schedule, the field now occupied by Entry 80 of List I of the Seventh Schedule of the Constitution, replicates the prohibition of police of one State investigating an offence in another State without the consent of that State. It was submitted that Entry 2 of List II which confers exclusive jurisdiction on the State Legislature in regard to the police, the exclusive jurisdiction of a State Legislature

cannot be encroached upon without the consent of the concerned State being obtained.

6. Learned senior counsel submitted that the separation of powers between the three organs of the State, i.e. the Legislature, the Executive and the Judiciary would require each one of these organs to confine itself within the field entrusted to it by the Constitution and not to act in contravention or contrary to the letter and spirit of the Constitution.

7. Thus, the thrust of argument of the learned counsel was that both, the federal structure as well as the principles of separation of powers, being a part of the basic structure of the Constitution, it is neither permissible for the Central Government to encroach upon the legislative powers of a State in respect of the matters specified in List II of the Seventh Schedule nor can the superior courts of the land adjure such a jurisdiction which is otherwise prohibited under the Constitution. It was urged that if the Parliament were to pass a law which authorises the police of one State to investigate in another State without the consent of that State, such a law would be *pro tanto* invalid and, therefore, the rule of law would require the courts, which are subservient to the Constitution, to ensure that the federal structure embodied in the Constitution as a

basic principle, is not disturbed by permitting/directing the police force of a State to investigate an offence committed in another State without the consent of that State.

8. Relying heavily on the observations of the Constitution Bench in *Supreme Court Bar Association Vs. Union of India & Anr.*³ to the effect that Article [142](#), even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly, learned counsel contended that when even Article 142 of the Constitution cannot be used by this Court to act contrary to the express provisions of law, the High Court cannot issue any direction ignoring the Statutory and Constitutional provisions. Learned counsel went to the extent of arguing that even when the State police is not in a position to conduct an impartial investigation because of extraneous influences, the Court still cannot exercise executive power of directing the police force of another State to carry out investigations without the consent of that State. In such a situation, the matter is best left to the wisdom of the Parliament to enact an appropriate legislation to take care of the situation. According to the learned counsel, till that

³ (1998) 4 SCC 409

is done, even such an extreme situation would not justify the Court upsetting the federal or quasi-federal system created by the Constitution.

9.As regards the exercise of jurisdiction by a High Court under Article 226 of the Constitution, learned counsel submitted that apart from the fact that there is a significant difference between the power of this Court under Article 142 of the Constitution and the jurisdiction of the High Court under Article 226 of the Constitution because of territorial limitations under Article 226 (1) of the Constitution, a High Court is disentitled from issuing any direction to the authorities situated outside the territories over which it has jurisdiction. According to the learned counsel Clause (2) of Article 226 would have no application in a case, such as the present one, since the cause of action was complete at the time of filing the writ petition and the power under Clause (2) can be exercised only where there is a nexus between the cause of action which arises wholly or partly within the State and the authority which is situated outside the State. It was asserted that the CBI being a rank outsider, unconnected to the incident, which took place within the State of West Bengal, the investigation of which was being conducted by the jurisdictional local police in West Bengal, had no authority to take up the case for investigation.

10. Shri Goolam E. Vahanvati, learned Solicitor General of India, appearing on behalf of the Union of India, submitted that the entire approach of the State being based on an assumption that the alleged restriction on Parliament's legislative power under Entry 80 of List I of the Seventh Schedule to the Constitution and restriction on the power of the Central Government under Section 6 of the Special Police Act to issue a notification binds the constitutional courts i.e. the Supreme Court and the High Courts is fallacious, inasmuch as the restrictions on the Central Government and Parliament cannot be inferentially extended to be restrictions on the Constitutional Courts in exercise of their powers under Articles 32 and 226 of the Constitution as it is the obligation of the Superior Courts to protect the citizens and enforce their fundamental rights. Learned counsel vehemently argued that the stand of the appellants that the exercise of power by the Supreme Court or the High Courts to refer investigation to CBI directly without prior approval of the concerned State Government would violate the federal structure of the Constitution is again misconceived as it overlooks the basic fact that in a federal structure it is the duty of the courts to uphold the Constitutional values and to enforce the Constitutional limitations as an ultimate interpreter of the Constitution. In support

of the proposition, learned counsel placed reliance on the decisions of this Court in *State of Rajasthan & Ors. Vs. Union of India & Ors.*⁴, *S.R. Bommai & Ors. Vs. Union of India & Ors.*⁵ and *Kuldip Nayar & Ors. Vs. Union of India & Ors.*⁶.

11. Relying on the recent decision by a Bench of nine Judges of this Court in *I.R. Coelho (D) By LRs. Vs. State of Tamil Nadu*⁷, learned counsel submitted that the judicial review being itself the basic feature of the Constitution, no restriction can be placed even by inference and by principle of legislative competence on the powers of the Supreme Court and the High Courts with regard to the enforcement of fundamental rights and protection of the citizens of India. Learned counsel asserted that in exercise of powers either under Article 32 or 226 of the Constitution, the courts are merely discharging their duty of judicial review and are neither usurping any jurisdiction, nor overriding the doctrine of separation of powers. In support of the proposition that the jurisdiction conferred on the Supreme Court by Article 32 as also on the High Courts under Article 226 of the Constitution is an important and integral part of the basic structure of the Constitution, learned counsel placed reliance on the decisions of this Court in *Special*

⁴ (1977) 3 SCC 592

⁵ (1994) 3 SCC 1

⁶ (2006) 7 SCC 1

⁷ (2007) 2 SCC 1

Reference No.1 of 1964⁸, *Minerva Mills Ltd. & Ors. Vs. Union of India & Ors.*⁹, *Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. Vs. Union of India & Ors.*¹⁰, *Nilabati Behera Vs. State of Orissa & Ors.*¹¹ and *L. Chandra Kumar Vs. Union of India & Ors.*¹². Relying on the decision of this Court in *Dwarkanath, Hindu Undivided Family Vs. Income-Tax Officer, Special Circle, Kanpur & Anr.*¹³, learned counsel emphasised that the powers of the High Court under Article 226 are also wide and plenary in nature similar to that of the Supreme Court under Article 32 of the Constitution.

The Questions for Consideration:

12. It is manifest that in essence the objection of the appellant to the CBI's role in police investigation in a State without its consent, proceeds on the doctrine of distribution of legislative powers as between the Union and the State Legislatures particularly with reference to the three Lists in the Seventh Schedule of the Constitution and the distribution of powers between the said three organs of the State.

13. In order to appreciate the controversy, a brief reference to some of the provisions in the Constitution

⁸ [1965] 1 S.C.R. 413

⁹ (1980) 3 SCC 625

¹⁰ (1981) 1 SCC 568

¹¹ (1993) 2 SCC 746

¹² (1997) 3 SCC 261

¹³ [1965] 3 S.C.R. 536

would be necessary. The Constitution of India is divided into several parts, each part dealing in detail with different aspects of the social, economic, political and administrative set up. For the present case, we are mainly concerned with Part III of the Constitution, which enumerates the fundamental rights guaranteed by the State primarily to citizens and in some cases to every resident of India and Part XI thereof, which pertains to the relations between the Union and the States.

14. Bearing in mind the basis on which the correctness of the impugned direction is being questioned by the State of West Bengal, we shall first notice the scope and purport of Part XI of the Constitution. According to Article 1 of the Constitution, India is a 'Union' of States, which means a Federation of States. Every federal system requires division of powers between the Union and State Governments, which in our Constitution is effected by Part XI thereof. While Articles 245 to 255 deal with distribution of legislative powers, the distribution of administrative powers is dealt with in Articles 256 to 261. Under the Constitution, there is a three-fold distribution of legislative powers between the Union and the States, made by the three Lists in the Seventh Schedule of the Constitution. While Article 245 confers the legislative powers upon the Union and the States, Article 246 provides for distribution of legislative

powers between the Union and the States. Article 246, relevant for our purpose, reads as follows:

"246. Subject-matter of laws made by Parliament and by the Legislatures of States - (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

15.The Article deals with the distribution of legislative powers between the Union and the State Legislatures. List I or the 'Union List' enumerates the subjects over which the Union shall have exclusive powers of legislation in respect of 99 items or subjects, which include Defence etc.; List II or the 'State List' comprises of subjects, which include Public Order, Police etc., over which the State Legislature shall have exclusive power of legislation and List III gives

concurrent powers to the Union and the State Legislatures to legislate in respect of items mentioned therein. The Article postulates that Parliament shall have exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The *non obstante* clause in Article 246(1) contemplates the predominance or supremacy of the Union Legislature. This power is not encumbered by anything contained in clause (2) and (3) for these clauses themselves are expressly limited and made subject to the *non obstante* clause in Article 246(1). The State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III (Concurrent List). The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an Entry in List I and an Entry in List II, which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede *pro tanto* the exercise of power of the State Legislature. Both

Parliament and the State Legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246 (1) and the words "subject to clauses (1) and (2)" in Article 246 (3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an overlapping between Lists II and III, the latter shall prevail. Though, undoubtedly, the Constitution exhibits supremacy of Parliament over State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the Lists is not to confer powers; they merely demarcate the Legislative field. But the issue we are called upon to determine is that when the scheme of Constitution prohibits encroachment by the Union upon a matter which

exclusively falls within the domain of the State Legislature, like public order, police etc., can the third organ of the State viz. the Judiciary, direct the CBI, an agency established by the Union to do something in respect of a State subject, without the consent of the concerned State Government?

16. In order to adjudicate upon the issue at hand, it would be necessary to refer to some other relevant Constitutional and Statutory provisions as well.

17. As noted earlier, the Special Police Act was enacted by the Governor General in Council in exercise of the powers conferred by the Government of India Act, 1935 (Entry 39 of List I, Seventh Schedule). The said Entry reads as under:-

"Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit."

It is manifest that the Special Police Act was passed in terms of the said Entry imposing prohibition on the Federal Legislature to enact any law permitting the police of one State from investigating an offence committed in another State, without the consent of the

State. The said Entry was replaced by Entry 80 of List I of the Seventh Schedule to the Constitution of India.

The said entry reads thus:

"Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Govt. of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State."

Entry 2 of List II of the Constitution of India, which corresponds to Entry 2 List II of the Government of India Act, conferring exclusive jurisdiction to the States in matter relating to police reads as under:

Entry 2 List II:

"Police (including railway and village police) subject to the provisions of entry 2A of List I."

Entry 2A of List I:

"Development of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

18. From a bare reading of the afore-noted Constitutional provisions, it is manifest that by virtue of these entries, the legislative power of the Union to provide for the regular police force of one State to exercise power and jurisdiction in any area outside the State can only be exercised with the consent of the Government of

that particular State in which such area is situated, except the police force belonging to any State to exercise power and jurisdiction to railway areas outside that State.

19.As the preamble of the Special Police Act states, it was enacted with a view to constitute a special force in Delhi for the investigation of certain offences in the Union Territories and to make provisions for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of the members of the said force in regard to the investigation of the said offences. Sub-section (1) of Section 1 specifies the title of the Special Police Act and sub-section (2) speaks that the Special Police Act extends to the whole of India. Section 2 contains 3 sub-sections. Sub-section (1) empowers the Central Government to constitute a special police force to be called the Delhi Special Police Establishment for the investigation of offences notified under Section 3 in any Union Territory; sub-section (2) confers upon the members of the said police establishment in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers of that Union Territory have in connection with the investigation of offences committed therein and sub-section (3)

provides that any member of the said police establishment of or above the rank of Sub-Inspector be deemed to be an officer in charge of a police station. Under Section 3 of the Special Police Act, the Central Government is required to specify and notify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment, constituted under the Special Police Act, named "the CBI". Section 4 deals with the administrative control of the establishment and according to sub-section (2), the "superintendence" of the Establishment vests in the Central Government and the administration of the said establishment vests in an officer appointed in this behalf by the Central Government. Explaining the meaning of the word "Superintendence" in Section 4(1) and the scope of the authority of the Central Government in this context, in *Vineet Narain & Ors. Vs. Union of India & Anr.*¹⁴, a Bench of three Judges of this Court said:

"40....The word "superintendence" in Section 4(1) cannot be construed in a wider sense to permit supervision of the actual investigation of an offence by the CBI contrary to the manner provided by the statutory provisions. The broad proposition urged on behalf of the Union of India that it can issue any directive to the CBI to curtail or inhibit its jurisdiction to investigate an offence specified in the notification issued under Section 3 by a directive under Section 4(1) of the Act cannot be accepted. The jurisdiction of the CBI to investigate an offence is to be determined with reference to the notification issued under

¹⁴ (1998) 1 SCC 226

Section 3 and not by any separate order not having that character."

20. Section 5 of the Special Police Act empowers the Central Government to extend the powers and jurisdiction of the Special Police Establishment to any area, in a State, not being a Union Territory for the investigation of any offences or classes of offences specified in a notification under Section 3 and on such extension of jurisdiction, a member of the Establishment shall discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of the police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.

21. Section 6, the pivotal provision, reads as follows:-

"6. Consent of State Government to exercise of powers and jurisdiction. - Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area, without the consent of the Government of that State."

22. Thus, although Section 5(1) empowers the Central Government to extend the powers and jurisdiction of members of the Delhi Special Police Establishment to any area in a State, but Section 6 imposes a restriction on the power of the Central Government to extend the

jurisdiction of the said Establishment only with the consent of the State Government concerned.

23. Having noticed the scope and amplitude of Sections 5 and 6 of the Special Police Act, the question for consideration is whether the restriction imposed on the powers of the Central Government would apply mutatis mutandis to the Constitutional Courts as well. As stated above, the main thrust of the argument of Shri K.K. Venugopal, learned senior counsel, is that the course adopted by the High Court in directing the CBI to undertake investigation in the State of West Bengal without the consent of the State is incompatible with the federal structure as also the doctrine of separation of powers between the three organs of the State, embodied in the Constitution even when the High Court, on the material before it, was convinced that the State Police was dragging its feet in so far as investigation into the 4th January, 2001 carnage was concerned.

24. In so far as the first limb of the argument is concerned, it needs little emphasis that, except in the circumstances indicated above, in a federal structure, the Union is not permitted to encroach upon the legislative powers of a State in respect of the matters specified in List II of the Seventh Schedule. However, the second limb of the argument of the learned counsel in

regard to the applicability of the doctrine of separation of powers to the issue at hand, in our view, is clearly untenable. Apart from the fact that the question of Centre - State relationship is not an issue in the present case, a Constitutional Court being itself the custodian of the federal structure, the invocation of the federal structure doctrine is also misplaced.

25.In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. As observed in *Raja Ram Pal Vs. Hon'ble Speaker, Lok Sabha & Ors.*¹⁵, the Constitution is the *suprema lex* in this country. All organs of the State, including this Court and the High Courts, derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it. Highlighting the fundamental features of a federal Constitution, in *Special Reference No.1* (supra), the Constitution Bench (7-Judges) observed as follows:

"...the essential characteristic of federalism is 'the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other'. The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the Constitution is protected by the

¹⁵ (2007) 3 SCC 184

authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers."

26. It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. In fact, the importance of separation of powers in our system of governance was recognised in *Special Reference No.1* (supra), even before the basic structure doctrine came to be propounded in the celebrated case of *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala & Anr.*¹⁶, wherein while finding certain basic features of the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Later, similar view was echoed in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain & Anr.*¹⁷ and in a series of other cases on the point. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a Constitutional amendment. [See: *L. Chandra Kumar Vs. Union of India & Ors.* (supra)]. Besides, judicial review

¹⁶ (1973) 4 SCC 225

¹⁷ 1975 (Supp) SCC 1

is otherwise essential for resolving the disputes regarding the limits of Constitutional power and entering the Constitutional limitations as an ultimate interpreter of the Constitution. In *Special Reference No.1 of 1964* (supra), it was observed that whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judiciary in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. In *Smt. Indira Nehru Gandhi* (supra), Y.V. Chandrachud, J. (as His Lordship then was), drawing distinction between the American and Australian Constitution on the one hand and the Indian Constitution on the other, observed that the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. The learned judge also observed that in a federal system, which distributes powers between three coordinate branches of government, though not rigidly, disputes regarding the limits of Constitutional power have to be resolved by courts. Quoting George Whitecross Paton, an Australian Legal Scholar, that "the distinction between judicial and other powers may be vital to the maintenance of the Constitution itself", the learned judge said that the principle of separation of powers is a principle of

restraint which "has in it the percept, innate in the prudence of self-preservation (even if history has not repeatedly brought in home), that discretion is the better part of valour"¹⁸.

27. Recently in *State of U.P. & Ors. Vs. Jeet S. Bisht & Anr.*¹⁹, S.B. Sinha, J. dealt with the topic of separation of powers in the following terms:

"77. Separation of powers is a favourite topic for some of us. Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to say that the constitutional court's role in that behalf is non-existent. The judge-made law is now well recognised throughout the world. If one is to put the doctrine of separation of power to such a rigidity, it would not have been possible for any superior court of any country, whether developed or developing, to create new rights through interpretative process.

78. Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as *check and balance* over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

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¹⁸ *Julius Stone: Social Dimensions of Law and Justice*, (1966) p. 668.

¹⁹ (2007) 6 SCC 586

80. The modern view, which is today gathering momentum in constitutional courts the world over, is not only to demarcate the *realm of functioning* in a negative sense, but also to define the *minimum* content of the demarcated *realm of functioning*. Objective definition of function and role entails executing the same, which however may be subject to the plea of *financial constraint* but only in exceptional cases. In event of any such shortcoming, it is the essential duty of the other organ to advise and recommend the *needful* to substitute inaction. To this extent we must be prepared to frame answers to these difficult questions.

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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."

28. Having discussed the scope and width of the doctrine of separation of powers, the moot question for consideration in the present case is that when the fundamental rights, as enshrined in Part III of the Constitution, which include the right to equality (Article 14); the freedom of speech [Article 19(1)(a)] and the right not to be deprived of life and liberty except by procedure established by law (Article 21), as alleged in the instant case, are violated, can their

violation be immunised from judicial scrutiny on the touchstone of doctrine of separation of powers between the Legislature, Executive and the Judiciary. To put it differently, can the doctrine of separation of powers curtail the power of judicial review, conferred on the Constitutional Courts even in situations where the fundamental rights are sought to be abrogated or abridged on the ground that exercise of such power would impinge upon the said doctrine?

29.The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity. In *Kehar Singh & Anr. Vs. Union of India & Anr.*²⁰, speaking for the Constitution Bench, R.S. Pathak, C.J. held that in keeping with modern Constitutional practice, the Constitution of India is a constitutive document, fundamental to the governance of the country, whereby the people of India have provided a Constitutional polity consisting of certain primary organs, institutions and functionaries with the intention of working out, maintaining and operating a Constitutional order. On the aspect of interpretation of a Constitution, the following observations of Justice

²⁰ (1989) 1 SCC 204

Dickson of the Supreme Court of Canada in *Lawson A.W.*

*Hunter & Ors. Vs. Southam Inc.*²¹ are quite apposite:

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

30.In *M. Nagaraj & Ors. Vs. Union of India & Ors.*²²,

speaking for the Constitution Bench, S.H. Kapadia, J.

observed as under:

"The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."

[Emphasis supplied]

²¹ (1984) 2 S.C.R.145 (Can SC)

²² (2006) 8 SCC 212

31. Recently, in *I.R. Coelho* (supra), noticing the principles relevant for the interpretation of Constitutional provisions, Y.K. Sabharwal, C.J., speaking for the Bench of nine Judges of this Court, observed as follows:

"The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes."

Observing further that the protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism, the Court went on to say:

"Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained."

32.The Constitution of India expressly confers the power of judicial review on this Court and the High Courts under Article 32 and 226 respectively. Dr. B.R. Ambedkar described Article 32 as the very soul of the Constitution - the very heart of it - the most important Article. By now, it is well settled that the power of judicial review, vested in the Supreme Court and the High Courts under the said Articles of the Constitution, is an integral part and essential feature of the Constitution, constituting part of its basic structure. Therefore, ordinarily, the power of the High Court and this Court to test the Constitutional validity of legislations can never be ousted or even abridged. Moreover, Article 13 of the Constitution not only declares the pre-constitution laws as void to the extent to which they are inconsistent with the fundamental rights, it also prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Therefore, judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of our Constitution. It is manifest from the language of Article 245 of the Constitution that all legislative powers of the Parliament or the State Legislatures are expressly made subject to other provisions of the Constitution, which obviously would include the rights conferred in Part III of the

Constitution. Whether there is a contravention of any of the rights so conferred, is to be decided only by the Constitutional Courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs of or "in the nature of" *mandamus, certiorari, habeas corpus, prohibition* and *quo warranto* for this purpose. It is pertinent to note that Article 32 of the Constitution is also contained in Part III of the Constitution, which enumerates the fundamental rights and not alongside other Articles of the Constitution which define the general jurisdiction of the Supreme Court. Thus, being a fundamental right itself, it is the duty of this Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision. Moreover, it is also plain from the expression "in the nature of" employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issue of any of these writs are not fulfilled, this Court would not be constrained to fold its hands in despair and plead its

inability to help the citizen who has come before it for judicial redress. (per P.N. Bhagwati, J. in *Bandhua Mukti Morcha Vs. Union of India & Ors.*²³).

33.In this context, it would be profitable to make a reference to the decision of this Court in *Nilabati Behera* (supra). The Court concurred with the view expressed by this Court in *Khatri & Ors. (II) Vs. State of Bihar & Ors.*²⁴ and *Khatri & Ors. (IV) Vs. State of Bihar & Ors.*²⁵, wherein it was said that the Court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "to forge new tools and devise new remedies" for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the enquiry, needed to ascertain the necessary facts, for granting the relief, as may be available mode of redress, for enforcement of the guaranteed fundamental rights. In his concurring judgment, Dr. A.S. Anand, J. (as His Lordship then was), observed as under:

"35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the

²³ (1984) 3 SCC 161

²⁴ (1981) 1 SCC 627

²⁵ (1981) 2 SCC 493

Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law - through appropriate proceedings."

34. It may not be out of place to mention that in so far as this Court is concerned, apart from Articles 32 and 142 which empower this Court to issue such directions, as may be necessary for doing complete justice in any cause or matter, Article 144 of the Constitution also mandates all authorities, civil or judicial in the territory of India, to act in aid of the orders passed by this Court.

35. As regards the power of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 of the Constitution that there is a marked difference in the nature and purpose of the right conferred by these two Articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III

of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well, i.e. for enforcement of any legal right conferred by a Statute etc.

36.In *Tirupati Balaji Developers (P) Ltd. & Ors. Vs. State of Bihar & Ors.*²⁶, this Court had observed thus:

"8. Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court "subordinate" to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose while the original jurisdiction of Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts."

37.In *Dwarkanath's case* (supra), this Court had said that Article 226 of the Constitution is couched in comprehensive phraseology and it *ex facie* confers a wide power on the High Court to reach injustice wherever it is found. This Article enables the High Courts to mould the reliefs to meet the peculiar and extra-ordinary circumstances of the case. Therefore, what we have said above in regard to the exercise of jurisdiction by this

²⁶ (2004) 5 SCC 1

Court under Article 32, must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226 of the Constitution.

38.Article 21, one of the fundamental rights enshrined in Part III of the Constitution declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It is trite that the words "life" and "personal liberty" are used in the Article as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of person's animal existence. (See: *Kharak Singh Vs. State of U.P.*²⁷)

39.The paramountcy of the right to "life" and "personal liberty" was highlighted by the Constitution Bench in *Kehar Singh* (supra). It was observed thus:

"To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ."

²⁷ (1964) 1 SCR 332

40.In *Minerva Mills* (supra), Y.V. Chandrachud, C.J., speaking for the majority observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be drained of its life blood. Emphasising the significance of Articles 14, 19 and 21, the learned Chief Justice remarked:

"74. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

41.The approach in the interpretation of fundamental rights has again been highlighted in *M. Nagaraj* (supra), wherein this Court observed as under:

"This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer

fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In *Sakal Papers (P) Ltd. v. Union of India*²⁸, this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras*²⁹. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in *A.K. Gopalan* and held in its landmark judgment in *Maneka Gandhi v. Union of India*³⁰ that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further

²⁸ AIR 1962 SC 305

²⁹ AIR 1950 SC 27

³⁰ (1978) 1 SCC 248

held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees."

42. Thus, the opinion of this Court in *A.K. Gopalan* (supra) to the effect that a person could be deprived of his liberty by 'any' procedure established by law and it was not for the Court to go into the fairness of that procedure was perceived in *Maneka Gandhi* (supra) as a serious curtailment of liberty of an individual and it was held that the law which restricted an individual's freedom must also be right, just and fair and not arbitrary, fanciful or oppressive. This judgment was a significant step towards the development of law with respect to Article 21 of the Constitution, followed in a series of subsequent decisions. This Court went on to explore the true meaning of the word "Life" in Article 21 and finally opined that all those aspects of life, which make a person live with human dignity are included within the meaning of the word "Life".

43. Commenting on the scope of judicial review vis-à-vis constitutional sovereignty particularly with reference to

Articles 14, 19 and 21 of the Constitution, in *I.R.*

Coelho (supra), this Court said:

"There is a difference between Parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles [14](#), [19](#), [21](#) represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constitutional amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda Bharati case* (supra) has to apply."

While observing that the abrogation or abridgement of the fundamental rights under Chapter III of the Constitution have to be examined on broad interpretation so as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure, the Court explained the doctrine of separation of powers as follows: (SCC p.86-87, paras 64-66)

"...[i]t was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In *The Federalist* Nos. 47, 48, and 51, James Madison details how a separation of powers preserves liberty and prevents tyranny. In *The Federalist* No. 47, Madison discusses Montesquieu's treatment of the separation of powers in *Spirit of Laws*, (Book XI, Chapter 6). There Montesquieu writes,

"When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty ... Again, there is no liberty, if the judicial power be not separated from the legislative and executive."

Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of Government should not be entirely in the hands of another department of Government.

Alexander Hamilton in *The Federalist* No.78, remarks on the importance of the independence of the judiciary to preserve the separation of powers and the rights of the people:

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."
(434)

Montesquieu finds that tyranny pervades when there is no separation of powers:

"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

The Court further observed: (SCC pg.105, paras 129-130)

"Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

Realising that it is necessary to secure the enforcement of the Fundamental Rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure - rule of law, separation of power - the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure."

JUDGMENT

Conclusions:

44. Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:

- (i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative

of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is

essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

- (iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in

exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime

which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.

45. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of

civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

46. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be

flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.

47. In *Secretary, Minor Irrigation & Rural Engineering Services, U.P. & Ors. Vs. Sahngoo Ram Arya & Anr.*³¹, this Court had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a *prima facie* case calling for an investigation by the CBI or any other similar agency. We respectfully concur with these observations.

48. All the cases shall now be placed before the respective Benches for disposal in terms of this opinion.

.....CJI.
(K.G. BALAKRISHNAN)

.....J.
(R.V. RAVEENDRAN)

.....J.
(D.K. JAIN)

³¹ (2002) 5 SCC 521

.....J.
(P. SATHASIVAM)

.....J.
(J.M. PANCHAL)

NEW DELHI;
FEBRUARY 17, 2010.

