

GAHC010152272022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/250/2022

RUKUVOTU RINGA AND 2 ORS.
SUPERINTENDENT, SPECIAL HOME (SH) AND OBSERVATION HOME (OH),
PHERIMA, DEPARTMENT OF SOCIAL WELFARE, GOVERNMENT OF
NAGALAND, DIMAPUR.

2: VENEDULU VERO
RESEARCH OFFICER
DIRECTORATE OF SOCIAL WELFARE
GOVERNMENT OF NAGALAND
KOHIMA

3: KELEVINU NALEO
CHIEF INSTRUCTOR
ANGANWADI WORKERS TRAINING CENTRE
DIPHUPAR
DEPARTMENT OF SOCIAL WELFARE
GOVERNMENT OF NAGALAND
DIMAPUR

VERSUS

MEYALEMLA AND 25 ORS.
SR. SUPERVISOR, CDPO OFFICE, DIMAPUR

2: UNICE SEMA
SR. SUPERVISOR
CDPO OFFICE
DANSIRIPAR
DIMAPUR

3: REYIVOLU KEZO
SR. SUPERVISOR
CDPO TRIBAL
KOHIMA

4:ZUBEMO JAMI
SR. SUPERVISOR
DWO OFFICE
WOKHA

5:ALONGLA AONOK
SR. SUPERVISOR
SPECIAL HOME AND OBSERVATION HOME
PHERIMA DIMAPUR

6:KHONBENI JAMI
SR. SUPERVISOR
CDPO OFFICE
DIMAPUR

7:LIMASANGLA
SR. SUPERVISOR
AWTC
DIPHUPAR
DIMAPUR

8:SUNEPWAPANG
SR. SUPERVISOR
DWO OFFICE
MOKOKCHUNG

9:M. LAKIUMONG
SR. SUPERVISOR
CDPO OFFICE
SHAMATOR

10:R. LANUAKUM WALLING
SR. SUPERVISOR
CDPO OFFICE
CHANGTONGYA
MOKOKCHUNG

11:MEYANGANGLA PONGNER
SR. SUPERVISOR
CDPO OFFICE
CHUKITONG
WOKHA

12:L. NIKUTO CHISHI
SR. SUPERVISOR
CDPO OFFICE
DIMAPUR

13:ZACHAMO NGULLIE
SR. SUPERVISOR
CDPO OFFICE
JAKHAMA
KOHIMA

14:AMILO YANTHAN
SR. SUPERVISOR
CDPO OFFICE
SANIS
WOKHA

15:LONGSHITHUNG
SR. SUPERVISOR
CDPO OFFICE
WOZHURO

16:ATSOLE KHALO
SR. SUPERVISOR
CDPO OFFICE
ONGPANGKING

17:ERENBENI KIKON
SR. SUPERVISOR
CDPO OFFICE
WOKHA

18:BENDANGTEMSU
SR. SUPERVISOR
CDPO OFFICE
WAKCHING
MON

19:A. NZANBEMO JAMI
SR. SUPERVISOR
CDPO OFFICE
CHUKITONG
WOKHA

20:VISHIHO AYE
SR. SUPERVISOR
CDPO OFFICE
SATAKA
ZUNHEBOTO

21:EMLITENZUK
SR. SUPERVISOR

CDPO OFFICE
MANGKOLEMBA
MOKOKCHUNG

22:OBED MAGH
SR. SUPERVISOR
CDPO OFFICE
TSEMINYU
KOHIMA

23:CHUBAMEREN
SR. SUPERVISOR
CDPO OFFICE
LONGCHEM
MOKOKCHUNG

24:STATE OF NAGALAND
REPRESENTED BY THE CHIEF SECRETARY
GOVERNMENT OF NAGALAND
KOHIMA

25:THE SECRETARY
DEPARTMENT OF SOCIAL WELFARE
KOHIMA
NAGALAND

26:THE DIRECTOR
DIRECTORATE OF SOCIAL WELFARE
KOHIMA
NAGALAN

For the Appellant(s) : Mr. R. Iralu, Sr. Advocate
: Mr. L. Iralu, Sr. Advocate

For the Respondent(s) : Mr. K.N. Balgopal, Advocate General, Nagaland
: Mr. M. Kechie, Advocate
: Mr. M. K. Choudhury, Sr. Advocate Amicus Curiae

Date of Hearing : **02.05.2024, 01.08.2024**

Date of Judgment : **13.08.2024**

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

(Devashis Baruah, J.)

Heard Mr. K. N. Balagopal, the learned Advocate General, Nagaland assisted by Ms. M. Kechi, the learned Additional Advocate General, Nagaland. We have also heard Mr. R. Iralu, the learned Senior counsel assisted by Mr. L. Iralu, the learned counsel appearing on behalf of the Appellants and Mr. M. K. Choudhury, the learned Senior counsel assisted by Mr. M. Sarma, the learned counsel who was appointed as Amicus Curiae by this Court vide an order dated 01.02.2024.

REFERENCE :

2. The Division Bench of this Court vide a judgment and order dated 26.06.2020 in Writ Appeal No. 3(K)/2020 deemed it appropriate that the issue as to whether Sub-Article (3) of Article 226 of the Constitution is directory or mandatory be referred to a larger Bench taking into account that the said learned Division Bench had opined that Article 226(3) of the Constitution of India is directory in nature whereas the Co-ordinate Benches of similar strength of our High Court in the cases of ***South East Bus Association and Others Vs. The State of Assam reported in (1981) 1 GLR 305; R. D. Srivastava Vs. Suren Panging reported in 2003 (1) GLT 346 and Thokchom Anita Devi & Others Vs. Tayenjam Herojit & Others reported in 2012 STPL 21444 Gauhati*** had decided that Article 226(3) of the Constitution of India is mandatory in nature.

SUBMISSIONS MADE BY LEARNED ADVOCATE GENERAL, NAGALAND:

3. Mr. K. N. Balagopal, the learned Advocate General of the State of Nagaland submitted that the power of judicial review which is conferred upon the High Courts is an essential feature that forms a part of the basic structure of the Constitution. He therefore submitted that this power which has been conferred cannot be limited by a procedural provision as encapsulated in Article 226(3) of the Constitution. The learned Advocate General further submitted that it is a well recognized principle of law that no one can be made to suffer on account of any mistake or fault of the Court. Developing the said principle, the learned Advocate General submitted that even delay on the part of the Court in deciding the proceedings or an application filed for vacation of an interim order would be detrimental to any of the parties to the litigation, much less to the party in whose favour an interim order is passed if the provision of Article 226(3) of the Constitution is not held to be directory. He therefore submitted that when grant of a stay order is passed by a Speaking Order as a necessary corollary, a stay order once granted cannot be vacated otherwise than by a Speaking Order, more so when its extension also requires reasons to be recorded. Referring to Sub-Article (3) of Article 226 of the Constitution, the learned Advocate General submitted that the automatic vacation as mandated under Sub-Article (3) of an interim order so passed would be in violation of the principles of natural justice which is a facet of Article 14 of the Constitution. The learned Advocate General further referred to the judgment of the Constitution Bench of the Supreme Court in the case of ***High Court Bar Association Allahabad Vs. State of Uttar Pradesh and Others*** reported in (2024) 6 SCC 267, wherein the Constitution Bench of the Supreme Court categorically observed that the

elementary principles of natural justice mandates that an order of vacating interim relief or modification of the interim relief is passed only after hearing all affected parties. The learned Advocate General further submitted that an order of vacating interim relief without hearing the beneficiary of the order is against the basic tenets of justice. He therefore submitted that as application of mind is an essential part of any decision making process and if an order of interim stay is vacated only on the ground of lapse of time when the litigant is not responsible for the delay, it would be in violation to the basic Rule of Law which is also an essential feature of the basic structure of the Constitution.

4. **SUBMISSIONS MADE BY THE LEARNED AMICUS CURIAE:**

(A) Mr. M. K. Choudhury, the learned Amicus Curiae, while making his submissions had led us through various amendments of the Constitution insofar as Article 226 of the Constitution. Referring to the 42nd Amendment of the Constitution, which was brought by the Constitution (Forty-second Amendment) Act, 1976, the learned Amicus Curiae submitted that post the 42nd Amendment, the High Courts' power was limited to redressal of "any injury of substantial nature" or where the illegality have resulted in "substantial failure of justice". In addition to that, Sub-Article (3) of Article 226 of the Constitution was inserted whereby a Constitutional bar was imposed to entertain a writ petition if there was an alternative remedy provided or under any other law for the time being in force. Vide the said Amendment, Sub-Article (4) was also inserted whereby the power to pass any interim order was restricted and was made subject to copies of such petitions and all documents in support of the plea for such interim order

being furnished to the party against whom such petition is filed or proposed to be filed and opportunity is given to such party/parties to be heard in the matter. In terms of Sub-Article (5), though the High Court had the power to dispense with the requirement of Clauses (a) and (b) of Sub-Article (4) and make an interim order as an exceptional measure if it was satisfied for reasons to be recorded in writing that it was necessary to do so for preventing any loss being caused to the petitioner which cannot be adequately compensated with money but it was made clear by Sub-Article (5) that if such interim order if not vacated earlier, would cease to have effect on the expiry of a period of 14 days from the date on which it is made unless the requirement has been complied with before the expiry of that period and the High Court had continued the operation of the interim order. Under Sub-Article (6) of Article 226 of the Constitution, a complete bar was created against passing of interim orders in cases where such order would have the effect of (i) delaying any inquiry into the matter of public importance; or (ii) any investigation or inquiry into an offence punishable with imprisonment; or (iii) any action for execution of any work or project of public utility; or (iv) the acquisition of any property for execution of public utility projects. In addition to that, by way of the 42nd Amendment, Article 131A and 226A were inserted whereby the validity of the Central Law could be challenged only before the Supreme Court.

(B) The learned Amicus Curiae further submitted that thereupon the Constitution (Forty-third Amendment) Act, 1977 was enacted whereby Sub-Article (1) of Article 226 of the Constitution was made subject to Article 131A and Article 226A of the Constitution. The learned Amicus Curiae further submitted that in the year 1978, the Constitution (Forty-fourth Amendment)

Act, 1978 was enacted whereby Sub-Articles (3), (4), (5) and (6) were deleted and the present Sub-Article (3) was inserted. Sub-Article (7) of Article 226 of the Constitution was re-numbered as Sub-Article (4) of Article 226 of the Constitution. The learned Amicus Curiae further referred to various judgments passed by the various High Courts wherein it has been held that the provisions of Article 226 of the Constitution is mandatory in nature. He further referred to the judgment of the Madras High Court in the case of ***T. Gnanasambanthan (Dr.) Vs. Board of Governors reported in (2014) 3 Mad LJ:1*** and the judgment of Division Bench of this Court whereby the instant reference had been made wherein it has been held that Article 226(3) of the Constitution is directory in nature.

(C) The learned Amicus Curiae further in support of the judgments wherein it was opined that the Article 226(3) of the Constitution of India to be directory in nature referred to the judgment of the Supreme Court in the case of ***Indore Development Authority Vs. Manoharlal and Others reported in (2020) 8 SCC 129*** and ***State of Haryana and others Vs. Raghubir Dayal reported in (1995) 1 SCC 133*** wherein the Supreme Court dealt with the proposition as to when the word "shall" shall be read as "may".

(D) The learned Amicus Curiae further submitted that it is well settled by the pronouncements of various judgments of the Supreme Court including the judgment of the Nine Judges' Bench of the Supreme Court in the case of ***L. Chandra Kumar Vs. Union of India and Others reported in (1997) 3 SCC 261*** that the power of judicial review over legislative action vested in the High Court under Article 226 of the Constitution and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the

Constitution constituting part of its basic structure. Therefore, the learned Amicus Curiae submitted that the affect of automatic vacation of an interim order by virtue of Article 226(3) of the Constitution amounts to interference with the judicial proceedings and modification of a judicial order by a deeming fiction is contrary to the principles of independence of the judiciary as it interferes with the judicial order passed by a Constitutional Court. He further submitted that a judicial order can be modified or vacated only by the same Court or by a higher Court while exercising Appellate jurisdiction. Adding further, he submitted that when an interim order is passed by the High Court after due application of mind, the said cannot be vacated except by application of judicial mind. It is a submission of the learned Amicus Curiae that the judicial discretion cannot be interfered by a legislation.

(E) The learned Amicus Curiae further submitted that the doctrine of *actus curiae neminem gravabit* have been consistently accepted by various judicial pronouncements. The said doctrine stipulates that no one should suffer from the act of the Court. He therefore submits that if Article 226(3) is held to be mandatory, it would have the effect of depriving the petitioner of the benefit of a judicial order passed without any fault on the part of the petitioner. He submitted that the Respondent in a given case can remain contented by filing an application for stay vacating without making any effort to get it listed or decided within a period of two weeks and in some cases, due to heavy pendency of the Court docket, the Court may not be able to take it up and pass orders on the application of vacating the same and the petitioner would suffer consequences due to inability of the Court to take up the matter. In that regard, he has referred to the judgment of the Supreme Court in the case of ***Indira Nehru Gandhi Vs. Shri Raj Narain*** reported in

(1975) Supp. SCC 1 and South Eastern Coalfields Ltd. Vs. State of Madhya Pradesh and Others reported in (2003) 8 SCC 648.

(F) The learned Amicus Curiae further submitted that in all cases where a limitation is provided, it is only for a litigant. There can be no mandatory limitations provided for disposal of cases by the Court especially in view of the huge pendency of the cases in all Courts across the Board. The learned Amicus Curiae further referred to the judgments of the Supreme Court in the case of ***Abdul Rehman Antulay and Others Vs. R. S. Nayak and Another*** reported in ***(1992) 1 SCC 225***; ***P. Ramachandra Rao Vs. State of Karnataka*** reported in ***(2002) 4 SCC 578*** as well as also the judgment in the case of ***High Court Bar association, Allahabad (supra)*** wherein the Supreme Court had categorically observed that there should be no time limit prescribed for disposal of cases. He further submitted that the analogy which the Constitution Bench of the Supreme Court applied in the case of ***High Court Bar Association Allahabad (supra)*** would also be applicable while interpreting the provisions of Article 226(3) of the Constitution.

ANALYSIS AND DETERMINATION:

5. We have heard the learned Senior counsels who have made their respective submissions as referred to hereinabove. At the outset, it is relevant herein to mention that the provision of Article 226(3) of the Constitution is not challenged before us. In the instant Reference proceedings, we are to decide as to whether the provisions of Article 226(3) of the Constitution of India is directory or mandatory in nature.

6. To analyze and determine the Reference so made to us, we feel it very

pertinent to deal first with the concept of a Constitution and as to whether the same can be treated at par with a legislative instrument like a statute. **Hans Kelsen**, a renowned legal and political philosopher, perceived a Constitution as an idea of highest order that determines the whole legal and political order of the country - a template for legal distribution of political power amongst its constituent units. According to him, the Constitution determines the genesis of the statutes, determination of the organs, and the procedure of legislation. The idea behind his thought was that the basic rule of the Constitution forms the foundation of all orders of the State and is thereby required to be as firm and unchangeable as possible, invariably leads to the view that it is necessary to differentiate between constitutional norms and statutory norms.

7. The Constitution Bench of the Supreme Court in the case of **Chief justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others reported in (1979) 2 SCC 34** observed that our Constitution is a living, integrated organism having a soul and consciousness of its own. The pulse beats emanating from the spinal cord of its basic framework can be felt all over its body, even in the extremities of its limbs.

8. His Lordship J. B. Pardiwala J. in his concurring opinion rendered in the case of **Janhit Abhiyan Vs. Union of India reported in (2023) 5 SCC 1** observed that the framing of a Constitution of a State is a capital political fact and not a juridical act. No Court or other authority in the State under the Constitution can therefore, determine the primordial question whether the Constitution has been lawfully framed according to any standards. Even if the Constitution is framed under violence, rebellion or coercion, it stands

outside the whole area of law, jurisprudence and justiciability. The basic principle of constitutional jurisprudence is that the Constitution is the Supreme Law of the land, even supreme above the law, and itself governing all other laws. However, His Lordship also observed that this principle is not applicable to an amendment of a Constitution inasmuch as the Constitution can be amended only in accordance with the provisions thereof by the authority empowered to do so in accordance with the procedure laid down therein. The validity of a constitutional amendment can, therefore be challenged on the grounds that it is ultra vires.

9. In ***Kihoto Hollohan Vs. Zachillhu and Others*** reported in **(1992) Supp. 2 SCC 651**, the Constitution Bench of the Supreme Court observed that a constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to the changing circumstances - a distinction which differentiates a statute from a charter under which all statutes are made.

10. In the case of ***M. Nagaraj and Others Vs. Union of India and Others*** reported in **(2006) 8 SCC 212**, the Constitution Bench of the Supreme Court observed that the Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out the principle for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs.

11. Now, as we are dealing with a provision which was inserted by virtue of an amendment to Constitution, we find it apposite to take notice of the power of amendment to the Constitution. The power to amend the Constitution is conferred upon the Parliament under Article 368 of the

Constitution. The doctrine of basic structure as is accepted today was not as such discussed in the Constituent Assembly while formulating the enabling provisions for amending the Constitution. At the initial stages of the Constitutional Law development of our country, the proposition of challenging an amendment to the Constitution, as mooted in ***Shankari Prasad Singh Deo Vs. Union of India*** reported in (1951) SCC 966 and ***Sajjan Singh Vs. State of Rajasthan*** reported in (1965) 1 SCR 933 did not meet with the approval of the Supreme Court. However, the first reference to the idea of basic feature was made by His Lordship Mudholkar, J. (as His Lordship then was) in the case of ***Sajjan Singh (supra)***. The idea that certain parts of the Constitution were unamenable was accepted by 11 Judge's Bench in ***Golak Nath and Others Vs. State of Punjab*** reported in AIR 1967 SC 1643. However, the doctrine of the basic structure was constitutionalized in the case of ***Kesavananda Bharati (supra)***. In the seminal opinion rendered by His Lordship H. R. Khanna J. (as His Lordship then was) in the case of ***Kesavananda Bharati (supra)***, it was observed at paragraph No.1426 that the word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alternations. His Lordship further observed that the words "amendment of the Constitution" with all their wide sweep and amplitude, cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. In other words, His Lordship was of the view that subject to the retention of the basic structure or the framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various Articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate

to essential features. He was also of the view that the right to property does not pertain to basic structure or framework of the Constitution.

12. In the Book titled as "Our Constitution, Defaced and Defiled", Mr. N. Palkhivala had summed up the effect of the majority judgment in ***Kesavananda Bharati (supra)*** with the following words.

"Parliament cannot, in the exercise of its amending power, alter the basic structure or framework of the Constitution. For instance, it cannot abolish the sovereignty of India or the free democratic character of the republic; nor can it impair the integrity and unity of India or abolish the States. (The principle that the basic structure or framework of the Constitution cannot be altered gives a wider scope to the amending power than the principle that none of the essential features of the Constitution can be damaged or destroyed.) The Court's jurisdiction cannot be ousted as is sought to be done by Article 31-C. If the Court's jurisdiction were ousted, any of the States could pass laws which might lead to the dismemberment of India."

13. The doctrine of basic structure so expounded in ***Kesavananda Bharati (supra)*** have received elaborate interpretation from time to time from the Supreme Court. In the case of ***Indira Nehru Gandhi (supra)***, the Constitution Bench expanding the scope of basic structure held that there were four unammendable features which form part of the basic structure, namely, (i) India is a Sovereign Democratic Republic. (ii) equality of status and opportunity shall be secured to all its citizens, (iii) the State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and (iv) the nation shall be governed by a Government of laws and not of men. In addition to that, the Constitution Bench in the case of ***Indira Nehru Gandhi (supra)*** also noted that the principle of free and fair elections is an

essential postulate of democracy and which in turn is a part of the basic structure of the Constitution.

14. In the case of ***Minerva Mills (supra)***, the Constitution Bench while discussing the standard to be applied as to what qualifies as the basic structure, opined that the features or elements which constitutes the basic structure or the framework of the Constitution, or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution. It was also observed by the Constitution Bench that in every case where the question arises as to whether a particular feature of a Constitution is a part of its basic structure, it would have to be determined on the consideration of various factors, such as the place of a particular feature in the scheme of the Constitution, its object and purpose, the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance. It was also observed that the fundamental rights occupy a unique place in the lives of a civilized societies and have been variously described as "transcendental", "inalienable" and "primordial" and they constitute the ark of the Constitution.

15. In the case of ***S. R. Bommai and Others Vs. Union of India and Others reported in (1994) 3 SCC 1***, the Constitution Bench of the Supreme Court expanding the list of basic features held that secularism was an essential feature of the Constitution and part of its basic structure.

16. In the case of ***M. Nagaraj (supra)***, the Constitution Bench observed that while dealing with the issue of basic structure, the axioms like secularism, democracy, reasonableness, social justice, etc. are overarching

principles, which provide linking factors for the principles of fundamental rights like Article 14, 19 and 21 of the Constitution. These principles are beyond the amending power of the Parliament. It was observed that these principles pervade all enacted laws and they stand in the pinnacle of the hierarchy of constitutional values.

17. The Nine Judge's Constitution Bench of the Supreme Court in the case of ***I. R. Coelho Vs. State of Tamil Nadu*** reported in **(2007) 2 SCC 1** had observed that the fundamental rights enshrined in Part-III were added to the Constitution as a check on the State's power, particularly the legislative power. It was observed that by virtue of Article 13, it provided that the State cannot make any laws that are contrary to Part-III. The framers of the Constitution have built a wall around the fundamental rights which have to remain forever, limiting the ability of majority to intrude upon them. That wall is the basic structure doctrine.

18. A Nine Judges' Bench of the Supreme Court in the case of ***L. Chandra Kumar (supra)*** had the occasion to examine the nature and the extent of jurisdiction of the High Courts under Article 226/227 of the Constitution. The said Constitution Bench which was dealing with Clause 2(d) of Article 323A and Clause 3(d) of Article 323B inserted by the Constitution (Forty-second Amendment) Act, 1976 held that the said provisions were invalid as it excluded the jurisdiction of the High Court. It was categorically observed that the jurisdiction conferred upon the High Court under Article 226/227 of the Constitution as well as upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution.

19. The above analysis so made makes it clear that the Constitution is the

grundnorm of our nation. The Constitution as was originally framed cannot be questioned by any Court or Authority in the State as to whether the Constitution had been lawfully framed according to any standards. The basic principle of the Constitutional jurisprudence is that the Constitution is supreme above the law and itself governing all other laws. However, the said principles do not apply insofar as the amendments to the Constitution are concerned inasmuch as the validity of an amendment can very well be challenged on the ground that it is ultra vires. At this stage, we may add that our Constitution is a living document and taking into account the challenging conditions and purposes so that a Constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges, the requirement for amending the Constitution emerges. As held by the Full Bench of the Supreme Court in the case of ***Kesavananda Bharati (supra)***, the power to amend the Constitution under Article 368 of the Constitution is very wide. The Parliament has all powers to amend the Constitution except to abrogate the Constitution or to change the basic structure of the Constitution. The analysis of the above judgments rendered by the various Constitution Benches of the Supreme Court and interpretation given as to what would constitute the basic structure, show that an amendment to the Constitution can only be challenged on the ground that it infringes upon the essential features forming the basic structure of the Constitution. At the cost of repetition, we find it relevant to yet again to remind ourselves that the instant proceedings is only a reference made to decide as to whether the provisions of Article 226(3) of the Constitution is directory or mandatory and it is not a proceedings wherein the said provision i.e. Article 226(3) of the Constitution is challenged on the ground of being

ultra vires the Constitution as it infringes upon the basic structure of the Constitution.

20. Be that as it may, we find it pertinent to deal with another aspect of the matter which touches upon the scope of judicial review vis-à-vis the plenary powers of the Parliament to amend the Constitution. We feel that this aspect would further throw some light as to whether a Constitutional provision can be declared to be directory and if declared so, what would be the impact upon the said provision.

21. In the case of ***Janhit Abhiyan (supra)***, the majority opinion of the Constitution Bench of the Supreme Court was rendered by His Lordship Dinesh Maheshwari, J. (as His Lordship then was). His Lordship observed at paragraph No.78 of the said judgment that the reason for minimal interference by the Court in Constitutional Amendment is not far too seek, inasmuch as, in our Constitutional set up of Parliamentary Democracy, even when the power of judicial review is an essential feature and thereby an immutable part of basic structure of the Constitution, the power to amend the Constitution vested in the Parliament is in terms with Article 368 of the Constitution which is equally an inherent part of the basic structure of the Constitution. His Lordship further opined that both these powers of amending the Constitution by the Parliament and judicial review by the Constitutional Courts are subject to their own limitations. The interplay of amending power of the Parliament and the judicial review by the Constitutional Courts over such exercising of amending power may appear a little bit complex, but ultimately leads towards strengthening the Constitutional value of separation of powers. It was further observed that

this synergy of separation is the strength of our Constitution. Taking into account, the exposition of law in the case of ***Kesavananda Bharati (supra)***, wherein it was held that the amending power can be used by the Parliament to amend the Constitution in order to fulfill the obligation imposed on the State, subject, of course, to the defined limits of not damaging the basic structure of the Constitution, His Lordship in his opinion at paragraph No.79, summarized the interlacing of the amending powers of the Parliament and the operation of the doctrine of basic structure. We find it apposite to reproduce paragraph No.79 and its sub-paragraphs herein under:

“79. A few material aspects related with this interlacing of the amending powers of Parliament and operation of the doctrine of basic structure could be usefully condensed as follows:

79.1. *The power to amend the Constitution essentially vests with Parliament and when a high threshold and other procedural safeguards are provided in Article 368, it would not be correct to assume that every amendment to the Constitution could be challenged by theoretical reference to the basic structure doctrine.*

79.2. *As expounded in Kesavananda, the amending power can even be used by Parliament to reshape the Constitution in order to fulfil the obligation imposed on the State, subject, of course, to the defined limits of not damaging the basic structure of the Constitution.*

79.3. *Again, as put in Kesavananda, judicial review of the constitutional amendment is a matter of great circumspection for the judiciary where the Courts cannot be oblivious of the practical needs of the Government and door has to be left open even for “trial and error”, subject, again, to the limitations of not damaging the identity of the Constitution.*

79.4. *The expressions "basic features" and "basic structure" convey different meanings, even though many times they have been used interchangeably. It could reasonably be said that the basic structure of the Constitution is the sum total of its essential features.*

79.5. *As to when abrogation of any particular essential feature would lead to damaging the basic structure of the Constitution would depend upon the nature of that feature as also the nature of amendment.*

79.6. *As regards Part III of the Constitution, every case of amendment of the fundamental rights may not necessarily result in damaging or destroying the basic structure. The issue would always be as to whether what is sought to be withdrawn or altered is an inviolable part of the basic structure.*

79.7. *Mere violation of the rule of equality does not violate the basic structure of the Constitution unless the violation is shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice, as expounded in Bhim Singhji.*

79.8. *If any constitutional amendment moderately abridges or alters the equality principles, it cannot be said to be a violation of the basic structure."*

22. His Lordship J. B. Pardiwala J. in his concurring opinion in the case of ***Janhit Abhiyan (supra)*** at paragraph number 412 opined that reasonably if an amendment is to be struck down under the basic structure formulation, the central principle of the interrelated provisions i.e. Articles 14, 15 and 16 of the Constitution should be a threat. A mere violation of one of these enabling provisions would not be of much consequence under the doctrine of basic structure as long as the violation does not infringe upon the central thesis of equality. Paragraph number 412 of the said judgment in the case of

Janhit Abhiyan (supra) is reproduced herein under:

412. *Each one of these constitutional provisions that are categorised as rights under Part III has intrinsic value content. Many of these rights are a part of the mechanism geared towards realising a common constitutional principle. For example, Articles 14, 15 and 16, respectively, of the Constitution are committed to the common principle of equality. Reasonably then, if an amendment is to be struck down under the "basic structure" formulation, the central principle of these interrelated provisions should be at threat. A mere violation of one of these enabling provisions would not be of much consequence under the Doctrine of Basic Structure as long as such violation does not infringe upon the central thesis of equality. Redress for marginal encroachment cannot be found under the "Basic Structure Doctrine". In considering the effect of an amendment on the constitutional core, it is important to keep in mind the widest ramifications of the amendment. It is imperative to contemplate and consider every way in which the "basic structure" of the Constitution might be threatened through the impugned Amendment. The amendment would stand as constitutional only after a satisfactory understanding as to its effect on the constitutional core is reached by the courts. To sustain itself, the amendment should not violate such core in the widest interpretation given to it. (Reference : Prof. Satya Prateek's essay.)*

23. The above opinions rendered by the Supreme Court makes it clear that the limited scope of judicial review vis-à-vis a Constitutional Amendment is that unless and until the walls built by the framers of the Constitution which are the essential features forming the basic structure of the Constitution is not intruded, the amendment to the Constitution cannot be touched in exercise of the powers of judicial review. Now, therefore in the above backdrop, let us deal with the question as to whether a Constitutional provision can at all be declared to be directory.

24. In Black's Law Dictionary, 11th Edition, the term "Directory Provision" have been defined as a statutory or a contractual sentence or paragraph in which a directory requirement appears. The term "Directory Requirement" is defined as a statutory or a contractual instruction to act in a way that is advisable but not absolutely essential. In the said Dictionary, "directory statute" is defined as a law that indicates only what should be done with no provision for enforcement. On the other hand, the term "Mandatory" have been defined in the same Dictionary relating to, or constituting a command. It has also been mentioned that a provision in a statute is said to be mandatory when its disobedience to it or want of exact compliance with it will make the act done under the statute absolutely void. It has also been defined in the said Dictionary that a "mandatory statute" is a law that requires a course of action as opposed to merely permitting it.

25. In The Major Law Lexicon, 4th Edition by P. Ramanatha Aiyar, the term "Directory Enactment" is defined with the words "when a statute is passed for the purpose of enabling something to be done and prescribes the way in which it is to be done, it may be either an absolute enactment or a directory enactment. The difference between the two is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

26. In ***Punjab Cooperative Bank Ltd. Vs. Income Tax Officer, Lahore*** reported in ***67 Indian Appeals 464***, the Privy Council observed that it is well settled General Rule that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled

substantially. This principle was approved by the Constitution Bench of the Supreme Court in the case of ***Thakur Pratap Singh Vs. Shri Krishna Gupta and Others*** reported in ***AIR 1956 SC 140***.

27. The above meaning ascribed to the terms “directory” and “mandatory” shows that when a provision is mandatory or absolute, the provision has to be obeyed or fulfilled exactly. However a directory provision only requires substantial compliance. The question therefore arises as to whether a Constitutional provision which is the basic law of the nation can be said to be directory or requiring substantial compliance only. We are of the opinion that taking into consideration the place a Constitution or Constitutional provision holds which is the supreme law of our nation, a Constitutional provision cannot be said or declared to be directory or requiring substantial compliance only. The framers of our Constitution as well as the evolution of the Constitutional Laws as referred to herein above, nowhere conceived that a Constitutional provision would be directory. No doubt, a statutory provision or contractual provision or a term of a tender document can be held to be mandatory or directory on the basis of the language used coupled with the intention of the Legislature or the parties respectively but the said principles of interpretation, in our opinion cannot be imported to interpret a Constitutional provisions to be mandatory or directory. In our opinion, declaring a Constitutional provision to be directory would not only result in demeaning or diluting the powers of the Parliament under Article 368 of the Constitution which is an essential feature of the basic structure of the Constitution, but would also go against the various judicial pronouncements which hold that the power of the Parliament to amend the Constitution is

plenary and wide and the Parliament can amend every aspect of the Constitution, except abrogating the Constitution or changing the essential features forming the basic structure of the Constitution. In addition to the above, we also find it is apposite to observe that except the judgments holding that Article 226(3) of the Constitution to be directory, we have not come across any judgment holding that a Constitutional provision is directory. The reason seems to be obvious inasmuch as the Constitution is the Supreme law of the land. We are further of the view that a Constitutional provision inserted to the Constitution by way of an amendment can be struck down on the ground that the said amendment infringes the basic structure of the Constitution forming the Constitutional core of our Constitution or given an interpretation which would be conducive to the changing times taking into account that our Constitution is a living document but under no circumstances, a Constitutional provision can be said to be directory save and except where the Constitution itself states so.

28. We are also of the opinion that a legislative enactment which is a creature of the Legislature in exercise of a legislative powers cannot be put into the same pedestal with a constitutional amendment in exercise of the constitutional powers of the Parliament. In this regard, we find it apposite to refer to a judgment of the Supreme Court in the case of ***Union of India Vs. Mohit Minerals (P) Ltd. reported in (2022) 10 SCC 700*** wherein His Lordship Dr. D. Y. Chandrachud, J. speaking for the Court observed that as a matter of first principle, the provisions of the Constitution which is the grundnorm of the nation, cannot be interpreted based on a provision of a primary legislation. It is only the provision of a primary legislation that can be

interpreted with reference to the Constitution. The Legislature amends the Constitution by exercising its constituent power and legislates by exercising its legislative power. The constituent power of the legislature is of higher Constitutional order as compared to its legislative power.

29. We accordingly hold that Article 226(3) of the Constitution is not directory in nature.

30. In view of our opinion, a question duly arises in view of the submissions made by the learned counsels as recorded hereinabove as to what should be the interpretation so given to Article 226(3) of the Constitution. **Laurence Henry Tribe**, an American Legal Scholar, in his paper "**Sounding and Silences**" published in **115 Michigan Law Review** opined that when the text of the Constitution is unambiguous, it's sounds can be easily interpreted. However, when the Constitution is silent on any right, immunity, privilege, or any form of distribution of power, it becomes an exercise to interpret the "sound of silence".

31. The Constitution Bench of the Supreme Court in the case of **Chief Justice of Andhra Pradesh (supra)** also dealt with the principle of interpretation of a constitutional provision. It was observed that normally a Constitutional or statutory provision should be construed according to the intent of they that made it. Normally such intent is gathered from the language of the provision and if the language of the phraseology employed is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to regardless of the consequences that may follow. It was also observed that if the words used in the provisions are imprecise or not clear and can reasonably have a meaning

more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. Paragraph Nos.66 and 67 of the said judgment being relevant is reproduced herein under.

“66. The primary principle of interpretation is that a Constitutional or statutory provision should be construed “according to the intent of they that made it” (Coke). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the Rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go beyond the and literal confines of the provision and to call in aid other well recognised rules of construction, such as its legislative/history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation.”

67. Where two alternative constructions are possible, the court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment. These canons of construction apply to the interpretation of our Constitution with greater force, because the Constitution is a living, integrated organism having a soul and consciousness of its own. The pulse beats emanating from the spinal cord of its basic framework can be felt all over its body, even in the extremities of its limbs. Constitutional exposition is

not mere literary garniture, nor a mere exercise in grammar. As one of us (Chandrachud, J. as he then was) put it in Kesavananda Bharati case: [(1973) 4 SCC 225, 969 (para 2017)]

“While interpreting words in a solemn document like the Constitution, one must look at them not in a school-masterly fashion, not with the cold eye of a lexicographer, but with the realization that they occur in ‘a single complex instrument in which one part may throw light on the other’ so that the construction must hold a balance between all its parts.”

32. It is well settled proposition of law that the interpretation of a Constitution involves more than a passing interest concerning the actual litigants and being a pronouncement of the Courts on the Government and the Administration. It has a more general and far reaching consequences. Chief Justice Marshall of the American Supreme Court in **McCulloch Vs. Maryland** reported in **17 US 316 (1819)** observed “*We must never forget that it is a Constitution we are expounding.*” The policy of a particular State is more easily discernible and interpreted than the policy of a Constitution which is a charter for the Government and administration of a whole nation and a country. This is a fundamental difference which makes a statutory interpretation different from the interpretation of a Constitution. At this stage, we find it very pertinent to take note of the judgments of the Supreme Court in the case of **Indore Development Authority (supra)** and **Raghubir Dayal (supra)**, referred to by the learned Amicus Curiae wherein the word “shall” was read as “may”. The said interpretations so given by the Supreme Court in the said judgments are in context with the relevant legislative enactments but not in reference to a constitutional provision. It has been observed in the case of **Janhit Abhiyan (supra)**, that more foresight

in the nature of judicial statesmanship is required in interpreting a Constitution than in construing a statute. The Constitution is not to be construed in a narrow pedantic sense and a broad liberal spirit should inspire those whose duty it is to interpret it; for a Constitution which provides for the Government of a country is a living and organic thing which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* (It is better for a thing to have effect than to be made void).

33. The Constitution Bench in the said judgment also put a word of caution that it must however not be understood that the Court is free to stretch or pervert the language of a Constitution in the interest of any legal or constitutional theory or even for the purpose of supplying omissions or for the purpose of correcting supposed errors. The eminent jurist **Mr. H. M. Seervai** in his treatise **Constitutional Law of India Vol-I** remarked that if there is an apparent or a real conflict between two provisions of the Constitution, it is to be resolved by applying the principle of harmonious construction. The Constitution Bench of the Supreme Court in ***M. Nagaraj (supra)*** advocated that a purposive rather than a strict literal approach to the interpretation of the Constitution should be adopted. In the backdrop of the above, let us take note of the Statement of Objects and Reasons of the Constitution (Forty-fourth Amendment) Act, 1978.

34. From a perusal of the Statement of Objects and Reasons, nothing could be discerned insofar as the amendment carried out thereby deleting Sub-Article (3), (4), (5) and (6) which were inserted vide the Constitution (Forty-second Amendment) Act, 1976 as well as relating to insertion of Sub-Article (3) by the Constitution (Forty-fourth Amendment) Act, 1978.

However, from the said Statement of Objects and Reasons, it is clear that the said amendments which were carried out by the (Forty-fourth Amendment) Act, 1978 were to undo what was done by the (Forty-second Amendment) Act, 1976 and to provide safeguards against any Proclamation of the Emergency under Article 352 of the Constitution. Under such circumstances, as the reason behind the insertion of Sub-Article (3) Article 226 of the Constitution is not clearly discernible, we are therefore to decide as regards the interpretation of Article 226(3) of the Constitution on the basis of the language so employed read with the provisions of the Constitution.

35. Unlike the US Constitution, which is substantially silent on many issues or sounds, our Constitution was drafted with great particularity. It is the longest Constitution as well as is much younger and the scope for it being silent is substantially lesser. Irrespective of that, the Supreme Court in its various decisions have introduced concepts like compensatory tax, the basic structure theory, arbitrariness, principles of natural justice into Article 14 and evolving multiple facets of right to equality and right to life.

36. The evolution of the aforesaid concepts as stated is done so by applying purposive interpretation to the provisions of the Constitution of India. For example, in the case of *Kesavananda Bharati (supra)*, the Supreme Court held that the Parliament's power to amend the Constitution included within itself the power to add, alter or repeal the various Articles of the Constitution, but it did not include the power to abrogate the Constitution or alter its basic structure. In the words of **Mr. Fali S. Nariman**, the eminent jurist in his article "**The Silences of Our Constitutional Law**", he stated

that the basic structure theory has evolved from the great silence in a Constitution. His words “after all, the Constitution provide that it could be amended, but surely it did not say that it could be abrogated or that its basic feature could be thrown to the winds”. Similarly, the Supreme Court in the case of ***Maneka Gandhi Vs. Union of India and Another* reported in (1978) 1 SCC 248** have constitutionalized the principles of natural justice by bringing it within the fold of “procedure established by law” which find place in Article 21 of the Constitution.

37. In the backdrop of the above, let us consider Article 226(3) of the Constitution and for the sake of convenience, the said provision is quoted herein under.

“226(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

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

(b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the

application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated."

38. A perusal of the above quoted Article 226(3) as it stands today, reveals that the said provision is in respect to passing of interim orders without (a) furnishing to such party copies of the petition and documents in support of the plea for an interim order; and (b) giving such party an opportunity of being heard. In other words, Article 226(3) of the Constitution relates to an ex-parte interim order. In the recent Constitution Bench judgment in the case of ***High Court Bar Association Allahabad (supra)***, the majority opinion rendered by His Lordship Abhay S. Oka J. categorically observed at paragraph No. 16 that when the High Court grants the stay of the proceedings while issuing notice without giving an opportunity of being heard to the contesting parties, it is not an interim order but it is ad-interim order. It was further observed that ad-interim order becomes an interim order only after an opportunity of being heard is granted on the prayer for interim relief to all the parties to the proceedings. We are also of the opinion that any interim order passed whether by way of an injunction or stay or in any other manner in exercise of the powers under Article 226 of the Constitution, without giving an opportunity to the party against whom such orders are passed, is also an ad-interim order and the said ad-interim order would only become an interim order after an opportunity of being heard is granted on the prayer for interim relief to all the parties to the proceedings. This aspect of the matter is very relevant taking into account that an application so conceived of in Article 226(3) of the Constitution has to be construed to be an application for vacation of an ad-interim order. It was observed that ad-interim orders has to be for limited duration or in other

words, fixing a date till when the ad-interim order would be in force. We find it relevant to reproduce the observations of the Supreme Court in paragraph No.16 of the judgment in the case of ***High Court Bar Association Allahabad (supra)***.

“16. When a High Court grants a stay of the proceedings while issuing notice without giving an opportunity of being heard to the contesting parties, it is not an interim order, but it is an ad interim order of stay. It can be converted into an interim order of stay only after an opportunity of being heard is granted on the prayer for interim relief to all the parties to the proceedings. Ad interim orders, by their very nature, should be of a limited duration. Therefore, such orders do not pose any problem.”

39. A further perusal of the provisions of Article 226(3) of the Constitution would show that the party against whom an ad-interim order has been passed has to *make an application to the High Court* for vacation of such ad-interim order and in doing so has to furnish a copy of such application to the party in whose favour such order has been made, or the counsel of such party. The constitutional mandate in terms with Article 226(3) of the Constitution is that the High Court shall dispose of the application within a period of two weeks *from the date on which it is received* or from the date on which the copy of such application is so furnished, *whichever is later*. The said provision further stipulates that where the High Court is closed on the last day of that period, before the expiry of the next date afterwards on which the High Court is open and if the application is not disposed off, the ad-interim order shall on the expiry of that period, or as the case may be, the expiry of the said next date stand vacated.

40. From the above, it would be seen that there is a constitutional obligation upon the High Court to dispose of the application filed for vacating ad-interim order within a period of two weeks. The said period of two weeks is to be counted either from the date on which an application is made to the High Court and is received or from the date on which a copy of such application is so furnished to the party in whose favour such order has been made, whichever is later. The date on which the copy of an application is furnished to the party in whose favour the ad-interim order has been passed is not difficult to ascertain or requires any interpretation. However, the question arises as to what interpretation is to be given to the term "*makes an application to the High Court*" and "*the date on which it is received*". We would deal with the interpretation of the said terms at a later stage of the instant judgment. However, prior thereto, we would like to take notice of an important aspect which touches on the submission made by the learned Senior counsel referred to supra.

41. In the previous segments of the instant judgment, we have duly taken note of the judgment of the Nine Judges' Bench of the Supreme Court in the case of ***L. Chandra Kumar (supra)*** wherein it has been held that the power of judicial review conferred upon the High Court is an integral and essential feature of the Constitution, constituting a part of its basic structure. What is being emphasized by the Supreme Court in the case of ***L. Chandra Kumar (supra)*** is that the power of judicial review cannot be taken away by making an amendment to the Constitution. We also take notice of the judgment of the Constitution Bench in the case of ***High Court Bar Association Allahabad (supra)***. At paragraph No.20, the majority opinion rendered by His Lordship Abhay S. Oka, J. observed that the elementary principles of natural justice

mandates that an order of vacating an interim relief or modification of an interim relief is to be passed only after hearing all effective parties. It was also observed that an order of vacating an interim relief passed without hearing the beneficiary of the order is against the basic tenets of justice.

42. We are aware that when High Court exercises jurisdiction under Article 226 of the Constitution and passes an ad-interim order and though the ad-interim order may not expressly state the three factors, i.e. prima facie case, irreparable loss and balance of convenience, but it is always presumed that the said three principles were in the back of the Judges' mind when the ad-interim order is passed. We are also of the opinion that the same principles also applies when the learned Judge(s) extends the ad-interim order in presence of the parties to the lis upon hearing.

43. As already observed hereinabove, an order passed which relates to Article 226(3) of the Constitution is an ad-interim order and it becomes an interim-order when the High Court passes an order in presence of the parties to the lis or extends the ad-interim order in presence of the parties to the lis. Under such circumstances, if the High Court upon an application filed for vacating an ad-interim order under Article 226(3) disposes of the said application by rejecting the application or by vacating, modifying or altering the ad-interim order or even extending the ad-interim order within the period of two weeks from the date the period of two weeks is to be reckoned, the ad-interim order which was passed cannot be said that it would automatically stand vacated. The said interpretation in our opinion would be in consonance with a reading of Article 226(1) and 226(3) of the Constitution, inasmuch as the power under Article 226(1) of the Constitution

conferred to the High Court is a basic structure of the Constitution and there being no bar under Article 226(3) of the Constitution to extend the ad-interim order during the pendency of the application filed invoking Article 226(3) of the Constitution.

44. Now the most pertinent question therefore arises as to from when the period of two weeks is to be counted. In the foregoing paragraphs we have duly observed that as regards the date of furnishing a copy of the application to the party in whose favour an ad-interim order has been passed or to the counsel of the said party is not difficult to ascertain. However, it seen that the terms "*makes an application to the High Court*" and "*from the date on which it is received*" have received various interpretations. The Full Bench of the Gujarat High Court in the case of ***District Development Officer Vs. Maniben Virabhai reported in (2000) SCC Online GUJ 115*** held that the term "*makes an application*" and "*when it is received*" to mean filing an application in accordance with the practice of the High Court and in that regard, had referred to various provisions of the Gujarat High Court Rules 1993. It was observed that making an application would mean filing the application by presenting in the Office of the Registry to such person as the Registry by special or general orders, ordinarily between 10:30 A.M. to 04:30 P.M. Now the question arises as to whether the term "*makes an application to the High Court*" and "*when it is received*" interpretation so given by the Full Bench of the Gujarat High Court can be duly adopted by us. We with great respect differ with the opinion of the Full Bench of the Gujarat High Court for the following reasons.

First, the interpretation so given of a Constitutional provision on the

basis of Gujarat High Court Rules, 1993 and thereby holding the term “makes an application” and “when it is received” to mean filing the application before the Registry do not in our opinion seems to be in consonance with the well settled principles for interpretation of a Constitutional provision. We again find it apposite to refer to the judgment of the Supreme Court in the case of ***Mohit Minerals (P) Ltd. (supra)*** wherein it was specifically observed that the provisions of the Constitution which is the grundnorm of the Nation, cannot be interpreted based on a provision of a primary legislation and it is the provision of a primary legislation that can be interpreted with reference to the Constitution.

Secondly, the term “*makes an application to the High Court*” if given an interpretation as filing an application before the Registry of the High Court would amount to changing the legislative intent of the very provision of Article 226(3) of the Constitution that too, when the said provision do not in any manner stipulate that the application is required to be filed before the Registry of the Court or making an application to the High Court as per the procedure of the High Court. We feel it apposite to observe that the settled position of law by the various Supreme Court judgments referred to supra clearly mandates that a constitutional provision is required to be given a broad and liberal interpretation however without stretching or perverting the language of the constitution. A perusal of the Article 226 of the Constitution would show that it refers to the High Court. In terms with Article 216 of the Constitution, the High Court shall consist of the Chief Justice, and such other Judges as the President may from time to time deem it necessary to appoint. In the judgment of the Supreme Court in the case of ***State of Rajasthan Vs. Prakash Chand and Others reported in (1998) 1 SCC 1***, the Supreme Court

categorically observed that the Administrative Control of the High Court vests upon the Chief Justice of the High Court alone and that it is his prerogative to distribute the business of the High Court, both judicial and administrative and what work the Benches shall do. Under such circumstances, the term "*makes an application to the High Court*" in our opinion would mean when the application so filed for vacating an ad-interim order is listed before the Bench holding the roster as endorsed by the Chief Justice of the High Court. The term "*the date on which it is received*" would therefore mean the day the application for vacating an ad-interim order is listed before the Bench endorsed the roster to take up the writ petition.

Thirdly, we further find that adopting the above interpretation to the terms "*makes an application to the High Court*" and "*the date on which it is received*" is also in consonance with the concept that our Constitution is living organism which has a soul and consciousness of its own. The provision of Article 226(3) was inserted by the Constitution (Forty-fourth Amendment) Act, 1978. In the Seventy-Ninth Report of the Law Commission of India on "**Delay and Arrears in High Courts and other Appellate Courts**", it was mentioned that the total pendency of cases in High Courts as on 30.06.1978 was 6,22,030 and as on 31.12.1978, it was 6,24,927. As we pen our opinion today, the total pendency of cases in the High Courts are 59,58,811 as from the data available from the National Judicial Data Grid (High Courts of India). Therefore, if the meaning of "*makes an application to the High Court*" means an application being filed before the Registry of the Court, it may result in vacation of an ad-interim order without the application for vacation of the ad-interim order being placed before the Court which would violate the principles of natural justice which is a facet of Article 21 of

the Constitution.

45. Accordingly, we decide the reference as herein under.

(i) Article 226(3) of the Constitution is not a directory provision.

(ii) An order referred to in Article 226(3) of the Constitution is an ad-interim order. The said ad-interim order is required to be of limited duration or in other words, the existence of the ad-interim order has to be limited to a date so fixed.

(iii) The ad-interim order is converted to an interim order only after an opportunity of being heard is granted on the prayer for interim relief to all parties to the proceedings.

(iv) The High Court on an application filed under Article 226(3) of the Constitution may reject the application or vacate, modify and/or alter the ad-interim order or may extend the ad-interim order in the presence of the parties to the lis. Once the ad-interim order is extended after hearing both the parties, it shall then be converted into an interim order and the prescription for automatic vacation of the ad-interim order for not being disposed within two weeks cannot be applied. However, the High Court can still vacate the interim order on various grounds viz. (i) when a litigant, after obtaining an interim order deliberately prolongs the proceedings either by seeking adjournments on unwarranted grounds or remains absent when the main case in which the interim relief is granted is called out for hearing before the High Court with the object of taking undue advantage of the interim order and/or (ii) when the High Court finds that the interim order is granted as a result of either suppression or misrepresentation of material

facts by the party in whose favour the interim order of stay was made and/or (iii) the High Court finds that there are material changes in the circumstances requiring interference with the interim order passed earlier. The above grounds so stated are not exhaustive and there can be other valid grounds for vacating an interim order.

(v) The term "*makes an application to the High Court*" and "*the date on which it is received*" would mean when the application is filed seeking vacation of an ad-interim order is placed before the learned Judge(s) who is/are holding the roster as endorsed by the learned Chief Justice of the High Court and date on which such an application is listed before the learned Judge(s) for the first time.

46. Before parting with the records, we feel that we would be failing in our duties not to appreciate the erudite submissions and valuable assistance received from the learned Advocate General, Nagaland, Shri K. N. Balagopal as well as the learned Amicus Curiae Shri M. K. Choudhury, Senior Advocate.

JUDGE

JUDGE

JUDGE

Comparing Assistant