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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 9th October, 2013

+ WP (C) No. 4770/2012 & CM Nos. 9869/2012 (for stay), 11129/2012 (for impleadment), 16545/2012 (for intervention/impleadment), 16845/2012 (for intervention/ impleadment), 16882/2012 (for intervention/ impleadment)

DELHI HIGH COURT BAR ASSOCIATION & ANR.

.....Petitioners

Through: Mr.A.S. Chandhiok, Sr. Adv. with Mr.Shyam Sharma, Mr.Mohit Gupta, Mr.Amit Saxena, Ms. Laxmi Chauhan, Advs.
Mr.J.P. Sengh, Sr. Adv. with Mr. Mohit Mathur, P-2 in WP (C) No.4770/2012 in person and Ms. Sandhya Gupta & Mr.Ritesh Singh, Advs.
Mr. Amit Khemka, Adv. with Ms. Sanorita D. Bharali, Mr. Rishi Sehgal, Advs. for New Delhi Bar Association, Rohini Bar Association & Dwarka Bar Association for applicants in CM Nos.16545/2012, 16845/2012 & 16882/2012.

versus

GOVT. OF NCT OF DELHI & ANR. .....Respondents

Through : Mr. Harish N. Salve, Sr. Adv. with Mr.Nakul Dewan, Mr. J.M. Kalia, Mr. Raghav Shankar & Ms.Bhawna Garg, Advs. for Govt. of NCT of Delhi.

+ **WP (C) No.7250/2012**

Rajiv Khosla .....Petitioner

Through: Mr.Rajiv Khosla in person.
Mr.M.N. Krishnamani, Sr. Adv.
with Ms.Aditi Patanjali, Adv. for
Delhi Bar Association

versus

State of NCT of Delhi .....Respondent

Through: Mr. Harish N. Salve, Sr. Adv. with
Mr. Nakul Dewan, Mr. J.M. Kalia,
Mr. Raghav Shankar &
Ms.Bhawna Garg, Advs. for Govt.
of NCT of Delhi.

+ **WP (C) No.456/2013 & CM Nos.885/2013 (for stay)**

Umesh Kapoor ..... Petitioner

Through: Ms.Neelam Rathore, Adv.

Versus

Govt. of NCT of Delhi & Anr. .....Respondents

Through: Mr. Harish N. Salve, Sr. Adv. with
Mr.Nakul Dewan, Mr.J.M. Kalia,
Mr. Raghav Shankar &
Ms.Bhawna Garg, Advs. for Govt.
of NCT of Delhi.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J.

"There can be peace only if there is justice"
- Mahatma Gandhi

1. The instant writ petitions challenge the constitutionality and validity of the Court Fees (Delhi Amendment) Act, 2012 "Delhi Act 11 of 2012" whereby the Legislative Assembly of the National Capital Territory of Delhi has amended the Court Fees Act, 1870 in force in the National Capital Territory of Delhi.

2. As per the scheme of the Court Fees Act, 1870, Section 6 prescribes documents specified as chargeable with court fee in Schedules I and II to the Act and prohibits their filing, exhibition or recording in a court of justice unless fees of the indicated amount have been paid. The schedules have been divided into Schedule I dealing with ad valorem court fees and Schedule II dealing with fixed court fees.

3. By the Court Fees (Delhi Amendment) Act 2012, Section 26 of the Court Fees Act was re-numbered as sub-section (1) thereof and sub-section (2) was inserted as follows:-

> (2) For the purposes of sub-section (1), and section 25, "stamp" means any mark, seal or endorsement by any agency or person duly authorized by the appropriate government, and includes an adhesive or impressed stamp, for the purposes of court fee chargeable under this Act.
>
> Explanation.- "Impressed stamp" includes impression

by a franking machine or any other machine, or a unique number generated by e-stamping or similar software, as the Appropriate Government may, by notification in the official Gazette, specify."

4. The Court Fees (Delhi Amendment) Act, 2012 also substituted Schedule I and Schedule II of the Court Fees Act, 1870 by new schedules specifying ad valorem and fixed fees, as applicable to the National Capital Territory of Delhi.

5. The impugned amendment seeks to introduce ad valorem payment of documents which are included in Schedule II.

6. As these writ petitions raise similar questions of fact and law and seek the same relief, they have been taken up together for the purposes of hearing and adjudication.

7. On one side of the watershed is the view that the amendments to the Court Fees Act 1870, which is a Central legislation, by the Legislative Assembly of the National Capital Territory of Delhi (hereinafter referred to as the 'Legislative Assembly of Delhi'), is unconstitutional, arbitrary and ultra vires on account of lack of legislative competence, whilst on the other side exists the view that the Legislative Assembly of Delhi has the competence to amend the Central Act as the power to legislate on the subject of fees taken in all courts except the Supreme Court vests exclusively in the State Legislature, vide Entry 3 of List II.

8. **W.P. (C) No.4770/2012** has been filed by the Delhi High

Court Bar Association through Shri Mohit Mathur, its Honorary Secretary (who is also petitioner no.2 before us). The Delhi High Court Bar Association, a representative body of advocates, seeks to safeguard the constitutional rights of citizens.

9. This writ petition has been argued before us by Mr. A.S. Chandhiok, Senior Advocate and President of the High Court Bar Association.

10. The following three impleadment applications have been filed in WP(C) No. 4770/2012:

I. CM No.16545/2012 by the Dwarka Court Bar Association.

II. CM No.16845/2012 by the New Delhi Bar Association.

III. CM No.16882/2012 by the Rohini Court Bar Association.

11. Given the urgency of the matter and for the reason of expediency, these applications were heard and kept for disposal with the main writ petition and Mr. Amit Khemka, Advocate appearing for the Dwarka, New Delhi and Rohini Court Bar Associations has been heard on merits.

12. **W.P. (C) No.7250/2012** has been filed by Mr. Rajiv Khosla, former President of the Delhi Bar Association. We have heard Mr. M.N. Krishnamani, Senior Advocate and President of the Supreme Court Bar Association as well as Mr. Rajiv Khosla in support of

this petition.

13. Mr. Krishnamani has submitted that the enhancement of court fees has been effected without taking into consideration relevant material and that the amendment completely ignores the 189th Report of the Law Commission of India on the "Revision of the Court Fee Structure" as well as its recommendations. It is contended that by the impugned amendment, in certain instances, the enhancement results in a person having to pay more than 24% of the value of the subject matter of the lis as court fee, restricting access to justice for those who are financially unable to afford the amended court fees. This goes against the basic structure and spirit of the Constitution.

14. **W.P.(C)No.456/2013** has been filed and argued by Ms. Neelam Rathore, Advocate. This writ petitioner had initiated proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an arbitral award. By an order dated 18th December 2012, the learned Single Judge of this court directed this petitioner to affix proper court fees in terms of the Court Fees (Delhi Amendment) Act, 2012 based on the value of the properties which form the subject matter of the award under challenge. In this background, this writ petition seeks to challenge the constitutionality of the amendment of the levy under Clauses 8(a)and 8(b) of Schedule II of the Court Fees Act on the ground that the same was arbitrary, unreasonable, illegal, ultra vires and unconstitutional.

15. The term 'respondents' refers to the Government of the National Capital Territory of Delhi and its agencies. Wherever reference is made to the Lieutenant Governor of the NCT of Delhi, it has been mentioned so specifically.

Judicial History

16. The first writ petition being **W.P. (C) No.4770/2012** was filed along with **CM No.9869/2012** which came to be listed before this court on the 9th of August 2012. The court noted that the challenge to the notification dated 23rd July, 2012 by which the Court Fees (Delhi Amendment) Act, 2012 had been notified, was laid on the ground that the Legislative Assembly of Delhi lacked legislative competence placing reliance on judicial precedents including a Full Bench decision of this court. The petitioner had also placed before the court a copy of the letter dated 8th August, 2012 addressed by Dr. Ashok Kumar Walia, Minister to Shri Rajiv Jai, the Chairman of the Coordination Council of All Bar Associations of Delhi assuring that the Government would look into the matter and also would hold discussions with all Bar Associations and all concerned to resolve the issue at the earliest.

17. In view of the above, the Court observed that the government may take such steps for resolving the issues at the earliest and preferably within two weeks after holding discussions with the State Coordination Council. The Court observed that the enhanced court fee which was under challenge would have to be

paid by the members of the public. Refund to them, in the event of the petition succeeding, would be impractical and that, on the contrary, the enhanced court fee if upheld, could always be recovered. Therefore on 9th of August 2012, an interim order of stay of the operation of the aforesaid notification was granted. This order was continued in proceedings thereafter.

18. The respondents filed a counter affidavit in W.P. (C) No.4770/2012 dated 6th September, 2012 to which the petitioner filed a rejoinder. The respondents also filed written submissions on 21st September, 2012. The learned Standing Counsel of GNCTD commenced with the arguments in the case on 27th September, 2012. Thereafter a request for filing additional documents was made on behalf of the GNCT of Delhi which was granted by the Court on 29th November, 2012. Despite repeated opportunity, nothing was brought on record till 4th January, 2013 when an additional affidavit of three pages with some documents was filed. The respondents still did not place before the Court any material considered by it before proposing the amendment placed before the Delhi Legislative Assembly or the President for consideration of the proposal for amendment or approval. No material has been placed to support the action of the respondents before this Court even till the time the case was reserved after hearing.

19. At a stage when Mr. Chandhiok, learned Senior Counsel for the petitioners was making submissions in rejoinder, Mr J.M.

Kalia, learned counsel appearing for the respondents made an oral request for placing further documents on record which were taken on record on 28th February, 2013 and the parties were heard on these documents as well.

20. The Government of NCT of Delhi assailed the interim orders dated 9th August, 2012 (which were continued on 28th August, 2012, 13th and 14th September, 2012) by way of **SLP(Civil)Nos.28958-28962/2012** filed before the Supreme Court of India on or about 22nd September, 2012 which came to be listed on 26th September, 2012 when the following order was passed by the Supreme Court:

> *"Taken on board.*
>
> *Issue notice on the special leave petitions as also on the petitioners' prayer for interim relief, returnable on 30.11.2012. Dasti, in addition, is permitted.*
>
> *In the meanwhile, operation of orders dated 09.08.2012, 28.08.2012, 13.09.2012 and 14.09.2012 passed by the Division Bench of the Delhi High Court in Civil Writ Petition No.4770 of 2012 shall remain stayed.*
>
> *It shall be the petitioners' duty to serve the respondents before the next date of hearing failing which the interim order passed today shall stand automatically vacated."*

21. On 16th October 2012, this order was modified by the Supreme Court to the following extent:

"I.A.Nos.11-15 of 2012 in SLP (C) Nos.28958-28962 of 2012

These applications have been filed by Delhi Bar Association for its impleadment as party to the special leave petitions.

Having heard learned Senior Counsel for the applicant, we are satisfied that ends of justice will be served by granting leave to the applicant to act as an intervenor in the proceedings of the special leave petitions. Ordered accordingly.

I.A.Nos.16-20 of 2012 in SLP(C)Nos.28958-28962 of 2012

Arguments heard.

Learned Senior Counsel appearing for the applicant – intervenor has made certain suggestions. Learned Solicitor General says that he will consult the concerned authorities and make a statement on the next date of hearing.

For further hearing, the case be listed on 30.10.2012.

While adjourning the case, we make it clear that the High Court shall be free to proceed with the final hearing of the writ petition.

The interim order passed on 26.09.2012 is modified in the following terms:-

i) No Court fee shall be payable on the written statement (simplicitor).

ii) No Court fee shall be payable on the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 and the application filed for review of the

judgment/order passed by the Courts.

All the interlocutory applications stand disposed of accordingly."

22. The SLP was disposed of by the Court by the following order passed on 30th October, 2012:-

"These petitions are directed against interim orders passed by the Division Bench of the Delhi High Court whereby the amendments made in Court Fees Act, 1870 by Court Fees (Delhi Amendment) Act, 2012 were stayed.

We have heard learned counsel for the parties and perused the record.

In our view, ends of justice will be served by requesting the High Court to dispose of the main writ petition as early as possible with the direction that interim order passed by this Court on 26.09.2012, as modified on 16.10.2012, shall remain operative till the disposal of the writ petition by the High Court.

Ordered accordingly.

The special leave petitions are disposed of in the manner indicated above."

23. Mr. Chandhiok, learned Senior Counsel for the petitioner has submitted that before the Supreme Court, the present respondents had given a declaration in terms of Rule 6 of the Supreme Court Rules, to the effect that Annexures P-1 to P-4 produced along with the SLP are true copies of the pleadings/documents which formed part of the records of the case in the Court below against whose

order the leave to appeal was sought for in the petition. Counsel for the Government of NCT for Delhi had further certified that no additional facts or documents have been taken and relied upon by the petitioner in the SLP. It is pointed out that with the SLP, the present respondents enclosed as Annexure P-1 a bunch of documents which were not filed by them before this Court. It is submitted that the same have not been placed on the record of this case even till date.

24. Before us, along with the counter affidavit, the respondents have only enclosed as Annexure B, a comparative analysis of expenditure on administration of justice in some States as a comparison of the sale of court fees. The aforenoticed enclosures with the Special Leave Petition were not filed in the writ petition before us.

25. It is important to note that the respondents have also not disclosed anywhere on record before this court details of the amount that they receive towards the expenditure on the judiciary from the Central Government, or the budgetary provisions made by the Government of NCT of Delhi for the judiciary. The respondents also have neither placed dates, details or documents, if any furnished for the consideration of the subject by the President of India; nor placed any orders passed thereon or material relied upon to support the decision to enhance the court fees.

26. Before the Supreme Court, the respondents had placed some

communications, which included a copy of a recommendation dated 12th August, 2010 for the formation of a Sub-Committee, its recommendations, and the draft proposal for the amendment for the Legislative Assembly of Delhi. It is urged by Mr. Chandhiok, learned Senior Counsel that the respondents therefore, gave a false declaration and a false certificate with the Special Leave Petition that the documents filed before the Supreme Court had been placed on record before this court.

Contentions of the Petitioners

27. Mr. Chandhiok learned Senior Counsel submits that as per Article 1 and Schedule I of the Constitution of India, Delhi was and continues to be a Union Territory; that Delhi is not a State within the meaning of expression under Article 1(3)(a) of the Constitution of India. The legislative action of the respondents is assailed inter alia on the ground of lack of legislative competence of the Legislative Assembly of Delhi. It is submitted that by the Constitution (Sixty-ninth) Amendment Act, 1991 w.e.f. 01.02.1992, Article 239AA was introduced into the Constitution which made special provisions with respect to the National Capital Territory of Delhi. By virtue of Article 239AA(2)(a) and Article 239AA(3)(a), the Legislative Assembly of Delhi was constituted with the powers to make laws with regard to any of the matters in the State List or in the Concurrent List in so far as such matter was applicable to the Union Territory of Delhi except matters with regard to Entries 1, 2 and 18 of the State List and Entries 64, 65

and 66 of that List in so far as they relate to Entries 1, 2 and 18.

28. Learned Senior Counsel has argued that the expression 'Union Territory' in Article 239AA(3)(b) refers to Delhi and therefore, the Parliament alone had the competence to legislate with regard to any matter concerning Delhi, in terms of the mandate of Article 246(4) which provided that the Parliament has power to make laws with respect to any matter for any Union Territory even if its falls under List II of Schedule VII of the Constitution.

29. It has been urged at length by the petitioners that despite introduction of Article 239AA by the Constitution (Sixty-Ninth) Amendment Act, 1991 which provides for the constitution of the Legislative Assembly of Delhi, only limited power and authority has been conferred on the Legislative Assembly of Delhi and the Parliament remains supreme so far as competence to legislate is concerned. It is also pressed that Delhi remains a Union Territory despite the provision of a Legislative Assembly for the National Capital Territory of Delhi. For this reason, the concept of subject-wise separation of powers into Union, State and Concurrent Lists in Schedule VII of the Constitution of India is of no consequence so far as Delhi is concerned.

30. It is urged by Mr. Chandhiok, that as per Article 200 of the Constitution of India, the Governor is prohibited from granting assent to any bill which in the opinion of the Governor would, if it

became law, derogate from the powers of the High Court so as to endanger the position which that High Court by the Constitution designed to fill. It is submitted that if the Governor of a State is so precluded, the Lt. Governor of Delhi would also not have the power under the Constitution to assent to any such legislation made by the Legislative Assembly of Delhi which would derogate from the powers of the court.

31. It is urged that under Article 239AA, the Lt. Governor of Delhi has been conferred no authority or jurisdiction to participate in the legislative process at all and consequently the acts attributed to the Lt. Governor are unconstitutional and in any case are without the authority of law.

32. Learned Senior Counsel submits that the Delhi Legislative Assembly had no legislative competence to pass the impugned legislation and that in the given facts and circumstances, the Presidential assent is of no avail. An alternate argument is made that even if the respondents had the competence, the respondents have failed to abide by the constitutional mandate which required them to point out to the President the repugnancy of the proposed amendment to the Central enactment; and to have specifically sought consideration by the President and assent to the same.

33. On merits, the petitioner assails the Court Fees (Delhi Amendment) Act, 2012 on the ground that the amended schedule of court fees negates the concept of a fee as there is no correlation

between the levy and the service which is administered by the State and that the fee actually partakes the character of a tax, which falls squarely within the jurisdiction and legislative competence of the Union Government. The argument is that by virtue of enhancement the court fee, the respondent is aiming to build general revenue which is constitutionally and legally impermissible. The contention also is that the impugned amendment impacts the jurisdiction of the Delhi High Court which also is prohibited.

34. Mr. Krishnamani, learned Senior Counsel for the petitioners has emphasised argued before this court that even if the Delhi Legislative Assembly had the legislative competence, the impugned amendment is against the basic constitutional value of administration of justice in a welfare State. The levy affects the untrammelled fundamental and human right of access to justice of the citizens, and also forms an insurmountable barrier to accessing justice. It violates their rights under Article 21 of the Constitution and is therefore not sustainable. By the amendment, the Delhi Government is abrogating from its primary duty of ensuring an efficacious justice dispensation system which is within the reach of all.

35. The writ petitioners also contend that the amendment has been effected in gross violation of the constitutionally prescribed procedure as well as in breach of the provisions of the Government of NCT of Delhi Act, 1991 and the Transaction of Business of the

Government of National Capital Territory of Delhi Rules, 1993.

36. The contention of the petitioners is that the impugned amendment has completely ignored relevant material including the prevalent local conditions, the authoritative reports of the Law Commission of India including the 189th Report on the 'Revision of the Court Fee Structure', as well as several binding judicial precedents on the issue.

Respondents' stand

37. The respondents, on the other hand, have taken the stand that in exercise of jurisdiction under Article 239AA read with Entry 3 List II, the Legislative Assembly of Delhi proposed the Court Fees (Delhi Amendment) Bill 2012 which was placed for the consideration of the President and received her assent. It is further contended that having received the assent of the President, it is the amendment which has to prevail.

38. We may usefully set out the stand of the respondents in the counter affidavit dated 6th September, 2012 and the additional affidavit dated 4th January, 2013 filed in these proceedings.

39. Mr Harish Salve, learned Senior Counsel for the respondents contends that the Presidential assent is not justiciable and the challenge by the petitioners is misconceived and untenable. It is contended that they have exercised their power to legislate under Article 246(3) read with Entry 3, List II and that the Government

of NCT Delhi has the exclusive power to make laws on court fees; that the respondents have exercised such jurisdiction and the President of India has assented to the same. Therefore, though the Court Fees Act, 1870 is a Central enactment, by virtue of the Presidential assent, the Court Fees (Delhi Amendment) Act, 2012 would prevail in Delhi.

40. Our attention has also been drawn to the well-settled position that there exists a presumption that a statute is constitutionally valid, unless it is proven otherwise beyond reasonable doubt by the party challenging the said statute on the grounds of constitutionality; and the constitutionality of the Act can only be challenged on the grounds of lack of legislative competence or violation of any of the fundamental rights guaranteed by the Constitution of India.

Constitutional procedure and separation of powers

41. Before considering the rival contentions, we may briefly notice the constitutionally prescribed procedure for legislative action and the separation of powers between the Union and States and the position of Union Territories.

(a) Legislative procedure

42. Given the extensive submissions made before us with regard to the legislative procedure required to be followed, the relevant constitutional provisions with regard to conduct of the business of

the Government and the legislative procedure mandated for the Parliament and the State Legislative Assemblies/Councils are required to be set out for convenience:

> **"77. Conduct of business of the Government of India.—**
>
> (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.
>
> (2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.
>
> (3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."

43. The relevant constitutional provisions relating to the introduction and passing of Bills by the Parliament are as follows:

> **"107. Provisions as to introduction and passing of Bills.—**
>
> (1) Subject to the provisions of Articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.
>
> (2) Subject to the provisions of Articles 108 and 109, a Bill shall not be deemed to have been passed by the

Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of Article 108, lapse on a dissolution of the House of the People."

"111. Assent to Bills.—

When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom."

44. So far as Bills relating to Legislative Assemblies or Councils of States are concerned, the following Constitutional provisions are

relevant:

> **"200. Assent to Bills.—** When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:
>
> Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:
>
> Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.
>
> **201. Bills reserved for consideration.—** When a Bill is reserved by a Governor for the consideration of the President, the President shall declare either that he

assents to the Bill or that he withholds assent therefrom:

Provided that, where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such a message as is mentioned in the first proviso to Article 200 and, when a Bill is so returned, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and, if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration."

45. So far as Union Territories are concerned, Article 239 is relevant and reads as follows:

239. Administration of Union Territories.— (1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers.

(b) Division of Powers under the Constitution of India

46. The distribution of the power to legislate is provided by Article 245 of the Constitution which reads as follows:

"**245. Extent of laws made by Parliament and by the Legislatures of States.—**(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

47. The constitutional scheme also envisages distribution of the subject-matter of laws which the Parliament may make and those which may be made by the legislatures of States. This distribution is provided in Article 246 which 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."

48. Several provisions of the Constitution govern the division of powers with respect to court fees. This is because specific entries in the Seventh Schedule of the Constitution each of List I (the 'Union List' of matters with respect to which Parliament has the exclusive power to legislate); List II (the 'State List' of matters with respect to which the State legislatures have the exclusive power to legislate); and List III (the 'Concurrent List') of the Seventh Schedule to the Constitution, relate to the subject of court fees. The relevant constitutional entries in this regard read as follows:

"List I (Union List)

> Entry 77 – "Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such court), and the **fees taken therein**...
>
> Entry 96 – "Fees in respect of any of the matters in this list, but **not including fees taken in any Court**.

List II (State List)

> Entry 3 – "Officers and servants of the High Court; procedure in rent and revenue Courts; **fees taken in all Courts except the Supreme Court**.

Entry 66 – "Fees in respect of any of the matters on this List, but **not including fees taken in any Court.**

List III (Concurrent List)

Entry 11A – "**Administration of justice**; constitution and organization of all Courts, except the Supreme Court and the High Courts.

Entry 47 – "Fees in respect of any of the matters in this List, **but not including fees taken in any Court**."

(c) The Supreme Court

49. By virtue of Entry 77 in List I (Union List) and Article 246(1), Parliament thus has exclusive authority over Supreme Court fees, and can enact any law relating to court fees payable in the Supreme Court. In exercise of its rule-making power conferred by Article 145, the Supreme Court may frame rules relating to court fees payable in the Supreme Court. These rules however, are subject to any law made by the Parliament.

(d) High Court and Other Subordinate Courts not in Union Territories

50. By virtue of Entry 3 of List II (State List) and Article 246(3), the State legislatures have exclusive power over the High Court and other subordinate court fees in any State. It is worth noting that the words "administration of justice" in Entry 11A of List III

(Concurrent List) do not grant legislative competence to Parliament with respect to High Court or subordinate courts in the States—this is because Entry 47 of List III clarifies that "fees taken in any court" do not fall within the enumerated subjects in List III.

(e) Courts in the Union Territories

51. As per the constitutional scheme, it is evident that by virtue of Entry 3 of List II (State List) and Article 246(4) which grants Parliament the power to legislate on a subject listed in the 'State List' in any part of the territory of India not included in a State, i.e. Union Territories, Parliament has exclusive authority over court fees payable in the courts situated in any Union Territory.

Prescription of Court Fees – legislative history

52. Given the nature of the challenge under examination, it is also necessary to delve into the history of the levy of court fees on litigating parties. This has been traced by the Supreme Court in the judgment reported at ***(1996) 1 SCC 345 Secretary to the Govt. of Madras v. P.R. Sriramulu and another*** as follows:

> "6. …Before the advent of British rule in India the administration of justice was considered to be the basic function of the State as guardian of the people without the levy of any charge on the party approaching the Court for redress of its grievance… It was only after the British rule that regulations imposing court fees were brought into existence. In the beginning the imposition of the fee was nominal but in the course of time it was enhanced gradually

> under the impression that it would prevent the institution of frivolous and groundless litigation and as an effective deterrent to the abuse of process of the court without causing any impediment in the institution of just claims."

53. The early legislative measures in India on court fees were the Madras Regulation III of 1782, the Bengal Regulation Act XXXVIII of 1795 and the Bombay Regulation VIII of 1802. Subsequently all provincial regulations were amalgamated into a single legislation, the Court Fees Act XXVI of 1860. This Act was also followed by subsequent legislation covering all of British India, including Act XXVI of 1867. All court fees statutes were eventually repealed by the "Court Fees Act, 1870" (Act VII of 1870). The 1870 Act (hereinafter the 'Act' or the 'Central Act') has been amended from time to time since then, but has not been repealed. The Central Act was extended to the Union Territory of Delhi as amended by the Punjab Acts 4/1939**.**

54. Though the Court Fees Act 1870 was applicable to the whole of British India, the '**Devolution Act 1920**' (Act XXXVIII of 1920) empowered the 'Provinces/ States' to amend the Court Fees Act, 1870 while making it applicable to the concerned State/Province. The Devolution Act, 1920 has since been repealed by the Repealing Act, 1938 (Act 1 of 1938). (189th Report of the Law Commission of India at pp. 42)

55. Because of Section 292 of the Government of India Act,

1935, the Court Fees Act, 1870 continued to be in force after 1935:

> "Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the laws in force in British India immediately before the commencement of Part III of this Act, shall continue to be in force in British India until altered or repealed or amended by a competent legislature or other competent authority." (s. 292, Government of India Act, 1935)
>
> (Emphasis added)

56. The proper meaning of the term "competent legislature" as used in Section 292 of the Government of India Act, 1935, can be gleaned through Section 100 of the same Act:

> "As per sub-section (1) of section 100 of the said Act of 1935, the Federal Legislature had exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule to that Act and under sub-section (3) thereof a provincial legislature alone had power to make laws with respect to any of the matters enumerated in List II of the said Seventh Schedule to that Act. The relevant entry relating to court - fees was Entry I of List II of the Seventh Schedule, which included "fees taken in all courts except in Federal Court." (189th Report at pp. 43-44)

Thus, the above provisions demonstrate that "the provincial legislature became the competent legislature in respect of matters relating to the court fees payable in all courts except the Federal Court."

57. A decision of the Bombay High Court **(*M/s Brindalal v. M/s Gokal and Haflman Ltd.*, AIR 1960 Bom 96)** supports this view.

> "Therefore, the Legislature competent to legislate in connection with court fees was a Provincial Legislature and not the Federal or Central Legislature because of the provisions of sub-section (3) of section 100. "Court fees" was very clearly within the exclusive legislative powers of a Provincial Legislature after the coming into operation of the Government of India Act, 1935 and the Federal Legislature did not have any such power. It is quite clear that it was a Provincial Legislature alone which could alter, repeal or amend the Court Fees Act, after the coming into operation of the Government of India Act, 1935….Therefore, since the date of the coming into operation of the Government of India Act, 1935 the Court Fees Act must be deemed to have continued to be in operation in the various Provinces of India as a Provincial Act passed by the appropriate Provincial Legislature and not as a Central Act because the Provincial Legislatures alone had the power to legislate in respect of court-fees."

58. On 26th November, 1949, the Constituent Assembly adopted the Constitution of India which was applicable to India described under Article 1 as a "Union of States". As per sub-clause 3 of Article 1, the Territory of India comprised the territories of the States; Union Territories specified in the First Schedule and such other territories as may be acquired.

59. The Court Fees Act, 1870 also continued to remain in force after the enactment of the Constitution of India on January 26th,

1950, by virtue of Article 372 of the Constitution which provides thus:

> "372. Continuance in force of existing laws and their adaptation.-
>
> (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.
>
> A pre-Constitutional law shall continue to be in force until altered, repealed, or amended by a competent Legislature, subject to the other provisions of the Constitution."

60. Inasmuch as the Court Fees Act was implemented before the independence of India, so far as its applicability after the independence is concerned, reference also requires to be made to the **Adaptation of Laws Order, 1950**. The Adaptation of Laws Order, 1950 consists of orders issued under the Constitution of India and published with the Ministry of Law and Justice (Legislative Department). The relevant portion is provided in Section 3 of the Order which is reproduced as follows:-

> *"Adaptation of existing Central Laws*-
>
> 3. As from the appointed day, the existing Central laws mentioned in the Schedules to this

> Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptation and modifications directed by those Schedules or if it is so directed shall stand repealed"

The First Schedule to the Adaptation of Laws Order 1950 mentions the Court Fees Act 1870 (VII of 1870) which therefore continued to have effect after 1950.

The Court Fees Act, 1870 and its applicability to Delhi

61. So far as application of court fees to Delhi are concerned, after the coming into force of the Constitution in 1950, the State Legislatures were given exclusive power to make laws within their territory with respect to fees for all courts but the Supreme Court [Article 246(3) read with Entry 3 of List II in the Seventh Schedule]. There are two categories of States at present: firstly, those that have adopted the central Court Fees Act of 1870 along with local amendments; and secondly, those States that have repealed the Central Act and enacted complete State laws on the subject.

62. With respect to other territories, the Central Act has been extended to new and merged States by the Merged States (Laws) Act, 1949, and to the Union Territories of Manipur and Tripura (now States). In addition, the Central Act has been extended to: Dadra and Nagar Haveli (Reg. 6 of 1963); Delhi (SRO 422 of 1951

and GSR 842 of 1959); Goa (which is now a State); Daman & Diu (Reg. 11 of 1963); and the Lakshadweep Islands (Reg. 8 of 1965 and Act 34 1973).

63. The Court Fees Act, 1870 extended its application to the whole of India except the territories which immediately before the 1st of November, 1956 were comprised in Part B States. Here it may be mentioned that **Delhi** was a **Part C State** and the **Court Fees Act, 1870 was therefore extended to Delhi**.

64. So far as amendment to the Court Fees Act, 1870 in Delhi is concerned, our attention has been drawn to two amendments effected prior to the impugned amendment. On the **27th October, 1956**, the **Delhi State Legislative Assembly** notified the **Court Fees Act, (Delhi Amendment) Act, 1956** (Act 15 of 1956) to amend the Court Fees Act, 1870 (7 of 1870). Section 1 (2) of the Court Fees (Delhi Amendment) Act, 2012 stated that the Act was to come into force on the date it receives the assent of the President.

65. This was **before** the **States Reorganization Act, 1956** whereupon **Delhi became a Union Territory**. Thereafter a further amendment was notified on the 16th of December, 1967 as the **Court Fees (Delhi Amendment) Act, 1967** (No.28 of 1967) by the **Parliament** as "*an Act further to amend the Court Fees Act, 1870, as in force in the Union Territory of Delhi*." This Act extended to the whole of Union Territory of Delhi. The relevant

extract of Part 2 and 4 reads as follows:-

> "2. In the Court-fees Act, 1870,(1 of 1870) as in force in the Union Territory of Delhi (hereinafter referred to as the principal Act), in section 4—
>
> (a) in the marginal heading to the first paragraph, for the words "in High Courts in their extraordinary jurisdiction", the words "in the High Court of Delhi in its ordinary or extraordinary jurisdiction" shall be substituted;
>
> (b) in the first paragraph, for the words "any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction", the words "the High Court of Delhi in any case coming before that Court in the exercise of its ordinary or extraordinary original civil jurisdiction" shall be substituted;
>
> xxx xxx xxx
>
> 4. (1) Notwithstanding anything contained in the principal Act or in the principal Act as amended by this Act, fees shall be levied in suits or other proceedings instituted on or after the 31st day of October, 1966, and pending immediately before the 7th October, 1967, in the High Court of Delhi by virtue, and in the exercise, of its ordinary original civil jurisdiction as if the principal Act, as amended by this Act, had been in force on the respective dates on which such suits or proceedings were instituted.
>
> (2) Any fees levied in respect of suits or other proceedings instituted before the High Court of Delhi by virtue, and in the exercise, of its ordinary original civil jurisdiction, on or after the 31st day of October, 1966, and disposed of before the 7th October, 1967, shall be deemed to have been levied in accordance

with law."

66. The above manifests that so far as the Union Territory of Delhi is concerned, the statutory amendment with regard to court fee was effected by the Parliament.

Factual background leading to the impugned legislation

67. It is also necessary to examine the facts and reasons which weighed with the Delhi Legislative Assembly to effect the impugned statutory amendments. For this purpose the factual matrix laid down in the counter affidavit filed on record deserved to be referred to.

68. The respondents state that the amendment to the Court Fees Act was enacted to fulfil the cherished and fundamental human and societal aspiration of a more law abiding citizenry and an organized state/nation. It is stated in the counter affidavit that "*to provide the fullest support for the best infrastructure etc., for the administration of justice, GNCTD has consistently and unflinchingly provided generous outlays to the justice system in the NCT of Delhi. This commitment is reflective in the fact that presently 2% of the entire State budget is being spent on for this purpose. It can safely be said that this amount is the highest per capita expenditure in the entire country, on the administration of justice. A chart (annexed herewith as Annexure –A (Colly.)] comparing the per capita expenditure of some other States bears*

this out". It is further submitted that *"an analysis of the monies expended towards administration of justice has grown exponentially in the last decade itself. It is noteworthy that in the year 2001 and 2002, the expenditure on this account was Rs.77.81 crores, whereas the court fees recovered was in the range of 11%-12%. The expenditure outlay for the current year i.e. 2012-2013 is about Rs.600 crores, i.e. an increase of nearly 800%. In merely 5 years of the past decade, Rs.1698.2 crores was spent on the administration of justice, whereas the recovery of court fees was approximately Rs.149 crores, i.e. approximately 11%. A chart depicting the expenditure and recovery of court fees in the NCT of Delhi, is annexed herewith as Annexure-B (Colly).* ***It is settled law that the State government can recover fees for services rendered. The fee is payable only by a consumer of justice and is not levied on all residents/domiciles in NCT of Delhi.*** *It is also a policy of good governance that these expenses should be recovered to a reasonable extent so as to facilitate the strengthening of the infrastructure and system of justice in the NCT of Delhi."*

69. A very material fact, essential for discharging the burden on the respondents for supporting the constitutionality of the impugned legislation is conspicuously missing from their affidavits and documents annexed. The respondents have carefully withheld from the court all information of amounts and grants received by it from the Central Government for expenditure on the judiciary and their own budgetary outlay. This information is material, if not

central to evaluation of the issue as whether there is a lack of resources to find the judiciary; the extent of the deficit; and most importantly, that the court fee prescription does not lead to profiteering which is constitutionally impermissible.

70. As per the counter affidavit, it is further stated that court fee "*…is a source of recovery of expenses for the Government, which is made to ensure the provision of an appropriate and sufficient infrastructure and financial support for consistent and effective administration of justice…*"

71. The following reasons for the impugned amendment are also discernible from the counter affidavit:-

> (i) *"The* ***court fees Schedules*** *applicable in respect of NCT of Delhi* ***were last amended in 1958*** *by the Punjab Government."*
>
> (ii) "*A perusal of the Schedules of the Court Fees Act, 1870 makes it evident that the* ***fees payable as on date is negligible*** *in today's context. Indeed in certain cases, the value is so little that it loses all relevance. For example, the court fee payable on filing an application in a petition is a mere 40 paisa"*
>
> (iii) "*In many cases, the* ***cost of issuing stamps*** *and administering the payments of court fees* ***is a lot more than the court fees actually collected*** *against them."*
>
> (iv) "***The States of Maharashtra, Gujarat, Karnataka and Rajasthan have already rationalized the rates of court fees. Furthermore, the Cost Price Index has multiplied many hundred times since 1958 (the year when the last amendment to the***

Court Fees Act in respect of the NCT of Delhi was made). Therefore, it was only logical and financially prudent and indeed <u>imperative</u> that the court-fees structure be revised to make them realistic."

(v) The <u>Cost Price Index has risen</u> considerably since the time the Court Fees Act, 1870 was enacted. Keeping in view the Cost Price Index, e-court-fees was proposed as given in a comparative chart in respect of Delhi whereby it was <u>proposed to hike</u> the same by <u>10 times</u> in most of the cases."

72. In answer to the petitioner's objections that by effecting the amendment to the court fees, the Government of NCT of Delhi is putting 'justice up for sale', the respondents have urged that "*the Government of NCT of Delhi has left no stone unturned to ensure that the system of administration of justice in the NCT of Delhi is improved, modernized and well equipped with respect to personnel, infrastructure, amenities etc. It is a universal truth that* ***justice is the force which binds a society or nation together***. *If the administration of justice is prompt and responsive to the citizens/consumers of justice, it builds faith in the rule of law. Thus, leading to a more law abiding citizenry and consequently an organised state/nation."*

73. While denying the petitioner's complaint that the respondents are putting 'justice up for sale', to source the permissibility of the power to recover the court fees in the counter affidavit, the respondents have also stated as follows:-

"…a tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered. A fee on the other hand, is a charge for special service rendered to the individual by some governmental agency."

"…if the essential character of the levy is that some special service is intented as quid pro quo to the class of citizens when is intended to be benefited by the service and a broad and general correlation between the amount so collected and the expenses incurred in providing the services is found to exist, then such levy would partake the character of a "fee", irrespective of the fact that special services for which the amount by levy of fee is collected incidentally and indirectly benefit the general public also."

"The co-relationship expected is one of a general character and not as of arithmetical exactitude."

We note that the above pleadings are really an extract from judicial precedents, as will be observed from the following discussion.

74. So far as the methodology adopted and procedure followed for effecting the amendment is concerned, in para 5 of the counter affidavit, the respondents have set out the same as follows:-

"5…it is submitted that the rationalization of court fees has been done with due diligence. A sub-committee was constituted for this purpose, which went through the schedules of court fees as appended to the Court Fees Act, 1870 and also examined the rates of court fees charged in other States in

comparison to the rates charged in the NCT of Delhi. After a detailed study and a careful analysis, the sub-committee recommended the revision of court fees for the NCT of Delhi in the form of the draft Court Fees (Delhi Amendment) Bill, to amend Section 26 of the Court Fees Act, 1870. The proposed increase in the court fees was about ten times that of the existing rates, for which Schedule I and Schedule II were to be amended. The Committee under the chairmanship of the Principal Secretary (Law, Justice and Legislative Affairs), Government of NCT of Delhi accepted the recommendations of the sub-committee, subsequent to which, the approval of the Council of Ministers was obtained, and thereafter the bill was placed before the Delhi Vidhan Sabha. Pursuant to the advice of the Law and Justice Department, and taking into consideration that the Court Fees Act, 1870 is a Central Legislation, a request was made to the Secretary (Home), Government of India, for obtaining prior approval of the Central Government. The Ministry of Home Affairs examined the matter in consultation with the Ministry of Law and Justice and thereafter the approval was granted. On receipt of the approval, the bill was again placed before the Cabinet of Ministers and thereafter the amended bill was introduced before the Assembly, which was then passed unanimously. The Bill became an Act only after it received Presidential assent and the date of amendment was notified as 01.08.2012, after the approval of the Lt. Governor."

(emphasis by us)

75. In the counter affidavit the respondents disclose no dates or details of the reference which was made to the Committee; or what was referred to the Sub Committee; or of the dates on which the several steps leading up to the notification of the amendment had

been taken.

76. In the hearing on 29th November, 2012, learned Senior Counsel for the Government of NCT of Delhi had sought leave to place "*additional documents, including relevant extracts on record in support of the Government's stand*" before this court. Given the nature of the issue being raised by both the sides, this request was deemed to be in the interest of justice and the documents were directed to be placed on record within one week. The respondents were also directed to keep available the original record for consideration by the court.

77. Instead of placing the documents, the respondents have filed before us a copy of the SLP which was filed before the Supreme Court in the present proceedings.

78. So far as the process of deliberation to revise the court fees is concerned, reference has been made by the respondents to a meeting of the Committee of the High Court on 22nd July, 2010 wherein it was observed that the Court Fees Act is required to be amended, apart from fulfilling other procedural and legal formalities.

79. The next reference is to a meeting held by the Principal Secretary (Law) on 12th August, 2010 with officers of IT, Revenue and Finance Department. In this meeting, it was decided to constitute a Sub-Committee to examine and recommend amendments to the Court Fees Act, 1870. The Sub-Committee

consisted of Mr. Manish Kumar Gaur - Assistant Legal Advisor (Law Department); Mr. N.G. Goswami - legislative counsel of the law department; Mr. J.M. Kalia - Legal Advisor (Income Tax Department); Mr. Arvind Jain - Deputy Secretary (Finance); Mr. Ravinder Kumar - SDM (Headquarters) – Revenue Department; and Ms. Savita Rao - Special Secretary, Law/Justice & Legislative Affairs as Chairperson.

80. The Sub-Committee compared the rates of the court fee in the States like Maharashtra, Karnataka, Gujarat, Rajasthan vis-à-vis the rates in Delhi. It looked at nothing else. On the basis of its analysis, the Sub-Committee recommended the revision of court fees to be made in Delhi and the amendments were in the form of a draft Court Fees (Delhi Amendment) Bill 2012 to amend Schedule I and II as well as Section 26 in the Court Fees Act, 1870.

81. The Committee under the Chairmanship of the Principal Secretary (Law, Justice and Legislative Affairs) accepted the recommendations of the Sub-Committee. Next, approval of the Council of Ministers was required before placing the Bill in the Delhi Vidhan Sabha. A Cabinet Note was prepared to this effect.

82. So far as the extent of enhancement is concerned, the note for the Council of Ministers discloses that "*the increase proposed in the court fee is about 10 times of the existing rates for which Schedule I and Schedule II are to be amended*."

83. Approval of the Council of Ministers was sought before

placing the Bill in the Delhi Vidhan Sabha. The comments of the Finance Department and Law Department were also enclosed. The note of the Council of Ministers was approved by the Minister of Revenue as well.

84. The "Statement of Objects and Reasons" enclosed with the note for consideration of the Council of Ministers was prepared by the Revenue department and stated as follows:-

"**STATEMENT OF OBJECTS AND REASONS**

> There is no revision of court fee since 1958 while all kinds of duties and fees have been revised. Hon'ble Computer Committee of the Delhi High Court has asked the Government to start e-court fee in the Delhi High Court. Further, certain denominations viz. 40 paise, 25 paise, 50 paise etc are no more in use. Thus, revision of court fee has become necessary.
>
> *Sd/-*
> **(D.M. SPOLIA)**
> **Principal Secretary (Revenue)**
> **Chief Controlling Revenue Authority, Delhi**"

85. In the Financial Memorandum, the following statement by the Principal Secretary (Revenue) was made:- "**FINANCIAL MEMORANDUM**

> At present, the monthly revenue generated on account of court fee is about Rs.3.5 – Rs.4 crores. The revision is likely to increase is about 10 times to Rs.35-40 crores.

Sd/-
(D.M. SPOLIA)
Principal Secretary (Revenue)
Chief Controlling Revenue Authority, Delhi"

86. Before finalizing, the draft note for the Council of Ministers and the draft Court Fees (Delhi Amendment) Bill, 2011 was sent by the Revenue Department, inviting the comments of the Law Department and advice on the following points:-

> "(i) Whether the approval of the Govt. of India is required while revising the court fees and for amending the Court Fees Act, 1870?
>
> (ii) Whether the proposed revision of court fees be referred to the Hon'ble Delhi High Court for their opinion/recommendations before sending the file for seeking the approval of the Cabinet?"

87. After examining the draft note, the Legislative Council has made inter alia the following noting:-

> "1. The subject-matter of the Bill is covered under Entry 3 of the State List (List II) of the Seventh Schedule of the Constitution, as such, the Legislative Assembly of the Delhi is competent to make the proposed amendment by virtue of sub-clause (a) of clause (3) of Article 239AA of the Constitution.
>
> 2. The need for the proposed legislation from legal point of view appears to be justified.

3. Regarding the consistency of the proposed enactment with the provisions of the Constitution, this aspect has been examined with particular reference to the provisions relating to Fundamental Rights. It does not seem to infringe the provisions of the Constitution including the provisions relating to fundamental rights.

4. **The provisions of the draft Bill are repugnant to the Court Fees Act, 1870, a law made by Parliament.** As such, **the provisions of sub-clause(c) of clause (3) of Article 239 AA of the Constitution and clause (a) of sub-rule (1) of Rule 55 of the Transaction of Business of** the Government of National Capital Territory of Delhi Rules, 1993, are attracted for obtaining the approval of the Central Government before the introduction of the Bill in the Legislative Assembly of Delhi.

5. xxx xxx xxx

6. After the Bill has been passed by the Legislative Assembly and presented under Section 24 of the said Act to the Hon'ble Lieutenant Governor, **the Lieutenant Governor shall reserve it for the consideration and assent of the President of India under the first proviso to sub-clause (c) of clause (3) of article 239AA of the Constitution to prevail the law as amended, in the NCT of Delhi."**

(Emphasis by us)

88. The draft Statement of Objects and Reasons and Memorandum were stated to have been suitably amended. Interestingly, the Additional Secretary, (Law, Justice and L.A.) endorsed a noting dated 5th May, 2011 on the above stating that *"there is no need to incorporate Article 31 of the Draft proposed*

amendment in the Schedule, as it relates to the bail application."

89. The note for the Council of Ministers was circulated and placed before it. By a noting dated 21st July, 2011 of the Principal Secretary, Chief Minister had approved the Cabinet note and desired that the note be placed for consideration of the Cabinet at the next meeting scheduled for 25th July, 2012.

The Cabinet note was circulated under cover of note date 22nd July, 2011.

90. The proposal for the amendment of the Court Fees Act, 1870 was placed by the Divisional Commissioner/Secretary (Revenue) before the Cabinet. The Cabinet took its Decision No.1789 dated 25th July, 2011 approving the proposal contained in para 9 of the Cabinet Note.

91. The Secretary to the Cabinet, General Administration Department, GNCT of Delhi by letter dated 27th July, 2011 intimated that the Cabinet vide Decision No.1789 dated 25th July, 2011 had considered the note of Divisional Commissioner/Secretary (Revenue) and approved the same as contained in para 9 of the Cabinet Note relating to the amendment of the Court Fees Act. It was also noted that the Court Fees Act, 1870 is a Central Act and it was necessary to obtain the prior approval of Central Government for placing the Cabinet Note, Draft Bill in Delhi Vidhan Sabha for seeking approval thereof. Approval was sought for forwarding the file to the Lieutenant

Governor, Delhi with the request to obtain the approval of the Central Government for placing the same before the Delhi Legislative Assembly.

92. The proposal for amendment of the Court Fees Act, 1870 in its application to the National Capital of Delhi was sent to the Secretary, Government of India of the Ministry of Home Affairs vide letter dated 12th August, 2011 by the Principal Secretary to the Lieutenant Governor. After referring to the afore noticed Cabinet approval, the office of the Lieutenant Governor informed the following:-

> "*Following the Cabinet approval, the Hon'ble Lt. Governor, Delhi has also accorded approval for the same.*
>
> *The Court Fees Act, 1870 is a Central Act. Hence the prior approval of Central Government is necessary before placing the same in Delhi Vidhan Sabha. A copy of the draft amendment Bill along with Financial Memorandum, the Cabinet Decision and the Cabinet Note are enclosed herewith for seeking approval of Central Government.*
>
> *It is therefore, requested to communicate the approval of Central Government for introducing the aforesaid Bill and Cabinet Note for its application to the NCT of Delhi in Delhi Vidhan Sabha at the earliest.*
>
> *This reference is being made with the approval of the Lt. Governor, Delhi*."

93. Mr. Chandhiok has vehemently objected to the failure of the

respondents to place on the writ record the enclosures to the letter dated 12th August, 2011. The original record produced before us shows that along with the letter dated 12th August, 2011, the respondents have enclosed the following documents:

(i) A copy of the draft amendment Bill,

(ii) The Financial Memorandum,

(iii) The Cabinet Decision and the Cabinet Note dated 27.07.2011.

Given the nature and impact of enhanced court fee proposed by the Amendment Bill, these documents by themselves are not sufficient to establish the need for the Government of NCT of Delhi to effect the impugned amendments.

94. The noting dated 2nd September, 2011 notes that the Government of India, Ministry of Home Affairs, New Delhi had sought a statement indicating the existing statutory provisions vis-à-vis proposed provisions, including the existing fee vis-à-vis the proposed fee in respect of the proposed amendment which was required for getting the approval of the Central Government for introducing the Bill and the Cabinet note for the Delhi Vidhan Sabha. A further noting refers to a draft letter for the Ministry of Home Affairs which, however, is not placed before us. The comparative statement sought by the Government of India of the existing and proposed statutory provisions does not appear to have

been prepared or given to the Central Government. It is not forthcoming in the record placed before us.

95. The Central Government conveyed "its prior approval" for introduction of the Court Fees (Delhi Amendment) Bill, 2011 in the Legislative Assembly of Delhi. It was also mentioned in this letter that since the Bill has not been vetted by the Legislative Department of the Ministry of Law and Justice, the same may be got vetted by the Law Department of the Government of NCT of Delhi before introduction in the Legislative Assembly and that two copies of the Bill, as introduced in the Assembly, be sent to the Ministry of Home Affairs.

96. The Principal Secretary to the Lieutenant Governor, under cover of the letter no. U.O.No.38(1)/RN/2012/678/6782 dated 10th May, 2012 duly informed the above requirement to the Principal Secretary (Law Judicial and L.A.) GNCT, Delhi, as well as Principal Secretary (Revenue) GNCT, Delhi.

97. The proposal for sending the matter to the Central Government was approved by the Lieutenant Governor and informed by the Additional Secretary to the Lieutenant Governor by noting dated 28th May, 2012.

98. The matter thereafter proceeded in the Department of Revenue for introduction of the Court Fee (Delhi Amendment) Bill, 2012.

99. After the Bill was passed by the Vidhan Sabha, the respondents started taking steps for obtaining the assent of the President.

100. This was in terms of the noting dated 11th June, 2012 by the Principal Secretary (Law, Justice and L.A.) which inter alia records the following:-

> "As the Bill seeks to amend the Court Fees Act, 1870 which is an **Act made by Parliament**, so, **if the proposed Amendment Act is to prevail in the National Capital Territory of Delhi, then, under the first proviso to sub-clause(c) of clause (3) of Article 239 AA** of the Constitution, it will be **reserved for** the **consideration and assent of the President.**
>
> Under the said Transaction of Business Rules, I recommend that the Court Fees (Delhi Amendment) Bill, 2012 as passed by the Legislative Assembly of Delhi may be reserved by the Hon'ble Lt. Governor for the consideration and assent of the President of India under the proviso of Article 239 AA (3) (c) of the Constitution."

101. So far as the proposed amendment is concerned, it is the respondent's stand in the counter affidavit dated 4th January, 2013 that the proposal to amend the Schedule of the Court Fees Act essentially being a Finance Bill, was referred to the Lieutenant Governor of Delhi as per law before introducing the Bill in the Legislative Assembly. Since the Bill sought to amend a Central legislation, the same was further referred by the Lieutenant

Governor of Delhi to the Government of India through the Ministry of Home Affairs, for prior approval of the Central Government, vide letter dated 12th August, 2011.

102. The respondents have placed before us a note prepared by the Revenue Department of the Government of NCT of Delhi for the Council of Ministers. In the 'Introduction', the Revenue Department has clearly stated that "*court fee is a source of revenue to the Government."*

103. So far as need for revision is concerned, the following reasons are disclosed:-

"(i) Court fee payable as on date is negligible in today's context.
(ii) In certain cases, the value is so little that it has lost its relevance. In many cases, the cost of issuing stamp and administering the payment of court fee may be more than the fee collected.
(iii) There is an immediate need to rationalize the fee structure. States like Maharashtra, Gujarat, Karnataka and Rajasthan have already rationalized the rate of court fee.
(iv) The Cost Price Index has risen considerably since 1958, i.e., since the last revision in respect of Delhi.
(v) The Computer Committee of Delhi High Court has recommended the initiation of the e-court fee project to collect court fee though a computerized process."

104. The respondents have placed before this court the

communication dated **15th June, 2012** sent by the Principal Secretary to the Lieutenant Governor, to the Secretary to the Government of India, Ministry of Home Affairs referring to the approval of the Central Government dated 20th April, 2011 to the introduction of the impugned amendments for the Legislative Assembly of Delhi. The office of the Lieutenant Governor has informed the Ministry of Home Affairs of the Central Government to the effect that the Bill was *"introduced in the Legislative Assembly of Delhi and has been passed by it on 4th June, 2012 without any amendments."* It was further informed therein to the effect that *"as the* ***Bill relates to amendments of the Court Fees Act, 1870, which is a law made by the Parliament***, ***Lt. Governor,*** *Delhi* ***has reserved the said Bill***, *as passed by the Legislative Assembly,* ***for consideration and assent of the President of India under proviso of sub-clause (c) of clause (3) of Article 239 AA of the Constitution and Rule 55(1)(a) of the Transaction of Business of the National Capital Territory of Delhi Rules, 1993***.

Three original copies of the above mentioned Bill, duly authenticated by the Speaker of the Legislative Assembly of Delhi and endorsed by Lt. Governor, Delhi are enclosed.

It is requested that assent of the President to the above Bill as envisaged under proviso of sub-clause (c) of clause (3) of Article 239 AA of the Constitution and rule 55(1)(a) of the Transaction of Business of the National Capital Territory of

Delhi Rules, 1993 may please be obtained and conveyed to this Secretariat at the earliest."

105. The Ministry of Home Affairs, Government of India thereafter informed the office of the Lieutenant Governor, Delhi by a letter dated 6th July, 2012 that the proposed amendments had received the assent of the President on 4th July, 2012 and that two copies of the Bill were enclosed.

106. The respondents further inform that on the 4th of July, 2012, the Court Fee (Delhi Amendment) Act, 2012 (Delhi Act 11 of 2012) received Presidential assent and was brought into force by notification dated 31st July, 2012 issued by the Lieutenant Governor.

107. It is now necessary to consider in seriatim the grounds of challenge pressed by the petitioners and the objections of the respondents in the writ petitions. For the purposes of convenience of reference, we are first setting out the headings under which we have considered the several issues raised before us. We also set out the paragraphs where the issue is considered as follows:

108. The challenge in the present case has been made by the petitioners and resisted on certain very important points. Given the magnitude of the challenge, we have divided our consideration under the following headings:

I **<u>The Delhi Legislative Assembly did not have the legislative competence to effect the impugned legislation</u>**

prohibited from enhancing court fee by virtue of Section 35 of the Court Fees Act, 1870 (paras 937 – 945)

(XXV) The Delhi High Court Committee's recommendations (paras 946 – 947)

We now propose to discuss the above issues in seriatim.

I The Delhi Legislative Assembly did not have the legislative competence to effect the impugned legislation

The discussion on this subject is being considered under the following sub-headings:

(i) Respondents' stand on the objection of legislative competence.

(ii) Status of Legislative Assembly of Delhi.

(iii) On the subject of court fees, there is pre-existing Central Legislation which occupies the field. For this reason as well, the Delhi Legislative Assembly has no competence to enact law or amend it

(iv) Whether Lists in the Seventh Schedule are a substantive source of power for the Parliament and the State Legislatures?

109. It is argued by the petitioners that the Delhi Legislative Assembly is not vested with the legislative competence to make any law which would amount to a repeal of or amendment of an existing Parliamentary law. It is the Parliament alone which under sub-clause (a) of Article 239AA (3) has the power to amend and alter the legislation and that no such corresponding power has been

given to the Legislative Assembly of the NCT of Delhi under Article 239AA.

Respondents' stand on the objection of legislative competence

110. It is firstly essential to examine the respondents' claim as to the source of the respondents power to enact and effect the impugned amendment. The respondents have extensively referred to the exclusive power conferred by Article 246(3) of a State to make laws for such State or any part thereof in respect of any of the matters contained in List II of the 7th Schedule to the Constitution of India. In the counter affidavit dated 6th September, 2012 also, the respondents have sourced their power to legislate to Entry 3 List II of the 7th Schedule to the Constitution of India. It is contended that the power to legislate on the subject of fees taken in all courts except the Supreme Court vests therefore, exclusively in the State Government.

111. In this regard, the respondents have also cited Entry 77 in List I which gives/empowers the Union of India the right to legislate on the subject of 'constitution, organization, jurisdiction and powers of Supreme Court (including contempt of such court) and the fees taken thereon; persons entitled to practice before the Supreme Court'.

112. So far as the authority of the Government of NCT of Delhi is concerned, the respondents have referred to Article 239AA(3)(a) of the Constitution to contend that the same empowers the

Government of NCT of Delhi (Union Territory) to 'legislate on any of the matters enumerated in List II (State List) except on Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18'. On the basis of these constitutional provisions, it is urged that the Government of NCT of Delhi has the exclusive power to legislate on the subject matter of the court fees chargeable in all courts within the State, except the Supreme Court and that it was legislatively competent to amend the Court Fees Act, 1870 with respect to fees chargeable in Delhi.

Status of Legislative Assembly of Delhi

113. It would at first blush appear that the Delhi Legislature has the required competence to pass laws with respect to the High Court and other subordinate court fees in Delhi. Before so concluding it is necessary to consider the status of Delhi under the Constitution especially on inclusion of Article 239 AA therein. Another question which bodes an answer is whether the creation of the Delhi Legislative Assembly by the Government of National Capital Territory of Delhi Act, 1991 (enacted by the Parliament in exercise of power under Article 239AA) has the effect of transforming the status of Delhi from a Union Territory to that of a State?

114. Mr. Chandhiok learned Senior Counsel for the petitioner has painstakingly pointed out that unlike the Parliament which has

been created under the Constitution, the Delhi Legislative Assembly is a creation of a statute, i.e, the Government of NCT of Delhi Act, 1991.

115. Mr. Chandhiok has referred to Article 1(2) and Article 1(3)(a) which deal with the geographic distribution of the territory of India between the Union Territories and States and require to be considered in extenso. For the purposes of convenience, the same are set out hereafter:-

> **"1. Name and territory of the Union**
>
> (1) India, that is Bharat, shall be a Union of States.
>
> [(2) The States and Territories thereof shall be a specified in the First Schedule.]
>
> **(3) The territory of the India shall comprise-**
>
> **(a) the territories of the States;**
>
> **(b) the Union territories specified in the First Schedule; and**
>
> **(c) such other territories as may be acquired;**
>
> xxx
>
> **3. Formation of new States and alteration of areas, boundaries or names of existing States.-**
>
> Parliament may by law-
>
> (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

116. As a challenge has been raised by the petitioner to the legislative competence of the Legislative Assembly of Delhi to effect the statutory amendment, it is also necessary to reflect on the Constitutional provisions regarding the legislative relations between the Union and the States as contained in Part II of the Constitution of India and provisions thereto. Articles 245, 246 and Schedule VII of the Constitution have been extracted earlier in this judgment.

117. As noted above, prior to the enactment of the States Reorganization Act on the 1st of November 1956, the territory of Delhi was a 'State'. Upon this legislation coming into force, Delhi was constituted as a Union Territory and was also placed at serial

no.1 of the list of Union Territories in Schedule I of the Constitution of India.

118. By virtue of the Constitution (Sixty-ninth) Amendment Act, 1991 with effect from 1st February 1992, Article 239 AA was inserted in the Constitution of India whereby a Legislative Assembly and a Council of Ministers would be established for the National Capital Territory of Delhi. Clause 7(a) of Article 239AA provided that the Parliament may, by law, make provisions for giving effect to or supplementing the provisions contained in the foregoing clauses and for all the matters incidental or consequential thereto.

119. Inasmuch as extensive reliance is placed on Article 239AA and reference made to Article 254 of the Constitution, for convenience the relevant extract of these provisions are reproduced hereunder:

> "**239AA**. **Special provisions with respect to Delhi.-** (1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union Territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor.
>
> (2) (a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.

xxx xxx xxx

(3) (a) **Subject to the provisions of this Constitution**, the **Legislative Assembly** shall have **power to make laws** for the whole or any part of the National Capital Territory **with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect** to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2, and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union Territory or any part thereof.

(c) **If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:**

Provided that if any such **law made by the Legislative** Assembly has been **reserved for the consideration of the President** and has **received his assent**, such law shall prevail in the National Capital Territory:

Provided further that **nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a**

law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

xxx xxx xxx

[(7)(a)] Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto."

(Emphasis supplied)

120. It is manifest from a bare reading of Article 239AA that it had the effect of only changing the nomenclature of Delhi from the 'Union Territory of Delhi' to the 'Government of NCT of Delhi'. Furthermore sub clause (a) of Article 239AA(3) enables its legislature to legislate with respect to matters in the State List insofar as any such matter is applicable to 'Union Territories' and that too, subject to exceptions.

121. In exercise of the powers conferred by Clause 7(a) of Article 239AA of the Constitution, the Government of National Capital Territory of Delhi Bill was proposed and passed by both the Houses of the Parliament. It received the assent of the President on 2nd January, 1992. It took effect as the 'Government of National Capital Territory of Delhi Act, 1991' (1 of 1992).

122. This enactment was amended by The Government of Union Territories and The Government of National Capital Territory of Delhi (Amendment) Act, 2001 (38 of 2001). The preamble of this Act states that it was enacted to supplement the provisions of the

Constitution relating to the Legislative Assembly and a Council of Ministers for the National Capital Territory of Delhi and for matters connected therewith or incidental thereto.

123. We may also examine the constitutional provisions which are concerned with inconsistencies between laws made by the Parliament and State Legislatures. Article 254 which is relevant in this regard reads thus:

> **254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.-** (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
>
> (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with

> respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

124. It is important to note that while incorporating Article 239AA in the Constitution, the Parliament did not effect any amendment to Articles 245, 246, which are concerned with division of powers or in Article 254. A perusal of Article 254 manifests that it refers to inconsistencies between legislation by the Parliament on the one hand and those by the States on the other. Articles 245 and 246 also refer to laws by the Parliament and the States. No reference is made to legislation by legislative assemblies of Union Territories.

125. Even more significant is the placement of the 69th constitutional amendment re-naming Delhi as "National Capital Territory of Delhi" and providing for legislation to create a Legislative Assembly for Delhi. Article 239AA has been placed in Part VIII of the Constitution which is titled as "Union Territories". So far as States are concerned, they fall under Part VI of the Constitution.

126. A conjoint reading of Article 1 and Article 239AA clearly shows that incorporation of Article 239 AA did not have any effect on the status of Delhi. Renamed as the National Capital Territory of Delhi, it was not transformed into a State. So far as the status of Delhi is concerned, it remains a Union Territory.

127. On the issue of who would be competent to legislate for the Union Territories and the scope of Article 246(4), the Constitution Bench of the Supreme Court speaking through Bachawat, J. in ***T.M. Kanniyan v. ITO [(1968) 2 SCR 103 : AIR 1968 SC 637 : 68 ITR 244***, (SCR p. 108-11) held thus:

> "Parliament has plenary power to legislate for the Union Territories with regard to any subject. *With regard to Union Territories there is no distribution of legislative power*. Article 246(4) enacts that '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.' In *R.K. Sen* v. *Union* [(1966) 1 SCR 430 : AIR 1966 SC 644] it was pointed out that having regard to Article 367, the definition of 'State' in Section 3(58) of the General Clauses Act, 1897 applies for the interpretation of the Constitution unless there is anything repugnant in the subject or context. Under that definition, the expression 'State' as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956 'shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory'. But this inclusive definition is repugnant to the subject and context of Article 246. There, the expression 'State' means the States specified in the First Schedule. *There is a distribution of legislative power between Parliament and the legislatures of the States*. Exclusive power to legislate with respect to the matters enumerated in the State List is assigned to the legislatures of the States established by Part VI. *There is no distribution of legislative power with respect to Union Territories. That is why Parliament is given power by Article 246(4) to legislate even with respect to matters*

> *enumerated in the State List*. If the inclusive definition of 'State' in Section 3(58) of the General Clauses Act were to apply to Article 246(4), Parliament would have no power to legislate for the Union Territories with respect to matters enumerated in the State List and until a legislature empowered to legislate on those matters is created under Article 239 A for the Union Territories, there would be no legislature competent to legislate on those matters; moreover, for certain territories such as the Andaman and Nicobar Islands no legislature can be created under Article 239 A, and for such territories there can be no authority competent to legislate with respect to matters enumerated in the State List. Such a construction is repugnant to the subject and context of Article 246. It follows that *in view of Article 246(4), Parliament has plenary powers to make laws for Union Territories on all matters*. Parliament can by law extend the Income Tax Act, 1961 to a Union Territory with such modifications as it thinks fit..."
>
> (Emphasis added)

128. It is well settled then that the Parliament alone is competent to legislate for Union Territories on all matters.

129. So far as Delhi is concerned it is necessary to keep in mind the impact of Article 239AA. We find that this question is not being raised for the first time. Several binding pronouncements of the Supreme Court and this court (including a Full Bench adjudication) have been placed before us by the petitioners. Before commenting on the question raised herein, we propose to refer to the prior judicial consideration on it.

130. We may first and foremost refer to the consideration of this

issue by the Supreme Court in the judgment reported at ***(1997) 7 SCC 339, New Delhi Municipal Council v. State of Punjab & Others*.** This case was concerned with the issue as to whether the properties of the States situated in the Union Territory of Delhi stood exempted from property taxation levied under the Municipal enactment which was in force in the Union Territory of Delhi. The question was as to whether the property taxation under two Municipal Acts, one being the Delhi Municipal Corporation Act, 1957 and the other being The Punjab Municipal Act, 1911 both applicable in Delhi, constituted Union taxation or not. The issue of the legislative competence of the Delhi Legislature to legislate by virtue of Article 239AA, the interpretation and impact of Clause 3(b), (c) and proviso thereto has been considered in both the majority and the minority views in the judgment and identical findings on this particular issue have been returned on the plenary power of the Parliament to legislate with regard to Delhi. The authoritative pronouncement by the court on these aspects binds our consideration on the issue of the legislative competence of the Delhi Legislature to legislate on the subject matter as well as the scope of its jurisdiction. The court ruled as follows:-

> "87. It has been urged that when Parliament legislates for Union Territories in exercise of powers under Article 246(4), it is a situation similar to those enumerated above and is to be treated as an exceptional situation, not forming part of the ordinary constitutional scheme and hence falling outside the ambit of "Union taxation". Having analysed the scheme of Part VIII of the Constitution including the

changes wrought into it, we are of the view that despite the fact that, of late, Union Territories have been granted greater powers, they continue to be very much under the control and supervision of the Union Government for their governance. Some clue as to the reasons for the recent amendments in Part VIII may be found in the observations of this Court in *Ramesh Birch case* [1989 Supp (1) SCC 430] , which we have extracted earlier. It is possible that since Parliament may not have enough time at its disposal to enact entire volumes of legislations for certain Union Territories, it may decide, at least in respect of those Union Territories whose importance is enhanced on account of the size of their territories and their geographical location, that they should be given more autonomy in legislative matters. However, these changes will not have the effect of making such Union Territories as independent as the States. This point is best illustrated by referring to the case of the National Capital Territory of Delhi which is today a Union Territory and enjoys the maximum autonomy on account of the fact that it has a legislature created by the Constitution. **However, clauses (3)(*b*) and (3)(*c*) of Article 239 AA make it abundantly clear that the plenary power to legislate upon matters affecting Delhi still vests with Parliament as it retains the power to legislate upon *any* matter relating to Delhi and, in the event of any repugnancy, it is the parliamentary law which will prevail**. It is, therefore, clear that Union Territories are in fact under the supervision of the Union Government and it cannot be contended that their position is akin to that of the States. Having analysed the relevant constitutional provisions as also the applicable precedents, we are of the view that under the scheme of the Indian Constitution, the position of the Union Territories cannot be equated with that of the States. Though they do have a separate identity

within the constitutional framework, this will not enable them to avail of the privileges available to the States."

(Emphasis added)

131. In para 136 of ***New Delhi Municipal Council*** (supra) the court considered the impact of Article 239AA and the above principle was further expanded in its context in the following terms:-

"136. By the Constitution Sixty-Ninth (Amendment) Act, 1991, Article 239 AA was introduced in Part VIII of the Constitution. This article renamed the Union Territory of Delhi as the "National Capital Territory of Delhi" and provided that there shall be a Legislative Assembly for such National Capital Territory. The Legislative Assembly so created was empowered by Clause (3) of the said article 'to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List insofar as any such matter is applicable to Union Territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1, 2 and 18.

Clause (3) further provided that the **power conferred upon the Legislative Assembly of Delhi by the said article shall not derogate from the powers of Parliament "to make laws with respect to any matter for a Union Territory or any part thereof". It further provided that in the case of repugnancy, the law made by Parliament shall prevail, whether the parliamentary law is earlier or later to the law made by the Delhi Legislative Assembly.**

> **Parliament is also empowered to amend, vary or repeal any law made by the Legislative Assembly.** Article 239 AA came into force with effect from 1.2.1992. Pursuant to the article, Parliament enacted the Government of National Capital Territory of Delhi Act, 1991. It not only provided for constitution of a Legislative Assembly but also its powers as contemplated by Article 239 AA. This Act too came into force on 1.2.1992. **The subordinate status of the Delhi Legislature is too obvious to merit any emphasis."**
>
> (Emphasis by us)

132. In the majority judgment, on the question of constitution of legislative assemblies for Union Territories, and the import of these assemblies for Union Territories with regard to Article 246, it was further observed as follows:-

> "145. It is relevant to point out that in clauses (2) and (3), as originally enacted — and up to the Seventh (Amendment) Act — the expression "State" was followed by the words "specified in Part A or Part B of the First Schedule". Similarly, the words, "in a State" in clause (3), were followed by the words "in Part A or Part B of the First Schedule". In other words, clauses (2) and (3) of Article 246 expressly excluded Part 'C' and Part 'D' States from their purview. The position is no different after the Constitution Seventh (Amendment) Act, which designated the Part C States as Union Territories. They ceased to be States. As rightly pointed out by a Constitution Bench of this Court in T.M. Kanniyan [(1968) 2 SCR 103: AIR 1968 SC 637: 68 ITR 244], the context of Article 246 excludes Union Territories from the ambit of the expression "State" occurring therein. As a matter of fact, this is true of

Chapter I of Part XI of the Constitution as a whole. It may be remembered that during the period intervening between the Constitution Seventh (Amendment) Act, 1956 and the Constitution Fourteenth (Amendment) Act, 1962, there was no provision for a legislature for any of the Union Territories. Article 239 A in Part VIII — "The Union Territories" — (which before the Seventh Amendment was entitled "The States in Part C of the First Schedule") introduced by the Constitution Fourteenth (Amendment) Act did not itself create a legislature for Union Territories; it merely empowered Parliament to create them for certain specified Union Territories (excluding Delhi) and to confer upon them such powers as Parliament may think appropriate. Thus, the legislatures created for certain Union Territories under the 1963 Act were not legislatures in the sense used in Chapter III of Part VI of the Constitution, but were mere creatures of Parliament — some sort of subordinate legislative bodies. They were unlike the legislatures contemplated by Chapter III of Part VI of the Constitution which are supreme in the field allotted to them, i.e., in the field designated by List II of the Seventh Schedule. The legislatures created by the 1963 Act for certain Union Territories owe their existence and derive their powers from the Act of Parliament and are subject to its overriding authority. In short, the State Legislatures contemplated by Chapter I of Part XI are the legislatures of States referred to in Chapter III of Part VI and not the legislatures of Union Territories created by the 1963 Act. Union Territories are not States for the purposes of Part XI (Chapter I) of the Constitution.."

133. In para 145 above, the Supreme Court has relied upon the

Constitution Bench pronouncement in ***T.M. Kanniyan*** (supra).

134. In ***New Delhi Municipal Council*** (supra), the Supreme Court specifically considered the status of the legislative assembly of the NCT of Delhi and in para 152 held as follows:-

> "152. On a consideration of rival contentions, we are inclined to agree with the respondents-States. The States put together do not exhaust the territory of India. There are certain territories which do not form part of any State and yet are the territories of the Union. That the States and the Union Territories are different entities, is evident from clause (2) of Article 1 — indeed from the entire scheme of the Constitution. Article 245(1) says that while Parliament may make laws for the whole or any part of the territory of India, the legislature of a State may make laws for the whole or any part of the State. **Article 1(2) read with Article 245(1) shows that so far as the Union Territories are concerned, the only law-making body is Parliament**. The legislature of a State cannot make any law for a Union Territory; it can make laws only for that State. **Clauses (1), (2) and (3) of Article 246 speak of division of legislative powers between Parliament and State legislatures. This division is only between Parliament and the State legislatures, i.e., between the Union and the States. There is no division of legislative powers between the Union and Union Territories**. Similarly, there is no division of powers between States and Union Territories. So far as the **Union Territories are concerned, it is clause (4) of Article 246 that is relevant. It says that Parliament has the 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. Now, the Union Territory is not included in the territory of any State. If so, Parliament is the only law-making body available for such Union Territories. It is equally relevant to mention that the **Constitution**, as originally enacted, **did not provide for a legislature for any of the Part 'C' States (or, for that matter, Part 'D' States). It is only by virtue of the Government of Part 'C' States Act, 1951 that some Part 'C' States including Delhi got a legislature. This was put an end to by the States Reorganisation Act, 1956. In 1962, the Constitution Fourteenth (Amendment) Act did provide for creation/constitution of legislatures for Union Territories (excluding, of course, Delhi) but even here the Constitution did not itself provide for legislatures for those Part 'C' States; it merely empowered Parliament to provide for the same by making a law. In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239 AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of — assuming that it could — lift the National Capital Territory of Delhi from Union Territory category to the category of States within the meaning of Chapter I of Part XI of the Constitution. All this necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament — or a legislative body created by it. Parliament can make any law in respect of the said territories** — subject, of course, to constitutional limitations other than those specified in Chapter I of Part XI of the Constitution. Above all, **the Union Territories are not "States" as contemplated by Chapter I of Part XI; they are**

the territories of the Union falling outside the territories of the States.

(Emphasis by us)

135. On the position of Delhi, the Supreme Court in ***New Delhi Municipal Council v. State of Punjab*** (supra) has further clearly stated thus:

> "155...The third category is Delhi. It had no legislature with effect from 1-11-1956 until one has been created under and by virtue of the Constitution Sixty-Ninth (Amendment) Act, 1991 which introduced Article 239 AA. We have already dealt with the special features of Article 239 AA and need not repeat it. Indeed, a reference to Article 239 B read with clause (8) of Article 239 AA shows how the **Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part VI of the Constitution. In sum, it is also a territory governed by clause (4) of Article 246.** As pointed out by the learned Attorney General, various Union Territories are in different stages of evolution. Some have already acquired Statehood and some may be on the way to it. **The fact, however, remains that those surviving as Union Territories are governed by Article 246(4) notwithstanding the differences in their respective set-ups — and Delhi, now called the "National Capital Territory of Delhi", is yet a Union Territory."**
>
> (Emphasis supplied)

136. The Supreme Court has therefore, noticed that there are certain territories which do not form part of the territory of the

States, yet are territories of the Union which are referred to as Union Territories; that State and Union Territory are different entities [Article 1(2)]. The Supreme Court observed that while the Parliament may make laws for the whole or any part of the territory of India, the legislature of State may make law for the whole or any part of the State. So far as Union Territories are concerned, Article 1 (2) read with Article 4 would show that the Parliament alone was the competent law making body. The Court also observed that the division of legislative powers under Article 246 was only between the Parliament and the State Legislatures and that there was no such division of legislative powers between the Union and the Union Territories or States and the Union Territories. Most importantly, it was declared that there was no demarcation of subject matters by lists so far as the Union Territories were concerned.

137. The position of the Legislative Assembly of Delhi therefore stands settled by the above enunciation of law. The Supreme Court has clearly declared that it is a class by itself; that the Delhi Legislature was not a full-fledged legislature and that Article 239 AA did not have the effect of transferring the status of Delhi from Union Territory to that of a State within the meaning of Chapter 1 of Part II of the Constitution of India. The constitutional position is that Article 239AA does not derogate from the powers of the Parliament to make laws with respect to any matter for a Union Territory or any part thereof. The Parliament is the legislative body

competent to make laws for the National Capital Region of Delhi.

On the subject of court fees, there is pre-existing Central Legislation which occupies the field. For this reason as well, the Delhi Legislative Assembly has no competence to enact law or amend it

138. The legislative competence of the Delhi legislative assembly to legislate with regard to court fees has to be examined from yet another angle. The petitioners have further submitted that admittedly, the Court Fees Act, 1870 is a central legislation. The Delhi Legislative Assembly is not vested with the legislative competence to make any law which amounts to repealing or amending an existing parliamentary law. Only the Parliament under Article 246(4) has the power to amend and alter such law but no corresponding power has been given to the legislature of NCT of Delhi, a Union Territory, akin to that conferred upon the State in the context of List III entries. Mr. Chandhiok has argued with all the vehemence at his command that a subordinate legislature cannot amend the law made by the Parliament, which is the supreme legislative body under the Indian Constitution.

139. There is further aspect to this issue. The Supreme Court also discussed in ***Offshore Holdings Pvt. Ltd. V. Bangalore Development Authority and ORs. (2011) 3 SCC 139*** the issue of 'occupied field', in the following terms:

> "72. In the event the field is covered by the Central legislation, the State legislature is not expected to

> enact a law contrary to or in conflict with the law framed by the Parliament on the same subject. In that event, it is likely to be hit by the rule of repugnancy and it would be a stillborn or invalid law on that ground. Exceptions are not unknown to the rule of repugnancy/covered field. They are the constitutional exceptions under Article 254(2) and the judge enunciated law where the Courts declare that both the laws can co-exist and operate without conflict. The repugnancy generally relates to the matters enumerated in List III of the Constitution."
>
> (Emphasis by us)

140. Placing reliance on the above, it is argued by Mr. Chandhiok that given the repugnancy between the Court Fees Act, 1870 and the Delhi Court Fees (Amendment) Act, 2012, the Amendment Act of 2012 is deemed to be still born and of no legal consequence and effect.

141. On these aspects, another judicial precedent sheds further light. A notification was issued by the Lieutenant Governor of Delhi on 28th June, 2000 specifying that it was issued in exercise of the powers conferred under sub-section 1 of Section 19 of the Punjab Courts Act, 1918 as extended to the National Capital Territory of Delhi, dividing it into nine civil districts. A challenge was made before the Supreme Court with regard to the competence of the Lieutenant Governor to issue such notification in exercise of powers conferred under the Punjab Courts Act, 1918 which was decided by the judgment reported at ***2008 (13) SCC 628 : AIR 2009 SC 693*** titled ***Delhi Bar Association (Regd.) v. Union of***

India. The Supreme Court was called upon to consider the impact of the enactment of the Government of National Capital Territory of Delhi Act, 1991 on the continued applicability of the Punjab Courts Act, 1919 to Delhi. The Supreme Court held that the enforcement of the Government of National Capital Territory of Delhi Act, 1991 from 1st February, 1992 does not hinder the continued application of the Punjab Courts Act, 1918 to Delhi and that the notification issued on 28th June, 2000 itself referred to the Punjab Courts Act, 1918 as extended to the National Capital Territory of Delhi. It was held that in the absence of any provisions in the Government of National Capital Territory of Delhi Act and in the absence of any other notification, order or legislation, the Punjab Courts Act, 1918 had continuous application to Delhi along with the laws made by the Delhi Legislative Assembly. Placing reliance on the principles laid down in ***AIR 1958 SC 682, Mithan Lal v. State of Delhi***, it was held that though the Punjab Courts Act was only extended to Delhi, it has the status of a Central legislation specifically enacted for Delhi. In this regard, it was held as follows:-

> "64. Further, **the Delhi High Court Act, 1966 is an enactment by Parliament whereunder from 31.10.1966 the High Court has been established for the U.T. of Delhi** which has been referred to as High Court of Delhi. The territorial jurisdiction of the High Court includes the territory of U.T. of Delhi. All original, appellate and other jurisdictions which had been exercised in regard to this territory by the High Court of Punjab shall be exercised by the High Court of Delhi. The Punjab Courts Act, 1918, though only

extended to Delhi, has the status of a central legislation directly enacted for Delhi. When a provincial Act or an Act which may be treated as a provincial Act was extended to the territory by a legislature, it would be deemed to be the enactment of such legislature. This principle has been clearly recognised by this Court in the case of ***Mithan Lal etc.* v. *State of Delhi*** [1959]1 SCR 445. It is, thus, clear that **on the extension of the Punjab Courts Act, 1918, to the U.T. of Delhi, it becomes a Central Act or an Act of Parliament as it is made by virtue of powers of Parliament to legislate for the U.T. of Delhi by virtue of Clause (4) of Article 246** of the Constitution of India. Therefore, the Punjab Courts Act, 1918 assumes the position of central legislation enacted specifically for Delhi and is the law operative in the NCT of Delhi. Hence, the notification issued by the Lt. Governor under Section 19 of the Punjab Courts Act, 1918 has been authorized by a central legislation. **Further, any legislation passed by the State Legislative Assembly is always subordinate to the laws of Parliament."**

(Emphasis by us)

142. In para 65 of ***Delhi Bar Association*** (supra), the provisions of Article 239AA(3)(b) and (c) were reproduced and the court observed that Article 239(3)(b) and (c) limited the power of the State legislature. It was thereafter further concluded thus:

"66. **Therefore, from the aforesaid constitutional provisions, it is clear that in the NCT of Delhi the laws made by the Delhi Legislative Assembly are always subordinate to the laws of Parliament whether prior or post in time.** This has been **reiterated** by a **Constitution Bench of nine Judges**

of this Court in ***New Delhi Municipal Council* v. *State of Punjab and Ors.*** AIR 1997 SC 2847, wherein the **Court held that Delhi Legislative Assembly is inferior to Parliament in hierarchy**."

67. **The power to legislate of the Legislative Assembly of Delhi shall not supersede the powers of Parliament to make laws with respect to any matter for Union Territory or any part thereof.** If any provision made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case **the law made by Parliament or such earlier law shall prevail and the law made by the Legislative Assembly shall, to the extent of repugnancy, be void. The Punjab Courts Act, 1918, being the Central legislation, will have the primacy over any legislation made by the Delhi Legislative Assembly on the subject and even if the Delhi Legislative Assembly has a power to make law on the subject which is covered under the impugned notification, Section 19 of the Punjab Courts Act, 1918 shall prevail on the subject and a notification issued thereunder shall not be invalidated merely because the subject-matter also falls within the Concurrent List."**

(Emphasis by us)

143. The Supreme Court has thus held that even if the Delhi Legislative Assembly has the power to make laws on the subject, any legislation passed by the Delhi Legislative Assembly is always subordinate to the laws of the Parliament, whether passed prior to or after the enactment of the Central legislation and that Article

239AA(3)(b) and (c) limited the power of the Delhi Legislative Assembly. The Supreme Court has reiterated the position that the Delhi Legislative Assembly does not have the same status as that of a full State Legislative Assembly and in fact is inferior to the Parliament in hierarchy.

The above discussion clearly shows that the position of the Court Fees Act with regard to Delhi thus would be the same as that of Punjab Courts Act.

144. Mr. Chandhiok, learned Senior Counsel for the petitioners has urged at some length that once a central legislation has occupied a field, the Delhi Legislative Assembly has no legislative competence to legislate on the same subject. The submission is that the Delhi Legislative Assembly cannot enact any law or make any enactment in view of the doctrine of "occupied field". In support of this submission reliance is placed on para 4 of the Full Bench pronouncement reported at ***AIR 2003 Delhi 317, Geetika Panwar & Ors. v. Government of NCT, Delhi***. This case related to the enhancement of the pecuniary jurisdiction of this court. Article 241 of the Constitution provides that the Parliament has the authority to constitute or to declare any court as a High Court for a Union Territory. In 1966, the Delhi High Court Act, 1966 (Act XXVI of 1966) was enacted by the Parliament with effect from 5th September, 1966 to provide for the constitution of a High Court for the Union Territory of Delhi. In terms of the statutory mandate in Section 17, the Central Government by a notification in the Official

Gazette appointed 1st of May 1967 as the date from which the jurisdiction of the High Court of Delhi shall extend to the Union Territory of Himachal Pradesh as well and from which date, the court of Judicial Commissioner for Himachal Pradesh shall cease to function and shall stand abolished.

145. Under Section 5(2) of the Delhi High Court Act, 1966, the legislature had conferred ordinary original civil jurisdiction in every suit, the value of which exceeded Rs.5,00,000/- upon the High Court of Delhi.

On the 20th December, 2001, the Legislative Assembly of the NCT of Delhi passed the Delhi High Court (Amendment) Act 2001, (Delhi Act No.5 of 2002) to amend the Delhi High Court Act, 1966 (Act No.26 of 1966) and the Punjab Court Act of 1918. This Amendment Act, 2001 received the assent of the President of India on 21st February, 2002 and was published in Part II of the Delhi Gazette Extraordinary on 13th March, 2002.

146. It is noteworthy that by the Delhi High Court (Amendment) Act, 2001 enacted by the Delhi Legislature, an increase was effected in the pecuniary limit of the original civil jurisdiction of the Delhi High Court from Rs.5,00,000/- to Rs.20,00,000/-.

147. The Amendment Act of 2001 was challenged by way of a writ petition under Article 226 of the Constitution titled ***Geetika Panwar v. Union of India & Ors.*** The challenge before the Full Bench has been reported at ***AIR 2003 Del 317*** and was made inter

alia on the following grounds:-

(i) The Amendment Act was ultra vires and without jurisdiction in as much as the Legislative Assembly of National Capital Territory of Delhi has no legislative competence under the Constitutional scheme to enact such law.

(ii) The impugned amendment sought to amend an enactment made by Act of the Parliament, the subject matter of which does not fall in any of the items either under List-II or List-III of the 7th Schedule of the Constitution of India.

(iii) The Delhi Assembly does not have the legislative competence to make any fresh law or amend any existing law in relation to the jurisdiction and power of the Delhi High Court. However, even by virtue of the special power conferred under Article 239AA, the Delhi Legislative Assembly was not competent to pass the impugned legislation effecting the pecuniary jurisdiction of the court.

(iv) Legislative competence was also challenged on the ground that Article 239 AA (3) (a) of the Constitution confers jurisdiction on the Legislative Assembly of National Capital Territory of Delhi to make laws, which are subject matter of various Entries in List-II and List-III, except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(v) The term "Administration of Justice" used in Entry 11-A of List-III does not empower the State Legislatures to make any law as regards

general jurisdiction and power of the High Courts, since it is specifically excluded there from.

(vi) It was further argued that phrase 'administration of justice' is included in the phrase 'constitution and organization' and, therefore Article 241 read with Entry 78 of List I postulated that the Parliament alone has the power to deal with the matters relating to jurisdiction and power of the High Court.

(Underlining by us)

148. The respondents had pressed a plea of legislative competency identical to that raised before us. The stand of the respondents has been noticed in paras 15 to 16 of the judgment which read as follows:-

"15. We have duly considered the submissions made by learned counsel for the parties. In Part VIII of the Constitution, there is a special provision made with respect to Delhi by Article 239AA, which was inserted by the Constitution (69th Amendment) Act, 1991, which came into force with effect from 1.2.1992. From the date of commencement of Constitution (69th Amendment) Act, 1991 Union Territory of Delhi is called National Capital Territory of Delhi and the Administrator appointed under Article 239 is designated as Lt. Governor. Clause (3) of the said Article says that there shall be a Legislative Assembly for National Capital Territory of Delhi. The power to legislate, conferred on this Legislative Assembly is not at par with that of the State Legislatures but is limited one as stipulated in Clause (3) of Article 239AA, which reads:-

xxx xxx xxx

> 16. Bare reading of the aforementioned clause suggest that the Legislative Assembly of National Capital Territory of Delhi has power to make laws for National Capital Territory of Delhi with respect to the matters in List II or in the Concurrent List, except which are in Entries 1, 2 and 18 of List-II and Entries 64, 65 and 66, in so far as they relate to Entries 1, 2 and 18 of the said list. As such it is competent for the Legislative Assembly of NCT of Delhi make any law in respect to all matters in entry 11-A of List II as well. True scope of Entry 11-A in List-III will be examined in subsequent part of this judgment."
>
> (Underlining by us)

149. In ***Geetika Panwar*** (supra), before the Full Bench of this court, the NCT of Delhi had urged that legislative competence to make the legislation was derived by the Legislative Assembly of the NCT of Delhi from Article 239 AA(3)(c) of the Constitution and the court was also called upon to interpret Entry 11A of List II of the Seventh Schedule. It was also urged that the legislation proposed by the Delhi Legislature had received the assent of the President and would prevail for this reason as well. These very submissions have made before us by the respondents in the present case. The Full Bench of this Court considered and rejected these submissions, holding as follows:-

> "39. Under the Constitution, there is **three-fold distribution of Legislative Powers provided by Article 246** between the Union and the States. List-I is the Union List. It includes those subjects over

which the Parliament alone has exclusive power to legislate. On items included in List-II, the State Legislatures alone have jurisdiction to legislate. Concurrent power is conferred on the Parliament and the State Legislatures over items included in List-III. The residuary power belongs to the Parliament. **Article 254** deals with inconsistency between the laws made by the Parliament and the laws made by the State Legislature and **Clause (3) thereof says that Union Law shall prevail where State Laws is repugnant to it**.

40. We, in this case, are concerned with **special provision**, which has been made with **respect to Delhi** under **Article 239AA** and **reliance was placed on behalf of the respondents to the first proviso to Sub-clause (c)** of **Clause (3)** that if any provision of law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly and if such law made by the Legislative Assembly has been **reserved for the consideration** of the **President** and has **received his assent, such law made by the Legislative Assembly shall prevail in National Capital Territory**. It was urged that since amendments had earlier been carried out to Sub-section (3) of Section 5 of the Delhi High Court Act, 1966 by the Parliament, the impugned legislation made by the Legislative Assembly of National Capital Territory of Delhi, which had been reserved for the consideration of the President and had also received his assent is to prevail by virtue of first proviso to Sub-clause (c) of Clause (3) of Article 239AA. **Learned Attorney General submitted that the Presidential assent cannot cure the basic defect of lack of legislative competence. If the Delhi Legislative Assembly had no legislative**

competence to pass the impugned legislation, Presidential assent is of no avail. The question of repugnancy can arise only when Parliament and the State Legislature have passed legislation, in respect of one or more entries in the Concurrent List. The Delhi High Court Act, 1966 was passed by the Parliament, in exercise of its legislative power under Entry 78 of List I of the Seventh Schedule of the Constitution. The said Act was not passed in respect of any entry in the Concurrent List. In fact, Entry 11-A of List III was not in existence when the Parliamentary legislation was passed, therefore, the question of repugnancy does not arise. **Field of legislation with regard to constitution and organisation of High Courts was an occupied field by the Parliamentary legislation, namely, the Delhi High Court Act, 1966, therefore; also the Delhi Legislative Assembly had no competence to enact the impugned legislation**."

(Emphasis supplied)

Thus, it was held by the court that in view of the Delhi High Court Act having been enacted by the Parliament, the subject "constitution and organization" of the High Court was an occupied field and, therefore, the Delhi Legislative Assembly was not competent to enact the legislation. The Full Bench held that consequently the Delhi Legislative Assembly had no competence to enact the impugned legislation.

150. Interestingly, the court has read the concept of occupied field usually referred to in the context of the Concurrent List entries with regard to which the Union and the States have concurrent power to

legislate, into the consideration of the legislative competency of the Legislature of Delhi, a Union Territory. More important is the enunciation of the binding principle of law that Presidential assent would not cure the basic defect of legislative competence.

151. We are informed that the decision of the Full Bench of this court was not assailed by the respondents any further and has attained finality.

152. The respondents have submitted that the decision of the High Court of Delhi in the case of ***Geetika Panwar v. Government of NCT of Delhi*** does not apply to the present case as this was a case related to List I Entry 78, whereas the present case falls only under List II Entry 3, with no corresponding entry, similar or otherwise, under either List I or List III. They also stated that the petitioner's reliance on ***Geetika Panwar*** (supra) is premised on an erroneous understanding of the principle of 'occupied field'. The respondents state that the doctrine of 'occupied field' has arisen in the jurisprudence of the Supreme Court in the context of specific entries in List II of Schedule VII of the Constitution, that are expressly made 'subject' to a corresponding entry in List I or List III. In the present case, the Delhi Legislative Assembly is competent under Article 239AA read with Entry 3 of List II to enact legislation prescribing the rate of court fees. This entry is not subject to any Entry in List I.

153. The respondent also stated that merely because the decision

in ***Geetika Panwar*** (supra) was not challenged did not mean that its ratio could be said to have attained finality. There is no question of there being any res judicata vis-a-vis a plenary legislation. The judgment can at most be considered as a precedent and its precedential value is significantly eroded by a later judgment of the Supreme Court: ***(2005) 2 SCC 591, Jamshed N. Guzdar v. State of Maharashtra & Ors.*** where it was stated in para 58 that the interpretation of the Constitution is the sole prerogative of the constitutional courts and the stand taken by the executive in a particular case cannot determine the true interpretation of the Constitution.

154. These submissions fail to note the binding principle noticed heretofore that so far as Union Territories including Delhi are concerned, the subjectwise separation by the Lists in Schedule 7 of the Constitution is inconsequential. The reference to the Lists in Article 239AA appears to be for the purpose of clarifying the limitation on the powers of the Delhi Legislative Assembly. It neither transforms the status of Delhi into a full-fledged state nor confers special authority to legislate. It certainly does not confer a status above the Parliament on the Delhi Legislative Assembly.

155. While there can be no dispute with the principle laid down in ***Jamshed N. Guzdar*** (supra), we have applied this very principle when we conclude that it is the interpretation and principles laid down by the Supreme Court and the Full Bench of this Court, i.e. Constitutional courts in constitutional challenges, which bind the

present consideration. More important is the fact that we have drawn strength on pronouncements interpreting Article 239AA whereas the respondents are unable to place any precedent wherein examination of Article 239AA of the Constitution has been undertaken.

156. We may also briefly examine the manner in which the respondents have proceeded in the matter post ***Geetika Panwar*** (supra). Our attention has also been drawn to the amendment effected thereafter to the pecuniary jurisdiction of this court. It was the Parliament which legislated on the matter thereafter and enacted the Delhi High Court Amendment Act (Act 35 of 2003) effective from 16th July, 2003 increasing the original civil pecuniary jurisdiction of this court to suits the value of which exceeds Rs.20,00,000/-. The pecuniary jurisdiction of the original side of the Delhi High Court by the Delhi High Court Act, 1966 has been increased by the following amendments:

Year	**Pecuniary jurisdiction**
1966	Over Rs.25,000/-
1969	Over Rs.50,000/-
1980	Over Rs.1,00,000/-
1999	Over Rs.5,00,000/-
16th July, 2003	Over Rs.20,00,000/-

157. It is noteworthy that even after coming into force of the Government of NCT of Delhi Act, 1991, the amendments to the Delhi High Court Act enhancing the pecuniary jurisdiction of the Delhi High Court were effected only by the Parliament. The

respondents have therefore accepted the above legal position on the limitations in the legislative competence of the Delhi Legislative Assembly as laid down in the above judgments, especially with regard to the jurisdiction to effect amendments to Central legislation. The respondents have thus admitted and accepted the legislative supremacy of the Parliament and parliamentary legislations.

158. In a judgment rendered by one of us (Gita Mittal, J.) reported at ***165 (2009) DLT 418, Delhi Towers Ltd. v. G.N.C.T of Delhi***, an issue arose as to whether an approved scheme of amalgamation under Sections 391 to 394 of the Company's Act, 1956 would be exigible to stamp duty. The petitioner had placed reliance on two notifications: the first notification bearing no.1 dated 16th January, 1937 and the second notification bearing no.13 dated 25th December, 1937; the Indian Independence Act, 1947 and the provisions of the Constitution of India. It was urged that these notifications were applicable even on date and the applicant would by virtue thereof be entitled to the benefit thereunder and remission of stamp duty on the transfer of property which takes place by virtue of approval by the Company Court of the scheme of amalgamation.

159. On behalf of Government of NCT of Delhi, learned counsel had inter alia argued that the two notifications had not been accepted by the Legislative Assembly of the Government of NCT of Delhi and consequently would stand repealed. Similar

submissions, as have been placed before this court, with regard to the unique position of Delhi in the constitutional scheme as well as the legislative power of the Delhi Legislative Assembly were pressed by the parties. Given the contentions of the parties in the present case, the following observations made in this pronouncement may be usefully adverted to:-

> "12.5 Delhi occupies a unique position and was one among the Union Territories listed in the Constitution. Part VIII of the Constitution is concerned with the provisions regarding Union Territories. Special provisions for some of the Union Territories have been made in Article 239. By virtue of the amendment of 1991, Article 239AA was incorporated to make special provisions with regard to Delhi which was renamed as the National Capital Territory as a result thereof.
>
> xxx xxx xxx
>
> 12.7 Article 239AA specifically states that it is subject to other constitutional provisions. So far as the conferment of legislative power is concerned, the same is to be found in Article 239AA(3). While sub-clause 3(a) is concerned with the conferment of power on the Legislative Assembly, sub clause (b) specifically states that the powers of the Legislative Assembly shall not derogate from the powers of the Parliament to make laws with respect to any matter for a Union Territory or part thereof.
>
> 12.8 The constitutionally recognised superiority of the legislative competence of the Parliament is also set out in Sub-clause (c) of Article 239AA(3) which provides that, if any provision of law made by the legislative assembly with respect to any matter is

repugnant to any provision of a law made by the Parliament with respect to that matter, whether passed before or after the law made by the legislative assembly, or of an earlier law, then the law made by the Parliament or such earlier law shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void. The second proviso to Sub-clause (3) of Article 239AA also provides that nothing in the sub-clause shall prevent the Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the legislative assembly.

12.9 It is also necessary to examine Article 246 of the Constitution so far as the legislative competence of the Parliament is concerned which reads as follows:

xxx xxx xxx

Sub-clause 4 of Article 246 of the Constitution of India, therefore empowers the Parliament 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 enumerated in the State list. Legislation in respect of the Union Territory would be such matter. These constitutional provisions thus set out in clear terms the legislative competence of the Parliament to legislate with respect to Delhi.

12.10 In exercise of powers under Article 239AA of the Constitution, the Parliament passed the Government of National Capital Territory of Delhi Act, 1991 which also took effect from the 1st of February, 1992. This by itself would show that the Delhi Legislature is subordinate to the Parliament.

12.11 The Government of National Capital Territory

of Delhi Act, 1991 was enacted to supplement the provisions of the Constitution relating to the Legislative Assembly and Council of Ministers for the National Capital Territory of Delhi and for matters connected therewith or incidental thereto. ...

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12.12 An issue as to the supremacy of the Legislative Assembly of Delhi over the Parliament and the impact of the afore noticed constitutional provisions fell for consideration before the Constitution Bench of nine Judges of the Supreme Court. In its judgment reported at : (1997) 7 SCC 339 New Delhi Municipal Council v. State of Punjab and Ors., the court held that the Parliament would be in a position of superiority in hierarchy qua the Delhi Legislative Assembly. In this regard, in para 10 of its judgment, the Constitution Bench had construed the implication of provisions of Section 239AA vis-a-vis the Government of National Capital Territory of Delhi Act in some detail …"

(Emphasis by us)

160. In para 12.13, the decision of the Supreme Court in ***AIR 2009 SC 693, Delhi Bar Association v. UOI and Ors.***, was relied upon. It was finally held in ***Delhi Towers Ltd.*** (supra) as follows:-

"12.14 From the above, it is apparent that the power of the Parliament to legislate under Article 245 of the Constitution in respect of Union Territories is not denuded or derogated by the provisions of Article 239AA or any other provisions of the Constitution, and the Parliament has the legislative competency to legislate with regard to any subject so far as the National Capital Territory of Delhi is concerned. I therefore find force in the submission

> that by virtue of the powers conferred in Article 239AA (3)(b) and 246(4), the Parliament has the legislative competence to enact laws applicable to Delhi."
>
> (Underlining supplied)

161. Given the authoritative and binding enunciation of law by the Supreme Court in ***New Delhi Municipal Council and Delhi Bar Association*** (supra) as well as the Full Bench adjudication in ***Geetika Panwar*** (supra), it may be said that it is unnecessary to advert to a Single Bench judgment of this court. We have noticed this judgment in some detail because the Government of NCT of Delhi made the same arguments in opposition as have been placed by it in the present case. These submissions of the Government of NCT of Delhi were rejected. The judgment in ***Delhi Towers Ltd*** (supra) was also not challenged by the Government of NCT of Delhi and has attained finality. Yet the same issues have been repeated before us.

162. In yet another pronouncement reported at ***ILR (2009) IV Delhi 280, M/s Narinder Batra v. Union of India*** by one of us (Gita Mittal, J.), the question with regard to distribution of legislative powers between Union and the States based on the lists in the 7th Schedule had arisen for consideration. Even though the instant case is not concerned with the distribution of legislative powers between the Union and States but between the Union and a Union Territory i.e. the National Capital Territory of Delhi, the observations made in this pronouncement on the separation of

powers and interpretation of the items in the Schedule to the Constitution are useful. Reliance was placed on the earlier pronouncement of the Supreme Court in ***(2002) 4 SCC 275, Union of India v. Delhi High Court Bar Association & Ors.*** In this case, the court was concerned with a challenge to the power of the Parliament to enact a law constituting a tribunal like the Banking Tribunal. On the aspect of construction of constitutional provisions, the court placed reliance on the following observations in ***AIR 1955 SC 58, Navinchandra Mafatlal v. CIT***:

> "… The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

163. So far as the supremacy of the Parliament to enact legislation is concerned, in ***Narinder Batra*** (supra), it was observed thus:-

> "65. The **supremacy of the parliament has been provided for by the non-obstante clause under Article 246(1) and the words 'subject to' in Article 246 (2) and (3).** Under Article 246(1), if any of the entries in the three lists overlap, the entry in list I will prevail. (Ref: ***AIR2007SC1584 Greater Bombay Co-op. Bank Ltd. v. United Yarn Tex. Pvt. Ltd. and Ors.; 2007 AIR SCW 2325 Greater Bombay Coop. Bank Ltd. v. United Yarn Tex. Pvt. Ltd.)"***
>
> (Emphasis supplied)

164. Mr. Chandhiok, learned Senior Counsel has placed before this court the pronouncement of a Division Bench reported at ***192 (2012) DLT 241 (DB), Vinod Krishna Kaul v. Lt. Governor NCT of Delhi & Ors.*** wherein the court had taken a view that the Delhi Legislative Assembly had the competence to legislate on the subject matter which was in issue before the court. In this case, the court was examining a challenge to the unit area method of levying property taxes in Delhi as were introduced by virtue of the Delhi Municipal Corporation (Amendment) Act, 2003 as well as the Delhi Municipal Corporation (Property Tax) Bye-Laws, 2004 and a prayer was made that both be declared as unconstitutional and void ab initio. The petitioner's challenge rested, inter alia, on the plea that the Legislative Assembly for the NCT of Delhi lacks the legislative competence to enact the Amendment Act, 2003. It was further contended that the Presidential assent in the manner stipulated in Article 239AA(3)(c) was not there.

165. Our attention has been drawn to para 2 of this pronouncement wherein the court has noticed the petitioner's challenge to the legislative competence placing reliance on the pronouncement of the Supreme Court reported at ***1997 (7) SCC 339, NDMC v. State of Punjab***. The observations of the court in ***Vinod Kaul*** (supra) are as follows:-

> "4. Let us examine the contention in respect of the "Union Taxation" argument. We note that Article 289(1) of the Constitution of India declares that the "property and income of a State shall be

exempt from Union taxation". In ***NDMC v. State of Punjab*** (supra), the question which arose for consideration was whether the properties of the States situated in the Union Territory of Delhi were exempt from property taxes levied under the municipal enactments in force in the Union Territory of Delhi. It is in this backdrop that the question of whether the property taxes under the two Municipal Acts extant in Delhi constituted Union taxation or not - arose for consideration. While doing so, the Supreme Court observed that the States put together do not exhaust the territory of India and that there are certain territories which do not form part of any State and yet are territories of the Union. The Supreme Court noted that the States and Union Territories are different entities as was evident from clause (2) of Article 1 and, indeed, from the entire scheme of the Constitution. It was further observed by the Supreme Court that Article 245 (1) prescribed that while Parliament may make laws for the whole or any part of the territory of India, the legislature of a State may make laws for the whole or any part of the State. Article 1 (2) read with Article 245 (1) would show that so far as the Union Territories are concerned, the only lawmaking body is Parliament. It was also observed that the legislature of a State cannot make any law for a Union Territory inasmuch as a State legislature can make laws only for that State. The division of legislative powers between Parliament and the State legislatures is clearly indicated in Article 246 of the Constitution**. The Supreme Court, importantly, noted that the division is only between Parliament and the State legislatures, that is, between the Union and the States and that there is no division of legislative powers between the Union and the Union Territories as much as there is no division of powers between States and the Union Territory**. The Supreme Court held that

insofar as the Union Territories are concerned, **it is clause (4) of Article 246 that is relevant and that says that Parliament has the power to make laws with respect to any matter or for any part of the territory of India not included in a State notwithstanding that such matter is enumerated in the State list. The Supreme Court categorically held that as the Union Territory is not included in the territory of any State, it was Parliament alone that was the lawmaking body available for such Union Territories**.

5. The Supreme Court also noted that in the year 1991, the Constitution provided for the establishment of a legislature for the Union Territory of Delhi (National capital Territory of Delhi) by the Constitution (Sixty-ninth) Amendment Act, 1991 but, the **legislature so created was not a full-fledged legislature nor did it have the effect of transforming the status of Delhi from a Union Territory to that of a State** within the meaning of chapter I of part XI of the Constitution.

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7. With regard to **Delhi**, the Supreme Court in NDMC v. **State of Punjab** (supra) observed as under:-

> "… In sum**, it is also a territory governed by clause (4) of Article 246**. As pointed out by the learned attorney general, various Union Territories are in different stages of evolution. Some have already acquired statehood and some may be on the way to it. **The fact, however, remains that those surviving as Union Territories are governed by Article 246(4) notwithstanding the**

> **differences in their respective set-ups - and Delhi, now called the "National Capital Territory of Delhi", is yet a Union Territory.**"
>
> (Emphasis by us)

166. These observations were reiterated in para 10 of the pronouncement [***Vinod Kaul*** (supra)] in the following terms:

> "10. What has to be examined is what is the source of power behind the Amendment Act of 2003? Did the Legislative Assembly of NCT of Delhi have the power to legislate on the field of property taxation or not? This can only be seen from constitutional provisions. **There is no dispute that the NCT of Delhi is not a State; it continues to be a Union Territory. Thus, Parliament has the full array of powers to legislate in respect of NCT of Delhi. As pointed out by the Supreme Court in NDMC v. State of Punjab (supra)**, insofar as **NCT of Delhi is concerned, it being a Union Territory**, "**there is no such thing as List I, List II or List III". And, the only legislative body is Parliament** --or a legislative body created by it, that is, the Legislative Assembly for the NCT of Delhi. By virtue of Article 239AA (Special provisions with respect to Delhi), the Union Territory of Delhi has been named as the National Capital Territory of Delhi. ..."
>
> (Emphasis by us)

167. Mr. Chandhiok has further submitted that in the light of the above principles laid down by the Supreme Court, in para 16 of ***192 (2012) DLT 241 (DB), Vinod Krishna Kaul v. Lt. Governor, NCT of Delhi,*** the court noticed the reliance of the petitioner on the

pronouncement of the Supreme Court in ***Kaiser-i-Hind***. In para 20, the court refers to the proviso to Article 239 AA (3)(c) as well as the repugnancy between a law made by the Delhi Legislature and Parliamentary law. It is contended that in this background, the finding by the court in para 26 that the mere statement in the proposal for Presidential assent that it was an 'amendment' is incorrect in law.

168. We find that Clauses 3(a) & (b) of Article 239AA have also been reproduced in the judgment. After these observations, the court directed itself only to the question as to whether the Legislative Assembly of Delhi had the power to legislate on property taxes. On this issue, in para 15, it was held that the power to legislate with regard to property taxes is traceable to Entry 49 of the State List, which, has not been excluded from the domain of the Legislative Assembly of NCT of Delhi by Article 239AA(3)(a) of the Constitution and it was therefore, held that the said Legislative Assembly had the power and competence to legislate with regard to "taxes on lands and buildings".

169. Mr. Chandhiok, learned Senior Counsel submits that the binding conclusions of the Supreme Court noted in the earlier paras 7 and 10 of the pronouncement have escaped attention in the concluding paragraphs of the judgment in ***Vinod Krishna Kaul*** (supra). It is pointed out by Mr. Chandhiok, learned Senior Counsel that the principles laid down by the Supreme Court in ***2008 (13) SCC 628, Delhi Bar Association v. Union of India and***

Others and the Full Bench decision of this court in ***AIR 2003 Del 317, Geetika Panwar v. Govt. of NCT of Delhi*** appear not to have been placed before the Division Bench in ***Vinod Krishna Kaul*** (supra).

170. The contention of learned Senior Counsel is that in view of the settled principles of law on this issue having not been placed or considered in ***Vinod Krishna Kaul*** (supra), the said judgment cannot bind the present consideration. It is contended that it is the law laid down and the findings in the authoritative pronouncements on the issue by the Supreme Court and the Full Bench which has to guide the consideration before us.

171. In support of this submission, reliance is placed on the pronouncement of the Jharkhand High Court reported at ***2012 Law Suit (Jhar) 482, Kiran Manjhi v. State of Jharkhand & Ors., State of Jharkhand & Ors. v. Sur Singh Hasda***. In this case, the court had observed thus:-

> "9. The learned single Judge, in subsequent order dated 14.11.2011 dismissing the writ petitions, held that the earlier judgments proceeded on mistake of facts. Obviously, if the judgment is rendered ignoring material facts which are relevant and if those facts would have been brought to the knowledge of the same Court, the Court may not have taken the same view which has been taken then judgment is no judgment and can be declared per incuriam. When very foundational fact of judgment itself is a cause for a decision and that fact is found to be wrong, then that judgment can be declared per incuriam even by the

> Coordinate Bench. If the judgment runs just contrary to the statutory provisions of law, then also that judgment can be declared per incuriam even by the Coordinate Bench but before holding so the fact and law must be clear and should be apparent so as to reach to that conclusion of mistake of fact or mistake of law by not doing roving or deep enquiry and this mistake must be apparent from the face of the order as well as by mere reading of the law. Therefore, we have to examine the issue in the light of the reasons given in the two different sets of impugned judgment/orders."

172. On the questions which have been urged before us, it needs no elaboration that we are bound by the enunciation of law by the Supreme Court and the Full Bench pronouncement of this Court.

173. It has been categorically declared that the Delhi Legislature remains subordinate to the Parliament; that it has not been conferred the power to repeal or amend or in any manner impact any Central legislation.

174. Article 246 which provides for separation of legislative powers between States legislatures and the Centre, does not provide for separation of powers between a Union Territory and a State.

175. We have discussed above that Delhi is not a State within the meaning of the expression 'Article 1(3)'. It remains a Union Territory. The separation of powers by the Lists is not applicable to the Union Territories under the Constitutional scheme.

176. Before us the respondents source their power to legislate to clause 3(a) of Article 239AA. It is submitted that the Delhi Legislative Assembly is empowered to make laws with respect to any of the matters in the State List and the Concurrent List subject to the exceptions detailed therein. In making this submission, the respondents overlook the opening words of clause 3(a) of Article 239AA. Article 239 AA of the Constitution, under which the respondent claims to have exercised its legislative power, begins with the words "*subject to provisions of the Constitution*". From the commencement of Article 239AA(3)(a), the Legislative Assembly of the National Capital Territory of Delhi has power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List. This legislative power under **Article 239AA(3)(a)** is subject to provisions of the Constitution, meaning thereby that the Legislative Assembly of the National Capital Territory of Delhi cannot alter or amend the Parliamentary statute notwithstanding that it has power qua entries in List II. **Article 239AA(3)(a)** itself provides as under:-

> "Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Construction to make laws with respect to any matter for a Union Territory or any part thereof".

177. Clause 3(b) of Article 239 AA reiterates that the powers of the Delhi Legislative Assembly under Article 239 AA (3)(a) do not

derogate from the power of the Parliament to make laws with respect to any matter for a Union Territory or any part thereof. Thus only limited power is given to the Delhi Legislative Assembly under Article 239AA to legislate. Clause 3(c) declares the supremacy of a Parliamentary law over any law made by the Delhi legislative assembly, whether passed before or after the law made by the legislative assembly. It goes to the extent of declaring that to the extent of its repugnancy with the Parliamentary law, the law enacted by the Delhi legislative assembly would be void. Sub clauses (b) and (c) thus reinforce the supremacy of the Parliamentary law even further.

178. We find an important difference between the expressions used in Articles 239 and 254 which further highlights the Parliamentary legislative supremacy over the powers of the Delhi legislative assembly. In Article 254(1) of the Constitution, the words "which the Parliament is competent to enact" have been incorporated. These are not to be found in Article 239AA. Therefore so far as Delhi is concerned, the Parliament is supreme so far as legislation is concerned. It is also evident from the above discussion that so far as NCT of Delhi is concerned, despite Article 239AA, extremely limited jurisdiction is conferred on the Legislative Assembly under Article 239 AA and that the law made by the Parliament is supreme.

Whether Lists in the Seventh Schedule are a substantive source of power for the Parliament and the State Legislatures?

179. We may now examine the impact of the subject wise demarcation in the Lists in Schedule VII and the effect thereof.

180. Before this court the respondents have sourced their jurisdiction to legislate on the subject of court fees, not only to Article 239AA of the Constitution but have heavily relied on Article 246(3) and Entry 3 in List II of the Seventh Schedule.

181. So far as entries in the lists are concerned, they do not confer the power of legislation but set out the field of legislation [Ref : ***(2002) 8 SCC 481, TMA Pai Foundation v. State of Karnataka***]

182. Mr. Chandhiok has drawn our attention to the judicial precedent reported at ***(2011) 3 SCC 139, Offshore Holdings Pvt. Ltd. V. Bangalore Development Authority & Ors.*** construing whether entries in the Lists under the Seventh Schedule were a substantive source of power for a legislature.

183. In the case of ***Girnar Traders (1) v. State of Maharashtra (2004) 8 SCC 505,*** the court was considering the question of whether all provisions of the Land Acquisition Act, 1894 (another Central enactment) can be read into the provisions under Chapter VII of the Maharashtra Regional and Town Planning Act, 1966 and the correctness of the view of the Supreme Court in ***(1995) Supp (2) SCC 475, State of Maharashtra v. Sant Joginder Singh***. The court observed that the Land Acquisition Act is relatable to Entry 42 of List III while the State enactment i.e. BDA Act was relatable to Entries 5 and 18 of List II of 7th Schedule. With regard to the

effect of the entries in the lists and their construction, in para 67, the Supreme Court observed that "*The entries in the legislative lists are not the source of powers for the legislative constituents but they merely demarcate the fields of legislation*." The court also reiterated the well settled position that "*these entries are to be construed liberally and widely so as to attain the purpose for which they have been enacted. Narrow interpretation of the entries is likely to defeat their object as it is not always possible to write these entries with such precision that they cover all possible topics and without any overlapping*."

184. After a detailed consideration of the principles laid down in several judicial pronouncements, so far as the conflict between a law made by the Parliament and another legislation made by the State Legislation is concerned, the Supreme Court laid down binding principles in paras 71 and 72 of ***(2011) 3 SCC 139, Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors.)*** (supra) which deserve to be considered in extenso and read as follows:-

> "71. **The Courts have taken a consistent view and it is well-settled law that various Entries in three lists are not powers of legislation but are fields of legislation. The power to legislate flows, amongst others, from Article 246 of the Constitution. Article 246(2), being the source of power incorporates the non- obstante clause, 'notwithstanding anything contained in Clause (3), Parliament and, subject to Clause (1), the legislature of any State' have power to make laws**

> **with respect to any of the matters enumerated in List III. <u>Article 246 clearly demarcates the fields of legislative power of the two legislative constituents</u>**. It clearly states on what field, with reference to the relevant constitutional Lists and which of the legislative constituents has power to legislate in terms of Article 246 of the Constitution. While the States would have exclusive power to legislate under Article 246(2) of the Constitution in relation to List II; the Concurrent List keeps the field open for enactment of laws by either of the legislative constituents."
>
> (Emphasis by us)

It is therefore well settled that the entries in the Lists provide the field in which the Parliament or the State Legislature may legislate. Power to legislate therefore cannot be sourced to entries in the Lists. Authority has to be found in the substantive constitutional provisions.

185. It is trite that the power to legislate flows from Article 246 of the Constitution. The Constitution recognizes only two legislative constituencies i.e. the Parliament and the State Legislative Assemblies as is manifested by Article 246 and the Seventh Schedule. The Lists do not confer or create the power to legislate, but only define the field of legislation, the boundaries of the separation of power with regard to the field of legislation. Article 246(3) is applicable only to States, and not to Union Territories. It therefore needs no further elaboration that the Delhi Legislative Assembly cannot source its legislative competence to legislate on

the subject of court fees (other than those applicable to the Supreme Court) to Entry 3 in List II which is the State List. On the other hand, Parliament has the legislative competence by virtue of Article 246(3) and Article 239AA(3)(b) to make laws in respect of all entries in all lists.

186. Article 246(1) contains a non obstante clause, while sub clauses (2) and (3) contain the expression "subject to". As such, the Parliament's power under Article 246(4) to legislate on subjects even in List II (State List) in respect of the Union Territories is primary. Therefore, a law made by Parliament will prevail over any law made by the Delhi Legislative Assembly, including any law made with respect to fees for the High Court or the subordinate courts.

187. The Delhi Legislative Assembly has also no power to effect legislation with regard to any subject on which there is an existing Central legislation. By virtue of Article 246(4), only the Parliament is empowered to amend or repeal a central legislation.

188. We have noted above that in ***New Delhi Municipal Council v. State of Punjab*** (supra) (SCC pg 414 paras 152 -156), it was held that the three Lists in the Seventh Schedule of the Constitution have no relevance to the Union Territory of Delhi since Parliament can make law respecting all the entries in all the three Lists. So far as Delhi is concerned, there is, thus, no separation of legislative power by the Lists. The Parliament remains supreme so far

legislation on any of the subject matters including that under Entry 3 of List II, which is relied upon by the respondents.

189. On the concept of 'occupied field' in ***AIR 2003 Delhi 317, Geetika Panwar & Ors. v. Government of NCT, Delhi*** where amendment Act of Delhi High Court, 1996 was in question held as under:-

> "40. …Field of legislation with regard to constitution and organisation of High Courts was an occupied field by the Parliamentary legislation, namely, the Delhi High Court Act, 1966, therefore; also the Delhi Legislative Assembly had no competence to enact the impugned legislation."

190. In the instant case, the Central Court Fees Act, 1870 admittedly occupies the field. Therefore, once there is a Central Legislation, the same can be amended by the Parliament alone, in the Union Territory of Delhi.

For all these reasons, it has to be held that the Delhi Legislative Assembly has no legislative competence to legislate on the same subject. Article 239AA of the Constitution does not empower the Delhi Legislative Assembly to enact any law on the same subject or effect any amendment thereto.

II Purpose of Statement of Objects and Reasons in a legislation- whether essential and whether it is an aid to legislative interpretation?

191. The petitioners points out that the Court Fees Act was

amended in 1867 to enhance the court fee. However, in view of the repressive effect on the litigation of the 1867 court fees enhancement on the general litigation of the country, it had to be amended within two years in 1870 to lower the court fees.

192. The reasons detailed in the Statement of Objects and Reasons of the Court Fees Act, 1870 are relevant for the present consideration. The material extract thereof reads as follows:-

> "The rates of Stamp fees leviable in Courts and offices established beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, and in proceedings on the appellate side of such High Courts, were, as fixed by Act XXVI of 1867, to a great extent tentative.
>
> The experience gained of their working during the two years in which they have been in force, seems to be conclusive as to their repressive effect on the general litigation of the country.
>
> It is, therefore, thought expedient to make a general reduction in the rates now chargeable on the institution of civil suits, and to revert to the principle of maximum fee which obtained under the former law.
>
> It is proposed also to reduce the valuation fixed by the existing law for the computation of the fee leviable on suits relating to land under temporary settlement or land exempt from the payment of revenue to the Government which is believed to be at least relatively excessive as compared with the valuation of permanently settled land; and to provide for the valuation of suits relating to mere parcels of land

which, though forming part of estates under settlement, bear no specific allotment of any portion of the assessment of Government revenue on such estates, at the estimated selling price of such land, as was the rule in those cases under Act X of 1862.

The want of some fixed valuation applicable to certain classes on suits, as for example, suits instituted between landlord and tenant to recover a right of occupancy or enforce adjustment, or suits for maintenance or for an annuity the subject-matter of which though not absolutely indeterminable, is certainly not susceptible of ready determination, has given rise to much uncertainty and variety in the procedure adopted by the several Courts in such cases; and the amendment of the existing law in this respect is felt to be urgently called for.

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The ad valorem fee now chargeable on summary suits instituted under Act XVI of 1838 and the Bombay Act (5 of 1864), is represented as working unsatisfactorily, and the substitution of a fixed rate is recommended.

It is to be observed that an award in such cases is liable to be set aside by a judgment passed in regard to the same matter in a regular suit; hence it appears more equitable to treat these summary suits as miscellaneous applications and to subject them to a similar fixed institution fee.

As the **Bill provides for a considerable reduction of the fees** heretofore chargeable on civil suits of small amount, it seems unnecessary to maintain the present distinction between the Courts of Cantonment Joint Magistrates and other Civil Courts in respect of the amount of fee leviable on the institution of such

suits."

(Emphasis by us)

193. So far as the fees imposed on petitions in criminal courts is concerned, the Statement of Objects and Reasons to the 1870 enactment make the following declaration:-

> "In deference to the strong objections entertained by the local authorities in certain Provinces to the retention of the fee imposed on the presentation of certain petitions in the Criminal Courts, it is proposed to reduce the amount of such fee from one rupee to eight annas."

194. The Statement of Objects also clearly set out the statutory intendment so far as the court fees on revenue petitions; and request of the military courts are concerned in the following terms:-

> "The uniform exaction of a fee of eight annas in the case of all petitions addressed to a Revenue Officer or a Magistrate, works harshly in its application to such communications when presented by persons having dealings or transactions with the Government in relation to such transactions. Equitable considerations require that petitions of this kind should be excepted from the operation of the general rule, and the Bill makes suitable provision for such cases.
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> It is proposed also to exempt suits instituted in a Military Court of Requests from the payment of any fee. The constitution of such Courts is peculiar; they form no part of the regular machinery employed in

> the general administration of justice, the present measure therefore is inapplicable to them. Moreover, the suitor in such Courts is placed at this disadvantage as compared with suitors in the ordinary Civil Courts that, although he may gain his case, he is unable to recover the costs which he has incurred in prosecuting his claim; hence the incidence of the taxation imposed by the levy of an institution fee in such cases is inequitable."

195. With regard to the cases relating to marriage, the Statement of Objects and Reasons contained the following statements:-

> "Suits for the restitution of wives, which are of common occurrence in Punjab are held to be somewhat excessively taxed under the present law, which prescribes that in suits the money value of the subject-matter of which cannot be estimated, fixed fee of Rs.10 shall be levied; the Bill substitutes for that rate in such cases, a special fee of Rs.5."

196. Referring to the introduction while proposing the amendment to the Court Fees Act, 1867, as well as the Statement of Objects and Reasons for the Court Fees Act, 1870 (amendment to the 1867 Act), it is submitted that the object of the 1870 amendment was to reduce the court fees so that it will not act as a deterrent for a person who seeks redressal of his/her grievance from the court.

197. Despite the fact that different court fees statutes governing different jurisdictions in the country, the legislative purpose of such statutes would be the same.

198. The consideration by Legislature in 1870 reflects a close scrutiny of the statutory provisions vis-a-vis the object of the statute. The amended Court Fees Act of 1870 was declared to be more equitable to the general community. The rearrangement of the existing provisions as well as the change of nomenclature from judicial stamps to court fees was effected to avoid confusion and this was also noted in the Statement of Objects and Reasons.

The Statement of Objects and Reasons of 1870 Act itself speaks of the need for reduction of court fee.

199. Interestingly, the above Statement of Objects and Reasons for the Central Act, remains unchanged even in the impugned legislation of 2012. This statement sheds valuable light on the reasons for the legislation. The rates of courts fees have been increased manifold by the impugned amendment without even considering the Statement of Objects and Reasons of the statute which remain a part of the impugned legislation. The impugned amendment is thus contrary to the very scheme and object of the Act itself.

200. In the present case, "The Court Fees (Delhi Amendment) Act, 2012" as its preamble, proceeds only to state that it is

> "An Act further to amend the Court Fees Act, 1870 in its application to the National Capital Territory of Delhi".

201. If the object and reasons of the Act remain the same as the

existing statute, an amendment cannot make the statutory provisions completely derogatory to the scheme of the enactment and contrary to the very intent of the statute.

202. To understand the purpose of the Statement of Objects and Reasons of a legislative Bill and the extent to which it serves as a valuable aid to legislative interpretation, we may usefully advert to the observations of the Supreme Court in ***(1987) 3 SCC 279 Utkal Contractors & Joinery (P) Ltd. v. State of Orissa.*** In this pronouncement the Court while interpreting the provisions of the Orissa Forest Produce (Control of Trade) Act, 1981 stated thus:

> "9. …A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not

> expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily."
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> (Underlining by us)

203. So far as the position of the Statement of Objects and Reasons for a Bill in the legislative scheme is concerned, the same has also been discussed in paras 66 to 68 of the pronouncement reported at ***(2011) 8 SCC 737, State of Tamil Nadu and Others v. K. Shyam Sunder and Others***. Thereafter, the court also clearly set down the purpose for which said Statement of Objects and Reasons could be utilized thus:

> "66. The **Statement of Objects and Reasons** appended to the **Bill is not admissible as an aid to the construction of** the Act to be passed, but **it can be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy**. The **Statement of Objects and Reasons may be relevant to find out** what is the ***objective*** **of** any given **statute** passed by the legislature. It **may provide for the reasons** which induced the legislature **to enact** the statute. "For the purpose of ***deciphering the objects and purport*** of the Act, the

court can look to the Statement of Objects and Reasons thereof".

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68. Thus, in view of the above, the **Statement of Objects and Reasons of any enactment spells out the core reason for which the enactment is brought and it can be looked into for appreciating the true intent of the legislature or to find out the object sought to be achieved by enactment of the particular Act or even for judging the reasonableness of the classifications made by such Act**."

(Emphasis by us)

204. On this issue in ***(2009) 8 SCC 431 (at pg 436), A. Manjula Bhashini v. A.P. Women's Coop. Finance Corpn. Ltd.***, the Supreme Court observed as follows:-

"40. The proposition which can be culled out from the aforementioned judgments is that although the Statement **of Objects and Reasons** contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same **can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved** by enactment of the particular Act or for judging reasonableness of the classification made by such Act."

(Emphasis by us)

205. The Statement of Objects and Reasons can therefore be looked at for appreciating the true intent of the legislature and/or object sought to be achieved by enactment of the particular Act. It is well settled that the Statement of Objects and Reasons in an enactment enables determination of the object sought to be achieved as well as for judging the reasonableness of the classification. This court can in all fairness advert to the same for the purpose.

206. The further question which arises is as to what would be the effect of a failure of the legislature to provide a Statement of Objects and Reasons for a Bill and enactment. In (***1826) 162 E.R. 456 Brett v. Brett,*** it was held that failure to state the objects and reasons would render the legislation arbitrary. We are not sure that this by itself would permit us to so hold.

207. The present case is one in which a statutory amendment has been effected without any amendment having been effected to the 'Statement of Objects and Reasons' to the Court Fees Act, 1870. It has been submitted before us therefore, that the amended Delhi Court Fees Act (impugned before us) remains in the same spirit, intendment and purpose as was declared in the Statement of Objects and Reasons of the 1870 enactment.

208. So far as the Court Fees Act, 1870 is concerned, in ***(1890) I.L.R. 12 ALL 129, Bal Karan Rai v Gobind Nath*** it was noticed that the Act has no preamble and it was held that it is for the judges

to decide what its objects were from its enacting clauses.

209. We are thus confronted with the hard reality that barely two years after enhancement of the court fee in 1867, the legislature was compelled to amend the statute again in 1870 to effectuate a reduction thereto in view of the regressive effect of the enhanced court fee on litigation. The legislature incorporated elaborate reasoning for this reduction which stands articulated as the 'Statement of Objects and Reasons' to the 1870 amendment.

210. It is astonishing that when the respondents have effected the impugned amendment in 2012 resulting in enhancement of the court fee by more than 100 times for certain items, they have not substituted (or amended) the existing objectives in the legislation of 1870. As a result, the amended enactment of 2012 is prefaced by the very reasoning which guided the legislature in 1870 to reduce the court fee! The inevitable conclusion is that the objectives for the court fee regime remain unchanged – yet, by the impugned legislation, the respondents have enacted statutory provisions completely to the contrary. We may note that before us, the respondents do not even attempt to reconcile the contradiction between the stated objects and reasons with the legislative amendment which has been effectuated. This illustrates the complete lack of application of mind and absence of the requisite seriousness with which, a legislative exercise, having such a deep impact on the constitutional rights of every person in Delhi, ought to have been undertaken.

III Can legislative history; social context; writings of experts/ authors; reports of commissions/committees preceding the enactment be utilized by the court as permissible external aids to construction of legislation?

211. Before this court, the petitioners place strong reliance on the Statement of Objects and Reasons to the Court Fees Act, 1870, writings on the subject as Reports of the Law Commission of India especially the 189th Report of 2004 titled **"Revision of the Court fee Structure"** and prior reports in support of the challenge to the amendment of 2012 to the Schedule of the Court Fees Act, 1870. An examination of the important issues pressed by both sides would inevitably require that we look at the said Reports. Before doing so, we deem essential an examination of the extent to which reliance can be placed on these aids by the court.

212. Mr. Chandhiok, learned Senior Counsel places reliance on the pronouncement of the Supreme Court reported at ***AIR 1984 SC 684, R.S. Nayak v. A.R. Antulay*** in support of his submissions on the permissibility of the reliance on the Statement of Objects and Reasons as well as the Law Commission Reports. The Supreme Court ruled that the history of the legislation, recommendations of Committees and Commissions, information collected before effecting the enactment are important aids for ascertaining the intention of the legislature. The objections of the respondents before the Supreme Court as well observations and findings of the court on this issue in paras 31, 33 and 34 of this judgment deserve

to be considered in extenso and read as follows:-

> "31. At the threshold learned Counsel for the accused sounded a note of caution that the Court should steer clear of the **impermissible attempt** of the appellant **to arrive at a true meaning of a legislative provision by delving deep into the hoary past and tracing the historical evolution of the provision awaiting construction. It was submitted with emphasis that this suggested external aid to construction falls in the exclusionary rule and cannot be availed of**. Therefore, it has become necessary to examine this preliminary objection to the court resorting to this external aid to construction.
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> 33. The trend certainly seems to be in the reverse gear in that **in order to ascertain the true meaning of ambiguous words in a statute, reference to the reports and recommendations of the Commission or Committee which preceded the enactment of the statute are held legitimate external aids to construction**. The modern approach has to a considerable extent eroded the exclusionary rule even in England. A **Constitution Bench** of this Court after specifically referring to ***Assam Railways and Trading Co. Ltd. v. I.R.C. in State of Mysore v. R.V. Bidap*** **: (1973)IILLJ418SC** observed as under:
>
> The trend of academic opinion and the practice in the European system suggest that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. There is a strong case for **whittling down the Rule of Exclusion** followed in the British courts, and for less apologetic reference to legislative proceedings and like materials to read the meaning of the words of a statute. **Where it is plain,**

the language prevails, but where there is obscurity or <u>lack of harmony with other provisions and in other special circumstances, it may be legitimate to take external assistance such as the object of the provisions, the mischief sought to be remedied, the social context, the words of the authors and other allied matters</u>.

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34. …At the very least, **ascertainment of the statutory objective can immediately eliminate many of the possible meanings that the language of the Act might bear; and, if an ambiguity still remains, consideration of the statutory objective is one of the means of resolving it**.

The **statutory objective is primarily to be collected from the provisions of the statute itself**. In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity--it is the plainest of all the guides to the general objectives of a statute. But it will not always help as to particular provisions. **As to the statutory objective of these, a report leading to the Act is likely to be the most potent aid; and, in my judgment, it would be more obscurantism not to avail oneself of it**. There is, indeed clear and high authority that it is available for this purpose.

…A reference to **Halsbury's Laws of England, Fourth Edition, Vol. 44 paragraph 901, would leave no one in doubt that "reports of commissions or committees preceding the enactment of a statute may be considered as showing the mischief aimed at and the state of the law as it was understood to be by the legislature when the statute was passed"**. In the footnote under the statement of law cases quoted amongst others are R.

v. Ulugboja [1981] 3 All. E. R. 443, R. v. Bloxham [1982] 1 All. E. R. 582 in which **Eighth report of Criminal Law Revision Committee was admitted as an extrinsic aid to construction**. Therefore, it can be confidently said that the **exclusionary rule** is flickering in its dying embers in its native land of birth and has been given a decent **burial by this Court**. Even apart from precedents the **basic purpose underlying all canons of construction is the ascertainment with reasonable certainty of the intention of Parliament in enacting the legislation. Legislation is enacted to achieve a certain object. The object may be to remedy a mischief or to create some rights, obligations or impose duties**. Before undertaking the exercise of enacting a statute, Parliament can be taken to be aware of the constitutional principle of judicial review meaning thereby the legislation would be dissected and subjected to microscopic examination. More often an expert committee or a Joint-Parliamentary committee examines the provisions of the proposed legislation. But language being an inadequate vehicle of thought comprising intention, the eyes scanning the statute would be presented with varied meanings. **If the basic purpose underlying construction of a legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a special committee preceding the enactment, existing state of law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the court of a substantial and illuminating aid to construction.** Therefore, departing from the earlier English decisions **we are of the opinion that reports of the committee which**

preceded the enactment of a legislation, reports of Joint Parliamentary Committee, report of a commission set up for collecting information leading to the enactment are permissible external aids to construction. In this connection, it would be advantageous to refer to a passage from ***Crawford on Statutory Construction*** **(page 388)**. It reads as under:

> "The judicial opinion on this point is certainly not quite uniform and there are American decisions to the effect that the general history of a statute and the various steps leading upto an enactment including amendments or modifications of the original bill and reports of Legislative Committees can be looked at for ascertaining the intention of the legislature where it is in doubt but they hold definitely that the legislative history is inadmissible when there is no obscurity in the meaning of the statute."
>
> In United States v. St. Paul, M.M. Rly. Co. 62 L ed. 1130 it is observed that the reports of a committee, including the bill as introduced, changes 'made in the frame of the bill in the course of its passage and the statement made by the committee chairman incharge of it, stand upon a different footing, and may be resorted to under proper qualifications'. The **objection** therefore of Mr. Singhvi **to our looking into the history of the evolution of the section with all its clauses, the Reports of Mudiman Committee and K. Santhanam Committee and such other external aids to construction must be overruled**."
>
> (Emphasis by us)

213. We find that several reports of the Law Commission of India

have commented upon the spirit, intendment and purpose of imposition of court fees. Our attention has been drawn to the 1st, 28th and 114th Reports of the Law Commission of India which make recommendations qua several facets of the challenge laid before us. The 189th Report of the Law Commission is devoted to a close examination of the court fees regime.

214. Mr. J.P. Sengh, learned Senior Counsel has submitted that the courts have also attached a great weightage to the reports of the Law Commission. In this regard, reference is made to the pronouncement of the Supreme Court in ***AIR 1992 SC 165, All India Judges Association (I) v. Union of India***; ***(1995) 4 SCC 262, State of Madhya Pradesh v. Shyam Sunder Trivedi*** and ***(1999) 6 SCC 591, Sakshi v. Union of India***.

215. Let us also examine the weight and worth of such recommendations. In ***AIR 1992 SC 165, All India Judges Association (I) v. Union of India***, the court ruled as follows:-

> "10A. …The main **objection against implementation** of the **recommendation of the Law Commission relating** to the setting up of the All India Judicial Service was founded upon the basis that control contemplated under Article235 of the Constitution would be affected if an All India Judicial Service on the pattern of All India Services Act, 1951, is created. **We are of the view that the Law Commission's recommendation should not have been dropped lightly. There is considerable force and merit in the view expressed by the Law Commission**..."
>
> (Emphasis by us)

216. In ***(1995) 4 SCC 262, State of Madhya Pradesh v. Shyam Sunder Trivedi***, the court held thus:-

> "18. In its 4th Report of June 1980, The National Police Commission noticed the prevalence of custodial torture etc. and observed that nothing is so *dehumanising* as the conduct of police in practising torture of any kind on a person in their custody.
>
> xxx xxx xxx
>
> **Disturbed by this situation, the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries** to a person while in police custody, **if there is evidence that the injury was caused during the period when the person was in the police custody, the Court may presume that the injury was caused by the police officer having the custody of that person** during that period unless, the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned. The **recommendation, however, we notice with concern, appears to have gone unnoticed and the crime of custodial torture etc. flourishes unabated.** Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, **we hope that the Government and Legislature would give serious thought to the recommendation of the Law Commission (supra)** and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished...."
>
> (Emphasis by us)

217. Given the dilution of the rule of exclusion of the written material as noticed above as an aid for statutory interpretation, it is well settled that the reports of the Law Commissions are valuable external aids to statutory interpretation.

218. The Law Commission is established by an order of the Government of India, constituted for reforming the law for maximising justice in society and promoting good governance under the Rule of Law. The Commission has a fixed tenure and works as an advisory body to the Ministry of Law and Justice. The Chairpersons of the Commission have been retired Judges of the Supreme Court (except for Mr M.C. Setalvad, who was the former Attorney General and Chairman of the 1st Law Commission; and Mr K.V. Sundaram, a civil servant, the Chairman of the 5th Law Commission). This fact adds to the prominence of the Commission and the conclusive nature of its research based reports.

219. The 114th Report of the Law Commission of India on Gram Nyalayaya authored by the 11th Law Commission was chaired by Mr. Justice D.A. Desai and the 189th Report of the Law Commission of India on Revision of Court Fees Structure was authored by the 17th Law Commission which was chaired by Mr. Justice M.J. Rao. Each Law Commission is appointed by an order of the President. For instance the 20th Law Commission of India was appointed for a period of three years from 1st of September 2012 to 31st of August 2015 by a Government of India order dated 8th of October, 2012.

220. The Supreme Court has repeatedly called upon the Government to act upon the Reports of the Law Commission of India and to consider the Reports as well as bring appropriate legislation thereon. Judicial precedent has unequivocally declared that such reports of expert committees can also be examined as external aids to statutory interpretation, especially when there is no clarity about the objective of the provision.

221. The recommendations by the Law Commission of India have been made after a deep study and analysis of relevant material from India and abroad, extensive and authoritative jurisprudence and comments of legal experts. To say the least, the 189th Report of the Law Commission making reference to the principles laid down by the Supreme Court on the very pertinent issues with regard to the imposition and effect of court fees as well as material from jurisdictions from different parts of the world necessitated and deserved attention and scrutiny by the legal and financial experts who have recommended, guided and effectuated the impugned amendment. It appears to us that the respondents have ignored the reports and recommendations of the Law Commission, relevant pronouncements and directions of the Supreme Court on the issue as well as the importance of the recommendations of the Law Commission, the expert body devoted to the work of legal reform. The sole report of the Sub Committee of the respondents which was the basis of the recommendation makes no reference to any of the above. These important basic issues were not drawn to the

attention of any person or authority concerned in any manner with the making of the impugned law. The discussions, conclusions and recommendations in these reports are relevant material in considering any change in the law involving court fees.

We have no hesitation in concluding that the respondents have therefore excluded relevant material from their consideration and have effected the impugned statutory amendment without application of mind thereto.

222. We could end our examination of the challenge to the impugned legislation at this point given our findings that the Delhi Legislative Assembly lacked the competence to amend the Court Fees Act, 1870. However, the petitioners have urged that even if this issue was decided in favour of the respondents, the impugned legislation is not sustainable in view of violation of Constitutional provisions and statutory procedure as well as several fundamental and human rights of the people guaranteed under the Constitution. We now propose to examine these submissions in seriatim.

IV <u>Is the assent of the President justiciable? Scope and extent of the permissible enquiry by the court</u>

The discussion on this subject is being considered under the following sub-headings:

(i) Whether requirements of Presidential 'consideration' and 'assent' under Articles 239AA and 254 are different?

(ii) Whether Presidential assent justiciable? If so, extent and manner

(iii) Whether grant of Presidential assent is exercise of legislative power?

(iv) Whether Presidential 'consideration' and 'assent' are exercise of legislative power?

(v) Respondent's objection to production of records

(vi) Burden of establishing existence of material and compliance with the pre-conditions

(vii) 'Consideration' and 'assent'- how accorded

(viii) Scope of judicial review of the Presidential consideration

(ix) Whether requirements for seeking "general" assent are different from those for seeking "specific" assent

(x) Position in the present case: exercise undertaken by the respondents

223. The petitioner has submitted that Presidential assent was sought because the proposed legislation was repugnant to the provisions of the Court Fees Act, 1870, a Central legislation. A challenge is also laid on grounds of non-compliance of constitutional provisions under Article 239 AA (3)(c). The petitioners contend that the matter of Presidential assent, be it general or specific cannot be treated with the informality and simplicity with which the respondents have treated it so.

224. It has been submitted by Mr. Chandhiok learned Senior Counsel for the petitioners that courts can always examine whether

the preconditions for exercise of power by constitutional authorities have been satisfied or not, and that this principle of judicial review applies in the case of a Bill which is reserved for the consideration of the President as well. In support of this contention, the petitioners have extensively relied upon the binding pronouncements of the Supreme Court in a plethora of judgments including ***AIR 1955 Bombay 35 Basantlal Banarsilal v. Bansilal Dagdulal***; (***1985) 3 SCC 661 Gram Panchayat of Village Jamalpur v. Malwinder Singh &Ors.***; ***(2002) 8 SCC 182 Kaiser-i-Hind Pvt. Ltd. v. National Textile Corporation (Maharashtra North) Ltd. &Ors.; (2009) 5 SCC 342 Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Ltd.*** In the discussion which follows we shall deal with each of these judgments individually.

225. The petitioners contend that the consideration and assent of the President require active application of mind to the repugnancy pointed out between the proposed law/amendment and the earlier Central enactment and to the necessity of having a different State law. They stress that assent must indicate an affirmative acceptance or concurrence to the demand made by the State and that this cannot be done without consideration of the relevant material. The proposal, the petitioners insist, should contain each provision which is repugnant to the Central law and must also specify the reasons for enacting the new law for that state. In support of this contention the petitioners rely on ***(2009) 5 SCC 342***

Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Ltd.

226. The petitioners further contend that the power to grant assent is not an exercise of legislative power but is a part of legislative procedure, and keeping in mind that procedure and pre-conditions as prescribed under the Constitution are always subject to judicial review, the court can examine whether the constitutional procedure was followed before the assent was granted.

227. On the other hand, Mr. Harish Salve, learned Senior Counsel for the respondents submits that Presidential assent having been accorded to the legislation, the challenge by the petitioner is misconceived. It is submitted that Presidential consideration and assent are completely non-justiciable and beyond judicial review by any Court. The respondents further contend that the judicial precedents relied upon by the petitioners have been rendered in the context of cases involving Article 254 of the Constitution which have no bearing on the case at hand. Mr. Harish Salve, learned Senior Counsel for the respondent has taken the objection that the requirements of Presidential assent under Articles 254(2) and 239AA are distinct. The respondents submit that when a State law is repugnant to a law made by the Parliament and assent of the President is sought under Article 254(2), the President is required to consider the issue from the perspective of two equally competent legislatures, in the framework of India's quasi-federal constitutional structure. In the present case, it is submitted that the

President is required to consider the matter from the perspective of the National Capital Territory of Delhi which seeks to depart from a law which otherwise prevails all over the country.

228. Relying upon ***(1997) 7 SCC 339, NDMC v. State of Punjab***, the respondents submit that on the other hand, this is not the case under Article 239 AA as in this case, the plenary power to legislate upon any matter relating to Delhi vests with the Parliament. It is submitted that in such a case, when Presidential assent is sought under Article 239 AA and especially for a law which falls under List II, all that the President is considering is an earlier law (Parliamentary or otherwise), which prevailed in Delhi.

Whether requirements of Presidential 'consideration' and 'assent' under Articles 239AA and 254 are different?

229. In view of the distinction, being drawn by the respondents to Presidential 'consideration' and 'assent' under the two Constitutional provisions, it behoves us to examine this contention of distinctiveness of the two articles - Article 254 and Article 239AA - in some detail.

230. The petitioners and the respondents have made claims concerning the nature of repugnancy between a law proposed by the Delhi Legislative Assembly and a Central law, as well as the constitutional requirements of Presidential assent, if sought, to cure such repugnancy. Article 239AA(3)(c) of the Constitution provides:

> "If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void..." [Article 239AA (3)(c)]

231. It is apparent from the scheme of Article 239AA that sub-clause 3(a) confers power, while sub-clause 3(b) reiterates the supremacy of the Parliament. By virtue of sub-clause 3(c), if the law made by the Legislative Assembly is repugnant to a Central enactment, it has been consistently and unequivocally declared as void. Such repugnant law is however, saved by operation of the proviso to Article 239AA(3) which provides that if such repugnant law is reserved for the consideration of the President and receives his assent, then such law shall prevail. It is noteworthy that the second proviso thereafter again reinforces the supremacy of the Parliament.

232. It is necessary to set out Article 254 for convenience as well, which reads thus:

> "254. *Inconsistency between laws made by Parliament and laws made by the Legislatures of States.—(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is*

competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, *then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."*

2. Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

233. We find use of the expressions 'consideration' and 'assent' of the President in not only Articles 239AA and 254 of the Constitution, but also in relevant statutory provisions of the Government of National Capital Territory of Delhi Act, 1991 as well, which are reproduced hereafter:

"24. Assent to Bills: When a Bill has been passed by the Legislative Assembly, it shall be presented to the Lieutenant Governor and the Lieutenant Governor

shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President :

Provided that the Lieutenant Governor may, as soon as possible after the presentation of the Bill to him for assent, return the Bill if it is not a Money Bill together with a message requesting that the Assembly will consider the Bill or any specified provisions thereof, and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the Assembly will reconsider the Bill accordingly, and if the Bill is passed again with or without amendment and presented to the Lieutenant Governor for assent, the Lieutenant Governor shall declare either that he assents to the Bill or that he reserves the Bill for the consideration of the President.

Provided further that the Lieutenant Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which:-

(a) In the opinion of the Lieutenant Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is, by the Constitution, designed to fill; or

(b) The President may, by order, direct to be reserved for the consideration; or

(c) Relates to matters referred to in sub-section (5) of section 7 or section 19 or section 34 or sub-section (3) of section 43.

Explanation:- For the purposes of this section and section 25, a Bill shall be deemed to be a Money Bill

> if it contains only provisions dealing with all or any of the matters specified in sub-section(1) of section 22 or any matter incidental to any of those matters and, in either case, there is endorsed thereon the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.
>
> 25. Bills reserved for consideration: When a Bill is reserved by the Lieutenant Governor for the consideration of the President, the President shall declare either that he assents to the Bill or that he without assent therefrom:
>
> Provided that where the Bill is not a Money Bill, the President may direct the Lieutenant Governor to return the Bill to the Legislative Assembly together with such a message as is mentioned in the first proviso to section 24 and, when a Bills is so returned, the Assembly shall reconsider it accordingly within a period of six months from date of receipt of such message and, if it is again passed by the Assembly with or without amendment, it shall be presented again to the President for his consideration.
>
> 26. Requirement as to sanction, etc: No act of the Legislative Assembly, and no provision in any such Act, shall be invalid by reason only that some previous sanction or recommendation required by this Act was not given, if assent to that Act was given by the Lieutenant Governor, or, on being reserved by the Lieutenant Governor for the consideration of the President, by the President.

234. A repugnancy may exist between a provision contained in any law made by the Delhi Legislative Assembly, and a provision of any law made by Parliament or any earlier Central enactment.

When this is the case, Presidential assent is sought in order to cure the repugnancy.

235. As the text of Article 239AA makes clear that merely legislating "*in respect of an earlier law*" necessitates Presidential assent, Article 239AA clarifies that Presidential assent is also necessary when the Delhi Legislative Assembly adopts a law that is repugnant to a Central enactment. It is worth noting that the identical provision for assent with respect to repugnancies between State and Central laws [Article 254(2)] only requires Presidential assent with respect to repugnancies. It does not require assent because a State law is "in respect of" an earlier law.

236. Article 254 is concerned with legislative relations between the Parliament and State legislatures in the context of legislative exercises undertaken by them. Article 254(2) specifically relates to repugnancy in legislation made by the legislature of a State and Parliamentary law or pre-existing law and provides for how the situation would be resolved in case of such repugnancy. Article 239 AA (3)(c) of the Constitution provides for repugnancy between law made by the Delhi Legislative Assembly and law made by the Parliament. Article 254(2) makes identical provision in respect of the law made by the legislature of a State which is repugnant to a Central legislation and having been reserved for the consideration of the President, has received his assent, and shall prevail. Article 239AA(3)(c) uses identical expressions in similar situations, the only difference being that while Article 254 is concerned with State

legislations, Article 239AA (3)(c) is confined to legislation approved by the Delhi Legislative Assembly.

237. We find that while there is no jurisprudence on the specific aspect of Presidential 'consideration' and 'assent' under Article 239 AA, several judicial precedents of the Supreme Court have construed the expressions reserved for 'consideration' and 'assent' in Article 254. It is necessary to point that the entire jurisprudence cited before us relates to consideration by and grant of Presidential assent under Article 254 of the Constitution, whereas the instant case is concerned with Presidential consideration and assent to a legislative proposal by the Delhi Legislative Assembly, a Legislative Assembly of a Union Territory, under Article 239AA(3)(c).

238. The respondents argue that the requirements of assent under Articles 254(2) and 239AA are distinct. The following discussion would show that neither the law nor the facts support the contention raised on behalf of the respondents. There is also neither statutory nor jurisprudential authority in support of this proposition.

239. In the first place, an examination of the provisions of Article 254 as juxtaposed against Article 239AA bears out the similarity in the constitutional provisions. But for the differences in the provision describing State legislatures and the Delhi Legislative Assembly, the text of the constitutional articles [Articles 239AA

and 254(2)] is identical.

240. The only case cited by the respondent in support of this submission that the requirements for Presidential assent under Article 239 AA are different than those for assent under Article 254(2) is ***(1997) 7 SCC 339, NDMC v. State of Punjab***. We find that this decision provides little support for the respondent's contention, as is evident from the following paragraph of the same judgment:

> "87. …Having analysed the scheme of Part VIII of the Constitution including the changes brought into it, we are of the view that despite the fact that, of late, **Union Territories have been granted greater powers, they continue to be very much under the control and supervision of the Union Government for their governance**…It is possible that since Parliament may not have enough time at its disposal to enact entire volumes of legislations for certain Union Territories, it may decide, at least in respect of those Union Territories whose importance is enhanced on account of the size of their territories and their geographical location, that they should be given more **autonomy in legislative matters.** However, **these changes will not have the effect of making such Union Territories as independent as the States**. This point is best illustrated by referring to the case of the **National Capital Territory of Delhi** which is **today a Union Territory** and **enjoys the maximum autonomy on account of the fact that it has a Legislature created by the Constitution**. **<u>However, Clauses 3(b) and 3(c) of Article 239-AA make it abundantly clear that the plenary power to legislate upon matter affecting Delhi still vests with Parliament as it retains the power to legislate upon *any matter* relating to Delhi</u>**

> **and, in the event of any repugnancy, it is the Parliamentary law which will prevail.** It is, **therefore**, **clear that Union Territories are in fact under the supervision of the Union Government and it cannot be contended that their position is akin to that of the States**. Having analysed the relevant Constitutional provisions as also the applicable precedents, we are of the view that under the scheme of the Indian Constitution, the **position of the Union Territories cannot be equated with that of the States**. Though they do have a separate identity within the Constitutional framework, this will not enable them to avail of the privileges available to the States."
>
> (Emphasis by us)

241. In the instant case, we are concerned with the use of expressions 'consideration' and 'assent' in two constitutional provisions.

242. It is well settled principle of statutory interpretation that a phrase which is used in several places in the statute has to be given the same meaning and interpretation. This principle would apply to interpretation of the words and expressions in the Constitution as well. In ***(1976) 2 ALL E.R. 721 Farrell v. Alexander*** (at page 85) it was declared that "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning."

243. It is noteworthy that the phrase 'consideration" as well as 'assent' has been used in Article 254 right from the inception. Article 254 is prior to the 69th Amendment to the Constitution

effected on 1st of February 1992 to incorporate Article 239AA in Part VIII (Union Territories) wherein the same expression stands used. It therefore has to be interpreted, understood and applied in the same manner for the purpose of Article 254 as well as Article 239AA. For this reason, the jurisprudence on the construction of the expressions 'consideration' and 'assent' in the context of Article 254 applies with full force to the interpretation of these expressions in Article 239AA.

We have no doubt at all that not only the expressions 'consideration' and assent', but other expressions as 'satisfaction', 'reservation' and 'repugnancy' therefore would have the same meaning where so ever they are used in the Constitution in similar context.

244. The objection of the respondents that the requirements of Presidential consideration and assent under Article 254 and 239AA are distinct is thus devoid of legal merit and hereby rejected.

245. Several authoritative pronouncements are to be found wherein these expressions have been interpreted and the scope of judicial review in the constitutional challenges to resultant legislations has been laid down. These judicial pronouncements would bind the present consideration as well.

Whether Presidential assent justiciable? If so, extent and manner

246. We now come to the contention on behalf of the respondents

that once there is Presidential assent to a proposed State law, it shall prevail over all Central enactments in the State. Several aspects of the consideration of the other contention of the respondents that Presidential assent is not justiciable overlap with this submission.

247. The respondents submit that the Court Fees (Delhi Amendment) Bill, 2012 was reserved for the consideration of the President and that Presidential assent was accorded on the 4th of June 2012. The primary argument is that once accorded, the constitutionality of Presidential assent is not justiciable. The respondents submit that the reasons why a Bill is sent to the President for assent are not justiciable. They rely on the three Judge Bench judgment in ***(1983) 4 SCC 45, Hoechst Pharmaceuticals Limited v. State of Bihar*** where it was held by the Hon'ble Supreme Court that courts "cannot look into the reasons why the Bill was reserved by the Governor under Article 200 for the assent of the President". The respondents have further submitted that the aid and advice given to the President under Article 74(2) of the Constitution and that given to the Lieutenant Governor under Section 42 of the Government of National Capital Territory of Delhi Act, 1991 are also outside the scope of judicial scrutiny.

248. This objection is countered by Mr. Chandhiok, learned Senior Counsel placing reliance on the pronouncements of the Supreme Court reported at ***(1994) 3 SCC 1, S.R. Bommai v. Union of India; (2002) 8 SCC 182, Kaiser-i-Hind Pvt. Ltd. v. National***

Textile Corporation (Maharashtra North) Ltd. &Ors. and ***(2006) 2 SCC 1, Rameshwar Prasad v. Union of India***.

249. To rule on the objections of the respondents, it is first necessary to understand the nature of the consideration and assent by the President. We do so hereafter.

Whether grant of Presidential assent is exercise of legislative power?

250. In ***(1994) 3 SCC 1 S.R. Bommai v. Union of India & Ors.***, the Supreme Court was concerned with the exercise of power by the President of India under Article 356 of the Constitution of India to issue a proclamation on the aid and advice of the Council of Ministers declaring emergency under Article 356 of the Constitution of India with regard to a State Government. Article 356(1) contains the expression 'Presidential satisfaction' with regard to the prevalent situation on receipt of a report from the Governor. Though Article 356 requires Presidential 'satisfaction' and Article 239AA mandates Presidential 'consideration', the importance of the subject matter of these constitutional provisions, one relating to failure of the constitutional machinery in a State and imposition of emergency; while the other relating to assent to a proposal for enacting a law in the GNCT of Delhi which is repugnant to a pre-existing Parliamentary legislation, cannot be emphasised sufficiently. The observations of the court with regard to the scope of judicial review; on the issue of the basis on which

the President arrives at and records his satisfaction into this matter would certainly guide the examination of the scope of inquiry into the expressions 'consideration' and 'assent' in Article 239AA; the procedural requirements and the compliance of the essential pre-conditions into the crystallisation of the Presidential view as well as their interpretation are relevant and read as follows:-

> **"JUDICIAL REVIEW AND JUSTICIABILITY:**
>
> 59. It is in the light of these other provisions relating to the emergency that we have to construe the provisions of Article 356. The **crucial expressions** in **Article 356(1)** are - if the **President**, "on the **receipt of report** from the Governor of a State or otherwise" "**is satisfied**" that "the situation has arisen in which the Government of the State cannot be carried on "in accordance with the provisions of the Constitution". The **conditions precedent to the issuance of the Proclamation**, therefore, are: (a) **that the President should be satisfied either on the basis of a report from the Governor** of the State or otherwise, (b) that **in fact a situation has arisen** in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. In other words**, the President's satisfaction has to be based on objective material**. **That material may be available in the report sent to him by the Governor or otherwise or both from the report and other sources.** Further, the objective material so available must indicate that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Thus the **existence of the objective material** showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a **condition precedent** before the President issued the

> Proclamation. **Once such material is shown to exist, the satisfaction of the** President **based on the material is not open to question**, However, **if there is no such objective material before the President, or the material before him cannot reasonably suggest** that the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the **Proclamation issued is open to challenge**."
>
> (Emphasis by us)

251. So far as the parameters of judicial review into the procedure leading to such proclamation and the satisfaction of the President are concerned, it was laid down in ***S.R. Bommai*** (supra) thus:

> **"ARTICLE 356 AND JUDICIAL REVIEW:**
>
> 74. From these authorities, one of the **conclusions** which may safely be drawn is that the **exercise of power by the President under Article 356(1) to issue Proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not**. This examination will **necessarily involve** the **scrutiny as to whether there existed material for the satisfaction** of the President that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. Needless to emphasise that it is not any material but material which would lead to the conclusion that the Government of the State cannot be carried on in accordance with the provisions of the Constitution which is relevant for the purpose. It has further to be remembered that the article requires that the President "has to be satisfied" that the situation in

question has arisen. Hence the **material in question has to be such as would induce a reasonable man to come to the conclusion in question.** The expression used in the article is "if the President … is satisfied". The word "satisfied" has been defined in Shorter Oxford English Dictionary (3rd Edn. at p. 1792):
"4. To furnish with sufficient proof or information, to set free from doubt or uncertainty, to convince; 5. To answer sufficiently (an objection, question); to fulfil or comply with (a request); to solve (a doubt, difficulty); 6. To answer the requirements of (a state of things, hypothesis, etc.); to accord with (conditions)."

Hence, it is **not the personal whim, wish, view or opinion or the ipse dixit of the President dehors the material but a <u>legitimate</u> inference drawn from the material placed before him which is relevant for the purpose.** In other words, the **President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty** about the state of things indicating that the situation in question has arisen. Although, therefore, the **sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial review**."

252. The principles stated above have also been reproduced in para 124 of the ***Rameshwar Prasad case*** (supra).

253. On the issue of permissibility of judicial review, the Supreme Court has further stated as follows:

"325. <u>Judicial review</u> of administrative and <u>statutory</u>

action is perhaps the most important development in the field of public law in the second half of this century. In India, the principles governing this jurisdiction are exclusively Judge-made. …

xxx xxx xxx

373. Whenever a Proclamation under Article 356 is questioned, **the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court - Supreme Court and High Courts - by the Constitution.** Now, what are the grounds upon which the court can interfere and strike down the Proclamation? ...

... Here the President acts on the aid and advice of the Union Council of Ministers and not in his personal capacity. Moreover, there is the check of approval by Parliament which contains members from that State (against the Government/Legislative Assembly of which State, action is taken) as well. So far as the approach adopted by this Court in ***Barium Chemicals*** is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot *ipso facto* be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high **constitutional power exercised by the highest constitutional functionary of the Nation**, **it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities - nor at any rate, in their entirety**. We would rather adopt the formulation evolved by this Court in State of

Rajasthan, as we shall presently elaborate. We also **recognise**, as did the House of Lords in ***CCSU. v. Minister for the Civil Service, (1985) AC 374*** that there are certain **areas** including those elaborated therein where **the court would leave the matter almost entirely to the President/Union Government**. The court would desist from entering those arenas, because of the very **nature of those functions**. They are not the matters which the court is equipped to deal with. The court has never interfered in those matters because they do not admit of judicial review by their very nature. Matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues relating to war and peace are some of the matters where the court would decline to entertain any petition for judicial review. **But the same cannot be said of the power under Article 356**. It is another matter that in a given case the court may not interfere. It is necessary to affirm that **the Proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may vary from an ordinary case of subjective satisfaction**.

xxx xxx xxx

434. We may **summarise our conclusion** now:

(1) Article 356 of the Constitution confers a **power** upon the President **to be exercised only** where he **is satisfied** that a situation has arisen where the Government of a State *cannot* be carried on in accordance with the provisions of the Constitution. Under our Constitution, the power is really that of the Union Council of Ministers with the Prime Minister at its head. **The satisfaction contemplated by the article is subjective in nature**.

(2) The power conferred by Article 356 upon the

> President is a **conditioned power**. **It is not an absolute power**. **The existence of material - which may comprise of or include the report (s) of the Governor - is a** precondition**. The satisfaction must be formed on relevant material**. The ***recommendations of the Sarkaria Commission*** **with respect to the exercise of power under Article 356 do merit serious consideration** at the hands of all concerned.
>
> xxx xxx xxx
>
> (Emphasis by us)

254. The Supreme Court has therefore held that Presidential satisfaction is amenable to judicial review within narrow parameters considered in judicial precedents. Though the above principles and conclusions summarise the position in respect of the Presidential satisfaction and proclamation under Article 356, the same would guide adjudication of a challenge to the Presidential consideration and assent under Article 239AA as well.

Whether Presidential 'consideration' and 'assent' are exercise of legislative power?

255. We may now examine the authoritative pronouncement of the Supreme Court reported at ***(2002) 8 SCC 182, Kaiser-i-Hind Pvt. Ltd. v. National Textile Corporation (Maharashtra North) Ltd. &Ors.*** This judgment was rendered in the context of Article 254 of the Constitution and concerned with Presidential consideration and assent in the context of Parliamentary legislation and State law. In this case, the Bombay Rent Act, 1947 was

enacted by the Bombay Legislature and received the assent of the Governor-General on 13th January, 1948. It was a temporary law and was to remain in force up to 31st March, 1950. Subsequently, it was extended by various extension laws passed by the State Legislature. Assent of the President was obtained to each of the State Acts which were passed after the coming into force of the Constitution, either to extend the duration of the Bombay Rent Act, 1947 or to extend its application with amendments to the State.

256. The provisions of the Bombay Rent Act were repugnant to the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971, a Central Act. The letters of the State addressed to the Government of India containing the proposals for obtaining the assent of the President pointed out the repugnancy between the State law and Central laws such as the Transfer of Property Act, 1882 and the Presidency Small Cause Courts Act, 1882. However there was no specific mention of the repugnancy between the Bombay Rent Act 1947 and the Central Act under consideration, i.e. the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The subject matter of the Central and State Legislation is covered by entries in the Concurrent List of the Seventh Schedule of the Constitution.

257. The appellant in this case challenged the decision of the Bombay High Court whereby it upheld the constitutionality of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and rejected the appellant's contention that having regard to Article

254(2), the provisions of the Bombay Rent Act would prevail over those of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

258. To understand the relevance of this judgment for the present consideration, we are setting out hereafter, the two relevant issues which arose before the Supreme Court, out of the summary in para 5 of the judgment:

> "5. xxx
>
> 3(a) Whether the provisions of the Bombay Rent Act, 1947 having been re-enacted after 1971 by the State Legislation with the assent of the President must prevail in the State of Maharashtra over the provisions of the PP Eviction Act by virtue of Article 254(2) of the Constitution?
>
> 4. Whether it is permissible for a court of law to enquire into and ascertain the circumstances in which assent to a law under Article 254(2) was given and hold as a result of such consideration that the State law even with respect to a matter enumerated in the Concurrent List (after having been reserved for the consideration of the President and after having received his assent) does not prevail in that State?"

259. The adjudication on these issues is not relevant. But it is manifest from the above that these very issues arise in the present case before us.

260. Before considering the question of permissibility of judicial review, a pertinent question which needs to be answered is whether

Presidential consideration and assent are exercise of legislative power? The following observations of the court in ***Kaiser-i-Hind*** (supra) authoritatively decide this:

> "77. The **assent of the President or the Governor**, as the case may be, **is considered to be part of the legislative process only for the limited purpose that the legislative process is incomplete without them for enacting** a law and in the absence of the assent the Bill passed could not be considered to be an Act or a piece of legislation, effective and enforceable and not to extend the immunity in respect of procedural formalities to be observed inside the respective Houses and certification by the presiding officer concerned of their due compliance, to areas or acts outside and besides those formalities ...".

261. It is therefore also well settled that consideration and grant of assent by the President is not exercise of legislative power. It merely forms part of the legislative procedure.

262. In ***Kaiser-i-Hind*** (supra), the court referred upon the judgment reported at ***(1983) 4 SCC 45, M/s Hoechst Pharmaceutical Limited & Ors. v. State of Bihar & Ors.*** and ***(1986) 4 SCC 51, Bharat Sevashram Sangh v. State of Gujarat*** and concluded that the court could ascertain whether assent was qua repugnancy between State legislation and earlier law. It has been clarified that such scrutiny does not tantamount to the court adjudicating upon the correctness of the Presidential assent. The observations of the Supreme Court deserve to be considered in

extenso and read as follows:

> "23. The learned Senior Counsel Mr.Nariman next submitted that the assent given by the President is not justiciable and placed reliance on decision of this Court in *Bharat Sevashram Sangh v. State of Gujarat* [1986] 4 SCC 51, wherein this Court observed thus:
>
> > "...it cannot be said that the assent which was given by the President was conditional. ***The records relating to the above proceedings were also made*** **available to the court**. On going through the ***material placed before us*** we are satisfied that the President had given assent to the Act and it is not correct to say that it was a qualified assent...."
>
> 24. In the aforesaid decision also the ***records relating to assent were made*** available to the Court and *on going through the material placed before it*, the Court was *satisfied that the President had given assent to the Act and it was incorrect to say that it was qualified assent*. In ***HOECHST Pharmaceuticals Ltd. v. State of Bihar (1983) 4 SCC 45***, this Court held thus:-
>
> > "84. ...That being so, the decision in *Teh Cheng Poh v. Public Prosecutor, Malaysia 1980 AC 458* is not an authority for the proposition that the assent of the President is justiciable nor can it be spelled out that the court can enquire into the reasons why the Bill was reserved by the Governor under Article 200 for the assent of the President nor whether the President applied his mind to the question whether there was repugnancy between the Bill reserved for his consideration and received his assent under Article 254(2)."

The Court further observed:-

> "...We have no hesitation in holding that the assent of the President is not justiciable, and we cannot spell out any infirmity arising out of his decision to give such assent."
>
> (Emphasis by us)

25. In our view, for finding out **whether the assent was given qua the repugnancy between the State legislation and the earlier law made by the Parliament, there is no question of deciding validity of such assent nor the assent is subjected to any judicial review. That is to say, merely looking at the record, for which assent was sought, would not mean that the Court is deciding whether the assent is rightly, wrongly or erroneously granted**. **The consideration by the Court is limited to the extent that whether the State has sought assent qua particular earlier law or laws made by the Parliament prevailing in the State or it has sought general assent.** In such case, the Court is not required to decide the validity of the 'assent' granted by the President."

(Emphasis by us)

263. The ***Hoechst case*** relied upon by the respondents is a landmark judgment on repugnancy. However, in the present case, we have set down the respondents' noting dated 11th June, 2012 pointing out that the proposed legislation was repugnant to the Central legislation, and hence reserved for the assent of the President. We have also noticed the deposition in the counter affidavit filed by the respondents to the same effect. Given the above admissions by the respondents, the question whether the impugned legislation was repugnant to a Central enactment or not,

is not an issue in the present matter. Therefore the prohibition laid in ***Hoechst*** (supra) would have no application to the present case. As noted above, ***Kaiser-i-Hind*** (supra) has also referred to ***Hoechst*** (supra).

264. So far, this scrutiny by the court in exercise of its power of judicial review is concerned, it stands further clarified by the Supreme Court that it is in the **nature of examination of whether the legislative procedure has been followed or not**. In this regard in para 29 of ***Kaiser-i-Hind***, the court observed as follows:

> "29. We further make it clear that **granting of assent** under Article 254(2) is **not exercise of legislative power of President** such as contemplated under Article 123 but **is part of legislative procedure. Whether procedure prescribed by the Constitution before enacting the law is followed or not can always be looked into by the Court**."

265. The Supreme Court made a valuable observation as to how such challenge could be avoided and observed thus:

> "30. Finally, we would observe that the challenge of this nature could be avoided if at the commencement of the Act, it is stated that the Act has received the assent with regard to the repugnancy between the State Law and specified Central law or laws."
>
> (Emphasis by us)

266. It is therefore wholly unnecessary for us to expand any further on the above objection of the respondents to the

maintainability of the present challenge. It has to be held that while examining a challenge to the constitutionality of legislation, judicial review of whether legislative procedure, which includes Presidential consideration and assent, was followed or not is permissible. The objection is overruled. We also make it clear that we shall confine our consideration to the parameters for judicial review settled in the above pronouncements.

Respondent's objection to production of records

267. The respondents have vehemently opposed placing their records before us on the ground that this court is legally prohibited from examining the records of the Govt. of NCT of Delhi on the ground that they relate to records of the Delhi Legislative Assembly as well as Presidential consideration and assent to a proposed legislation.

268. The objection of the respondents to production before court of the material placed for Presidential consideration is premised on the shield provided by Article 74(2) of the Constitution.

Article 74 of the Constitution of India reads as follows:

> **"Article 74 - Council of Ministers to aid and advise President**
>
> [(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:]

> [Provided that the President may require the Council of Ministers to reconsider such advice; either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]
>
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

269. Article 74 is concerned with aid and advice tendered by the Council of Ministers to the President. As per clause (1) of Article 74, in exercise of his functions, the President shall act in accordance with such advice. Under Article 74(2), the question whether any, and if so, what advice was tendered by Ministers to the President shall not be inquired into in any court.

270. Based on this constitutional provision, objection to production of records has been taken by the State in several cases and stands rejected by the Supreme Court. The court has also considered claims of privilege under Section 123 of the Evidence Act and laid down the parameters thereof. We notice the major judicial precedents in this regard and extract the relevant portions hereafter.

271. In ***(1994) 3 SCC 1 S.R. Bommai v. UOI***, the Union of India had urged that judicial review and enquiring of the reasons which led to the issuance of the Presidential proclamation under Article 356 issued on the advice of the Council of Ministers stands barred

by virtue of clause (2) of Article 74. This objection of the respondents also stands authoritatively examined and rejected by the Supreme Court in this pronouncement. On this objection, the discussion and the findings of the court read as follows:

> "83....This contention is fallacious for reasons more than one. In the first instance, it is based on a misconception of the purpose of Article 74[2]. As has been rightly pointed out by Shri Shanti Bhushan, the **object of Article 74[2] was not to exclude any material or documents from the scrutiny of the Courts but to provide that an order issued by or in the name of the President could not be questioned on the ground that it was either contrary to the advice tendered by the Ministers or was issued without obtaining any advice from the Ministers**. Its object was only to make the question whether the President had followed the advice of the Ministers or acted contrary thereto, non-justiciable. What advice, if any, was tendered by the Ministers to the President was thus to be beyond the scrutiny of the Court.
>
> xxx xxx xxx
>
> 86. What is further, although **Article 74[2]** bars judicial review so far as the advice given by the Ministers is concerned, it **does not bar scrutiny of the material on the basis of which the advice is given**. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. **The Courts are,** however, **justified in probing as to <u>whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it.</u> Hence when the <u>Courts undertake an enquiry into the existence of such material</u>, the prohibition**

> **contained in Article 74[2] does not negate their right to know <u>about the factual existence of any such material</u>**…"

272. So far as the plea of privilege under Section 123 of the Evidence Act is concerned, the Union Government had urged this plea as well in ***S.R. Bommai*** (supra) which was considered by the Supreme Court thus:

> "86. …This is not to say that the Union Government cannot raise the plea of privilege under Section 123 of the Evidence Act. As and when such privilege against disclosure is claimed, the Courts will examine such claim within the parameters of the said section on its merits."

273. The Supreme Court in ***S.R. Bommai*** (supra) while rejecting the plea against secrecy, has further noted that the Proclamation under Article 356 has to be discussed and approved on the floor of both Houses of Parliament, members of which are entitled to go through the material which was the basis of the advice of the Council of Ministers:

> "87. Since further the Proclamation issued under Article 356(1) is required by Clause (3) of that Article to be laid before each House of Parliament and ceases to operate on the expiration of two months unless it has been approved by resolutions by both the Houses of Parliament before the expiration of that period, it is evident that the question as to whether a Proclamation

should or should not have been made, has to be discussed on the floor of each House and **the two Houses would be entitled to go into the material on the basis of which the Council of Ministers had tendered the advice to the President for issuance of the Proclamation Hence the secrecy claimed in respect of the material inquestion cannot remain inviolable, and the plea of non-disclosure of the material can hardly be pressed..**."

274. After an elaborate discussion, the Supreme Court summed up its conclusions in ***S.R. Bommai*** (supra) in Para 434, the relevant extract whereof reads as follows:-

"434. (1) to (5) xxx xxx xxx

(6) **Article 74(2) merely bars an enquiry into the question whether any, and if so, what advice was tendered by** the ministers to the President. **It does not bar the court from calling upon the Union Council of Ministers (Union of India) to disclose to the Court the material upon which the** President **had formed the requisite satisfaction. The material on the basis of which advice was tendered does not become part of the advice. Even if the material is looked into by or shown to the President, it does not partake the character of advice. Article 74(2) and Section 123 of the Evidence Act cover different fields**. It may happen that while defending the Proclamation, the Minister or the official concerned may claim the privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of Section 123.

(7) **The Proclamation under Article 356(1) is not**

> **immune from judicial review**. The Supreme Court or the High Court **can strike down the Proclamation** if it is found to be **mala fide or based on wholly irrelevant or extraneousgrounds**. The deletion of Clause (5) [which was introduced by 38th (Amendment) Act] by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. **When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do** so**, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the** material **was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as there is some material which is relevant to the action taken.....**."

275. In ***2002 (8) SCC 182, Kaiser-I-Hind Pvt. Ltd. v. National Textile Corporation (Maharashtra North) Ltd. &Ors.,*** the Supreme Court has also considered the objection on behalf of the appellant to the effect that when the President has given assent to a State legislation, the court cannot call for files to find out whether the assent was limited to repugnancy between the State legislations and laws mentioned therein. Even though this contention was rejected by the Supreme Court, the same objection has been unfortunately taken by the respondents before us. The observations of the court on this issue are important and also set down the boundaries of judicial review into the subject matter of the Presidential assent. The court held as follows:-

"20. It is true that President's assent as notified in the Act nowhere mentions that assent was obtained qua repugnancy between the State legislation and specified certain law or laws of the Parliament. But from this, it also cannot be inferred that as the President has given assent, all earlier law/ laws on the subject would not prevail in the State. As discussed above before grant of the assent, consideration of the reasons for having such law is necessary and the consideration would mean consideration of the proposal made by the State for the law enacted despite it being repugnant to the earlier law made by the Parliament on the same subject. ***If the proposal made by the State is limited qua the repugnancy of the State law and law or laws specified in the said proposal, then it cannot be said that the assent was granted qua the repugnancy between the State law and other laws for which no assent was sought for***. Take for illustration -- that a particular provision namely, section 3 of the State law is repugnant to enactment A made by Parliament; other provision, namely, Section 4 is repugnant to some provisions of enactment B made by Parliament and Sections 5 and 6 are repugnant to some provisions of enactment C and the State submits proposal seeking "assent" mentioning repugnancy between the State law and provisions of enactments A and B without mentioning anything with regard to enactment C. In this set of circumstances, if the assent of the President is obtained, the State law with regard to enactments A and B would prevail but with regard to C there is no proposal and hence there is no "consideration" or "assent". ***Proposal by the State pointing out repugnancy between the State law and of the law enacted by the Parliament is sine qua non for "consideration" and "assent". If there is no proposal, no question of "consideration" or "assent" arises. For finding out whether "assent"***

given by the President is restricted or unrestricted, the letter written or the proposal made by the State Government for obtaining "assent" is required to be looked into*."*

(Emphasis by us)

276. In ***Kaiser-i-Hind*** (supra), the court makes a reference to the correspondence of the State Govt. for obtaining assent as well as records relating to the issue and further ruled thus:

"21. We would also make it clear that in all the decisions relied upon**, wherein such question was raised,this Court has referred to the correspondence made by the State Government for obtaining the assent of the President** to find out **whether the assent was with regard to repugnancy between the State Legislature and particular enactment of the Parliament**. For this purpose, we would straightaway refer to the decision in *Gram Panchayat'scase (supra)*, wherein the Court considered the alleged repugnancy between the Administration of Evacuee Property Act of 1950 and the Punjab Village Common Lands (Regulation) Act of 1953.....

.....In that case also the High Court of Punjab had adjourned the matter to enable the State Government to place material before the Court showing the purpose for which the Punjab Act of 1953 was forwarded to the President for his assent. As per the record of that case, the Act was not reserved for the assent of the President on the ground that it was repugnant to the earlier Act passed by the Parliament, namely, Central Act of 1950. The Court thereafter pertinently held thus:-

> "***<u>The record shows</u>***, and it was not disputed either before us or in the High Court, that the **<u>Act was not reserved for the assent of the President</u>** on the ground that it was repugnant to an earlier Act passed by the Parliament, namely, the Central Act of 1950. In these circumstance, we agree with the High Court of the Punjab Act of 1953 *cannot be said to have been reserved for the assent of the President within the meaning of Clause (2) of Article 254* of the Constitution in so far as its repugnancy with the Central Act of 1950 is concerned..."

277. On the objection to the examination of the records in the judgment reported at ***(2002) 8 SCC 182 Kaiser-i-Hind (P) Ltd. v. National Textile Corporation (Maharashtra North) Ltd.*** the Supreme Court observed thus:

> "28. In this view of the matter, <u>it cannot be</u> said that the High Court committed any <u>error in looking at the file</u> of the correspondence Ex.F collectively <u>for finding out - for what purpose "assent" of the President</u> to the extension of Acts extending the duration of Bombay Rent Act <u>was sought for and given</u>. After looking at the said file, the Court considered relevant portion of the letter, which referred to the Bill passed by the Maharashtra Legislative Council and the Maharashtra Legislative Assembly extending the duration of the Bombay Rent Act for 5 years from 1st April, 1986.
>
> xxx xxx xxx
>
> A telegraphic message dated 25th February, 1986 sent by the Special Commissioner, New Delhi, addressed to two Secretaries of the State of Maharashtra and the Secretary to the Governor of the State of Maharashtra

> shows that the President accorded his assent to this Bill on 23rd February, 1986. Thereafter, the Court rightly relied upon the decision in *Gram Panchayat case (supra)* for arriving at the conclusion that the *assent of the President was sought* to the Extension Acts *for the purpose of overcoming its repugnancy* between the Bombay Rent Act on the one hand and the Transfer of Property Act and the President Small Cause Courts Act on the other. *The efficacy of the President's assent was limited to that purpose only*. Therefore, the PP Eviction Act would prevail and not the Bombay Rent Act."

278. In ***S.R. Bommai*** (supra), the Supreme Court also observed that the limited aspect covered under Article 74(2) cannot override the basic provisions in the Constitution relating to the exercise of judicial review by the court in the following terms:-

> "321. Clause (2) of Article 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. In fact, Clause (2) is a reproduction of Sub-section (4) of Section 10 of the Government of India Act, 1935. [The Government of India Act did not contain a provision corresponding to Article 74(1) as it stood before or after the Amendments aforementioned]. The scope of Clause (2) should not be extended beyond its legitimate field. In any event, it cannot be read or understood as conferring an immunity upon the Council of Ministers or the Minister/Ministry concerned to explain, defend and justify the orders and acts of the President done in exercise of his function. ***The limited provision contained in Article 74(2) cannot***

override the basic provisions in the Constitution relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed to have been taken in accordance with Article 74(1). As to which Minister or which official of which Ministry comes forward to defend the order/action is for them to decide and for the Court to be satisfied about it. ..."

(Emphasis by us)

279. On the objection to examination of the records of the respondents and material placed before the President, in ***S.R. Bommai*** (supra), the court further held thus:

"323. Evidence Act is a pre-Constitution enactment. Section 123 enacts a rule of English Common Law that no one shall be permitted to give evidence derived from unpublished official records relating to affairs of State except with the permission of the concerned head of the department. It does not prevent the head of department permitting it or the head of the department himself giving evidence on that basis. The law relating to Section 123 has been elaborately discussed in several decisions of this Court and is not in issue herein. Our only object has been to emphasise that **Article 74(2) and Section 123 cover different and distinct areas**. It may happen that while justifying and Government's action in Court, the Minister or the official concerned may claim a privilege under Section 123. If and when such privilege is claimed, it will be decided on its own merits in accordance with the provisions of that Section. But, **Article 74(2) does not and cannot mean that the Government of India need not**

justify the action taken by the President in the exercise of his functions because of the provision contained therein. No such immunity was intended - or is provided - by the clause. If the act or order of the President is questioned in a Court of Law, it is for the Council of Ministers to justify it by disclosing the material which formed the basis of the act/order. The **Court will not ask whether such material formed** part of the advice tendered to the President or **whether that material was placed before the President. The Court will not also ask what advice was tendered** to the President, what deliberations or discussions took place between the President and his Ministers and how was the ultimate decision arrived at.**The Court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action under Article 356(1)**. **The court will not go into the correctness of the material or its adequacy. Even if the court were to come to a different conclusion on the said material, it would not interfere since the Article speaks of satisfaction of the President and not that of the court**.

324. In our respectful opinion, the **above obligation cannot be evaded by seeking refuge under Article 74(2)**. The argument that the advice tendered to the President comprises material as well and , therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. **The material placed before the President** by the Minister/Council of Ministers does **not thereby become part of advice**. Advice is what is based upon the said material. **Material is not advice.** The material may be placed before the President to acquaint him - and if

need be to satisfy him - that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Article74(2). But it is difficult to appreciate how does the supporting material becomes part of advice. **The respondents cannot say that whatever the President sees - or whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the court**. Article 74(2) must be interpreted and understood in the context of entire constitutional system. Undue emphasis and expansion of its parameters would engulf valuable constitutional guarantees. For these reasons, we find it difficult to agree with the reasoning in *State of Rajasthan* on this score, insofar as it runs contrary to our holding."

(Emphasis supplied)

280. In the judgment reported at ***(1985) 3 SCC 661, Gram Panchayat of Village Jamalpur v. Malwinder Singh*** the point under consideration was whether there was any repugnancy between the administration of Evacuee Property Act, 1950 and the Punjab Village Common Lands (Regulation) Act, 1953. The court concluded that there was a direct conflict between the two Acts and hence there arose an issue as to the applicability of Article 254. The Supreme Court noted the exercise undertaken by the High Court to examine the records and approved the findings with the following observations:

> "12. ...Since the Punjab Act of 1953 extinguished all private interests in Shamlat-deh lands and vested those lands in the Village Panchayats and since, the Act was a measure of agrarian reform it was reserved for the consideration of the President. **The judgment of the High Court shows that the hearing of the writ petitions was adjourned to enable the State Government to place material before the Court showing the purpose for which the Punjab Act of 1953 was forwarded to the President for his assent. The record shows and it was not disputed either before us or in the High Court, that the Act was not reserved for the assent of the President on the ground that it was repugnant to an earlier Act passed by the Parliament, namely, the Central Act of 1950**. In these circumstances we agree with the High Court that the **Punjab Act of 1953 cannot be said to have been reserved for the assent of the President within the meaning of clause (2) of Article 254 of the Constitution insofar as its repugnancy with the Central Act of 1950 is concerned. ...**"
>
> (Emphasis by us)

281. Another aspect necessitating a scrutiny of the material which had been considered by the Government before effecting the amendment to an enactment is manifested in the judgment reported at ***(1995) 1 SCC 104, D.C. Bhatia v. Union of India.*** In this case, the Supreme Court examined the material mentioned in the Statement of Objects and Reasons on which the statutory amendment under challenge was based. The following observations of the court are noteworthy:

> "13. In the Statement of Objects and Reasons, the

purpose of the amendment by the Delhi Rent Control (Amendment) Act, 1988 was stated as under:

> "The Delhi Rent Control Act, 1958 (59 of 1958) which came into effect on 9th February, 1959, provides for control of rents and lodging houses and for the lease of vacant premises to the Government within the Union Territory of Delhi."

> 2. For quite sometime, there have been demands from the associations of house-owners as well as tenants for amendment of Delhi Rent Control Act, 1958. The Committee on Petitions of RajyaSabha, the Economic, Administration Reforms Commission, Secretaries Committee and National Commission on Urbanisation have also recommended amendment of certain provisions of the Act. Considering these demands/recommendations as also the fact that with the passage of time, the circumstances have also changed, necessitating a fresh look at the tenant-landlord relationship, the amendment of Delhi Rent Control Act, 1958 has been proposed ...
>
> 3. The Bill seeks to achieve the above objects."

282. In the summarisation in para 434(7) in ***(1994) 3 SCC 1, S.R. Bommai v. Union of India*** (supra) while laying the scope of enquiry by the court on the aspect of production of the material by the Union of India, the court had observed as follows:-

> **"... When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as**

there is some material which is relevant to the action taken. ..."

283. The objection by the respondents to both the production of their records and its examination by the court premised on the prohibition in Article 74 has to be rejected outright. We may note that the respondents before us did not claim privilege under Section 123 of the Indian Evidence Act before us.

284. The submission of the respondents that this court is precluded from examining the records of Presidential assent as well as the records of Govt. of NCT of Delhi has therefore, neither factual nor legal basis and stands considered and authoritatively rejected in several binding judicial precedents by the Supreme Court. In all these cases, the court has closely examined official records, especially the proposal placed for Presidential consideration and the material in support, both before the Parliament as well as the President.

285. There is no prohibition in law for this court to examine the records as well as the material which was placed before the Legislative Assembly of Delhi or the President for consideration before obtaining assent in order to ascertain the nature and scope of the proposal which was placed before the President as well as the relevancy of the material. Such examination is also necessary to arrive at a conclusion as to whether the procedure constitutionally prescribed has been followed or not.

286. While it is settled law therefore that the act of granting Presidential assent cannot itself be reviewed by the courts, the Supreme Court has held that courts may review the records that the President considered in giving assent in order to establish the purview of said assent.

287. Such examination is mandated by law and also essential to rule on the primary question to see whether relevant material formed the basis of the Presidential proclamation (or assent, as the case may be) as well as ascertain whether the assent was with regard to repugnancy of the proposed State legislation and a particular enactment of the Parliament or whether the assent had been sought and granted generally.

288. It is therefore trite that this court has the jurisdiction to call for records of the respondents to examine the proposal placed by the respondents as well as the material placed for consideration of the President.

289. The principles laid down in these pronouncements would be known to the respondents who are required to stand guided by legal experts in their decision making and actions. This court is required to examine compliance with these principles by the respondents.

Burden of establishing existence of material and compliance with the pre-conditions

290. We may also examine the question as to on whom rests the burden of establishing the existence of material to satisfy the pre-

conditions and a meaningful consideration before the Presidential assent under Article 239AA. We may draw support on this aspect from some other constitutional provisions conferring power on the President to issue proclamations upon 'advice' of and 'satisfaction' as Article 356 of the Constitution. The Supreme Court considered the important aspect of the burden of proving the existence of relevant material in para 87 in ***(1994) 3 SCC 1, S.R. Bommai v. Union of India*** and held thus:

> "…When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government."
>
> (Emphasis supplied)

291. On the same issue of the burden of proving existence of relevant material the following extract from the summarization by the Supreme Court in ***S.R. Bommai*** (supra) is very important:

> **"SUMMARY OF CONCLUSION:**
>
> 153 Our conclusions, therefore, may be summarised as under:
>
> I. The validity of the Proclamation issued by the President under Article 356(1) is ***judicially***

> ***reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power***. When a ***prima facie case is made out*** in the challenge to the Proclamation, the ***burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report.***
>
> II. Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction."
>
> (Emphasis by us)

292. It needs no elaboration that the burden to show that material existed and was relevant, that there was due application of mind by the competent authorities and also that such records were placed before for Presidential consideration, all lies on the respondent.

293. The respondents have contended that the pronouncement in ***S.R. Bommai case*** (supra) related to an executive act and that the petitioners' reliance thereon overlooks the vital distinction between an executive act and a legislative act. The respondents conceived that the judicial review of executive action can be premised on the ground that it is vitiated by non-application of mind by the maker which is established by showing that there was no material based on which the decision maker arrived at his/her satisfaction. Mr. Harish Salve, learned Senior Counsel for the respondents contended that a legislative measure on the other hand cannot be questioned on any grounds of judicial review available to challenge

execution action. It is further submitted that the executive has no right to speak for the law makers therefore it necessarily follows that the question as to whether or not there was any material before the executive which proposed the law to the law makers, is entirely irrelevant to the question of validity of a statute.

294. These submissions unfortunately are premised on a complete misunderstanding of the petitioners' submissions before us. The reliance on ***S.R. Bommai case*** (supra) is not for the purposes of supporting the challenge to a legislative act. The petitioners have placed a pronouncement in ***S.R. Bommai case*** (supra) before us in order to explain the meaning of the expression 'satisfaction' and the manner in which constitutional expressions have to be interpreted and construed. Furthermore, no objection has been addressed before us with regard to non-application of mind by the Legislative Assembly of Delhi. Inasmuch as the foregoing discussion amply sets out the submissions of the petitioners and our discussion thereon, it is unnecessary to dwell further on these objections of the respondents.

'Consideration' and 'assent'- how accorded

295. It is now necessary to understand the scope and spurt of the expressions 'consideration' and 'assent'. The phrase 'consideration' in Article 254 has been the subject matter of judicial pronouncements in ***AIR 1955 Bombay 35, Basantlal Banarsilal v. Bansilal Dagdulal*** and ***(1985) 3 SCC 661, Gram Panchayat of Village Jamalpur v. Malwinder Singh.***

296. In ***AIR 1955*** Bombay ***35, Basantlal Banarsilal v. Bansilal Dagdulal***, it was held thus:-

> "3. …Therefore, in the hierarchy of legislation in India a higher place was naturally accorded to laws passed by Parliament, and the Constitution enacts that if a law is passed both by the Legislature of a State and by Parliament with regard to the same subject matter, then if there is any repugnancy between the provisions of the two laws, the law of Parliament shall prevail. This is subject to cl.(2) which is the important provision and that provides:
>
> xxx xxx xxx
>
> Therefore, if the State Legislature passes a law subsequent to the law passed by Parliament and the State Legislature wants in any way to depart from the provisions of the law as laid down by Parliament, it could do so provided it satisfies the condition, viz., that it reserves the bill for the consideration of the President and the President gives his assent.
>
> The **principle** underlying this clause is clear, viz., that the **President should apply his mind to what Parliament has** enacted and **also consider the local conditions prevailing in a particular State**, and if he is **satisfied** that **judging by the local conditions a particular State should be permitted to make a provision of law different from the provision made by Parliament**, he should give his assent and thereupon the State legislation would prevail. There is a proviso to this cl. (2) and that is:
>
> > "Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying

or repealing the law so made by the Legislature of the State."

This again emphasises the omnipotence of Parliament. Even though the State law may contain a provision assented to by the President and may have contained a provision of law different from the provision contained in the Parliamentary statute, it is open to Parliament to legislate again with regard to the same matter.

xxx xxx xxx

The departure made under the Constitution is that wider power is conferred upon Parliament directly to tackle State legislation and to amend, vary or repeal State legislation. But it is impossible to contend that the additional words contained in the proviso in any way restrict the competence of Parliament. Whether under the Constitution or under the Government of India Act, the Central Legislature or Parliament had always the power to override any legislation passed by a Provincial or State Legislature provided the subject it dealt with found a place in the Concurrent List, and that important principle is reiterated in Article 254 and the proviso to cl. (2) merely emphasises that important principle."

(Emphasis by us)

297. On this aspect, reference may usefully be made to the judgment of the Constitution Bench of the Supreme Court in ***(1985) 3 SCC 661, Gram Panchayat of Village Jamalpur v. Malwinder Singh.*** The case arose in the context of direct conflict between Section 8(2) of the Central Act of 1950 and Section 3 of the Punjab Act of 1953 on the question of vesting of evacuee property, the issue considered was as to which of these two Acts

would prevail. It was held that the question has to be answered in the light of the provisions of the Constitution. The court construed the requirements, contours and the nuances of the expression "*reserved for consideration*" which have been used in Article 254(2) of the Constitution. The Supreme Court also considered the purpose of an enactment being reserved for Presidential assent and the examination by the High Court of the material placed for the Presidential consideration and assent. The applicable principles were laid down in the following terms:-

> "9. ...Since the interest of the evacuees in the Shamlat-deh lands was deemed to be declared as evacuee property, both the State Legislature and the Central Legislature had the power to deal with that interest by virtue of Entry 41. Article 254 of the Constitution deals with situations where there is inconsistency between the laws made by the Parliament and the laws made by the Legislature of a State.
>
> xxx xxx xxx
>
> Since the law made by the Legislature of the State of Punjab, namely, Section 3 of the Punjab Act of 1953, is repugnant to the law made by the Parliament which the Parliament was competent to enact, namely, Section 8(2)of the Central Act of 1950, the law made by the Parliament must prevail and the law made by the Punjab Legislature has to be held to be void to the extent of the repugnancy...
>
> xxx xxx xxx
>
> 12. ...The **assent of the President under**

Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be apprised of the reason why his assent is sought if, there is any special reason for doing so… "

(Emphasis supplied)

It has therefore, been unequivocally declared that if a State is proposing a legislation which conflicts with a Central legislation, Presidential assent is required under Article 254. Consideration by the President to the proposal of the State legislature is required before according assent. The President has to be informed of the reason for which the Presidential assent is sought. The repugnancy, if any, has to be mandatorily pointed out. The Presidential assent is confined to the purpose for which it was sought, and not beyond. It is well settled that the consideration by the President has to be real and meaningful and is not an empty formality.

298. The enunciation of law in the ***Gram Panchayat's*** case with regard to the interpretation of Article 254 was approved by the Supreme Court in paras 18 and 22 of ***Kaiser-i-Hind*** (supra). It was also noted that these principles were relied upon in the earlier judgment rendered in ***P.N. Krishan Lal and Ors. v. Govt. of Kerala and Anr.1994 (5) SCALE 1*** as well. In para 17, the Supreme Court also approved the principles laid down in ***AIR 1955 Bom 35 Basantlal Banarsilal v. Bansilal Dagdulal.***

299. It is noteworthy that the appellant in ***Kaiser-i-Hind*** (supra) had referred to the decision of the Madras High Court in ***AIR 1982 Mad 399, Bapalal and Co. v. P. Thakurdas and Ors.*** wherein the

Court had specifically arrived at a conclusion that Ex.P.12 showed that Section 10 of the proposed State law (Rent Control Act) has been referred to as the provision which could be said to be repugnant to the provisions of Code of Civil Procedure and the Transfer of Property Act, which were existing laws on the concurrent subject. After observing that, the Court had raised the presumption that even if the State Legislature did not point out the provisions of the Bill which are repugnant to the existing Central law, the President should be presumed to have gone through the Bill to see whether any of the provisions is repugnant to the Central law and whether such a legislation is to be permitted before giving assent to the Bill. The Court in ***Bapalal case*** (supra) further stated that merely because the State Government does not indicate the exact provisions which are repugnant to the earlier Central law, the assent given by the President cannot be said to be invalid. This presumption was not approved by the Supreme Court and in para 27, it was observed as follows:-

> "27. ...**We do not think that it was necessary to do so. In any case as discussed above, the essential ingredients of Article 254(2) are: (1) mentioning of the entry/entries with respect to one of the matters enumerated in the Concurrent List; (2) stating repugnancy to the provisions of an earlier law made by the Parliament and the State law and reasons for having such law; (3) thereafter it is required to be reserved for consideration of the President; and (4) receipt of the assent of the President**."
>
> (Emphasis supplied)

300. The petitioners object before us that the conditions precedent to the obtaining of Presidential assent have not been fulfilled. The requirements for Presidential consideration are explicitly delineated in ***Kaiser-I-Hind*** (supra) in the following terms:-

> "14. In view of aforesaid requirements, before obtaining the assent of the President, the **State Government has to point out that the law made by the State legislature is in respect** of one of the matters enumerated in the Concurrent List by mentioning entry/entries of Concurrent List and **that it contains provision or provisions repugnant to the law made by the Parliament or existing law**. Further, the words "reserved for consideration" would definitely indicate that there should **be active application of mind by the President** to the repugnancy pointed out between the proposed State law and the earlier law made by the Parliament and the necessity of having such a law, in the facts and circumstances of the matter, which is repugnant to a law enacted by Parliament prevailing in a State. The word "consideration" would manifest that **after careful thinking over and due application of mind regarding the** necessity of having State law which is repugnant to the law made by Parliament, the President may grant assent. This aspect is further reaffirmed by use of the word "assent" in clause (2), which implies knowledge of the President to the repugnancy between the State law and the earlier law made by Parliament on the same subject-matter and the reasons for grant of such assent. The word "**assent**" would mean in the context as an **expressed agreement of mind to what is proposed by the State**.
>
> (Emphasis supplied)

301. The Supreme Court has also considered the different meanings to the word '*assent'* in dictionaries in para 15 and thereafter laid down the following binding principles:-

> "16. Applying the aforesaid meaning of the word "assent" and from the phraseology used in Clause (2), the object of Article 254(2) appears that even though the law made by the Parliament would have supremacy, **after considering the situation prevailing in the State and after considering the repugnancy between the State legislation and the earlier law made by Parliament, the President may give his assent to the law made by the State Legislature. This would require application of mind to both the laws and the repugnancy as well as the peculiar requirement of the State** to have such a law, which is repugnant to the law made by Parliament. The word **"assent" is used purposefully indicating affirmative action of the proposal made by the State** for having law repugnant to the earlier law made by Parliament. It would amount to accepting or conceding and concurring to the demand made by the State for such law. **This cannot be done without consideration of the relevant material.** Hence the **phrase used is "reserved for consideration", which under the Constitution cannot be an idle formality but would require serious consideration on the material placed before the President. The "consideration" could only be to the proposal made by the State."**
>
> (Emphasis supplied)

302. A matter reserved for consideration under Article 254(2) thus requires active application of mind of the President not only to the repugnancy between the proposed State law and the prior Central enactment but to the necessity of having different law as

well. Such repugnancy and necessity has to be pointed out to the President in the proposal and material placed for his/her consideration. The Presidential assent must rest on a meaningful ("careful") consideration and due application of mind on this issues to support the constitutionality of the legislation under challenge.

303. Our attention is also drawn to the following discussion on the submission raised as an additional ground noticed in para 62 of ***Kaiser-I-Hind Pvt. Ltd.***(supra) which has been pressed before us and reads as follows:-

> "62. On behalf of the appellant, the following additional ground is raised in the written submission.
>
> > "Article 254(1) incorporates the principle of supremacy of parliamentary law - it applies to any provision of 'a law made by the legislature of a State' which is repugnant to any parliamentary law or (which is repugnant) to any existing law. Article 254(1) opening part, does not expressly give supremacy to parliamentary law over existing State/provincial law - i.e. law made in the Provinces before the Constitution (sic) hence Constitution, the Bombay Amending Act 43 of 1951 (the first law enacted by the State legislature after the Constitution) - even though a mere extension law - must constitutionally be regarded as a law made by the legislature of a State, for purposes of applicability of Article 254(1), which it could only be if it was a substantive law re-enacting or incorporating the provisions of the 1947 Act, post-Constitution. That it was reserved

> for the consideration of the President and received his assent lends support to the fact that it was not a mere extension but treated as a substantive enactment."

304. After a detailed consideration, this submission was also rejected by the Supreme Court. The Supreme Court laid down binding principles on the requirements to be met to substantially comply with Article 254(2) of the Constitution. The declaration of the legal principles which clearly apply to the instant case are set out hereafter:

> "65. The result of the foregoing discussion is:
>
> xxx xxx xxx
>
> 2.(a) Article 254(2) contemplates "reservation for consideration of the President" and also "assent". **Reservation for consideration is not an empty formality. Pointed attention of the President is required to be drawn to the repugnancy between the earlier law made by Parliament and the contemplated State legislature and the reasons for having such law despite the enactment by Parliament**.
>
> (b) The word "**assent"** used in Clause (2) of Article 254 would in context mean **express agreement of mind to what is proposed by the State**.
>
> (c) In case **where it is not indicated that "assent" is qua a particular law made by Parliament, then it is open to the Court to call for the proposals made by the State for the consideration of the President** before obtaining assent."
>
> (Emphasis by us)

305. It is manifest therefore that Presidential assent is confined to the proposal by the State Legislature, under Article 254 and nothing more.

306. It is essential to emphasise that while considering the phrase "reserved for consideration", the Supreme Court has clearly stated that the same "under the Constitution cannot be an idle formality". On this aspect, the supplementary opinion given by Justice D. Raju, in ***Kaiser-I-Hind Pvt. Ltd.***(supra) is important and reads as follows:-

> "73. The assent of the President envisaged under Article 254(2) is neither an idle or empty formality, nor an automatic event, necessitated or to be given for the mere asking, in whatever form or manner and whether specific, vague, general of indefinite - in the terms sought for to claim that once sought and obtained as well as published, a curtain or veil is drawn, to preclude any probe or contention for consideration that what was sought and obtained was not really what should and ought to have been, to claim the protection envisaged under clause (2) in respect of a particular State law vis-a-vis or with reference to any particular or specified law on the same subject made by Parliament or an existing law, in force. The repugnancy envisaged under clause (1) or enabled under clause (2) to get excepted from under the protective coverage of the assent obtained from the President, is such that there is a legislation or legislative provision(s), covering and operating on the same field or identical subject-matter made by both the Union and the State, both of them being competent to enact in respect of the same subject-matter or the legislative field, but the legislation by

> Parliament has come to occupy the entire field. Necessarily, in the quasi-federal structure adopted for the nation, predominance is given to the law made by the Parliament and in such circumstances only the State law which secured the assent of the President under clause (2) of Article 254 comes to be protected, subject of course to the powers of Parliament under the proviso to the said clause. **Therefore, the President has to be apprised of the reasons at least as to why his assent is being sought, the need or necessity and the justification or otherwise for claiming predominance for the State law concerned. This itself would postulate an obligation, inherent in the scheme underlying as well as the very purpose and object of seeking the assent under Clause (2) of Article 254 to enumerate or specify and illustrate the particular Central law or provision with reference to which the predominance is desired.** The absence of any standardized or stipulated form in which it is to be sought for, should not detract the State concerned, to disown its obligation to be precise and specific in the extent of protection sought having regard to the serious consequences which thereby inevitably follow, i.e. the substitution of the Union law in force by the State law, in the territorial limits of the State concerned, with drastic alteration or change in the rights of citizen, which it may, thereby bring about."
>
> (Emphasis by us)

307. On this issue the judgment reported at ***(2009) 5 SCC 342 Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Ltd.,*** it was held as under:-

> "81. The impugned judgment is a complete answer to the question raised regarding Article 254(2). There can be no doubt that both the Central Act and the

impugned State Act operate in the same field inasmuch as the "service compensation" is nothing but "gratuity", though called by a different name. Under such circumstances, unless it was shown that while obtaining the Presidential assent for the State Act, the conflict between the two Acts was specifically brought to the notice of the President, before obtaining the same, the State could not have used the escape route provided by Article 254(2) of the Constitution. We fully agree with the High Court when the High Court held that the two Acts occupy the common field and were in conflict with each other. The contention of the appellant that Article 254(2) would save the impugned provisions is, therefore, rejected."

(Emphasis by us)

308. So far as the manner in which the proposal is required to be made for the Presidential reference, reliance has been placed by Mr. Chandhiok on the judgment reported at ***(2012) 9 SCC 368, Krishi Upaj Mandi Samiti, Narsinghpur v. Shiv Shakti Khansari Udyog & Ors.*** The appellants before the Supreme Court had urged that the provisions of the Control Order cannot prevail over the Market Act because the Market Act was enforced after considering the conflict between the provisions of both and thereafter received Presidential assent. This submission was rejected by the Supreme Court for the reason that "*in the counter filed before the High Court, no such plea was raised and no document was produced to show that the Market Act was reserved for Presidential assent on the ground that the provisions contained therein are in conflict with those contained in the Control Order*."

The Supreme Court thus noted that before the High Court, it was not argued that the President had been apprised of the conflict between the Control Order and the Market Act and he accorded assent after considering this fact.

309. In para 42.3 of the judgment, the court noted that during the arguments, it had

> "42.3 …directed Shri B.S. Banthia, learned counsel for the State of Madhya Pradesh to produce the record to show as to in what context the Market Act was reserved for the Presidential assent. After the judgment was reserved, ShriBanthia handed over an envelope containing File No. 17/62/73-Judicial of the Ministry of Home Affairs, perusal of which reveals that the request of the State Government for Presidential assent was processed by the Ministry of Home Affairs. In the first instance, the Departments of Agriculture, Food and Internal Trade as also the Planning Commission were asked to offer their comments. The Department of Agriculture conveyed no objection but wanted its suggestions to be incorporated in the Bill. The others did not offer any comment. Thereafter, the Joint Secretary (Home) recorded a note that the suggestions given by the Agriculture Department will be sent to the State Government for consideration. He also prepared a summary for consideration of the President…
>
> xxx xxx xxx
>
> 43. From the summary reproduced hereinabove, it is clear that the State Government had not reserved the Market Act for Presidential assent on the ground of any repugnancy between the provisions of that Act and the Control Order.

xxx xxx xxx

> 48. In view of the aforesaid judgments of the Constitution Benches, we hold that Article 254(2) of the Constitution is not available to the appellants for seeking a declaration that the Market Act would prevail over the Control Order and that transactions involving the purchase of sugarcane by the factories operating in the market areas would be governed by the provisions contained in the Market Act. As a corollary, we hold that the High Court did not commit any error by quashing the notices issued by the appellant Market Committees to the respondents requiring them to take licence under the Market Act and pay market fee on the purchase of sugarcane from cane-growers/Cane-Growers' Cooperative Societies."

310. In para 44 of the judgment reported at (2012) 9 SCC 368 ***Krishi Upaj Mandi Samiti, Narsinghpur v. Shiv Shakti Khansari Udyog & Ors.*** the Supreme Court relied upon the pronouncement by the Constitution Bench in ***Gram Panchayat of Village Jamalpur v. Malwinder Singh*** (supra) on the nature and scope of Presidential assent under Article 254(2).

311. In the present case, the respondents have merely forwarded copies of the proposed Bill to the President without anything more. It is urged that this was in compliance of the constitutional requirement.

312. In reply to the contention, Mr. Harish Salve, learned Senior Counsel for the respondents has placed the judgment reported at

(1977) 3 SCC 592, State of Rajasthan &Ors. v. Union of India &Ors. It is however pointed out by the petitioners that this judgment was overruled in the judgment of the Supreme Court reported at ***(1982) 1 SCC 271, A.K. Roy &Ors. v. Union of India &Ors.*** The same has also been overruled by the Constitutional Bench in para 31 of the ***S.R. Bommai case*** (supra).

313. In ***Kaiser-i-Hind*** (supra), the Supreme Court also considered the issue as to whether simply forwarding a copy of the proposed Bill to the President is sufficient compliance of the requirement. It was clearly held that it would not suffice. On this issue the court held as follows:

> "74. **The mere forwarding of a copy of the Bill may obviate, if at all, only the need to refer to each one of the provisions therein in detail in the requisition sent or the letter forwarding it, but not obliterate the necessity to point out specifically the particular Central law or provisions with reference to which, the predominance is claimed or purported to be claimed.** The deliberate use of the word "consideration" in Clause (2) of Article 254, in my view, not only connotes that there should be an active application of mind, but also postulates a deliberate and careful thought process before taking a decision to accord or not to accord the assent sought for. If the object of referring the State law for consideration is to have the repugnancy resolved by securing predominance to the State law, the President has to necessarily consider the nature and extent of repugnancy, the feasibility, practicalities and desirabilities involved therein, though may not be obliged to write a judgment in the same manner, the

courts of law do, before arriving at a conclusion to grant or refuse to grant or even grant partially, if the repugnancy is with reference to more than one law in force made by the Parliament."

314. The proviso to Clause 3(c) of Article 239AA contains the phrase 'such law made by the Legislative Assembly'. Reference in this proviso is clearly made to such law made by the Delhi Assembly provisions whereof are repugnant to provisions of a law made by the Parliament. It is implicit in a bare reading of this constitutional provision that it envisages an enactment which is repugnant and therefore the repugnancy has to be pointed out prior to seeking the assent of the President in the proposal seeking Presidential consideration and assent.

315. The information and material which must be placed for a meaningful consideration by the President is concerned, in para 77 of ***Kaiser-i-Hind*** (supra), the Supreme Court in no uncertain terms set out the requirements and importance thereof in the following terms:

"xxx ***A genuine, real and effective consideration would depend upon specific and sufficient information being provided to him inviting, at any rate, his attention to the Central law with which the State law is considered or apprehended to be repugnant, and in the absence of any effort or exercise shown to have been undertaken, when questioned before courts, the State law cannot be permitted or allowed to have predominance or overriding effect over that Central enactment of the***

Parliament to which no specific reference of the President at all has been invited to. This, in my view, is a must and an essential requirement to be satisfied; in the absence of which the "consideration" claimed would be one in vacuum and really oblivious to the hoard of legislations falling under the Concurrent List in force in the country and enacted by the Parliament. To uphold as valid the claim for any such blanket assent or all-round predominance over any and every such law - whether brought to the notice of the President or not, would amount to legitimization of what was not even in the contemplation or consideration on the basis of some assumed "consideration". xxx"

(Emphasis by us)

316. From the above discussion, it is also evident that the logic of the judicially-expounded requirements underlying Presidential assent under Article 254(2) apply with equal—and arguably even greater—force to Article 239AA.

317. We may usefully also examine the manner in which the scope of Presidential consideration has been construed in other jurisdictions as well. The decision of the Supreme Court of the United States of America in ***Okanogan, Methow, San Poelis, Nespelem, Colville and Lake Indian Tribes or Bands of State of Washington v. United States (The Pocket Veto Case) 279 U.S. 655, 49 S. Ct. 463*** is useful in this regard . Under the second clause in Section 7 of Article 1 of the Constitution of the United States of America, a Bill which is passed by both the Houses of Congress during the first regular session of a particular Congress and presented to the President less than 10 days (Sundays

excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it. At the first session of the 69th Congress, Senate Bill No.3185 having been duly passed by both the Houses of Congress and duly authenticated was presented to the President on 24th June, 1926. On July 3, the first session of the 69th Congress was adjourned under a House Concurrent Resolution. It is noteworthy that on this day, the period of 10 days available to the President under Article 1 had not expired. The Congress was not again in session until the commencement of the 2nd Session on the first Monday in December and neither House of Congress was in session on July 6th to 10th day after the bill had been presented to the President (Sundays excepted).

318. The President neither signed the Bill nor returned it to the Senate and it was not published as a law. Some Indian tribes residing in the State of Washington filed the petition in the Court of Claims setting up certain claims in accordance with the terms of the Bill, on the position that the Bill had become a law without the signature of the President. The question as to whether in these circumstances, under the provisions of the Constitution of the United States of America, the Bill had or had not become a law was considered by the Supreme Court. It was argued before the court by counsel for the petitioners and by the amicus curiae that the provision as to the return of a Bill to the House within a

specified time is to be construed in a manner that will give effect to the reciprocal rights and duties of the President and of the Congress and not enable him to defeat a Bill of which he disapproves by a silent and 'absolute veto' i.e. a so called 'pocket veto', which neither discloses his objections nor gives the Congress an opportunity to pass the Bill over them.

319. The Supreme Court of the United States of America in this context had occasion to construe the Presidential duty of consideration of the Bill. It was held as follows:

> "This argument involves a misconception of the reciprocal rights and duties of the President and of Congress and of the situation resulting from an adjournment of Congress which prevents the President from returning a bill with his objections within the specified time. This is illustrated in the use of the term 'pocket veto,' which does not accurately describe the situation, and is misleading in its implications in that it suggests that the failure of the bill in such case is necessarily due to the disapproval of the President and the intentional withholding of the bill from reconsideration. **The Constitution in giving the President a qualified negative over legislation-commonly called a veto-entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. The faithful and effective exercise of this momentous duty necessarily requires time in which the President**

> **may *carefully examine* and *consider* a bill and *determine, after due deliberation*, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress.**
>
> **xxx xxx xxx**
>
> The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercises lessened, directly or indirectly. **And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress**, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections."
>
> (Emphasis by us)

320. The above narration shows that the solemnity attached to the consideration of a bill by the President and assent thereto cannot be denigrated by any action of the legislature. The proposal by the State must receive scrutiny and consideration before assent is accorded thereto under the Constitution.

321. Merely forwarding the proposal and copies of the Bill to the President therefore does not meet the Constitutional requirement.

322. The respondents before us have therefore completely failed to meet the essential pre-conditions, which are sine qua non for Presidential consideration and assent.

323. It is well settled that if the Constitution of India provides preconditions for exercise of power by the constitutional authorities, the courts can always examine whether the preconditions have been satisfied or not. The same principles as above shall equally apply in case of judicial review with respect to a bill which is reserved for the consideration of the President.

324. The fact that Presidential assent has been accorded, therefore is by itself not determinative of the matter. The respondents must conform to the requirement of active application of mind by the President to the repugnancy which has to be pointed out in the proposal by the State Government. It must also be shown that there was active application of mind to the *necessity* of having a State law which is different from the Central law. If there is a constitutional challenge to a legislation and the 'assent' does not disclose its nature (as in the present case) the inquiry by the court may include examination of the nature of the proposal as well as the purpose for which the legislation was placed before the President.

325. From the principles laid down in the several authoritative judicial precedents, we find that it is a sine qua non for valid consideration and application of mind by the President, that the proposal by the State Government must set out the provisions of the proposed statutory amendment which are repugnant to the Central law. It indubitably follows that a mere averment of the conflicting provisions would not suffice. The proposal must

comprehensively incorporate the reasons and state the compulsion for enacting the contemplated amendment.

Scope of judicial review of the Presidential consideration

326. We have held that 'consideration' and 'assent' are not exercise of legislative power, but merely part of legislative procedure. We have also examined the facets of Presidential consideration and assent.

327. The respondents have pressed an absolute prohibition to our examination of the legislation on the ground that the President has accorded assent thereto. On the parameters of judicial review on issues relating to 'assent', the observations of D. Raju, J. in his supplementing opinion in (***2002) 8 SCC 182, Kaiser-i-Hind Pvt. Ltd. v. National Textile Corporation (Maharashtra North) Ltd. &Ors.*** shed valuable light on the issue under our consideration. The same reads as follows:

> "75. *This Court has, no doubt, held that the assent accorded by the President is not justifiable, and courts cannot spell out any infirmity in the decision arrived at, to give the assent. Similarly, when the President was found to have accorded assent and the same was duly published, it cannot be contended that the assent was not really that of the President, as claimed. It is also not given to anyone to challenge the decision of the President according assent, on merits and as to its legality, propriety or desirability.* ***But that is not the same thing as approving an attempt to draw a blanket or veil so as to preclude an examination by this Court or the High Court as to***

the justifiability and sufficiency or otherwise of the protection or predominance claimed for the State law over the law made by the Parliament or the existing law, based upon the assent accorded, resulting at times in substantial alteration, change or modification in the rights and obligations of citizen, including the fundamental rights. When the **Constitution extends a form of protection to a repugnant State law, permitting predominance and also to hold the field in the place of the law made by the Centre, conditioned upon the reservation of the State law for consideration of the President and obtaining his assent, it is to be necessarily viewed as an essential prerequisite** to be **effectively** and **meticulously fulfilled** before ever availing of the protection and the same cannot be viewed merely as a ceremonial ritual. If such a ***vitally essential procedure and safeguard is to be merely viewed as a routine formality which can be observed in whatever manner desired by those concerned and that it would be merely enough, if the assent has been secured howsoever obtained, it would amount to belittling its very importance in the context of distribution of legislative powers and the absolute necessity to preserve the supremacy of the Parliament to enact a law on a concurrent topic in List III, for the entire country. It would also amount to acceptance of even a farce of compliance to be actual or real compliance. Such a course could not be adopted by Courts except by doing violence to the language, as well as the scheme, and very object underlying Article 254(2).***"

(Emphasis supplied)

328. In ***(2006) 2 SCC 1, Rameshwar Prasad v. Union of India***, the court was concerned with the invalidity of proclamation under Article 356 of the Constitution dissolving the Assemblies of

Karnataka and Nagaland. Reference was made to a pronouncement of the Supreme Court of Pakistan. The following observations in the pronouncement on the parameters on which the Presidential powers would be exercised are important:

> "121. Reference has been made to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant articles of the Pakistani Constitution is not couched in the same terms. In ***Mohd. Sharif v. Federation of Pakistan, (1982) 1 SCC 271***, the question was whether the order of the President dissolving the National Assembly on 29-5-1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Pakistani Constitution. It was held in that case that it is not quite right to contend that since it was the discretion of the President, on the basis of his opinion, the President could dissolve the National Assembly; but he has to have the reasons which are justifiable in the eyes of the people and supportable by law in a court of justice. He could not rely upon the reasons which have no nexus to the action, *are bald, vague, general or such as can always be given and have been given with disastrous effects* (Emphasis supplied by us). It would be instructive to note as to what was stated by the learned Chief Justice and R.S. Sidhwa, J., as reproduced in the opinion of Sawant, J. ***(Bommai case):***
>
> ***"Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a***

> ***grave nature that the representatives of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen***. His action must appear to be called for and justifiable under the Constitution if challenged in a court of Law. No doubt, the courts **will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the courts will have to perform their duty cast on them under the Constitution**. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for."
>
> (Emphasis by us)

329. In ***(2006) 2*** SCC ***1, Rameshwar Prasad v. Union of India,*** the Supreme Court also unequivocally declared that the court would have jurisdiction to examine whether the satisfaction is malafide or based on wholly extraneous or irrelevant grounds. In para 124, it was observed as follows:-

> "**124. It is well settled that *if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine* it, because in that case *there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied*.** On consideration of these observations made in State of Rajasthan as also the other decisions ***{Kehar Singh v. Union of India*** (1989) 1 SCC 204 and ***Maru Ram v. Union of India*** (1981) 1 SCC 107}, Sawant, J. concluded that "The exercise of ***power to issue the proclamation under Article 356(1) is subject to judicial review at least to the extent of examining whether the conditions precedent to the issue of the***

Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. ..."

330. In exercise of its extraordinary powers under Article 226 of the Constitution, the High Court therefore has the jurisdiction to examine whether preconditions and procedure constitutionally prescribed has been followed or not, in the consideration by the President of the proposed State Legislation and grant of assent thereto. The court would scrutinize whether relevant material existed and was actually placed before the President or not. As part of the judicial review, it is also open to the court to examine whether the Presidential consideration is based on extraneous or irrelevant grounds. The Presidential consideration and assent so granted would confer supremacy to the State law over the law made by the Parliament. In this context the consideration assumes vital importance and has to be real and meaningful.

331. The extent of the power of the court to examine the basis of the Governor's report as well as the nature of its consideration was discussed and the principles laid down in paras 140 and 141 of ***Rameshwar Prasad v. Union of India*** (supra) and the conclusions in para 145 were based on these. These may also be usefully extracted and read as follows:-

"140. Thus, it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not. The absence of these factors resulted in the majority declaring the dissolution of State Legislatures of Karnataka and Nagaland as invalid.

141. In view of the above, we are unable to accept the contention urged by the learned Attorney General for India, Solicitor General of India and Additional Solicitor General, appearing for the Government that the report of the Governor itself is the material and that it is not permissible within the scope of judicial review to go into the material on which the report of the Governor may be based and the question whether the same was duly verified by the Governor or not. In the present case, we have nothing except the reports of the Governor. In absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal ipse dixit of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court cannot remain a silent spectator watching the subversion of the Constitution…

xxx xxx xxx

145. In the present case, like in ***Bommai case***, there is **no material whatsoever except the *ipse dixit* of the Governor.** The action which results in preventing a political party from staking claim to form a Government after election, on such **fanciful assumptions**, if allowed to stand, would be **destructive of the democratic fabric**. …The **extra ordinary emergency power** of recommending

dissolution of a Legislative Assembly is not a matter of course to be **resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material**. These are the matters better left to the wisdom of others including Opposition and electorate."

(Emphasis supplied)

332. The following observations which expound the principles on the scope of judicial review in ***S.R. Bommai*** (supra) also may usefully be set out in extenso:

"93. In ***A.K. Roy v. Union of India : (1982) 1 SCC 271,*** the Court has observed that "Clause [5] has been deleted by the 44th Amendment and, therefore, any observations made in the ***State of Rajasthan case*** [supra] on the basis of that clause **cannot any longer hold good**". These observations imply that after the deletion of Clause [5], **the judicial review of the Proclamation issued under Article 356[1] has become wider than indicated in the State of Rajasthan case**.

xxx xxx xxx

96. ... Any interpretation that we may place on Article 356 must, therefore help to preserve and not subvert their fabric. The power vested *de jure* in the President but *de facto* in the Council of Ministers under Article 356 has all the latent capacity to emasculate the two basic features of the Constitution and hence it is necessary to scrutinise the material on the basis of which the advice is given and the President forms his satisfaction more closely and circumspectly. This can be done by the Courts while confining themselves to the acknowledged parameters of the judicial review as discussed above, viz., illegality, irrationality and mala fides. Such scrutiny

of the material will also be within the judicially discoverable and manageable standards.

xxx xxx xxx"

333. We may usefully extract the principles laid down in para 77 of ***Kaiser-i-Hind*** (supra) on the scope of judicial review into Presidential consideration as well, the relevant portion whereof reads thus:

> ***"... In order to find out the real state of affairs as to whether the "assent" in a given case was after a due and proper application of mind and effective "consideration" as envisaged by the Constitution, this Court as well as the High Court exercising powers of judicial review are entitled to call for the relevant records and look into the same. This the courts have been doing, as and when considered necessary, all along. No exception therefore could be taken to the High Court in this case adopting such a procedure, in discharge of its obligations and exercise of jurisdiction under the Constitution of India.***"
>
> (Emphasis by us)

334. We have noticed above the parameters within which Presidential assent would be examined by court. If the conditions precedent or the relevant material is not placed before the President for consideration, then it *ipso facto* follows that there is no consideration under the constitutional mandate. It would then follow that mere grant of the Presidential assent would not confer superiority to the State Legislation over a Central law.

Whether requirements for seeking "general" assent are different from those for seeking "specific" assent

335. A plea is taken on behalf of the respondents to the effect that that the President had granted general assent to the proposed legislation. This plea has been orally raised for the first time during the course of oral arguments.

336. No such plea has also been taken in the counter affidavit or in the written submissions filed by the respondents before us. There is no material to this effect in the records which were produced before us.

337. It is possible that there may be a case where Presidential assent is sought in general terms. In such a circumstance, assent when given, will be applicable generally for which it was sought. The nature and contents of the proposal made to the President seeking the assent would be material in deciding the nature of assent which was granted.

338. The distinction between so-called "specific" and "general" assent has been urged before us by the respondent as obviating the need to fulfil any of the constitutional requirements for a valid 'consideration' under Article 239AA.

339. Even if such a plea of the respondent is accepted, the decision in ***Kaiser-i-Hind*** (supra) makes it clear that assent of a general nature must also comport with certain principles in order to be considered as constitutional.

340. It has been clearly declared in para 20 of ***Kaiser-i-Hind*** (supra) that the 'consideration by the President' and his 'assent' under Article 254(2) is limited only to the proposal made by the State Government and that the such legislation would prevail only qua the laws for which the repugnancy was actually pointed out and the 'assent' of the President sought for. Proposal by the State is *sine qua non* for 'consideration' and 'assent'. Thus, if the assent relates to a law approved by the State legislature (or the GNCT of Delhi as at present) which is repugnant to any provision of the Parliamentary enactment, it is essential to examine the proposal sent by the concerned government ('the Govt. of NCT of Delhi' in the instant case) to the President to ascertain as to whether the President has assented to the proposed law which is repugnant to Parliamentary law to prevail or not. This is more so when neither the Presidential assent (as in the instant case) nor the statutory enactment so states.

341. This, thus, is in fact reiteration of the meaning of assent in 'general terms', stated in ***(1985) 3 SCC 661, Gram Panchayat of Village Jamalpur v. Malwinder Singh*** wherein the court observed as follows:

> **"12. ...If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise. But if, as in the instant case, the assent of the President is sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it.**

> **Not only was the President not apprised in the instant case that his assent was sought because of the repugnancy between the State Act and the pre-existing Central Act on the vesting of evacuee properties but, his assent was sought for a different, specific purpose altogether**. Therefore, that assent cannot avail the State Government for the purpose of according precedence to the law made by the State Legislature, namely, the Punjab Act of 1953, over the law made by the Parliament, even within the jurisdiction of the State."
>
> (Emphasis supplied)

342. The Supreme Court has laid down the law on such plea of the respondents (as in the present case) that assent was sought in general terms in ***Kaiser-i-Hind*** (supra).

> "74. …**Protection cannot be claimed for the State law, when questioned before courts, taking cover under the assent, merely asserting that it was in general form, irrespective of the actual fact whether the State claimed for such protection against a specific law or the attention of the President was invited to at least an apprehended repugnancy vis-a-vis the particular Central law**. In the teeth of innumerable Central laws enacted and in force on concurrent subjects enumerated in List III of the Seventh Schedule to the Constitution, and the hoard of provisions contained therein, **artificial assumptions based on some supposed knowledge of all those provisions and the presumed regularity of official acts, cannot be blown out of proportion, to do away with an essential exercise, to make the "assent" meaningful, as if they are empty formalities, except at the risk of rendering Article 254 itself a dead letter or merely otiose.** The significant and serious alteration in or modification of

the rights of parties, both individuals or institutions resulting from the "assent" cannot be overlooked or lightly brushed aside as of no significance, whatsoever. In a federal structure, peculiar to the one adopted by our Constitution it would become necessary for the President to be apprised of the reason as to why and for what special reason or object and purpose, predominance for the State law over the Central law is sought deviating from the law in force made by Parliament for the entire country, including that part of the State. When this Court observed in ***Gram Panchayat of Village Jamalpur v. Malwinder Singh and Ors. (1985) 3 SCC 661***, **that when the assent of President is sought for a specific purpose the efficacy of the assent would be limited to that purpose and cannot be extended beyond it, and that if the assent is sought and given in general terms so as to be effective for all purposes different considerations may legitimately arise, it cannot legitimately be contended that this court had also declared that reservation of the State law can also be by mere reference to Article 254(2) alone** with no further disclosures to be made or that with mere forwarding of the Bill, no other information or detail was either a permissible or legalized and approved course to be adopted or that such course was held to be sufficient, by this Court, to serve the purpose of the said article**. The expression "general terms" needs to be understood, in my view, a reference to a particular law as a whole in contrast to any one particular or individual in the said law and not that, it can be even without any reference whatsoever.** The further observation therein,

> "not only was the President not apprised in the instant case that his assent was sought because of the repugnancy between the State Act and the pre-existing Central Act on the

> vesting of evacuee properties but his assent was sought for a different, specific purpose altogether"

would belie any such claim. Per contra, **it would only reinforce the principle that the consideration as well as the decision to accord consent should be a conscious one, after due application of mind, relevant and necessary for the purpose.** Though, submission of a thesis on the various aspects of repugnancy involved may not be the requirement the **reservation for "consideration"** would **necessarily obligate an invitation of the attention of the President as to which of the pre-existing Central enactments or which provisions of those enactments are considered or apprehended to be repugnant, with reference to which the assent envisaged in Article 254(2) is sought for.** This becomes all the more necessary also for the reason that the **repugnancy** in respect of which predominance is sought to be secured must be **shown to exist or apprehended, on the date of the State law and not in vacuum to cure any and every possible repugnancy in respect of all laws- irrespective of whether it was in the contemplation or not of the seeker of the assent or of the President** at the time of "consideration" for according assent."

(Emphasis supplied)

In order for the Presidential assent to be in general terms, the respondents were required to have so stated clearly in the proposal to the President. It was necessary for the President to have considered the proposal from this aspect.

343. We shall examine whether the proposal sent by the

respondents complies with the Constitutional requirements noticed by us in the next section of this judgment.

Position in the present case: exercise undertaken by the respondents

344. We may now examine exercise undertaken by the respondents in the present case. In view of the principles laid down in ***AIR 1955 Bombay 35, Basantlal Banarsilal v. Bansilal Dagdulal***, local conditions prevalent in a State at a particular point of time are certainly a relevant consideration. The Presidential consideration requires the President to be satisfied that judging by such considerations, a particular State should be permitted to make a departure from a Central enactment to the extent proposed by it.

345. Based on the foregoing, we find that the Supreme Court has held that, in order to ensure that the President undertakes the constitutionally required 'consideration' of a repugnancy under either of the Articles – 239AA or be it 254(2), the body seeking Presidential assent must:

> (i) Apprise the President of the reasons as to why assent is being sought;
>
> (ii) Apprise the President of the necessity of overruling the predominance of the Central law, and justify this claim of necessity;
>
> (iii) Specifically point out the particular Central law or laws with reference to which predominance is desired (if claiming repugnancy with an entire Central law or laws);

(iv) Specifically point out the particular provisions within a Central law with reference to which predominance is desired (if claiming repugnancy with particular provisions of a Central law or laws);

(v) Point out the nature and extent of the repugnancy; and

(vi) Precisely and specifically outline the extent of protection sought with regard to the consequences that would follow.

346. As noticed above, the respondents have stated in para (iii) of their affidavit dated 4th of January 2013 that by their letter dated 15th June, 2012, the Amendment Bill was referred to the President for her consideration "***expressly setting out the repugnancy to the central enactment"***. The letter dated 15th June, 2012 clearly refers to 'repugnancy', so as to countermand any generality. The affidavit dated 4th of January 2013 was filed at an advanced stage of hearing in the writ petition when the respondents had full knowledge of the challenge by the petitioners. In the oral submissions made before us, the respondents urge us to accept the oral contention that the Court Fees (Delhi Amendment) Act, 2012 in question was referred to the President for assent because it was "in respect of an earlier law" and not because of a putative repugnancy between the two laws.

347. It is well settled that the respondents cannot be permitted to raise a defence for action which is not supported by their official records. In this regard, in ***(1978) 1 SCC 405, Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and***

Ors. the court had laid down the following principle:

> **"8.** The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. ***in Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16*** :
>
> > "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> Orders are not like old wine becoming **better** as they grow older."

348. It is well settled that the order and records must speak for themselves and the respondents cannot rely on pleadings or depositions in counter affidavits to support the same.

349. All the points for consideration of the President including the reasons for the amendment as well as points of repugnancy ought to have been stated in the proposal itself. However, in the present

case, the proposal dated 15th June, 2012 is completely silent on these material aspects. Therefore, there is no evidence that the possible conflict had been brought to the notice of the President before assent was obtained. Consequently, the assent given by the President would not be the assent required to be given under Article 239AA(3)(c).

At the same time, there is nothing to remotely suggest that assent was sought in 'general terms'.

350. In the case in hand, the repugnancy between the Court Fees Act, 1870, a Central legislation and the impugned Amendment by the Delhi Legislative Assembly is accepted. We have noted above that under Article 239AA, the Delhi Legislative Assembly merely legislating "in respect of an earlier law" would necessitate Presidential assent. In the present case the respondents have noted that the proposed legislation was also repugnant to the "earlier law" (Court Fees Act, 1870). In order to establish that the repugnant law received the assent after due consideration of the President, the Government of NCT of Delhi must therefore, show the material which was placed before the President for consideration and that the repugnancy between the Central enactment and the impugned amendment was pointed to the President. It must also be established that such material has been actually considered by the President before according assent.

351. The factual background in the present case, so far as the

procedure which was followed by the respondents is concerned requires to be examined. In the counter affidavit dated 6th September, 2012, the respondents have made the following disclosure:

> "Pursuant to the advice of the Law and Justice Department, and taking into consideration that the Court Fees Act, 1870 is a Central Legislation, a **request was made** to the Secretary (Home), Government of India, for obtaining **prior approval** of the Central Government. The Ministry of Home Affairs examined the matter in consultation with the Ministry of Law and Justice and thereafter **the approval was granted.** On receipt of **the approval,** the bill was again placed before the Cabinet of Ministers and thereafter the Amendment Bill was introduced before the Assembly, which was then passed unanimously. The Bill became an Act only after it received Presidential Assent and the date of amendment was notified as 01.08.2012, after the approval of the Lt. Governor."

352. It is stated that a letter dated 15th June, 2012 was sent from the office of the Lt. Governor to the Ministry of Home Affairs. This letter dated 15th June, 2012 makes a reference to only three original copies of the Bill authenticated by the Speaker of the Legislative Assembly of Delhi as having been enclosed with it. It is argued by Mr. Chandhiok, learned Senior Counsel that the communication dated 15th June, 2012 does not even request a consideration of the matter by the President but merely seeks the assent of the President.

353. The material impact of the impugned legislation on the

jurisdiction of this court was also not pointed out.

354. The submission on behalf of the respondents that a general or a broad spectrum assent of the President was obtained in the instant case and that it would meet the constitutional requirement of assent is erroneous.

355. The respondent's contention that in the instant case, the President had accorded general consent and therefore, it was wholly unnecessary to point out repugnancy in the proposal seeking assent has to be rejected not only on the basis of the specific plea to the contrary in the counter affidavit but also in view of the binding position in law set out hereinabove. Even if it could be held that in the instant case the assent had been sought and given in general terms, such grant would not cure the legislation of the defects noted above.

356. As noted above, in **(2002) 8 SCC 182, *Kaiser-I-Hind Pvt. Ltd. v. National Textile Corporation (Maharashtra North) Ltd. & Ors.,*** it was held that the Presidential assent was limited to overcoming the repugnancy only with respect to the Transfer of Property Act and Presidency Small Causes Court Act and not vis-à-vis the Public Premises Act, a Parliamentary enactment. It was therefore, concluded that the Public Premises Act would prevail in a State so far as the properties covered under the enactment were concerned.

357. We have also noted above the finding of the Supreme Court

in (***1985) 3 SCC 661, Gram Panchayat of Village Jamalpur v. Malwinder Singh*** that the President has to be apprised of the reasons for seeking the assent. In the instant case, it is an admitted position that the respondents did not point out the repugnancy qua the Arbitration and Conciliation Act, 1996 or the rules framed by the Delhi High Court in exercise of powers thereunder to the President or why the amendment to the court fees superseding the stipulations made in the Arbitration Act, 1996 was necessary and should be permitted to prevail in Delhi.

358. In this background, the Presidential assent would not operate qua repugnant provisions which were not placed before the President and to which there is no assent at all in the eyes of law.

359. The Presidential assent is stated to have been granted on the 4th of June 2012 which was communicated to the Principal Secretary to the Lt. Governor by way of letter dated 6th July, 2012.

360. The original record produced before the court merely contains a rubber stamp having been affixed to the effect that the President had granted assent with her signatures.

361. On receipt of the communication conveying the assent of the President, the Bill was again placed before the Cabinet of Ministers and thereafter the Amended Bill was passed by the Legislative Assembly. The date of the Amendment was thereafter notified as the 1st of August 2012 after receipt of the approval of the Lt. Governor.

362. There are therefore no constitutional or statutory provisions to support the stand of the respondents. There is also no jurisprudence to do so either.

363. It is argued on behalf of the petitioner that apart from the primary submission that the relevant material was not placed before the President for consideration. Therefore affixation of a rubber stamp of assent on which the President had merely put her signatures shows the President was prevented from a meaningful consideration of the relevant issues. It is contended that relevant material was required to be placed before the President, the same was required to be considered by the President before granting assent.

364. It is thus apparent that all that was placed before the consideration of the President was the draft Bill without even a statement explaining the repugnancy or a clarification of how the amendment would amount to a desideratum for the litigants and the system of justice operating in the NCT of Delhi, the relevant matters which deserved the consideration of the President.

365. Even the Court Fees Act, 1870 itself was not placed before the President. This would have enabled the President, before according her assent, to peruse through the clear statement made by the legislature in the 'Introduction' to the Act of 1870 and the Statement of Objects and Reasons for the enactment of 1870 and how an increase in court fees was repressive on general litigation.

Nothing has been shown to us which justified the need for the proposed amendments to the President or demonstrated that the amendment did not impact, adversely or otherwise, the constitutional rights of any person.

366. The existing Court Fees Act, 1870 which would have enabled the President to understand the existing statutory provisions and what was being proposed by the Legislative Assembly was not sent to her. The respondents also failed to draw attention of the President to the provisions of the Delhi High Court Act. No circumstance warranting departure from the Central legislation in the National Capital Region of Delhi was pointed out in the Presidential reference. The President was also not given any relevant information about the prevalent circumstances or the necessity for the amendment.

367. Admittedly, in the instant case, the respondents have not placed the prevalent conditions in Delhi before the President of India. No circumstance which has been judicially and Constitutionally declared relevant and necessary for Presidential assent qua a repugnancy between a Central enactment and proposed State amendment legislation has been placed for consideration of the President.

368. We may note that the respondents did not forward even the reasons advanced in the Sub-Committee report nor any supporting material forwarded to the office of the President. It is, therefore,

evident that there was no material at all before the President; the repugnancy between the existing statute and the amendment was not pointed out; the local conditions and circumstances necessitating the 2012 legislative amendment were not placed. In fact, the President had nothing at all for her 'consideration'. The element of application of mind to relevant material is completely absent. It is legally impermissible to accept that under the given circumstances, the President was fully apprised of the need for an amendment to the Court Fees Act and the effect that such an amendment would have on the litigants, both of which, according to the Supreme Court, are essential for the formation of the 'consideration' of the President. The 'Presidential assent' has to be examined in this factual background and its impact so construed.

369. We therefore find substance in the submission of Mr. Chandhiok, learned Senior Counsel that no demand for consideration of the President, in terms of Article 239AA3(c) and the principles laid down in ***Kaiser-I-Hind Pvt. Ltd.***(supra), was made by the Government of NCT of Delhi. No material at all was placed before the President. The communication by the Government of NCT of Delhi did not even suggest that the matter requires consideration from the aspect of repugnancy between a Central legislation and the proposed amendment thereto at the instance of the Government of NCT of Delhi. There was no material at all, let alone relevant material placed before the President.

370. Given the categorical stand of the respondents on affidavit, the submission orally made before us that the respondents placed the proposed amendment before the President only as there was a prior Central Law and not because of a repugnancy is factually incorrect and legally untenable.

371. In the absence of inviting the attention of the President to the repugnancy, the submission that Presidential assent was obtained thereto is erroneous and contrary to the constitutional scheme. If this submission of the respondent was accepted, the concluding part of Article 239AA Clause 3(c) proviso would be rendered otiose which is legally impermissible. The respondents have therefore failed to abide by the legislative procedure constitutionally mandated. The respondents have also not complied with established essential pre-conditions for the Presidential Consideration and assent under Article 239AA of the Constitution. Therefore, the Presidential assent to the impugned legislation is insufficient to defeat the challenge laid by the petitioners to the Court Fees (Delhi Amendment) Act, 2012.

(V) <u>The legislative action is manifestly arbitrary and the legislation suffers from substantive unreasonableness rendering it ultra vires of Article 14.</u>

372. It requires to be stated that even if it could be held that the Delhi Legislative Assembly had the legislative competence to effect the impugned amendment, the petitioners have pressed that the impugned legislation also violates the equality clause under

Article 14 as well as the rights guaranteed under Articles 16 and 21 of the Constitution. It is contended that the impugned law is an absolute barrier to justice for a large segment of the population and for these reasons as well cannot be sustained. We now examine these grounds of challenge under separate headings in seriatim.

373. It is contended that the increase in the present case appears to be manifestly arbitrary and totally contrary to the objects and reasons of the Court Fees Act, 1870 and is therefore violative of Article 14 of the Constitution of India and liable to be quashed.

374. We may point out that for the purposes of the discussion in the rest of this judgment, it has been assumed that the Delhi Legislature is competent to increase the charges.

375. At the very outset, the respondent submitted that the impugned Amendment Act of 2012 does not violate any fundamental right. In response to the petitioner's assertion that certain parts of the Amendment Act violate Articles 14 and 21, the respondents submitted that the court is not required to go into each and every individual entry of court fees and ascertain the rate with the work to be performed. Their contention is that rationalization of court fees has been done in a manner to reduce court fees on small claims, whereas the high value claims now attract an increase in court fees, such a classification is not violative of Article 14. They contend that there was no specific pleading regarding a violation of Article 14 in the writ petition, and bereft of a

particularized plea, there is no basis for the petitioner to maintain such action.

376. Before examining the submission of the petitioner from the various angles urged before us, we may set down Article 12, 13 and 14 in Part III of the Constitution relevant to this consideration, which read as follows:-

> **"12. Definition.—**
>
> In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
>
> **13. Laws inconsistent with or in derogation of the fundamental rights.—**
>
> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires,—
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having

in the territory of India the force of law;

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

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

14. Equality before law.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

377. Referring to Article 13 of the Constitution of India, it is pointed out that under clause 1 of Article 13, all laws in force before commencement of the Constitution, to the extent of inconsistency with Part III (fundamental rights) are void.

378. Under clause 2 of Article 13, the States are prohibited from making any law which takes away or abridges the rights conferred by Part III and further clearly declares that any law which is made in contravention of this clause, shall to the extent of the contravention, be void.

379. Article 14 unequivocally declares that the State shall not deny to any person equality before the law or equal protection of

the laws within.

380. The petitioners have submitted that a challenge to a legislation by way of a writ petition is maintainable on the ground of legislative arbitrariness and that the legislation results in violation of rights of the people under Article 14. Expanding on the meaning of the expression 'legislative arbitrariness', Mr. Chandhiok, learned Senior Counsel has drawn support from the pronouncement of the Supreme Court reported at ***(2011) 8 SCC 737, State of Tamil Nadu v. K. Shyam Sunder & Ors.*** In this case, the respondents had successfully challenged provisions of the Tamil Nadu Uniform System of School Education (Amendment) Act, 2011, a State law, before the High Court of Judicature at Madras. Right to education was a fundamental right under Article 21A of the Constitution. The State Act was prior to the Right of Children to Free and Compulsory Education Act, 2009 enacted by the Parliament.

381. Amongst others, the challenge rested on the plea that the questions of mala fide and colourable exercise of power cannot be alleged against the legislature and yet the High Court had recorded that the 2011 Amendment Act was a product of 'arbitrary exercise of power'.

382. The Supreme Court noted (para 18) that the enactment attempted to create an egalitarian society removing disparity amongst individuals using education as the most effective means.

383. So far as the contention that the legislation was effected in bad faith is concerned, the Supreme Court considered the same under the heading of 'colourable legislation' and observed as follows:-

> ***"II. Colourable legislation***
>
> 36. In *State of Punjab* v. *Gurdial Singh* [(1980) 2 SCC 471 : AIR 1980 SC 319] , this Court held that when power is exercised in bad faith to attain ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal, it is called colourable exercise of power. The action becomes bad where the true object is to reach an end different from the one for which the power is entrusted, guided by an extraneous consideration, whether good or bad but irrelevant to the entrustment. When the custodian of power is influenced in exercise of its power by considerations outside those for promotion of which the power is vested, the action becomes bad for the reason that power has not been exercised bona fide for the end design.
>
> 37. It has consistently been held by this Court that the doctrine of mala fides does not involve any question of bona fide or mala fide on the part of legislature as in such a case, the Court is concerned to a limited issue of competence of the particular legislature to enact a particular law. If the legislature is competent to pass a particular enactment, the motives which impelled it to an act are really irrelevant. On the other hand, if the legislature lacks competence, the question of motive does not arrive at all. Therefore, whether a statute is constitutional or not is, thus, always a question of power of the legislature to enact that statute. Motive of the legislature while enacting a statute is inconsequential: "Malice or motive is beside

> the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides." The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose. This kind of "transferred malice" is unknown in the field of legislation. (See*K.C. Gajapati Narayan Deo* v. *State of Orissa* [AIR 1953 SC 375] , *STO* v. *Ajit Mills Ltd.* [(1977) 4 SCC 98 : 1977 SCC (Tax) 536 : AIR 1977 SC 2279] , SCC p. 108, para 16, *K. Nagaraj* v. *State of A.P.* [(1985) 1 SCC 523 : 1985 SCC (L&S) 280 : AIR 1985 SC 551] , *Welfare Assn., A.R.P.* v. *Ranjit P. Gohil* [(2003) 9 SCC 358 : AIR 2003 SC 1266] and *State of Kerala* v. *Peoples Union for Civil Liberties* [(2009) 8 SCC 46] .)"

384. For the purposes of the present case, we may note that so far as the consideration of legislative competence was concerned, in para 38, the Supreme Court held that the legislative competence can be adjudged with reference to Articles 245 and 246 of the Constitution read with the three Lists given in the 7th Schedule as well as with reference to Article 13(2) of the Constitution which prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution and provides that any law made in contravention of this clause shall, to the extent of the contravention be void.

385. In paras 50 to 53 of ***State of Tamil Nadu v. K. Shyam Sunder & Ors.*** (supra), the court discussed the meaning and constituents of the expression 'legislative arbitrariness' which deserve to be extracted in extenso and read as follows:-

"50. In **Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors.** AIR 1981 SC 487, this Court held that Article 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. **Whenever** therefore, there is **arbitrariness** in **State action**, whether it be of the **legislature** or of the **executive**, **Article 14 immediately springs into action and strikes down such State action**. (See also: **E.P. Royappa v. State of Tamil Nadu and Anr.** : AIR 1974 SC 555; and **Smt. Meneka Gandhi v. Union of India and Anr.** : AIR 1978 SC 597).

51. In **M/s. Sharma Transport rep. by D.P. Sharma v. Government of A.P. and Ors. : AIR 2002 SC 322**, this Court defined arbitrariness observing that the **party has to satisfy that the action was not reasonable** and **was manifestly arbitrary**. The expression '**arbitrarily**' means; **act done in an unreasonable manner**, as fixed or done **capriciously** or **at pleasure without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone**.

52. In **Bombay Dyeing and Manufacturing Co. Ltd. (3) v. Bombay Environmental Action Group and Ors.**: AIR 2006 SC 1489, this Court held that:

> "205. **Arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness**."

53. In cases of **Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board and Ors.**: AIR 2007 SC 2276; and **Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v.**

> **Srinivasa Resorts Limited and Ors.** : AIR 2009 SC 2337, this Court held that a **law cannot be declared ultra vires on the ground of hardship <u>but can be done so on the ground of total unreasonableness</u>**. **<u>The legislation can be questioned as arbitrary and ultra vires under Article 14</u>**. However, **<u>to declare an Act ultra vires under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute itself</u>**."
>
> (Emphasis supplied)

386. Our attention has been drawn to the pronouncement of the Supreme Court in ***(2011) 9 SCC 286, Andhra Pradesh Dairy Development Corporation Federation v. B. Narasimha Reddy & Ors.*** The court was required to examine as to whether the list prepared under Article 15(4) had been properly prepared or not. The Supreme Court has clearly held that the doctrine of arbitrariness applies to the legislature as well and that in order to be rendered ultra vires, the action of the legislature should be manifestly arbitrary and be a case of substantive unreasonableness. On the scope of challenge to legislative action on these grounds, the Supreme Court has observed as follows:-

> "29. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness ***<u>because an action that is arbitrary, must necessarily involve negation of equality</u>***. **This *<u>doctrine of arbitrariness</u>* is not restricted only to executive actions, but <u>also *applies to legislature*</u>.** Thus, a <u>party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rationale, and has been done according to reason or judgment, and</u>

certainly does not depend on the will alone. However, ***the action of legislature, violative of Article 14*** of the Constitution, ***should ordinarily be manifestly arbitrary***. There must be a ***case of substantive unreasonableness in the statute itself*** for ***declaring the act ultra vires of Article 14 of the Constitution***. (Vide: **Ajay Hasia etc. v. Khalid Mujib Sehravardi and Ors. etc.** AIR 1981 SC 487; **Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Ors.** : (2006) 10 SCC 1; **Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board and Ors.** : AIR 2007 SC 2276; **Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited and Ors.** : AIR 2009 SC 2337; and **State of Tamil Nadu and Ors. v. K. Shyam Sunder and Ors.** : 2011 8 SCALE 474.

30. In **State of Andhra Pradesh and Anr. v. P. Sagar** : **AIR 1968 SC 1379**, this Court examined the case as to whether the list of backward classes, for the purpose of Article 15(4) of the Constitution has been prepared properly, and after examining the material on record came to the conclusion that there was nothing on record to show that the Government had followed the criteria laid down by this Court while preparing the list of other backward classes. The Court observed as under:

> *"9. ... Honesty of purpose of those who prepared and published the list was not and is not challenged, but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen.* ***The test of the***

> ***validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed****."*

31. In **Indra Sawhney II v. Union of India** : AIR 2000 SC 498, while considering a similar issue regarding preparing a list of creamy layer OBCs, this Court held that **legislative declarations on facts are not beyond judicial scrutiny in the constitutional context of Articles 14 and 16 of the Constitution**, for the reason that a conclusive declaration could not be permissible so as to defeat a fundamental right.

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34. In **State of Gujarat and Anr. v. Raman Lal Keshav Lal Soni and Ors.** : AIR 1984 SC 161, this Court while dealing with a similar issue observed as under:

> *"52. ...The* ***legislature*** *is undoubtedly* ***competent to legislate with retrospective effect*** *to* ***take away or impair any vested right*** *acquired* ***under existing laws*** *but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution* ***neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights****. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. ..."*
>
> (Emphasis by us)

387. Placing reliance on ***K.C. Gajapati Narayan Deo and Ors. v. State of Orissa (1954 SCR 1),*** before us, the respondents have submitted that when the constitutionality of a legislation is being considered, factors such as the reasons behind the enactment and motive of the legislature are irrelevant. The test for the constitutional validity of a statute is always a question of power – whether the legislature was competent to pass the impugned enactment. It is contended that there cannot be any colourable exercise on the part of the legislature nor can any mala-fide be attributed to it while exercising legislative functions. The parameters of judicial review while examining the constitutionality of a legislation on grounds of arbitrariness have been laid down in the judicial precedents noted above and need no repetition.

388. So far as a challenge laid to legislative action on the grounds of malafide is concerned, in the Constitutional Bench pronouncement in Paras 153(1) and 434(7) of ***S. R. Bommai*** (supra) it has been held that the validity of a proclamation issued by the President is judicially reviewable, and that it can be struck down by the Supreme Court or the High Court if it is found to be malafide or based on wholly irrelevant or extraneous grounds. Also, the burden is on the Union Government to prove that relevant material did exist. The submission of the respondents thus is contrary to the settled legal position noted above. However, it need detain us no further as this is not the petitioner's case in the present writ petition.

389. An issue with regard to the scope of power of the constitutional court to conduct judicial review of constitutional and valid legislative action arose before the Supreme Court in ***Brij Mohan Lal v. Union of India &Ors.*** (supra) On the strength of Rule 7 Chapter III, Part VI of the Bar Council of India Rules, the retired members of the Custom, Excise & Service Tax Appellate Tribunal (for short the CESTAT) were not permitted to practice before the same Tribunal. The validity of the said Rules was upheld placing reliance on the prior pronouncement reported at ***(2012) 4 SCC 653, N.K. Bajpai v. UOI***. On the scope of judicial review into a constitutional challenge into legislation and delegated legislation, the following observations are important:

> "116. This question, in somewhat similar circumstances, came up for consideration of this Court in N.K. Bajpai case when the retired members of the Customs, Excise and Service Tax Appellate Tribunal (for short "Cestat") were not permitted to practise before the same Tribunal on the strength of Rule 7, Chapter III, Part VI of the Bar Council of India Rules. This Court not only upheld the validity of the said Rules, but also held that this did not amount to an absolute and unreasonable bar on the right to practise of the past members of the Tribunal. Upon an objective analysis of the principles stated therein, **this Court held that except where a challenge is made on the grounds of legislative incompetence or the restriction imposed is ex facie unreasonable, arbitrary and violative of Part III of the Constitution, the restriction would be held to be valid and enforceable**.
>
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> 119. The power of judicial review to examine the validity of a legislation falls within a very limited compass. It is treated by the Courts with greater restraint and on a much higher pedestal than examination of the correctness or validity of State policies. ....”
>
> (Emphasis by us)

390. It needs no further elaboration therefore, that the doctrine of arbitrariness applies to legislative action; that action of the legislature if manifestly arbitrary and suffers from substantive unreasonableness. Such arbitrariness necessarily negates equality. The legislative action would thus be ultra vires of Article 14 of the Constitution and would be so declared.

391. It is also a well settled principle that exercise of power, whether legislative or administrative, will be set aside if there is a manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. [Reference: ***(2003) 4 SCC 579 (para 13), Indian Railway Construction Company Limited v. Ajay Kumar*** and; ***(1988) 4 SCC 59, State of UP v. Renu Sagar Power Co.]***

392. We usefully notice the principles on which unreasonableness’ would be construed as well as onus on the State. The following observations of the Supreme Court in ***AIR 1986 SC 1205, Municipal Corporation of the City of Ahmedabad v. Jan Mohd. Usmanbhai*** are illuminating:-

"15. Before proceeding to deal with the points urged on behalf of the appellants it will be appropriate to refer to the well-established principles in the construction of the constitutional provisions. When the validity of a law placing restriction on the exercise of a fundamental right in Article 19(1)(g) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State. ... Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition. But when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the interest of general public lies heavily upon the State. In this background of legal position the appellants have to establish that the restriction put on the fundamental right of the respondents to carry on their trade or business in beef was a reasonable one. The Court must in considering the validity of the impugned law imposing prohibition on the carrying on of a business or a profession attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency, national or local, or the necessity to maintain necessary supplies or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that a case for imposing restriction is made out or a less drastic restriction may ensure the object intended to be achieved.

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> 20. The tests of reasonableness have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and in judging their validity, courts must approach the problem from the point of view of furthering the social interest which it is the purpose of the legislation to promote. They are not in these matters functioning in vacuo but as part of society which is trying, by the enacted law, to solve its problems and furthering the moral and material progress of the community as a whole. (See Joti Prasad v. Union Territory of Delhi 1961 S.C.R. 1601) If the expression 'in the interest of general public' is of wide import comprising public order, public security and public morals, it cannot be said that the standing orders closing the slaughter houses on seven days is not in the interest of general public."

393. In ***1977 (1) SCC 697, Assistant Controller of Customs v. Charan Das Malhotra,*** and ***(1984) (3) SCC 65, Manick Chand Paul v. Union of India.***, the court has indicated that the correct approach of the court had to be a strict one as "*...greater the restriction, the more the need for strict scrutiny by the Courts*."

394. The statute under examination and the challenge by us has to be examined from these important perspectives.

395. The petitioners' challenge to the Court Fee (Delhi Amendment) Act, 2012 on the ground that it violates Article 14 of the Constitution has to be examined on these binding principles. In order to illustrate the irrationality and the arbitrariness of the action of the respondents as well as the absurdity of the result, Mr.

Chandhiok has taken us through some of the entries in the impugned schedule. It is urged that most of the entries in the amended Schedule are much beyond the ten times increase stated in the counter affidavit. We are conscious of the limitations on the court conducting an item wise examination of court fee challenges. However in the instant case, the respondents have primarily amended the Schedule. In order to conclude that the impugned legislation is not arbitrary and is reasonable, it is essential to examine the same. For reasons of avoiding prolixity, we are adverting to only few entries in "Schedule I" to the Court Fees (Delhi Amendment) Act, 2012 which provides for "Ad Valorem Fees" and their impact. These are considered in seriatim hereafter:

(i) Suits for recovery of money; counter claims by defendants in any suit

Entry			**Present fee**	**Earlier Fee (Rs.)**
1.	Plaint, written statement, pleading, a set off or counterclaim or memorandum of appeal (not otherwise provided for under any of these Schedules of the Court Fees Act, 1870 (7 of 1870) or to cross	When the amount or value of subject-matter in dispute is-		
		(i) Upto fifty thousand rupees;	Two percentum on such amount or value or one	Forty eight rupees eight naye paise

	objection presented to any Civil or Revenue Court except those mentioned in Section 8.		thousand rupees whichever is more;	
		(ii) Fifty thousand one rupees upto twenty lakh rupees;	Three percentum on such amount or value;	On Rs.4 lakh Rs.6248.00 and on Rs.5,000.00 or part thereof at Rs.48.80 p (0.976 percent)
		(iii) Above twenty lakh rupees.	Four percentum on such amount or value.	

396. As per the earlier schedule, the plaintiff was required to pay court fee of Rs.6248.00 for a suit claim up to Rs.4,00,000/-. Thereafter he was required to pay court fee at the rate of Rs.48.80 for every Rs.5,000/- or part thereof. Thus, the higher the amount of the claim, the percentage of court fee payable would fall.

It has been pointed out to us that as per the earlier court fee schedule, the court fee was equivalent to only about 1% of the value of the subject matter.

397. In the new schedule, the court fee has been increased by almost 400%. After the amendment, 4% of court fee is payable on claims above rupees twenty lakhs. As a result, the larger the value

of the claim, the larger is the amount of court fee payable thereon. There is no capping on the maximum court fee. Further no court fee was required to be affixed on the written statement unless a counter claim, or a set-off was prayed by the defendant. Court fees thereon were computable on the same basis as on a plaint.

(ii) Suits for possession of immovable property

398. Let us examine the court fee position on a claim for possession of immovable property:

Entry		**Present fee**	**Earlier Fee (Rs.)**
2.	Plaint in suit for possession under section 6 of the Specific Relief Act, 1963 (47 of 1963)	A fee of one-half the amount prescribed in the foregoing scale (vide Article 1)	A fee of one-half the amount prescribed in the foregoing scale.

399. So far as the valuation of such relief is concerned, a suit for recovery of possession of property is valued at the current market value as on the date of its filing. It will vary if it is tenanted property.

400. It is therefore, evident that the court fee payable on a suit for possession is also on the same increasing basis as a suit for recovery of money.

401. Mr. Chandhiok, learned Senior Counsel has placed before us three notifications whereby the respondents notified the land circle rates applicable in Delhi and the revisions effected thereto keeping

in view the prevailing conditions. In the notification dated 18th July, 2007, the respondents had categorized localities in Delhi into category A, B, etc. for prescribing land rates as circle rates. So far as land in category 'A' is concerned, the respondents had prescribed circle rate of Rs.43,000/- per sq. mt. This rate was enhanced by the notification dated 4th February, 2011 to Rs.86000/- per sq. mt. A third upward revision has been affected by the notification dated 15th November, 2011 whereby the minimum land rate in residential use of land in category 'A' locality has been prescribed at Rs.2,15,000/- per sq. mt. It is contended that given the prescribed scale of the notified land circle rates and the revisions effected thereto, the valuation of a claim of the relief of property in a suit would have automatically increased proportionately.

As a result of the above, enhanced court fee would have automatically been recovered on property claims which were filed in court even as per the existing court fee regime. It is contended that for this reason, the enhancement in the prescription of the court fee rates so far as claims for property are concerned was unwarranted and that the respondents have arbitrarily amended the court fee prescription completely ignoring this important circumstance.

(iii) Probate

402. Similar is the position so far as probates are concerned. The earlier and present position is as follows:

Entry			Present fee	Earlier Fee (Rs.)
11.	Probate of a Will or Letters of Administration with or without Will annexed.	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one lakh rupees, but does not exceed ten lakh rupees.	Two and one-half per centum on such amount or value.	Two per centum on such amount or value.
		When such amount or value exceeds ten lakh rupees, but does not exceed fifty lakh rupees.	Three and one-quarter per centum on such amount or value.	Two and one-half per centum on such amount or value.
		When such amount or value exceeds fifty lakh rupees. Provided that when after the grant of a	Four per centum on such amount or value.	Three per centum on such amount or value.

		certificate under Part X of the Indian succession Act 1925 (39 of 1925) or under the Regulation of the Bombay Code No.8 of 1827 in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.		

403. The prejudice to a legatee is exacerbated by the fact that in the city of Delhi, probate is not mandatorily required. Therefore, a beneficiary under a Will may not seek probate immediately upon the death of a Testator because there may not be any immediate dispute between the beneficiaries with regard to the devolution of interest in the properties of the original testator. However, a dispute may arise amongst the third or fourth generation of the beneficiaries. Or say, between a beneficiary and a tenant of the testator, who may then be compelled to seek probate. Such petitioners would be required to pay court fee at the then prevalent market rates and that too of amounts which are way beyond the benefits acquired by their predecessors (who were the beneficiaries under the Will or of the subsequent successions.)

(iv) Suits for partition

404. We may now examine the court fee position so far as a suit for partition is concerned which reads thus:

Entry			**Present fee**	**Earlier Fee (Rs.)**
4.	Suit for Partition of immoveable joint property	Filled before Civil Court including High Court at its original side, (as per pecuniary jurisdiction).	Ad-valorem as per Article 1 of this Schedule calculated in accordance with market value of the property subject to minimum court-fee of	Fee levied as per the share in the property.

			one thousand rupees.	

405. The plaintiff has to additionally pay stamp duty under Entry 25 of Schedule I of the Indian Stamp Act, 1899 while drawing up of the partition decree. It is noteworthy that the respondents have prescribed payment of ad valorem court fee on a claim of partition which is to be calculated on the market value of the entire property, partition whereof has been sought. The litigant therefore pays twice for the same subject matter – once, as the ad valorem court fee on the plaint and then, a second time as stamp duty on the decree.

406. Prior to the amendment, if the plaintiff was in possession of immovable property, he was required to pay court fee of Rs.19.50 only. By virtue of the amendment, the plaintiff has to pay court fee at the time of institution of the suit on the value of the entire property, notwithstanding that he is in part possession thereof.

407. Mr. Harish Salve, learned Senior Counsel for the respondents has sought to justify this levy on the plea that in a partition suit every party is a plaintiff. This may be tested on a hypothetical fact situation where a person may be having, say, only $1/70^{th}$ share in the property. By virtue of the impugned amendment, he is now required to affix court fee equivalent to the market value of the entire property which is subject matter of the suit and not his share alone, as was the past requirement. There

may be several instances where the value of the share of the plaintiff may be less than the court fee which he is therefore required to affix. How many litigants would balk at the court fee amount they would need to pay to enforce their rights in family properties! Where would unemployed women, without any source of income, harness the resources to enforce their rights in family or their father's properties?

408. If such requirement was to be based on the respondent's contention that in such situation every person is a plaintiff, then the legislation would have mandated payment of court fee by all the shareholders of the property and not by the plaintiff alone. The court fee levy on a suit for partition has therefore a discriminatory impact inasmuch as the plaintiff is made to pay the court fee on the share of the defendant as well. There is no basis or rationale for such imposition.

(v) Intellectual property litigation

409. The position becomes quite startling when the prescription of the impugned legislation on intellectual property litigation is examined. The legislature has now provided as follows:-

Details			**Present fee**	**Earlier Fee (Rs.)**
30.	Any suit or petition under the intellectual Property Rights.	When filed before a Civil Judge.	Five hundred rupees	According to the amount at which the relief sought is valued in the plaint or fixed court fee

		When filed before a District Judge. When filed before the High Court.	One thousand rupees. Five thousand rupees.	where no consequential relief is sought.

410. Under Section 8 of the Suits Valuation Act, 1887, on suits which do not fall under Section 7, paragraphs (v), (vi) and (ix) and paragraph (x), clause (d) of the Court Fees Act, 1870, court fees are payable ad valorem under the Court Fees Acts, 1870. The value of the suit claim determinable for computation of court fee and for the purposes of jurisdiction has to be the same. However, by the Court Fees Amendment Act, 2012, the respondents have prescribed fixed court fee for any suit or petition under the Intellectual Property Act.

(vi) Suits for rendition of accounts

411. The petitioners have contended that the position qua suits for rendition of accounts is arbitrary and unconstitutional as would be apparent from the following:-

Entry	**Present fee**	**Earlier Fee (Rs.)**

32.	Any Suit Under The Partnership Act, 1932 (9 Of 1932) For Rendition Of Accounts And / Or Partition Or For Any Relief Under The Limited Liability Partnership Act, 2008.	When filed before a Civil Judge. When filed before a District Judge. When filed before the High Court.	One hundred or one percentum of the valuation of the suit whichever is more; Two hundred fifty or one percentum of the valuation of the suit whichever is more; Five hundred or one percentum of the valuation of the suit whichever is more.	As per valuation fixed by the plaintiff in suit for rendition of accounts and in the suit for partition according to value of share in property when not in possession and fixed court fee when in possession.

No rationale is forthcoming for the same. Our discussion on the entries relating to suit for recovery of money and possession apply in full force to this prescription as well.

(vii) Application for review of a judgment and execution of a judgment

412. Our attention has been drawn to the following court fee prescription in the impugned amendment on an application for review of a judgment as well as an execution petition seeking enforcement of any judgment/order/decree:

Entry		Present fee	Earlier Fee (Rs.)
5.	Application for review of judgment, if presented on of after the ninetieth day from the date of the decree.	The fee leviable on the plaint or memorandum of appeal.	One-half of the fee leviable on the plaint or memorandum of appeal.

413. Interestingly, while the court fee prescribed on a petition for review of judgment is placed in Schedule I providing for ad-valorem fees, the petition seeking execution is placed in Schedule II which provides "Fixed Fees". However the following discussion would show as to how this is also incorrect:

(viii) Execution

Entry			Present fee	Earlier Fee (Rs.)
16.	Execution petition seeking enforcement of	(a) When filed before a Civil	Two hundred fifty	Rs.1.25p

	any judgment, order or decree passed by any court.	Judge; (b) When filed before a District Judge; (c) When filed before the High Court;)	rupees Five hundred rupees. One thousand rupees.	 Rs.1.25p Rs.2.65p

414. The above illustrates that charges for enforcement of the decree have been enhanced by more than five hundred times.

Applications under the criminal justice system

415. Let us examine the court fee prescription under the Amendment Act, 2012 so far as some petitions/applications in the criminal justice system are concerned:

(ix) Petitions under Section 482 of the Cr.P.C.

Entry		**Present fee**	**Earlier Fee (Rs.)**
19.	Petition under Section 482 of the Code of Criminal Procedure, 1973 (2 of 1974) before the High Court.	Two hundred and fifty rupees.	Rs.2.65p

416. In every judgment passed by the Supreme Court, it has repeatedly been reiterated that administration of justice is a function of the State and levy of court fee is confined to the

adjudication in civil matters. The Law Commission Reports are strident and unequivocal on this. Prior to the amendment, a notional court fee of Rs.2.65 was being charged on petitions filed before the High Court under Section 482 of the Code of Criminal Procedure which have now been increased by virtue of the impugned amendment to Rs.250, which is an increase of about 100 times. The position qua a criminal revision petition filed under Section 397 or 401 of the Cr.P.C. is no different as would be evident from the following:

(x) Criminal revisions

	Entry		**Present fee**	**Earlier fee (Rs.)**
20.	Criminal revision petition under Section 397 of the Code of Criminal Procedure, 1973 (2 of 1974)	when filed before the High Court; when filed before a Session Judge	One hundred rupees. Fifty rupees.	**Rs.2.65p**
21.	Criminal Revision Petition under Section 401 of the Code of Criminal Procedure, 1973 (2 of 1974), before the High Court.		One hundred rupees.	**Rs.2.65p**

417. So far as bail applications are concerned, the impugned legislation provides thus:

(xi) Bail applications

Entry			**Present fee**	**Earlier Fee (Rs.)**
22.	Bail application under Section 437 or Section 438 of the Code of Criminal Procedure, 1973 (2 of 1974)	When filed before the High court.	Two hundred fifty rupees.	**Rs.2.65p**
		When filed before a Sessions Judge	One hundred rupees.	**Rs.1.50p**
		When filed before a Metropolitan Magistrate.	Fifty rupees.	**Rs.1.25p**

418. It is noteworthy that Section 438 of the Cr.P.C. is concerned with a petition seeking anticipatory bail. The power to grant such anticipatory bail is conferred on either the High Courts or to the Sessions Court alone. Such petitions are never filed before the Magistrate. Yet by the impugned amendment to the Schedule, the respondents have proposed court fee on such petitions if filed before the Magistrate as well!

419. Similarly, a petition under Section 437 never goes before the Sessions Court or the High Court. Yet court fee has been prescribed for affixation in the amended Schedule. Interestingly, a

petition under Section 439 of the Cr.P.C. may be filed either before the High court or before the Sessions Court. The respondents have prescribed no court fee on such petitions!

420. Our attention has been drawn to the Section 19 of the Court Fees Act which provides the substantive legal provision which provides certain exemptions from court fee. Sub – Section (xvii) of Section 19 of Court Fees Act stipulates that a petition by a prisoner or other person in duress or under restraint of any court or its officer is exempt from fixation of court fee. By virtue of Entry 22 in the Schedule II of the impugned legislation noticed hereinabove, court fee has been prescribed even on petitions by persons who are in custody. It is noteworthy that no amendment has been effected to Section 19 of the Court Fees Act.

Proceedings under Section 138 of the Negotiable Instruments Act, 1881

421. We may also examine the amendment effected qua proceedings under Section 138 of the Negotiable Instruments Act. It is prescribed as follows:

Complaint under Section 138 of the Negotiable Instruments Act, 1881

Entry		**Present fee**	**Earlier Fee (Rs.)**
3.	Complaint under section 138 of the Negotiable Instruments Act,	Same as prescribed in the foregoing scale (vide Article I)	**Rs.1.25p**

	1881 (26 of 1881)	calculated in terms with value of the instrument.	

422. Mr. Harish Salve, learned Senior Counsel has defended this amendment and the court fee which is now payable on a complaint under Section 138 of the Negotiable Instruments Act urging that proceedings under Section 138 of the Negotiable Instruments Act have been held by the Supreme Court to be substantive proceedings for recovery of money and, therefore, the demand for ad valorem court fee is justified. In support of this submission, reliance has been placed on the pronouncement of the Supreme Court reported at ***(2012) 1 SCC 260*** titled ***R. Vijayan v. Baby & Anr.***

423. A perusal of the judgment in ***R. Vijayan v. Baby*** (supra) would show that in this case, the learned trial court had found the accused guilty of an offence punishable under Section 138 of the Negotiable Instruments Act. She was sentenced to pay a fine of Rs.2,000/- and in default to undergo imprisonment for one month. The convict was also directed to pay Rs. 20,000/- as compensation to the complainant and in default to undergo simple imprisonment for three months. The High Court did not uphold the direction for payment of the compensation under Section 357(3) of the Code of Criminal Procedure taking the view that once the statutorily prescribed sentence permitted imposition of only fine, the power under Section 357(3) of the Code of Criminal Procedure could not

be invoked for directing payment of compensation.

424. In ***R. Vijayan*** (supra), the court was concerned with the inconsistency between Chapter 17 of the Code of Criminal Procedure, 1973 and Section 138 of the Negotiable Instrument Act. In para 17, the Court noted that *"though a complaint under Section 138 of the Act is in regard to criminal liability for the offence of dishonoring the cheque* ***and not for the recovery of the cheque amount (which strictly speaking, has to be enforced by a civil suit),*** *in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonor of cheque, under Section 357(1)(b) of the Code and the provision for compounding the offences under Section 138 of the Act."*

In para 18 the Court observed that

> "18. …***In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired***."

425. The court also discussed the difficulty fixed with regard to making of directions for compensation under Section 357 of the Code and has categorically observed as follows:-

> "19. ***We are conscious of the fact that proceedings under Section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest***.
>
> xxx xxx xxx
>
> …While it is not the duty of criminal courts to ensure that successful complainants get the cheque amount also, it is their duty to have uniformity and consistency, with other courts dealing with similar cases."

426. We find that there is no statement in the pronouncement in ***R. Vijayan*** (supra) to the effect that Section 138 proceedings are in the nature of civil suit.

427. It is also noteworthy that a cheque may not necessarily have been issued in a commercial transaction.

428. So far as the nature of proceedings under Section 138 of the Negotiable Instruments Act is concerned, the same may be tested on a hypothetical fact situation. Let us take the case of a Delhi resident suffering from cancer and critically ill. His unscrupulous private employer gave him retiral benefits including the gratuity by way of a cheque. Such cheque has bounced. He has no source of income and no money to pay for his bare necessities, including his treatment. This person certainly cannot afford to pay the court fee while he needs the cheque amount critically in order to meet the expenses of the treatment of his disease as well as to support his poor family and himself. He could seek initiation of the remedy

under Section 138 of the Instruments of Negotiable Act or/and opt for filing a suit for recovery against his employer. In either event, because of the impugned amendment to the Court Fees Act, he is now first required to pay ad valorem court fee for filing even the complaint under Section 138 of the Negotiable Instruments Act. The only other alternative available in law, as also proposed by the respondents in the written submissions, is that he could seek to sue *in forma pauperis*. This option would be available only if he invoked the civil remedy of filing a suit. Order XXXI A of the C.P.C. (which permits in forma pauperis proceedings) does not apply to proceedings under Section 138 of the Negotiable Instruments Act. And then too, he could do so, only if he met the stringent prescribed conditions and qualified the indigency barrier after protracted proceedings.

429. The important issue here is that, would such terminally ill person have the time to await the indigency adjudication required by law before he could seek to establish the legality and genuineness of his claim? Thus the court fee regime put in place by the amendment completely prohibits the legal remedy to him.

Petitions under the Motor Vehicles Act

430. The following position qua claims under the Motor Vehicles Act is also noteworthy:

Entry			**Present fee**	**Earlier fee (Rs.)**
28.	Claim petition	Filed	One	**Rs.1.25p**

	under the Motor Vehicles Act, 1988 (59 of 1988)	before a Motor Accidents Claims Tribunal.	hundred rupees.	

431. The court fee on claim petitions filed before the Motor Accident Claims Tribunal has been increased manifold. Most of the persons seeking redressal in these cases are victims or dependants of road accidents who may have lost their only bread earner and be hard pressed for funds. Payment of Rs.100/- may be well beyond their means, Court fee is not the only expenditure which the litigant has to bear. Lawyers' fees, typing/stenography charges etc. may be prohibitive and may add to the woes of the petitioners.

Proceedings under Article 226 of the Constitution of India

432. Our attention has also been drawn to the requirement under the amended Schedule to the Court Fees Act whereby court fee of Rs.100 has been prescribed on writ petitions filed under Article 226 of the Constitution of India. As against this, the respondents have mandated payment of court fee of Rs.250/- on each application which is to accompany the writ petition. It is trite that an application would seek interim orders which are applicable only during the pendency of the writ petition. Petitioners also enclose formal applications such as those for exemption from filing certified copies. Therefore, the respondents' submission that lesser court fee has been demanded on a smaller claim is without any

basis. There is strength in the petitioner's submissions that the levy has been so fixed so as to generate revenue.

Suit for maintenance and annuity

433. According to Section 7(ii) of the Court Fees Act, 1870, the amount of court fee payable in a suit for maintenance and annuity or any other sum payable periodically is according to the value of the subject matter of the suit and such value is statutorily deemed to be ten times the amount claimed to be payable for one year. Let us visualize the plight of a housewife who has been thrown out of the matrimonial house with her children by husband and in-laws and is compelled to seek relief of maintenance and restoration of her belongings as well as to enforce their rights to a residence under Sections 18 and 20 of the Hindu Maintenance and Adoption Act, 1956 for her children and for herself. She would be required to pay ten times of the amount of her claimed yearly maintenance for the relief of maintenance alone, which is the court fee required to be affixed by a person seeking such relief. This, as experience shows, is not an isolated incidence.

434. As a home maker, such women would not have any source of income. In the larger segment of middle class society, certainly in the lower middle class society, such a person would have no savings. If she did, the control would more often than not, be with her husband. Where would she garner the resources needed to enforce basic human rights to her children and herself? And even if she had the resources, how would she make the critical choice

between spending it on the necessities of food, shelter, education etc. of all of them or spending it in purchasing court fee, engaging counsel etc. – all essential for filing a case? Is the alternative of seeking a waiver from payment of court fee as a pauper efficacious? How would she exist whilst adjudication into the pauper claim was being undertaken? Are these not aspects which are relevant and material while prescribing a court fee regime? The record does not disclose any need having been paid to these aspects.

435. The above discussion elucidates the exacerbated gender impact of the impugned legislation, which in our view is by itself sufficient to render such provisions unconstitutional. By virtue of the impugned amendment, the respondents have thus prescribed enhancement of the court fee for almost every petition filed under the Code of Civil Procedure.

Court fee regime on petitions under the Arbitration and Conciliation Act, 1996 and otherwise

436. Appearing for writ petitioner in W.P.(C)No.456/2013, Ms. Neelam Rathore, learned counsel for the petitioner points out that a substantive challenge has been laid in this writ petition to the amendment effected to items 8(a)(iii) and (iv) as well as 8(b) of the Schedule II of the impugned amended Court Fees Act.

437. So far as ***W.P.(C)No.456/2013, Umesh Kapoor v. Government of NCT of Delhi*** is concerned, it is pointed out that

the writ petition relates to an arbitral award which is in the nature of a family award and invokes distribution of shares in family properties and businesses between the father and the sons. No monetary amount has been awarded. The submission is that as a result only fixed court fee would be payable thereon.

438. For the purposes of convenience, the comparison of relevant extract of the prescriptions before and after the court fee amendment are extracted hereunder:-

SCHEDULE II
(AS APPLICABLE TO THE NATIONAL CAPITAL TERRITORY OF DELHI)
FIXED FEES

Entry			**Present fee**	**Earlier Fee (Rs.)**
8(a)	(iii) for seeking enforcement of an award under Section 36;	When made before (i) a Civil Judge;	One thousand rupees or one percentum of the amount awarded in the Award, whichever is more.	One thousand rupees
		(ii) a District Judge;		
		(iii) the High Court		
8(a)	(iv) for setting aside the arbitral	When made before (i) a Civil	One thousand rupees or one	**One thousand rupees**

	award under section 34;	Judge;	percentum of the amount awarded, whichever is more.	
		(ii) a District Judge;		
		(iii) the High Court		

439. In order to deal with the petitioner's challenge, it is necessary to examine the historical perspective of the court fee regime which applied to arbitration proceedings. The applications for appointment of an Arbitrator as well as for those challenging or enforcing an arbitral award were originally dealt in Sections 326 and 327 of the Code of Civil Procedure, 1859 (C.P.C. of 1859) respectively.

440. Section 326 of the Code of Civil Procedure, 1859 provided that *"…when any persons shall, by an instrument in writing, agree that any differences between them, or any of them shall, be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, the application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement*

should not be filed."

The statute provided that the application:

> "…shall *be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered* and *registered as a suit* between some or one of the parties interested, or claiming to be interested, as plaintiffs or plaintiff, and the other, or others of them, as defendants or defendants, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff as the other parties as defendants."

441. So far as the application for filing an arbitral award in Court was concerned, the same was prescribed under Section 327 of the C.P.C. of 1859. It was required that such application *"shall be written on the stamp paper required for petitions to the Court where a stamp is required for petitions by any law for the time being in force".* This requirement was also repealed by the Court Fees Act, 1870.

442. The Court Fees Act, 1870 (Act VII of 1870) amended Sections 326 and 327 of the C.P.C., 1859 and repealed payment of the court fee based on the value of the relief. Clause 17(iv) and Clause 18 of Schedule II to the Court Fees Act, 1870 prescribed fixed fee on a petition or appeal for setting aside the award and for reference to arbitration under Section 326 of the C.P.C. It would appear that this was in consonance with the Statement of Objects and Reasons of the Court Fees Act, 1870 as noted above. Thus Sections 326 and 327 of the C.P.C. stood amended to this extent.

443. So far as the Court Fees Act, 1870 was concerned, it prescribed the following court fee payable on an application seeking setting aside of the award as well as an application under Section 326 of the C.P.C.:

Entry	**Present Fee**
17. Plaint or memorandum of appeal in each of the following suits:- (i) xxx (ii) xxx (iii) xxx (iv) to set aside an award	Ten rupees.
18. Application under Section 326 of the Code of Civil Procedure	Ten rupees.

444. A new Code of Civil Procedure was enacted in the year 1908, which contained Section 89, Section 104(1)(a) to (f) and Schedule II dealing with arbitration. These provisions inter alia enabled parties to civil suits to seek reference of disputes for arbitration, empowered the courts to refer the dispute for arbitration and have control over arbitral proceedings and to adjudicate on the validity of awards. Fixed court fees continued to be payable as per Court Fees Act, 1870.

445. Thereafter a substantive enactment, the Arbitration Act, 1940 was enacted. The above provisions of the C.P.C. dealing with arbitration were repealed. Arbitration Act, 1940 essentially contained provisions which were similar to the earlier statute for reference of disputes to arbitration. Power was conferred on courts to interfere with the functioning of arbitration at all stages as well

as the power to interfere with awards passed by the arbitrators.

446. An important amendment was effectuated by the Code of Civil Procedure (Amendment) Act, 1999 to the C.P.C., 1908. So far as the present case is concerned, reference requires to be made to the legislative intent in incorporating amendments to two pivotal provisions in Section 89 of the C.P.C. and the Rules 1A to 1C to Order X. These provisions rendered it incumbent upon the court, where there appeared to be elements of settlement, to call upon the parties at their option to agree for one or the other alternative methods of dispute resolution including arbitration. Thereby a new impetus was given to alternative dispute resolution methods which included arbitration at its core.

447. The year 1996 saw a drastic change in the statutory provisions governing arbitration. The Arbitration and Conciliation Act, 1996 was enacted repealing the Arbitration Act, 1940 with the legislative intent of reducing court interference in arbitral proceedings at the three critical stages of pre and post reference stages as well as the post award stages. The scope of challenge to arbitral awards was limited to a few grounds.

448. Ms. Neelam Rathore, learned counsel appearing for petitioners in W.P.(C)No.456/2013 has urged at some length that challenge to the arbitral award is provided by way of a petition under Section 34 of the Arbitration Act, 1940 which is to be adjudicated by a summary procedure. The petitioners have urged that the spirit of the Arbitration Act, 1996, is further manifested by

the provisions of Section 89 in 1999 in the C.P.C., both aimed at promoting alternative dispute resolution mechanisms.

449. It is pointed out that on a petition for setting aside the arbitration award under Section 34, the respondents have now prescribed court fee of Rs.1,000/- or 1% of the amount awarded whichever is more.

450. The petitioners contend that the court fee which has been levied on proceedings arising out of arbitration would work as a strong disincentive for invoking this alternate dispute resolution mechanism. The levy of fees under the impugned court fee amendment is exorbitantly high, repressive and defeats the resort to arbitration as an efficacious alternative dispute redressal mechanism. It is further pointed out that as per the Statement of Objects and Reasons to the Court Fees Act, 1870, arbitration proceedings should be subjected to fixed fees only and not to the ad-valorem fixed in the impugned legislation.

451. The petitioner contends that the challenge by way of objections to an arbitral award, is not to the amount awarded. An unsuccessful party would challenge the award to extent of the claim which has not been awarded. There is no logic or basis for fixation of the court fee based on the amount awarded. In fact such prescription supports the petitioner's contention that there is no correlation between the services rendered and the court fee levied. The only object of the amendment appears to be raising the general

revenue of the Government which is impermissible.

452. It is also pointed out that in case the arbitration award does not make a mention of any amount but relates to immovable property, then court fee of only Rs.1,000/- would be payable irrespective of the value of the property awarded in view of the provisions of item 8(a)(iv) noticed hereinabove. There is also uncertainty with regard to a case where there are not only claims but counter claims as well.

453. Under the Arbitration and Conciliation Act, 1996 and the rules framed thereunder, charges of Rs.15,000 are payable for invoking the jurisdiction of the court. These provisions have not been amended and remain in force. Therefore, apart from this amount payable for invoking the jurisdiction, court fee of Rs.1,000 or 1% becomes payable under Entry 8(a) of the Arbitration and Conciliation Act, 1996.

454. It is noteworthy that the arbitration award is made on stamp paper on which stamp duty of 0.001% is payable.

Objections to the Award

455. The petitioner makes a grievance with regard to the court fee levy on a petition under Section 34 for setting aside an arbitral award. The relevant prescription (earlier and now) reads as follows:-

Entry			Present fee	Earlier Fee (Rs.)
8(a)	(iv) for setting aside the arbitral award under section 34;	When made before (i) a Civil Judge; (ii) a District Judge; (iii) the High Court	One thousand rupees or one percentum of the amount awarded, whichever is more.	**One thousand rupees**

456. Thus for making of the objections to the award as well as filing of an appeal party is required to pay Rs.1,000/- or 1%, whichever is more, for filing of the appeal in addition to the stamp duty- unlimited court fee.

Execution of awards

457. Mr. Chandhiok, learned Senior Counsel appearing for the petitioners has drawn our attention to two other aspects of the impugned court fee prescription. It is pointed out that enforcement of an arbitral award is provided under Section 36 of the Act of 1996.

458. The above narration would show that enforcement of a domestic arbitral award under Section 36 of Part I is subject to ad valorem fee under Clause 8(a)(iii). Foreign awards for the purposes of enforcement under Sections 49 and 58 of Part II of the

Arbitration Act, 1996 are treated differently for the purposes of levy of court fees by the impugned legislation as against the enforcement of domestic awards.

459. Section 36 prescribes that where the time for making an application for setting aside the award under Section 34 has expired, or such application having been made, and it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if the decree of the court. It is pointed out that such 'decree' would be covered within the meaning of the expression in Section 2 sub- section (2) of the C.P.C. and would become executable under Order 21 of the C.P.C.

460. The nature of the decree would show that no real distinction can be drawn between a decree by the civil court or the duly stamped arbitral award.

461. We find that however for the execution of a *decree* under Section 96 of the Code of Civil Procedure, fixed court fee has been prescribed by the legislature under Item 16 of Schedule II.

462. An arbitral award has been legally equated to a decree of the civil court. However, under Item 8(a) Sub-Rule 3, on an application seeking enforcement of an arbitral award under Section 36 (i.e., domestic award), the court fee of Rs.1000/- or 1% of the amount awarded in the award, whichever is more, is prescribed. The respondents do not even venture an explanation. What could possibly be the explanation for such prescription, given the

legislative object of the Arbitration Act, 1996 to promote recourse to dispute resolution by arbitration!

463. Therefore, the court fee stipulation in Clause 8(a)(iii) and (iv) of the amended Schedule II to the Amendment Act of payment of ad valorem fees on the 'amount awarded in the award' results in a peculiar uncertainty apart from resulting in an irreconcilable situation. This is best illustrated by an instance where the arbitrator holds on some part amount claimed in favour of the claimant. The claimant wishes to challenge the award to the extent that it rejects the other claims. As per the amended Schedule, the claimant would still have to pay court fees on the amount awarded.

464. Similarly in a case where there are rival claims and counter claims; the determination of the 'amount awarded in the award' would be highly debatable and uncertain.

465. Interestingly, the prescription under Clause (iii) and (iv) of payment of court fees is not on the value of the subject matter in dispute. Court fees is payable on the basis of the amount awarded.

466. The court fee prescription for an execution petition seeking enforcement of an arbitral award therefore also suffers from the vice of arbitrariness.

Enforcement of Foreign Awards

467. We find that so far as foreign awards are concerned, Section 49 of the Arbitration and Conciliation Act provides that if the court

is satisfied that a foreign award is enforceable under Chapter I of Part II of the enactment, the award shall be deemed to be decree of that court.

468. The conditions for enforcement of foreign award have been prescribed under Section 48 of the Act of 1996. Mr. Chandhiok, learned Senior Counsel has urged at length that in enforcement of the foreign award, the court has to first determine whether award is executable in the courts in Delhi or not. It is noteworthy that despite the judicial inquiry mandated for ascertaining enforceability of the award and the judicial time expended on this adjudication and then the enforcement, no court fee at all has been stipulated so far as enforcement of foreign awards are concerned. Foreign awards would be primarily concerned with commercial affairs and disputes. Non fixation of the court fee on the foreign awards is opposed to the stated spirit, intendment and purpose of the amendment of the Schedule to the Court Fees Arbitration Act of increased revenue collection.

469. There is substance therefore, in the petitioner's contention that for the purposes of enforcement, foreign awards are treated differently under Sections 49 and 58 of Part II of the Arbitration Act, 1996 for the purposes of levy and court fees by the impugned legislation as against the enforcement of domestic awards. Whereas the respondents have stipulated ad valorem court fee so far as enforcement of domestic awards under Section 36 of the Arbitration Act, 1996 is concerned, fixed court fee is prescribed

under Court Fees Act for enforcement of foreign awards. The respondents do not point out any object which they sought to achieve. There is no intelligible reason or purpose in this distinction between foreign and domestic awards. This discriminatory classification suffers from the vice of arbitrariness and is therefore, not sustainable. The differentia drawn by the impugned legislation has no rationale to the object of the Court Fees Act and is therefore, completely impermissible classification under Article 14 of the Constitution.

Arbitral Appeals

470. So far as an appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996, it is prescribed as under:

Entry			**Present fee**	**Earlier Fee (Rs.)**
8(b)	Memorandum of appeal under Section 37;		One thousand rupees or one percentum of the amount awarded, whichever is more.	**Rs.5.25p**

471. A further grievance is made by the petitioner with regard to the court fee which is liable to be paid on the memo of an appeal under Section 37 of the Arbitration Act against interim orders

under Item 8(b) of Schedule II. It is pointed out that court fee of Rs.1,000/- or 1% of the amount awarded has been fixed. Thus ad valorem court fee is prescribed for appeals under Section 37 against orders passed under Section 34 of the Arbitration Act, 1996.

472. Learned Senior Counsel would contend that there is no justification as such for fixation of ad valorem court fee in appeals from interim order in arbitration cases and the respondents should have reasonably accorded them the same treatment as appeals against interim order in civil cases.

473. We find that for appeals against orders under Section 104 and Order XLIII of the C.P.C., fixed fee is payable under Clause 23 of the Court Fees Act. It cannot be disputed that appeals, whether under Section 37 of the Arbitration Act, 1996 or under Section 104, Order XLIII of the C.P.C. are concerned, the adjudication is summary in nature. This aspect has been completely ignored while imposing the exorbitant levy under Clause 8(b) of Schedule II of the Court Fees Act. Even appeals are treated differently from appeals under Section 37 of Part I relating to domestic awards. Arbitral awards under Part II are all commercial awards. There is no rationale or intelligible differentia which could distinguish domestic from foreign awards. There is certainly no differentia which has any relation to the object of the Court Fees Act which the legislature could be seeking to achieve. For this reason, the classification between two kinds of awards is completely

impermissible classification.

474. It is noteworthy that the Court Fees Act is a procedural enactment whereas the Arbitration and Conciliation Act is a special statute stipulating the statutory regime so far as arbitration is concerned. It is trite that a procedural enactment cannot override the provisions of substantive legal provisions.

475. Our attention has also been drawn to Section 6 of the Court Fees Act, 1870 pursuant whereto the two Schedules to the enactment have been drawn up. Interestingly Schedule I is captioned as "Ad valorem fees" whereas Schedule II is captioned as "Fixed Fees". Under Schedule II, all the items carry fixed court fee except, inexplicably, the matters relating to arbitration as noticed hereinabove on which ad valorem court fee is affixed.

476. In ***AIR 1925 ALL DB, Chunni Lal & Ors. v. Charan Lal Lalman & Ors.; AIR 1926 Cal 638, Altap Ali v. Jamsur Ali; AIR 1932 Cal 346, In re Anandalal Chakrabutty & Ors.,*** it was held that the heading of chapters and schedules in an enactment are only guides for the construction and cannot override the express provisions under those headings. The Schedule to the Act neither imposes nor confers any power to impose court fees. However placing ad valorem levies in the Schedule prescribing fixed fees certainly suggests complete non- application of mind in prescribing the impugned amendments to the statute.

(VI) Court fee is recovered only from a litigant: the concept of a "user fee"

477. The respondents have argued that the amount of court fee is recovered only from litigants. And that the litigants are those who benefit from the justice system. No recovery is effected from non-users of the system! This submission is to be noted only for its rejection.

478. It is noteworthy that there is another extremely important dimension to this issue. Before the Supreme Court also, only the submission that benefits of the litigation do not necessarily enure proportionally to the party who has paid the court fee or filed the case has been made. What has never been pointed out is the very pertinent fact that the benefits of the litigation do not stop at the parties to the lis alone. A judicial precedent binds consideration of the same issue in other cases. The benefits of adjudication may percolate to the entire society- those who are neither a party to the litigation nor have paid court fee.

479. This very issue has been the subject matter of judicial consideration in other jurisdiction as well. In a decision of the Supreme Court of Canada reported at ***2012 BCSC 748, Vilardell v. Dunham***, Mr. Justice McEwan rejected a narrow view of courts as a mechanism of last resort:

> "On a more basic level, the [state's] characterization of citizens as "users" who choose to come to court, does not reflect the reality of how the courts work.

Every individual in society may quite unexpectedly require resort to the courts. This is much more a function of circumstance, than of choice, either for claimants and, more obviously, for defendants. A more accurate picture of courts' "use" was given in *Pleau* at para. 22:

> In respect to the criteria, and notwithstanding the respondent's assertion there is no compulsion to access the court, it is clear there is the "practical compulsion" referred to by Justice Major. Citizens wronged, or believing themselves to have been wronged, or denied, or believing themselves to have been denied rights to which they are entitled, and whether the alleged transgressor is another citizen or the state itself, apart from self help remedies, will see little alternative than to seek to have the judicial component of our Constitution affirm their rights. Self help remedies are unacceptable, and therefore there is the practical compulsion to seek redress in the courts. The respondent's stated position that a litigant makes a choice to go to court and therefore there is no compulsion, fails to recognize the inherent right, and in some cases need, for all of us to seek redress and relief. Although private resolution models have been developed, and provide a valuable forum for resolving certain types of disputes, they cannot provide remedies in cases involving fundamental rights and freedoms. In respect to accessing the courts, there is a practical and real "compulsion."

Viewed from a more positive "civic" perspective, all those who seek legal redress in court at least implicitly make an affirmative act of faith in the

> principles and consequences of self-government, and perform a positive act of citizenship by electing to submit to the authority of the law. On the mundane level of even the most ordinary kind of domestic or civil disagreement, participation enriches democratic governance (as Resnick and Curtis suggest), and enriches and extends the law itself. Every day in the courts of British Columbia the names of people whose cases are long over live on in courtrooms as shorthand for one legal proposition or another. Every day the cases of those who have come to court in the past inform advice given to those who choose to settle, or to accept as already decided some aspect of their own claim. In this way virtually every case makes a contribution, actual or potential, to the development of the law, or to the advice which resolves other cases."

480. The court went on to decry the application of market rationale to court fees:

> "In a culture where almost everything is for sale it is evident that notions borrowed from the marketplace have come to influence the paradigms of government. But the premium a democratic society puts on inclusiveness, equality and citizen participation cannot be fulfilled in a society that sees citizens as customers or consumers. The fewer things a community shares in common, the more money matters, and the more difference there is between those of modest means and those who are well off.…
>
> The characterization of the unique features of the courts – a focus on individual, discrete encounters with the law – as **"services" provided to "users" commodifies justice and runs a foul of its constitutional duty to support the courts**. **The legislative branch of government cannot purport**

to "sell" or ration the services of the judicial branch without creating an impermissible hierarchy between the two. It cannot interpose itself between the courts and those who seek access – what the [state] calls "striking a balance" – without interfering with the courts' ability to serve all those who require its assistance, not only those who can afford the government's impositions.

Similarly, the government cannot lawfully use its control over funding to impede the judicial branch from fulfilling its essence as an accessible forum for the development of the law. **It is by means of the vote and by means of access to the courts that a state maintains its status as a democracy. A state that limits the right of individuals to call it to account by economic or bureaucratic pressures, because it lacks the commitment to fund the judiciary, inhibits a core democratic function. A court that is not available to a significant segment of the public because another branch of government stands in its way is a court whose independence is compromised**."

(Emphasis by us)

481. The Judicial Conference of the United States in the 'Long Range Plan' suggested by it has unequivocally recognized federal courts as being the indispensable forum for protecting rights which should obtain funding primarily through general appropriations, and not through 'user fees'. In this regard, the JCUS has stated thus:

"**Federal courts are an indispensable forum for the protection of individual constitutional rights; their costs are properly borne by all citizens. Unlike other governmental operations such as**

national parks, for which substantial funding through user fees may be appropriate, the mission of federal courts could not be performed if users were denied access because of an inability to pay reasonable user fees."

"At least three reasons support continued reliance on general appropriations instead of user fees. First, given that the frequency of federal court filings can vary substantially from year to year, **economic uncertainty** about the amount of revenue that can be raised annually through user fees **makes user fees an unreliable** and, therefore, undesirable source of funding. Second, with that uncertainty, **constant fee adjustments might be necessary** in order **to sustain ongoing judicial programs.** Finally, and most importantly, **litigants should not be so burdened with fees as to effectively eliminate the access of some low and moderate income users** to our federal forum."

(Emphasis supplied)

482. The Australian Law Reforms Commission (ALRC) submitted a report titled 'Managing Justice: A review of the Federal Civil Justice System' (Report No.89). In para 4.1 of chapter 4 on legal costs, the ALRC has pointed out that full cost recovery is not pursued because "*the judicial system has a key role in the democratic system of government which goes well beyond the resolution of individual disputes, encompassing progressive development of the law, providing the check on executive authority and protecting human rights*." (Ref: 189th Report of Law Commission)

483. The Australian Law Reforms Commission (ALRC) had

explained that it was difficult to correlate payments received from users of the court system to the services provided by the courts because "*it is difficult to conceptualise who the users of the service are: whether respondents or applicants, either of whom may benefit from the outcome. There are community benefits in the effective operation of the court system and in precedents created by individual disputes. There are also practical difficulties in developing a court fee structure that reflects the actual costs of the services provided and takes into account the complexity and cost of different matters*". (Noted in the 189th Law Commission Report)

484. The benefits of accessing the courts for redressal of private claims or invoking public remedies flow way beyond the litigants who are before the courts. The benefits trickle into the community, as well as the larger canvass of the nation.

485. The provision of a robust justice dispensation system is akin to the provision of a strong national defence mechanism, which is provided for as a necessity, even though its benefits do not enure to individual citizens. The presence of a strong army, navy, air force guarding our borders from intrusions inculcates a deep sense of security and comfort. It encourages healthy economic activity within and across notional borders. It ensures and enables healthy developmental activities.

486. It would not be wrong to say that just as national defence, access to justice is a public good. No distinction can therefore, be

made between *actual* and *potential* users of the justice system. Every individual derives satisfaction from the mere fact that they can seek justice, if a need arises. Those who actually happen to use the justice system, are compelled to do so on account of circumstances beyond their control. Certainly nobody opts for a legal problem so as to access the justice system. Therefore, the distinction sought to be made by the respondents between actual and potential users of the justice system is arbitrary. It is certainly without any factual or legal basis or justification, oblivious of the constitutional mandate and the hard social and economic categories and classes prevalent in our society.

487. The Nobel Laureate Ronald Coase (1960) has argued that in a world with zero transaction costs, assignment and enforcement of rights will result in efficient outcomes. The Government policy should therefore aim at reducing transaction costs as high transaction costs will make the enforcement of rights costly and lead to inefficiencies. For example, a person may not buy a house even if it is profitable for him to do so if it will be very costly to enforce the person's right over the house after he has bought it. [Ref: **Ronald H. Coase, "The Problem of Social Cost",** ***Journal of Law and Economics,*** **3, pp 1-44 (1960)**].

It is evident that ensuring a healthy administration of justice system is essential for economic activity and growth as well. It ushers in a unique confidence in the community and ensures stability in industrial, commercial and personal relationships.

488. The only conclusion therefore is that the availability of an efficient justice dispensation system which would actually have an effect of creating an enabling environment which would nurture important economic activity and development. It definitely encourages peace in the community. This aspect has never been placed before the court examining the challenges aforenoticed. It has been completely ignored by the respondents.

489. Individual and social disputes are brought into the public domain by accessing the justice dispensation system. This augments an enabling environment in which the community grows. Similarly, when criminal activity is brought to book, it results in social and community benefit.

490. Everybody who is desirous of living in a just and lawful society benefits from adjudication therefore, the institution responsible for maintaining a lawful environment must pay for the creation and maintenance of justice delivery system.

491. The notion of "user pays" in the context of court fee creates a simile of marketing so far as access to justice is concerned. Judgments impact even those who were not parties to litigation. Typically, a judgment may have huge externalities therefore, the notion that one who asks for the service or benefits therefrom, pays the court fee is a misconception.

492. As per the constitutional scheme administration of justice is one of the pillars on which the entire edifice of a constitutional

order and a democratic society rests.

493. Administration of justice and provision of a platform where people can, inter alia, seek redressal of wrongs, reliefs against violations of constitutional rights, prosecution of criminals cannot be compared to rendering of a mere "service" in the conventional sense. To reduce it to a mere service for which citizens can be charged would be incorrect and impermissible. It has no comparison at all to rendering services in the sense of, say, housekeeping or security or repairing of vehicles, electrical equipment etc. Given the nature of the rights involved, an examination of court fees and administration of justice therefore as a mere service, or an evaluation of whether the levy of court fee is a 'fee' or tax' alone, is to fall into a deep error.

494. As a corollary, it could be pressed that just as the cost of creating and maintaining the national defence mechanisms, hospitals, educational facilities, infrastructure as roads etc., the cost of creating and maintaining the justice system should be funded by a general tax as ever one stands to benefit from very, irrespective of whether a person actually uses the system or not. Cost recovery of the expenditure on the judiciary if effected, has to be minimal. The recovery by levy of court fee as a percentage of the value of the claim (or amount awarded by an arbitral award) without a maximum, results in recovery of an amount which totally disproportionate to and has no nexus or relation to the costs incurred by the respondents for a service.

495. It was observed by a Constitution Bench of Supreme Court in ***AIR 1955 SC 661, Bengal Immunity Co. Ltd. v. State of Bihar*** that if there is any hardship, it is for the legislature to amend the legislation and that the court cannot be called upon to discard the cardinal rule of interpretation for the purposes of mitigating such hardship. In ***Civil Appeals No. 2133-34/2004, Rohitash Kumar & Ors. v. Om Prakash Sharma & Ors.***, the expression "*dura lex sed lex*" that is to say that "*the law is hard but it is the law"* was used which sums up the position.

496. It is therefore well settled that hardship to parties alone would not be sufficient to the Court Fees (Delhi Amendment) Act, 2012.

497. In ***(1989) Supp 1 SCC 696, P.M. Ashwathanarayana Setty v. State of Karnataka***, the Supreme Court was considering a challenge to court fee in the States of Karnataka and Rajasthan which was where the court fee could be nearly 10% of the value of the subject matter. The Supreme Court had made the following important observations:-

> "72. What emerges from the foregoing discussion is that when a broad and general correlation between the totality of the fee on the one hand and the totality of the expenses of the services on the other is established, the levy will not fail in its essential character of a fee on the ground alone that the measure of its distribution on the persons of incidence is disproportionate to the actual services obtainable by them. The argument that where the levy, in an individual case, far exceeds the maximum value, in

> terms of money, of the services that could at all be possible, then, qua that contributor, the correlation breaks down is a subtle and attractive argument. …**The test is on the comprehensive level of the value of the totality of the services, set-off against the totality of the receipts. If the character of the 'fee' is thus established, the vagaries in its distribution amongst the class, do not detract from the concept of 'fee' as such, though a wholly arbitrary distribution of the burden might violate other constitutional limitation.** This idea that the test of the correlation is at the "aggregate" level and not at the "individual" level is expressed thus: (First Principles of Public Finance by De Marco, pp83)
>
> > The fee must be equal, in the aggregate to the cost of production of the service. That is the aggregate amount of the fees which the State collects from individual consumers must equal the aggregate expenses of production."

498. On the same aspect, the reasoning of the court in ***(1995) 1 SCC 104, D.C. Bhatia & Ors. v. Union of India & Anr.*** also sheds valuable light on the present consideration. In paras 6 to 12, the court has noticed the details of the material which had been placed before the government prior to the amendment. In para 13, the court noted that the purpose of the amendment by the Delhi Rent Control (Amendment) Act was stated in the proposed statute. Rent laws were already in force. In para 27, the court observed that the objects of the Amendment Act were different from the objects of the parent Act. The observations of the court in paras 27, 28, 29, 30 and 40 are material for the present case and the relevant portion thereof read as follows:

"27. The objects of the Amending Act are quite different from the objects of the parent Act. One of the objects of Amending Act was to rationalise the Rent Control Law by bringing about a balance between the interest of landlords and tenants. The object was not merely to protect the weaker section of the community.

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"28. ...This is a matter of legislative policy. The legislature could have repealed the Rent Act altogether. It can also repeal it step by step....

29. In our view, it is for the Legislature to decide what should be the cut-off point for the purpose of classification and the Legislature of necessity must have a lot of latitude in this regard. It is well settled that the **safeguard provided by Article 14** of the Constitution **can** only **be invoked**, **if the classification is made on the grounds which are totally irrelevant to the object of the statute.** But, if there is **some nexus between the objects sought to be achieved and the classification, the Legislature is presumed to have acted in proper exercise of its constitutional power.** The classification in practice may result in some hardship. But, **a statutory discrimination cannot be set aside, if there are facts on the basis of which this statutory discrimination can be justified.**

30. In the case of Harmon Singh and Ors. v. Regional Transport Authority, Calcutta and Ors. : [1954]1SCR371, a Bench consisting of five Judges of this Court upheld a notification issued by the Regional Transport Authority, Calcutta Region, fixing lower tariff for smaller taxis. The benefit of this lower fare was given to "small motor taxi cabs of

not below 10 H.P. and not above 19 H.P.". Mahajan, J., speaking for the Court observed:

"xxx ***A law applying to a class is constitutional if there is sufficient basis or reason for it. In other words, a statutory discrimination cannot be set aside as the denial of equal protection of the laws if any state of facts may reasonably be conceived to justify it***."

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xxx

*48. ...**The court can only consider whether the classification has been done on an understandable basis having regard to the object of the statute**. The **court will not question its validity on the ground of lack of legislative wisdom**.*

*49. Moreover, the **classification cannot be done with mathematical precision**. The **legislature must have** considerable **latitude for making the classification having regard to the surrounding circumstances and facts**. The court cannot act as a super-legislature?*"

(Emphasis supplied)

499. Even though the resultant hardship or inconvenience may not be a valid ground for challenged, it is permissible to examine the classification in the legislation from the perspective of its impact on the constitutional rights and provisions. We may advert to the pronouncement of Supreme Court at ***(2013) 1 SCC 745, Namit Sharma v. Union of India*** wherein the Court ruled as

follows:

> 1. "The value of any freedom is determined by the extent to which the citizens are able to enjoy such freedom..."
>
> xxx xxx xxx
>
> 10. In determining the constitutionality or validity of a constitutional provision, the court must weigh the real impact and effect thereof, on the fundamental rights. The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. In *Minerva Mills Ltd.* v. *Union of India* [(1980) 3 SCC 625] this Court mandated without ambiguity, that it is the Constitution which is supreme in India and not Parliament. Parliament cannot damage the Constitution, to which it owes its existence, with unlimited amending power.
>
> xxx xxx xxx
>
> 14. **A law which violates the fundamental right of a person is void**. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute. First and the foremost, as already noticed, is the **competence** of the legislature to make the law. The **wisdom or motive** of the **legislature** in making it is **not a relative consideration**. **The Court should examine the provisions of the statute in light of the provisions of the Constitution (e.g. Part III)**, regardless of how it is actually administered or is capable of being administered. In this regard, the Court may consider the following factors as noticed in D.D. Basu, *Shorter Constitution of India* (14th Edn., 2009):

"(*a*) The possibility of abuse of a statute does not impart to it any element of invalidity.
(*b*) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements.

In *Charan Lal Sahu* v. *Union of India* [(1990) 1 SCC 613] , SCC at p. 667, para 13, Mukharji, C.J. made an unguarded statement viz. that

> '*13. In judging the constitutional validity of the Act, the subsequent events, namely, how the Act has worked itself out, have to be looked into*.'

It can be supported only on the test of 'direct and inevitable effect' and, therefore, needs to be explained in some subsequent decision.

(*c*) When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the '**direct and inevitable effect**' of such law.

(*d*) There is presumption in favour of constitutionality of statutes. The law courts can declare the legislative enactment to be an invalid piece of legislation only in the event of gross violation of constitutional sanctions."

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16. Article 14 forbids class legislation but does not forbid reasonable classification which means:

16.1. It must be based on reasonable and intelligible

differentia; and

16.2. Such differentia must be on a rational basis.

16.3. It must have nexus with the object of the Act.

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42. The courts have observed that when the law-making power of a State is restricted by a written fundamental law, then any law enacted, which is opposed to such fundamental law, being in **excess of fundamental authority, is a nullity**. **Inequality** is one such example. Still, **reasonable classification** is permissible under the Indian Constitution. **Surrounding circumstances** can be taken into consideration in support of the constitutionality of the law which is otherwise hostile or discriminatory in nature, but the circumstances must be such as to justify the discriminatory treatment or the classification, **subserving the object sought to be achieved**. Mere apprehension of the order being used against some persons is no ground to hold it illegal or unconstitutional particularly when its legality or constitutionality has not been challenged. (Ref. *K. Karunakaran* v. *State of Kerala* [(2000) 3 SCC 761 : 2001 SCC (Cri) 183] .) To raise the **plea of Article 14 of** the Constitution, the element of **discrimination** and **arbitrariness** has to be **brought out in clear terms**. The courts have to keep in mind that by the process of classification, the State has the power of determining who should be regarded as a class for the purposes of legislation and in relation to law enacted on a particular subject. The power, no doubt, to some degree is likely to produce some inequality but if a law deals with liberties of a number of individuals or well-defined classes, it is not open to the charge of denial of equal protection on the ground that has no application to other persons. Classification, thus,

means segregation in classes which have a systematic relation usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily, as already noticed. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a *nexus* between them. The basis of testing the constitutionality, particularly on the ground of discrimination, should not be made by raising a presumption that the authorities are acting in an arbitrary manner. No classification can be arbitrary. One of the known concepts of constitutional interpretation is that the **legislature cannot be expected to carve out classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned. The courts would respect the classification dictated by the wisdom of the legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness tested on the touchstone of Article 14 of the Constitution**. (Ref. *Welfare Assn., A.R.P.*v. *Ranjit P. Gohil* [(2003) 9 SCC 358] .)

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45. In *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] and *Charan Lal Sahu* v. *Union of India* [(1990) 1 SCC 613] , the Court has taken the view that when the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the "**direct and inevitable effect**" of such law. **A matter within the legislative competence of the legislature has to be left to the discretion and wisdom** of the framers, **so long as it does not infringe any constitutional provision or violate any**

> **fundamental right. <u>The law has to be just, fair and reasonable</u>**. Article 14 of the Constitution does not prohibit the prescription of reasonable rules for selection or of qualifications for appointment, except, where the classification is on the face of it, unjust."
>
> (Emphasis by us)

500. The Supreme Court has therefore, held that the legislature must have latitude, but it is not unlimited. It has been clearly declared that Article 14 can be invoked, if the <u>classification is made on grounds</u> which are <u>totally irrelevant</u> to the <u>object of the statute</u>. The <u>direct and inevitable effect of the law</u> and whether any fundamental right is violated are important considerations.

501. The question in the present case is whether the increase in the present case would fall within the definition of the expression 'manifestly arbitrary' and suffering from substantive unreasonableness.

It is equally well settled that a constitutional challenge to a statute on the ground of legislative arbitrariness deserves the close scrutiny which we have undertaken as in the present case.

502. Judicial notice has to be taken of the fact that costs of administration of justice would have steeply increased since 1870. The inflationary trends as well as the socio-economic status of the people accessing the court system would also required to be kept in mind. We have to concede to the executive the requisite expertise

to collate and assimilate the relevant information as well as the prevalent circumstances and to analyse the information and thereafter to present the information and the analysis to the legislature. However, is it possible to deny that the judicial time which may be spent for enforcement of the judgment or for decree for suits of the same kind (say for recoveries of property located in different areas and of varying valuations) would remain the same? Execution of a possession decree for a small flat, if contested by an unscrupulous judgment debtor, may generate litigation and last decades. Whereas possession of a large property may be recovered merely upon filing of the execution petition. In any case, court fee has been recovered when the suit seeking the adjudication was filed. We have noted above the irrationality in the prescriptions of the court fee on suits for recovery of possession of immovable property as well as the classifications of litigation created by the respondents which do not appear to have any nexus to the object sought to be achieved. The arbitrariness and unreasonableness of the prescriptions stares in the face. The same position is evident qua the several other classes of litigation noted above.

503. We may consider the issue of reasonableness of the proportions of the resources involved in justice dispensation in some of the litigation categories noticed above. This may be illustrated by the court time occupied by suits on which court fee of Rs.13 or Rs. 20 has been affixed. A probate case requires a fixed court fee which may be Rs.20 initially. A contested probate case

may occupy hundreds of hours of court time and in case the probate petition is dismissed, no charge is payable. Which means a party has wasted the court resources by bringing forward a case on which he has paid court fee of an amount which does not bear the remotest, let alone reasonable, nexus to the court time consumed. On the other hand, on account of increase of value of the property over the last years, the valuation can be heavy. Because the parties are putting forward a correct claim which is not contested, the matter is decided with hardly any consumption of court time. Yet court fee totally disproportionate to the time for adjudication would be payable.

504. So far as suits for recovery of money are concerned, the impugned legislation has stipulated ad valorem court fee without an upper limit thereon. Let us examine a hypothetical situation. There are two suits which are identical in every way except their value. Suit A is for recovery of Rs.10 lakhs on which court fee of Rs10,000/- is paid while suit B is for recovery of Rs.10 crores on which a court fee of Rs.10 Lakhs is paid. As the facts giving rise to the two identical suits as well as issues of law are identical, it would take identical resources and judicial time in deciding the two suits. Would not this be sufficient reason as to why the plaintiff in suit A should not be called upon to pay shortfall in the court fee? At the same time, would it not be unconstitutional to charge the plaintiff in suit B an excess of Rs.10,000/- only because the value of the amount claimed is large. Thus the variation in the valuation

may render the court free prescription exorbitant and arbitrary as it is unrelated to and without any consideration of the resources which are expended on the adjudication of the cases. Large value suits often take lesser time in completing the adjudicating process, as compared to lower valued suits.

505. Whereas, in order to be constitutional and legal, the court fee must bear a reasonable nexus to the cost incurred. There must also be a limit on the maximum recoverable court fee. Otherwise, unlike a stamp duty on a sale deed, which of course is pure revenue, such court fee without a limit would be wholly illegal and be contrary to the 'user pay' principles.

506. As noted above, the respondents have prescribed fixed court fee on suits relating to intellectual property. Fixed court fee is prescribed on petitions for enforcement of foreign awards. No intelligible differentia between these and similar cases is discernible. No reason therefore is advanced. No object for such magnanimity is disclosed for such favoured treatment to these classes of litigation.

507. Judicial notice can be taken of the fact that cases, especially suits on the original side of this court, relating to intellectual property rights are of high value. Judicial notice also deserves to be taken of the important reality, maybe justified, that this commercial litigation not only involves high value stakes, but inevitably litigants press for prioritized hearings. These hearings are

invariably protracted and time consuming. Therefore, though the subject and issues are of prime commercial importance and, of course, intellectually stimulating, yet it cannot be denied that this litigation makes a large demand on the available justice dispensation resources, especially on judicial time. Of course that public interest is also involved in the several important issues, especially those concerning patenting and copy rights amongst others, cannot be denied. The parties to this litigation are largely economic giants. They are certainly not the economically deprived whose access to justice was or would be impeded by court fee levy.

508. The respondents have claimed that court fee has been enhanced to generate revenue. As per the earlier court fee regime, ad valorem court fee was payable on these claims. Instead, the respondents have brought in a fixed court fee regime in respect of these claims.

509. If the respondents had material or reason to support this levy, they would have placed it before us. Nothing is placed. No reference or reason is supplied as to why there is under charging of court fee in this litigation. Intellectual property causes are brought before the same courts which try other causes. The expenditure on provision of a justice dispensation system for adjudication on these cases would remain the same. There is certainly no relationship between the court fees prescription and the expenditure on provision of the justice dispensation system for adjudication of such disputes. Clearly an arbitrary exercise and a prescription

without any basis at all.

510. The criticism of such court fee regimes by the noted jurist H.M. Seervai is noted in the 189th Report of the Law Commission. In his book 'Constitutional Law of India' (3rd Ed. Vol. II p. 1958), where the eminent author observed that court fees should not be a weapon to stifle suits or proceedings and that though in fixing the court fees regard may be given to the amount involved*, "a stage is reached when an increasing amount ceases to be justified*".

511. We have noted above, the statement in the counter affidavit that by the proposal for amendment to the Court Fees Act, it was proposed to amend the Schedule to the Court Fees Act and increase the court fee by ten times. However, as a result of the amendments to the entries (including those noted above), court fee has been increased manifold, in any case, more than 10%, and in certain instances to more than 200 to 400 times.

512. The Supreme Court of Brazil in a judgment dated 28th March, 1984 reported as ***Representation No.1077, Quarterly Journal of Jurisprudence of the Supreme Court 112/34-67. (Representacao n 1077 Revista Trimestral de Jurisprudencia do Supremo Tribunal Federal 112/34-67)*** is reported to have declared unconstitutional the statutory provision for court fee providing for fixed percentage without any maximum cap. The court appears to have reasoned that in some cases, the court fee would be so high that it would prevent the exercise of the

fundamental rights of obtaining judicial redressal and assistance. The decision also considered the disproportion between the cost of service and fee levied, i.e, that the fee was not reasonably equivalent to the actual cost of service.

513. The Supreme Court of India has repeatedly emphasized on the feasibility of the maximum fees. Such unlimited court fees payable under the impugned Act is excessive, harsh, unreasonable and transforms levy into a tax.

514. It is noteworthy that in ***1989 Supp (1) SCC 696 (para 92), P.M. Ashwathanarayana Setty v. State of Karnataka***, the Supreme Court held that not giving a upper limit for the court fee payable on probates was discriminatory and a piece of class legislation which was prohibited under Article 14.

515. The court fees payable under the impugned Act on the several entries noted above for which no maximum limit is prescribed has to be held to be discriminatory and arbitrary and as such liable to be struck down. On the several entries for which fixed court fee is prescribed no rationale is discernible. Such prescription is also contrary to the declared objective of revenue collection.

516. The above narration also manifests that clearly none of the authorities appear to have considered the recognized and established distinction between the criminal and civil justice dispensation system or the settled principles governing

permissibility of levying court fees. No attention has been paid to either the binding constitutional principles or the statutory provisions on this aspect.

517. In the present case, statutory amendments have been effected which are contrary to substantive statutory provisions. Binding dicta in judicial pronouncements of the Supreme Court and the High Court on the applicable principles and subject matter appear to have completely escaped the notice of the experts who have guided the legislation. Authoritative consideration of not only the law as formulated in Indian judicial precedents but also deliberations over international instruments and jurisprudence for years by the experts, coupled with relevant inputs regarding the socio-economic realities peculiar to India by the Law Commission of India do not seem to have been even looked at, let alone deliberated upon. We are compelled to note that no formulation of filing details in terms of nature of cases; valuations thereof; categorizations in terms of judicial time taken; profiling of litigants; analysis of empirical data etc. has been undertaken before proposing the amendment. The inevitable result is to render such legislative exercise arbitrary as well as contrary to law.

518. We are therefore, compelled to hold that the action of the legislature is manifestly arbitrary; that the present case manifests substantive unreasonableness in the impugned statute and the same is ultra vires under Article 14 of the Constitution.

(VII) Whether the levy in the present case partakes the character of a tax?

519. Premised on the extent of the levy, the petitioners have also urged that the imposition of the court fee by percentage without a maximum limit for several entries including suits for recovery of amounts; possession of property probates under the impugned amendment has the effect of profiteering by the respondents without any relation to the cost of service rendered. The levies are thus in the nature of a tax and not in the nature of a fee.

520. So far as arbitration is concerned, the petitioners have submitted that prescription of court fee at a percentage of the claim/ amount awarded without a maximum at every stage of the arbitration proceedings is contrary to the avowed object of encouraging arbitration. It has no relation to the expenditure on the service rendered and partakes the character of a tax.

521. For the purposes of decision on this question, it becomes necessary to examine as to what is the nature of Court Fee — whether it is a 'tax' or a 'fee'. On this aspect the observations of the Supreme Court in paras 31, 33, 45 and 46 of ***(1973) 1 SCC 162 Secretary, Government of Madras v. Zenith Lamp and Electrical*** are relevant and read as follows:

> "31. But even if the meaning is the same, what is "fees" in a particular case depends on the subject-matter in relation to which fees are imposed. In this

case we are concerned with the administration of civil justice in a State. The fees must have relation to the administration of civil justice. While levying fees the appropriate Legislature is competent to take into account all relevant factors, the value of the subject matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of courts and officers administering civil justice, the vexatious nature of a certain type of litigation and other relevant matters. **It is free to levy a small fee in some cases, a large fee in others, subject of course to the provisions of Art. 14. But one thing the Legislature is not competent to do, and that is to make litigants contribute to the increase of general public revenue In other words, it cannot tax litigation, and make litigations pay, say for road building or education or other beneficial schemes that a State may have. There must be a broad co-relationship with the fees collected and the cost of administration of civil justice**.

xxx xxx xxx

33. It was urged that various articles in the Constitution show that fees taken in Courts are taxes. For instance, by virtue of Article 266 all fees, being revenues of the State, will have to be credited to the Consolidated Fund. But this Court has held that the fact that one item of revenue is credited to the Consolidated Fund is not conclusive to show that the item is a tax. In ***The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mut***, it was held "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.

It is not possible to formulate a definition of fees that

can apply to all cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases such expenses are arbitrarily assessed.

The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for special benefit or privilege".

xxx xxx xxx

45. With respect, the fees taken in courts and the fees mentioned in Entry 66 List I are of the same kind. They may differ from each other only because they relate to different subject-matters and the subject-matter may dictate what kind of fees can be levied conveniently, but the overall limitation is that fees cannot be levied for the increase of general revenue. For instance if a State were to double court-fee with the object of providing money for road building or building schools, the enactment would be held to be void...

xxx xxx xxx

46...**As soon as the broad correlationship between the cost of administration of civil justice and the levy of court fees ceases, the imposition becomes a tax and beyond the competence of the State Legislature.** ***(para 46)***

(Emphasis by us)

522. The question whether court fee is a 'tax' or a 'fee' was also raised before the Supreme Court in ***1989 Suppl (1) SCC 696, P.M.***

Ashwathanarayana Setty v. State of Karnataka ('A Setty') and (***1996) 1 SCC 345, Secretary to Government of Madras v. P.R. Sriramulu.***

523. In A. Setty it was observed as follows:-

> "Another review of all the earlier pronouncements of this court on the conceptual distinction between a `fee' and a `tax' and the various contexts in which the distinction becomes telling is an idle parade of familiar learning and unnecessary. What emerges from these pronouncements is that if the essential character of the impost is that some special service is intended or envisaged as a quid pro quo to the class of citizens which is intended to be benefitted by the service and there is a broad and general correlation between the amount so raised and the expenses involved in providing the services, the impost would par-take the character of a `fee' notwithstanding the circumstance that the identity of the amount so raised is not always kept distinguished but is merged in the general revenues of the State and notwithstanding the fact that such special services, for which the amount is raised, are, as they very often do, incidentally or indirectly benefit the general public also. **The test is the primary object of the levy and the essential purpose it is intended to achieve. The correlationship between the amount raised through the 'fee' and the expenses involved in providing the services need not be examined with a view to ascertaining any accurate, arithmetical equivalence or precision in the correlation; but it would be sufficient that there is a broad and general correlation. But a fee loses its character as such if it is intended to and does go to enrich the general revenues of the State to be applied for general purposes of Government.** ***(para 35 of A.***

Setty) (Also quoted in para 12 of Sriramulu)

Conversely, from this latter element stems the sequential proposition that the object to be served by raising the fee should not include objects which are, otherwise, within the ambit of general governmental obligations and activities. ***(para 35 of A. Setty)***

The concept of fee is not satisfied merely by showing that, the class of persons from whom the fee is collected also derives some benefit from those activities of Government. ***(para 35 of A. Setty)***

The benefit the class of payers of fee obtain in such a case is clearly not a benefit intended as special service to it but derived by it as part of the general public. ***(para 35 of A. Setty)***

Nor does the concept of a fee- and this is important- require for its sustenance the requirement that every member of the class on whom the fee is imposed, must receive a corresponding benefit or degree of benefit commensurate with or proportionate to the payment that he individually makes. It would be **sufficient if the benefit of the special services is available to and received by the class as such. It is not necessary that every individual composing the class should be shown to have derived any direct benefit**. A fee has also the element of a compulsory exaction which it shares in common with the concept of a tax as the class of persons intended to be benefitted by the special services has no volition to decline the benefit of the services. A fee is, therefore, a charge for the special services rendered to a class of citizens by Government or Government at agencies and is generally based on the expenses incurred in rendering the services. ***(para 36 of A. Setty)***

The **extent and degree of the correlation** required to support the fees, has also been considered in a

> number of pronouncements of this court. It has been **held that it is for the governmental agencies imposing the fee to justify its impost and its quantum as a return for some special services**." ***(para 37 of A. Setty)***

524. The Supreme Court has clearly enunciated the principles on which the examination of the issue as to whether the court fee levy was a 'fee' or a 'tax' has to be effected. The same are best stated in the words of the Supreme Court which are extracted as follows:-

> "What emerges from the foregoing discussion is that when a broad and general correlation between the totality of the fee on the one hand and the totality of the expenses of the services on the other is established, the levy will not fail in its essential character of a fee on the ground alone that the measure of its distribution on the persons of incidence is disproportionate to the actual services obtainable by them. The argument that where the levy, in an individual case, for exceeds the maximum value, in terms of money, of the services that could at all be possible, them, qua that contributor, the correlation breaks down is a subtle and attractive argument. However, on a proper comprehension of the true concept of a fee the argument seems to us to be more subtle than accurate. The test of the correlation is not in context of individual contributors. ***(para 72 of A. Setty) (Also quoted in para 12 of Sriramulu)***
>
> The test is on the comprehensive level of the value of the totality of the services, set-off against the totality of the receipts of the character of the `fee' is thus established, the vagaries in its distribution amongst the class, do not detract from the concept of a `fee' as

such, though a **wholly arbitrary distribution of the burden might violate other constitutional limitation**." ***(para 72 of A. Setty) (Also quoted in para 12 of Sriramulu)***

The submission of the petitioners would require to be examined on the above principles.

525. On this issue, reference may be made to the pronouncement of the Supreme Court reported at ***(2009) 4 SCC 72, M. Chandru v. Member Secretary, Chennai Metropolitan Development Authority and Anr.*** wherein a similar issue had arisen before the Supreme Court and the authority failed to set out how the services rendered would satisfy the requirements of a fee:

> "24. It is not contended before us that IDC is not a fee but a tax. If it is a fee, the principle of quid pro quo shall apply. Like a State, all other authorities which are statutorily empowered to levy the same must spell out as to on what basis the same is charged. The State has not placed any material before the High Court. The High Court has also not addressed itself properly on the same issue. It failed to pose unto itself a relevant question. It proceeded on the basis as if overall development charges by itself is sufficient to levy a fee without spelling out how the services rendered will satisfy the equivalence doctrine for the purpose of levy and collection of fees."

526. On application of the principle laid in ***M. Chandru*** (Supra), it is necessary for the respondents to state and establish that the fees are being levied and collected only for the purposes of the

services being rendered.

527. Some states in India have set limits of maximum the chargeable court fee on select categories of cases. Gujarat for instance imposes a ceiling of Rs.75,000/- on court fee when instituting a suit or for matters of probate. West Bengal and Maharashtra also have limits of select categories. West Bengal imposes a ceiling of Rs. 50,000/- in its rates of ad valorem fees leviable on the institution of suits, while Maharashtra imposes a ceiling of Rs 3,00,000 on the same. Jammu and Kashmir has also prescribed ceiling of maximum court fee of Rs 75,000 on the institution of suits.

528. In the court fee regime applicable in Assam (which would apply to Arunachal Pradesh, Nagaland and Mizoram as well), there is ceiling of Rs.10,000/- on money suit; in Goa there is a ceiling of Rs.15,000/- for money suit and in the state of Gujarat, there is ceiling of Rs.75,000/- for both money suit and probate case.

529. Mr. Chandhiok, learned Senior Counsel has also contended that the figures which have been compiled in the reports published by the Delhi High Court show that litigation under Section 138 of the Negotiable Instruments Act, litigation is voluminous. It is urged that given the scheme of the amended statute, it is evident that in effectuating this amendment to the Court Fee Schedule, the intention of the Delhi Legislature was clearly only to affect an increase in the general revenue from Section 138 of the Negotiable

Instruments Act litigation and that, such levy partakes the character of a tax. The submission is that apart from the impermissible for a legislature to effect recovery of amount towards the general revenue under the guise of the court fee. It is urged that such arbitrary increase tantamounts to taxation of the litigant which is clearly beyond the legislative competence of the legislative assembly by the NCT of Delhi. There appears to be strength in these submissions.

530. Several countries impose no court fees at all. We have noticed in detail the court fee provisions on suits for arbitration petitions and other cases, recovery of money, property, probates in Delhi under the impugned legislation. Ad valorem and without a limit, the levy of court fee for the reasons discussed have all the trappings of taxation.

(VIII) Access to justice: a right, not a privilege; optimum level of court fee to be assessed by capacity of not just the economically well placed, but also the capacity of the poor and those on the border line

"Access to justice is basic to human rights. The right to justice is fundamental to the rule of law and so 'We, the people of India' have made social justice an inalienable claim on the State, entitling the humblest human to legal literacy and fundamental rights and their enforcement a forensic reality, however powerful the hostile forces be… Declarations and proclamations, resolutions and legislations remain a mirage unless there is an infrastructure which can be set in locomotion to prevent or punish a wrong and to make legal right an inexpensively enforceable human right. Injustices are many, deprivation victimizes the weaker sections and the minority suffers the

oppression syndrome."

- Justice V.R. Krishna Iyer

The discussion on this subject is being considered under the following sub-headings:

(i) What is Justice

(ii) Access to Justice: Nature of Right

(iii) *The Content of Access to Justice*

(iv) Purpose of access to justice

(v) International treaties and conventions

(vi) The position in India: pre and post Constitution, and statutory provisions

(vii) The Constitution of India and relevant legislations

(viii) "Access to justice" may not be synonymous with "access to courts"

(ix) Court fee: an entry point financial barrier to access to justice?

(x) Ensuring access to justice and impact of court fee

(xi) Administration of justice – a State responsibility

(xii) Differing obligations of the State to provide Civil and Criminal Justice.

(xiii) Can access to justice be for a price by way of court fee

531. We now propose to examine the impact of a court fee levy on the most important fundamental right, considered a basic human right in all jurisdictions. We advert to the right to justice. To

understand such impact, it is essential to understand the nature and contents of the right and the several nuances thereof. We now examine the contours of this right as well as the impact of the impugned amendment thereon from some relevant angles.

532. Mr. A.S. Chandhiok and Mr. M. Krishnamani, learned Senior Counsels appearing for the petitioners have urged at some length that the enhancement of the court fee has adversely impacted the right of access to justice of the litigants. It has placed the level of court fee in some cases at a high level making it impossible for those who are on the border line of indigency to file claims for redressal of their grievances or securing their rights. Hence such levy is not sustainable for this reason as well. This submission in our view is of paramount importance, as it involves a consideration of the impact of the impugned legislation on a right placed at the core of all rights in the Constitution. This argument is certainly not without merit, as the following discussion would show.

What is Justice

533. It is an established and time-honoured fact that the courts of law are guided by the principles of justice. It is germane at this stage to identify the concept of justice and to delineate the planes on which justice operates.

534. 'Justice' is not defined by any determinate definition. Justice is first and foremost a social construct and then, as a second step, a

legal one. In the social acceptance and visibility of justice lie its validation, its very rationale for existence. Hence the oft –quoted aphorism "justice must not only be done, it should also *be seen* to be done." Therefore, when society is structured in a manner that it creates barriers to legal recourse, that is, access to justice, then society works contrary to its own organization.

535. The overlap of the social, economic and legal spheres has been widely experienced; it is a well-known fact that the social groups placed at the extreme margins of society are also the poorest. Statistics acknowledge this social and economic categorization of poverty. The poor are, thus, socially excluded and have low access not only to economic opportunities but to other systems including health, education, and especially legal services.

536. It is important to note that the contours of this right are different for persons placed at different social and economic groups as will be manifested from the following discussion. The right therefore encapsulates the right to have an effective and efficient forum for protection of rights; to seek prevention of violations as well as redressal if a right is violated. Inherent in such right is the availability of an equal opportunity to access the forum to seek justice.

Access to Justice: Nature of Right

537. The jurisprudence of the Supreme Court of India has

repeatedly emphasized that the right to a fair trial and of access to justice is a basic fundamental/human right. [Ref: ***(2003) 6 SCC 230***, ***Dwarka Prasad Agarwal v. B.D. Agarwal***].

538. In **(*2007) 4 SCC 241, Bhagubhai Dhanabhai Khalasi v. State of Gujarat***, the Supreme Court observed:

> "10. A party having a grievance must have a remedy. Access to justice is a human right. When there exists such a right, a disputant must have a remedy in terms of the doctrine *ubi jus ibi remedium*."

539. The emergence of the right of access to justice as 'the most basic human right' was in recognition of the fact that possession of rights without an effective mechanism for their vindication would be meaningless.

The Content of Access to Justice

540. In assessing the precise effects of the enhanced court fee regime on the recognized fundamental and human right of access to justice, it is first necessary to explore the content of that right. The word "justice" in the phrase "access to justice" also merits attention.

541. In this regard we may refer to a document prepared by '*Governance, Social Development, Humanitarian Conflict (Applied Knowledge Services)*' [available on ww.gsdrc.org]. It is very aptly stated in this document that at the level of legal theory, law is

defined by its three attributes: (i) as a relationship of power; (ii) as a social process; (iii) and as a standard of justice. As one of the founding attributes of law itself, the concept of justice includes standards of rights defined in law. The state bears the primary responsibility for the protection of these rights, and the courts are the specific institution that ultimately guarantees their enforcement through the sanction of law.

542. The word "access" connotes both contact with something, and the right of entry or the right of use. When used in the phrase "access to justice," the word "access" has therefore to be understood in a comprehensive sense, including entry to, as well as use of the justice system.

543. "Access to justice" also knows of no statutory definition. In this context, the phrase "access to justice" relates to the ability of individuals, groups, and communities to realise justice through the meaningful and practical enforcement of their rights by the justice delivery system, of which the courts are an integral part. Thus, the authorities in Indonesia while examining "*A Framework for Strengthening Access to Justice in Indonesia*" have proposed the following comprehensive definition of access to justice *[Ref: Presidential Regulation No.7/2005 on the National Medium – Terms Development Plan (2004 – 09) Chapter 9, Section 2]:*

> *"Access by people, in particular from poor and disadvantaged groups to fair, effective and accountable mechanisms for the protection of rights,*

> *control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and the ability to seek and exercise influence on law-making and law implementing processes and institutions."*

This wide definition succinctly sums up all facets of access to justice.

Purpose of access to justice

544. *"Access to* Justice*"* inheres in the very basic notion of justice. The learned author Cappelleti in his book "Access to Justice", Vol.I Book 1, (also quoted in several pronouncements of the Supreme Court as well as by the Law Commission of India), on the need for access to justice has stated that:

> "The need for access to justice may be said to be twofold; first, we must ensure that the rights of citizens should be recognized and made effective for otherwise they would not be real but merely illusory; and secondly we must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, so as to promote harmony and peace in society, lest they foster and breed discontent and disturbance. In truth, the phrase itself 'access to justice' is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged."

545. The essentiality of a judicial remedy for redressal of

grievances and enforcing rights has been highlighted by the Law Commission (189th Report) relying on Lord Diplock's pronouncement reported at ***1981 (1) ALL ER 289 = 1981 AC 909, Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corp.*** wherein it was stated that:

> "Every civilized system of government requires that the State should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."

546. In the famous case of ***Marbury v. Madison, (1803) 5 U.S. 137***, Marshall CJ. broadly ruled the power of the constitutional courts to go into the validity of the laws made by the Legislature or of the actions of the executive and reiterated that "*the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury*". One of the first duties of the government is to afford that protection. He also quoted Blackstone when he declared the principle in the laws of England that every right when withheld must have a remedy and that every injury its proper redress.

547. The right of access to justice when impacted, has been the

subject matter of adjudication in several jurisdictions stating the purpose and essentiality of access to justice. Reference has been made to the pronouncement reported at ***(1997) 2 All ER 779, R v. Lord Chancellor, ex parte Witham*** (referred to as the '*Witham case*'). This decision was rendered in judicial review proceedings challenging the validity of the Supreme Court Fees (Amendment) Order, 1996. Article 3 of this Order, 1996 amended the Supreme Court Fees Order, 1980 and repealed the provisions contained in Article 5(1) and (3) of the 1980 Order, which relieved the litigants in person who were in receipt of income support, from the obligation to pay court fees and permitted the Lord Chancellor to reduce or remit the fee in any particular case on grounds of undue financial hardship in exceptional circumstances. The amendment had been issued by the Lord Chancellor, acting under the powers conferred on him by Section 130 of the Supreme Court Act, 1981. The High Court (Queen's Bench Division) struck down the amendment holding that the effect of the amendment was to "*bar absolutely many persons from seeking justice from the courts"*. At page 788, it was further stated that "*access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass a legislation which specifically – in effect by express provision – permits the Executive to turn people away from the court door".*

It was unequivocally stated that the right of access to justice was a constitutional right which could only be abrogated by

specific statutory provisions or by regulations made pursuant to a legislation which specifically conferred the power to abrogate that right. It was thus the removal of the discretion to waive court fee which was held to adversely impact access to justice.

548. Justice Laws in ***Witham*** (supra) equated the right of access to justice to the right of speech and expression in the following words:

> "I cannot think that the right of access to justice is in some way a lesser right than that of free expression; the circumstances in which free speech might be jusfiably be curtailed in my view run wider than any in which the citizen might properly be prevented by the State from seeking redress from the Queen's courts. Indeed the right to a fair trial with all necessity imports the right of access to the court is as near to an absolute right as in which I can envisage."

549. De Smith's Judicial Review of Administrative Action (5th Ed, 1995) has quoted Sir John Laws in the decision in ***Witham*** (supra) as follows:-

> "It is a common law presumption of legislative intent that access of Queens's Court in respect of justiciable issues is not to be denied save by clear words in a statute"

550. On the subject of interference with a person's right of access to justice, reference requires to be made to the pronouncement by Steyn LJ in ***1993 (4) All ER 539 (CA), R v. Secretary of State for***

Home Dept, ex p Leech. It may be noted that in this case, the court was considering a complaint by a prisoner to the effect that his correspondence with his solicitor concerning litigation in which he was involved or intended to launch, was being censored by the prison authorities under the Prisons Rules, 1964. It was urged that the statute did not authorise framing of rules which would create an impediment to the free-flow of communication between him and his solicitor about contemplated legal proceedings. The court commented on the issue of creation of barriers to access to the courts holding as follows:

> "It is a principle of our law that every citizen has a right of unimpeded access to a court. In Raymond v. Honey (1982) 1 All ER 756 Lord Wilberforce described it as a 'basic right'. Even in our unwritten Constitution, it ranks as a constitutional right."

551. An issue with regard to the right of a person to lay information before a Magistrate was held, could not be prohibited, as the same could not be brought within vexatious "legal proceedings" which could be prevented under the 1896 statute on the subject. In the pronouncement reported at ***(1915) 1 KB 21, Re Vexatious Actions Act 1896, Re Boaler***, Scrutton J. pronounced as follows:

> "One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if

> he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any statute should be jealously watched by the court, and should not be extended beyond its least onerous meaning unless clear words are used to justify extension…I approach the consideration of a statute which is said to have this meaning with the feeling that unless its language clearly convinces me that this was the intention of the Legislature I shall be slow to give effect to what is most serious interference with the liberties of the subject."

552. The right of access to justice is thus not only well established but staunchly protected so far as common law jurisdictions are concerned. In the jurisdictions where the rights have been so enshrined as noted above, this right is constitutionally protected.

553. As the highest court of the Canadian province of British Columbia noted in ***2005 BCCA 631***, ***Christie v. British Columbia***, one of the <u>three foundational components</u> of the rule of law is that the relationship between citizens and the State be regulated by law. This component of the rule of law cannot be fulfilled if access to law enforcement agencies or the justice delivery system is restricted:

> "not only would individuals be unable to have their rights determined vis-à-vis the government or other private persons; governments would also be stymied

> in the execution of many of their executive and enforcement functions."

In the context of the rule of law, then, access to justice operates at a "threshold" level.

> "It is content-neutral, just as courts of law are impartial between litigants. It does not imperil legal certainty and predictability: to the contrary, it seeks to provide a forum, both physical and systemic, in which those and other principles may be perused."

Limiting access to courts thus also affects the rule of law.

554. In ***1993 Suppl. (2) SCC 433, M.V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd.,*** the Supreme Court stated that the judicial power of this country, which is an aspect of judicial sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by Courts empowered to exercise it. The Supreme Court further stated:-

> "86. Access to courts which is an important right vested in every citizen implies the existence of the power of the court to render justice according to law. Where statute is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience."

555. It is important also to keep in mind the importance of access in the broader social context. The Indonesian authorities, for example, have emphasized the relationship between access to justice, poverty reduction, and the empowerment of communities [*Ref: Presidential Regulation No.7/2005 on the National Medium – Terms Development Plan (2004 – 09) Chapter 9*]. It was further stated that increasing the effectiveness of, and confidence in the justice system can reduce conflict and improve human security. Thus, there is international recognition that improving physical access to justice can directly increase income and welfare for the poor who are especially vulnerable due to the reality that they are, *inter alia*, disproportionately victimized by crime, systemically prevented from asserting their land rights, and face barriers to securing their rightful inheritance or property rights upon divorce. It has to be recognised that conflict reduction in the country would not only create an environment of social security, but would facilitate economic security as well. Availability of a strong legal redressal and enforcement mechanism has to thus make a contribution to robust economic developments.

556. Thus two essential purposes which are intended to be served by providing access to justice are:

> "(a) to ensure that every person is able to invoke legal processes for redressal, irrespective of social or economic status or other incapacity; and

(b) that every person should receive a just and fair treatment within the legal system." (Ref: *S. Muralidhar, Law, Poverty and Legal Aid: Access to Criminal Justice, Lexis Nexis (2004), p.1)*

International treaties and conventions

557. We may briefly note also the position of the right of access to justice in international covenants and treaties. The Universal Declaration of Human Rights ('UDHR') adopted by the United Nations General Assembly on 10th December, 1948 articulates and recognizes the right of access to justice in the following provisions:

> "Article 6: Everyone has the right to recognition everywhere as a person before the law.
>
> Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.
> All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
>
> Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.
>
> Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 21:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country…"

558. The United Nations International Covenant on Civil and Political Rights ('ICCPR'), which came into force on 23rd March, 1976, provides thus:

"Article 2(3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

559. Similar to Article 7 of the UDHR, under Article 14.1 of the International Covenant on Civil and Political Rights, it is stated

that:-

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…"

It is noteworthy that India acceded to the International Covenant on Civil and Political Rights on 10th April, 1979.

560. Even though the European Convention does not expressly contain such a right, however, the European Court of Human Rights has held that it would be 'inconceivable' that Article 6 thereof should not first protect that which alone makes it possible to benefit from such guarantees, that is, a right to access to the courts, subject to reasonable limits is the doorway through which the remaining rights of criminal procedure may be invoked. (Ref: ***Golder v. UK 1975 (1) EHRR 524; Airey v. Ireland (1979) 2 EHRR 305***).

The position in India: pre and post Constitution, and statutory provisions

561. Historically, it is considered that the right of "access to justice" has roots in the origin of the common law. In the 12th century in England during the reign of Henry II, the King agreed for establishing a system of writs that would enable the litigants of all classes to avail themselves of the King's justice giving root to

the concept of "access to justice and rule of law". The abuses of 'King's justice' by King John promoted the rebellion in 1215 which led to articulation of the concept of "access to justice" which has roots in the origins of the common law, as manifested in the Magna Carta. Even the Law Commission of India (189th Report on the Revision of the Court Fee Structure) characterizes the legal entitlement to access courts articulated in the Magna Carta as a 'right' that inheres in individuals rather than just a general preference or ideal.

562. The 189th Report (February, 2004) of the Law Commission (pages 11 and 12) has noted following three clauses of the Magna Carta which are the foundation of the basic right of access to the courts:

> "No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in anyway ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. To no man will we sell, to no one will we deny or delay right to justice.
>
> Moreover, all those aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all our kingdom, as well clergy as laymen, as far as pertains to them towards their men.
>
> Wherefore, it is our will, and we firmly enjoin, that the English Church be free, and the men in our kingdom have and hold all the aforesaid liberties,

> rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all aspects and in all places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intention – Given under our hand – the above named and many others being witnesses – in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign."

563. The Indian judicial system, since the ancient period has been based on the concept of 'dharma' or rules of right conduct, as outlined in the *'Puranas'* and the *'Smritis'*. The King derived his powers from 'dharma' or the 'rule of law'. Emperor Ashoka of the Mauryan dynasty showed great concern for fairness in the dispensation of justice; in his opinion justice had to be seen to be done. This is manifested from the inscription/edict on the Pillars of Ashoka:

> "It is my desire that there should be uniformity in law and uniformity in sentencing. I even go this far, to grant a three day stay for those in prison who have been tried and sentenced to death. During this time their relatives can make appeals to have the prisoner's lives spared. If there is none to appeal on their behalf, the prisoners can give gifts in order to make merit for the next world, or observe fasts."

564. The citizens have always had access to the King for redressal of their disputes. During Akbar's reign, in the civil courts Akbar abolished laws that discriminated against non-Muslims.

565. The judgment seat of Vikramaditya and access to the King for accessing justice in the Ramayana are proverbial.

566. It is important to note that there was no fee (or court fee) for accessing justice in the pre-British days.

567. The right of access to justice was non-derogable even in the pre-independence era (Ref: the decision of the Bombay High Court in ***AIR 1926 Bom 551, Re: Llewelyn Evans*** and ***AIR 1943 Nagpur 26, P.K. Tare v. Emperor)***. In the latter case, Justice Vivian Bose explained that the right to move the High Court remained intact despite detention under the Defence of India Act, 1939 and that "*an attempt to keep the applicants away from this court under the guise of these rules, is an abuse of power and warrants intervention*". The importance of the right of any person to apply to the court and the demand that he be dealt with according to law was emphasized.

The Constitution of India and relevant legislations

568. The right of access to justice embodied in the international covenants noticed above has been incorporated in several constitutional and statutory provisions. Access to justice has been made an enforceable right in India.

569. In 1947, the charter of the United Nations was adopted with

India as one of its founding members. This charter reaffirmed the worth of the human person and the equal rights of men and women. The General Assembly of the UN adopted the Universal Declaration of Human Rights (UDHR) on the 10th of December, 1948.

570. At around this time, the Constituent Assembly of India, under the chairmanship of Dr. B.R. Ambedkar began its deliberations about the basic objectives of new India to be incorporated into the Constitution of India and the modalities of achieving the same.

571. The Constituent Assembly of India adopted the Constitution on 26th November, 1949 while India was declared a republic on 26th of January, 1950. The Indian Constitution is the largest in the world and unequivocally imbibes the spirit of the Universal Declaration which is fully reflected in its Preamble, and contains elaborate provisions concerning the fundamental rights conferred on the citizens of the country.

572. The Constitution of India unequivocally acknowledges the injustices rooted in the social system inherited by free India. It includes specific protections for disadvantaged social groups in the economic system (such as abolition of untouchability, castes, forced labour, child labour).

573. Pandit Jawahar Lal Nehru, India's first Prime Minister embodied the essence of the four core objects of the Indian

Constitution i.e. the goals of justice, liberty, equality and fraternity of the Constitution in his following words to the Constituent Assembly:

> *"The first task of this Assembly is to free India through a new Constitution, to feed the starving people and to clothe the naked masses and to give every Indian the fullest."*

574. The Constitution stridently acknowledges and reinforces the statement that equality in terms of opportunities or formal equality before the law may be impactless amongst those who are socially, educationally or economically deprived. We consider the impact of such deprivation on the right to access justice of these persons a little later. For the time being, suffice it to state that the Constitution sets forth a programme for reconstruction and transformation of the medieval hierarchical society, re-enforcing the transformation of inequalities into an egalitarian society based on equal opportunities regardless of one's caste, race or religion. The Constitution also envisages a pro-active role for the State in this regard with the objective of statutorily transforming the unequal social order and removing existing discrimination.

575. In ***(2000) 1 SCC 168 Indira Sawhney v. Union of India***, a nine Judge Bench of the Supreme Court held that Article 14 enjoins the State to take into account de facto inequalities existent in society and to take affirmative action by either giving preference to the socially and economically disadvantaged persons or by

inflicting handicaps on those more advantageously placed, in order to bring real equality. The court stated that such affirmative action, though apparently discriminatory, is calculated to produce equality on the broader basis of eliminating de facto inequalities and placing the weaker sections of the community at par with the more powerful sections of the society so that each member of the community may enjoy equal opportunity of using natural endowments to the full.

576. Before us, it is urged that the enhancement of the court fee impacts constitutional rights of the citizens under Articles 16, 21 and 32 of the Constitution placed in Part III of the Constitution of India. We have already dealt with the violation of Article 14 of the Constitution. The other constitutional provisions are set out in extenso hereafter:

"Right to Equality

> **16. Equality of opportunity in matters of public employment.-** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
>
> xxx xxx xxx
>
> **21. Protection of life and personal liberty.-** No

> person shall be deprived of his life or personal liberty except according to procedure established by law.

577. Apart from the inalienable fundamental rights, the Constituent Assembly maintained the spirit of access to justice by providing for Article 32, in Part III of the Constitution, a guaranteed right to legal remedy. The right under Article 32 to petition the Supreme Court for enforcement and protection of fundamental rights is thus itself a fundamental right, and has been described in a plethora of judgments as being "absolutely absolute".

578. We may advert to an important legislation motivated by our international obligations. The **Protection of Human Rights Act, 1993** was promulgated by the President of India on 28th September, 1993 to provide for the constitution of National and State Human Rights Commissions for better protection of human rights. These measures were undertaken to discharge Indian obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both covenants to which India is a party.

579. The expression "human rights" is defined under Section 2(1)(d) of the Protection of Human Rights Act, 1993 in the following terms:-

> "'Human rights' means the rights relating to life, liberty, equality and dignity of the individual

guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

580. The National Commission for Review into the working of Constitution has recommended that the right to "access to justice" be incorporated expressly as a fundamental right (Article 30A) in the Constitution. This Commission has relied on the following Article 34 in the South African Constitution of 1996:-

> "Article 34: Access to Courts and Tribunals and Speedy Justice
>
> (1) Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or tribunal or forum or where appropriate, another independent and impartial Court, tribunal or forum.
>
> (2) The right to access to Courts shall be deemed to include the right to reasonably speedy and effective justice in all matters before the Courts, tribunals or other forum and the State shall take all reasonable steps to achieve that object."

581. The existence of the right to access to justice thus can be sourced into the constitutional rights and its legal status depends on its source. We find that this is further elaborated in the 189th Law Commission Report which has noted the reiteration by Laws LJ. in ***(2002) 3 WLR 344, International Transport Roth GmbH v. Secretary of State for the Home Department*** when he pointed out

that after coming into force the Human Rights Act, 1988 (w.e.f. 2.10.2000), the British system which was once based on the principle of parliamentary supremacy, has now moved on to the system of constitutional supremacy. In this regard, reference was made to the pronouncement of the Canadian Supreme Court reported at (***1998) 1 SCR 493, Vriend v. Alberta*** rendered after the Canadian Charter of Rights and Freedoms was introduced and Canada had moved from Parliamentary supremacy to constitutional supremacy.

582. We also find emphasised in the conclusions of the Law Commission of India in its 189th Report on Revision of Court Fee Structure that "*the concept of access to justice, can be understood as constituting an integral part of the constitutional and common law jurisdictions, and is considered sacrosanct and attempts to lightly interfere with the right are generally viewed strictly*".

583. To sum up access to justice is an essential part of the fundamental rights under Articles 14, 16 and 21 of the Constitution of India and therefore, a fundamental right. It is equally well settled that access to justice is a basic human right.

"Access to justice" may not be synonymous with "access to courts"

584. It is essential at this juncture to consider a very important facet of access to justice which we find has been completely overlooked. 'Access to justice' cannot be understood as being

synonymous to ‘access to courts’ or only to ‘free legal aid’. Our experience in the courts has shown that apart from economic, technical and geographical barriers, there are several more basic and inherent barriers to access to justice.

585. The discussion about ensuring an environment of accessing justice presupposes that access to justice is synonymous with access to courts. Hence it has taken into its purview primarily availability of courts and free legal aid. Unfortunately, there are several other barriers for accessing justice.

586. Despite the constitutional and statutory recognition of the rights of the people and the protections afforded thereunder, the impact of economic deprivation, social subjugation and emotional separation over centuries has led to a vicious circle so far as the poor and marginalized are concerned. Even within the poor and socially excluded, there is a hierarchy. Statistics show that, more than sixty years after independence, the persons who are of the disadvantaged castes fall at the very bottom of the poorest of the poor.

587. The dynamics of the impoverished and socially excluded are not only economic but, first and foremost, very personal and internalized. It is important to understand these dynamics so as to understand the direct and inevitable facet of any additional impediment to their right to access to justice. Social scientists points out that the dynamics of such impoverishment is not only

about ‘having’ nothing but about ‘being’ nothing. The experiences then produce a ‘trap effect’ which is independent of ‘having nothing’.

588. Even amongst the marginalized, the interface of the severely imbalanced social, economic and politically poor equations in caste, misogyny and patriarchy structures impacts one caste (for instance, a Dalit woman) in a manner which may be distinct from the experience of Dalit men, or women of the general castes. The social order recognizes neither their social nor economic contribution and strongly limits their choices and opportunities. Such marginalization places such person at the bottom in all development indicators. The result is that such marginalized groups (or individuals) are prevented from having any access to or control over assets and resources – the inevitable result is that they are then prevented from accessing justice. There is neither a right to dignity nor right to equality of such marginalized groups. They certainly are clueless about all the nuances of the right to life. Voiceless and subservient, such exploited persons have not even begun to dream of, let alone taken recourse to accessing justice. It cannot be denied that a very large percentage of such persons exists in Delhi as well.

589. The 189th Report of the Law Commission (at page 31) has also noted that there exists a large body of such persons who are not even conscious that they have any right, let alone of its violation arising from repression, governmental omissions or

excesses, administrative lethargy or arbitrariness, or the non-enforcement of beneficial legislation.

590. As noted above, Article 14 of the Constitution provides equality before the law irrespective of caste, creed or religion. Furthermore, Article 15 of the Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 provides equal opportunities in matters of public employment, Article 17 of the Constitution provides for abolition of untouchability, a vice which we have inherited from our caste-ridden past under which lower castes were considered untouchables.

591. In addition to the above, Article 23 of the Constitution confers the right against exploitation, prohibition of traffic in human beings and forced labour. Similarly Article 24 prohibits employment of children in factories etc. while Article 25 gives freedom of religion to the citizens including minorities. Article 29 of the Constitution protects the interest of minorities, while Article 350A and B of the Constitution, and provide facilities for instructions in mother tongue at primary stage and for appointment of a special officer for linguistic minorities by the President of India.

592. Various Acts were passed after the independence of India in order to uplift and assimilate the marginalized into the main stream. The Bonded Labour (Abolition) Act, 1976, the Child

Labour (Prohibition and Regulation) Act, 1986, Employment of Manual Scavengers and Constructions of Dry Latrines (Prohibition) Act, 1993, Provision of Panchayat (Extension to Scheduled Areas) Act, 1996 are few of the endeavours made by the legislature in the right direction.

593. Five years after the adoption of the Constitution, the Parliament passed the Untouchability (Offences) Act, 1955 which in 1976 was renamed the Protection of Civil Rights Act, 1976. After a lapse of two decades, the SC/ST (Prevention of Atrocities) Act, 1989 was passed recognizing punishable atrocities and creating special courts. It is, therefore, clear that the required legal protection is there but are the people for whom the said Acts, been enacted, getting the intended benefits and protections? And if denied, then do they access the justice system? It is here that we again come back to the question of access to justice.

594. Not very far back, in the pronouncement of the Supreme Court reported at ***(1986) 4 SCC 767, Bihar Legal Support Society v. Chief Justice of India*** it was observed thus:

> "The weaker sections of Indian humanity have been deprived of justice for long, long years: they have had **no access to justice on account of their poverty, ignorance and illiteracy**. They are not aware of the rights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights and they do not have the

material resources with which to enforce their social and economic entitlements and combat exploitation and injustice. **The majority of the people of our country are subjected to this denial of access to justice** and, overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings. This Court has always, therefore, regarded it as its duty to come to the rescue of these deprived and vulnerable sections of Indian humanity in order to help them realise their economic and social entitlements and to bring to an end their oppression and exploitation. **The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and the disadvantaged sections of the community**. This Court has always shown the greatest concern and anxiety for the welfare of the large masses of people in the country who are living a life of want and destitution, misery and suffering and has become a symbol of the hopes and aspirations of millions of people in the country. It is, therefore, not correct to say that this Court is not giving to the "small men" the same treatment as it is giving to the "big industrialists". In fact, the concern shown to the poor and the disadvantaged is much greater than that shown to the rich and the well-to-do because the latter can on account of their dominant social and economic position and large material resources, resist aggression on their rights where **the poor and the deprived just do not have the capacity or the will to resist and fight.**"

595. Recognition of this very hard reality in law is also stated by the Supreme Court of India in ***Guruvayur Devaswom Managing Committee and Anr.*** **v.** ***C.K. Rajan and Ors AIR 2004 SC 561.*** It was brought to the notice of the Supreme Court that the Courts exercising their power of judicial review found that the poorest of the poor, the depraved, the illiterate, the urban and rural unorganized labour sector, women, children, handicapped by ignorance, indigence and illiteracy and other down trodden have either no access to justice or had been denied justice, leading to the evolution of a new branch of proceedings known as 'Social Interest Litigation' or 'Public Interest Litigation' with a view to rendering complete justice to the aforementioned classes of persons. It expanded its wings in course of time. The courts in '*pro bono publico'* granted relief to the inmates of the prisons, provided legal aid, directed speedy trial, maintenance of human dignity and covered several other areas. It is recognition of the right of access to justice and the necessity of ensuring it which is recognized when the importance of public interest litigation has been emphasized by the Supreme Court in this decision in the following terms:

> "45. Pro bono publico constituted a significant State (sic) in the present day judicial system. They, however, provided the dockets with much greater responsibility for rendering the concept of justice available to the disadvantaged sections of the society. Public interest litigation has come to stay and its necessity cannot be overemphasized. The Courts evolved a jurisprudence of compassion. Procedural propriety was to move over giving place to

> substantive concerns of the deprivation of rights. The rule of locus standi was diluted. The Court in place of a disinterested and dispassionate adjudicator became active participant in the dispensation of justice."

596. Gideon Hausner, Former Attorney General of Israel in his book '*Justice in Jerusalem*' compiling the record of the Eichmann Trail and the German pogrom against the Jews and the rest of the world quotes a poignant lullaby composed at the Wilno Jewish ghetto:-

> "Hush, my baby, hush, be silent!
> Here the graves are seen;
> They were planted by the butchers,
> Still they lie and green.
>
> Hush, my child; don't cry, my treasure;
> Weeping is in vain,
> For the enemy will never
> Understand our pain.
>
> For the ocean has its limits,
> Prisons have their walls around,
> But our suffering and torment
> Have no limit and no bound."

This lament by a parent with regard to the atrocities on the Jewish people sums up the sufferings of a large number of disadvantaged people still suffering in this country as well as in this city. This lullaby has also been noted by Justice V.R. Krishna Iyer in the judgment reported at ***AIR 1981 SC 298 ABSK Sangh***

(Railways) v. Union of India.

597. A recent study on access to justice commissioned by the European Commission titled "*Study on Access to Justice and Legal Aid in the Mediterranean Partner Countries*," measured the level of access to courts on several grounds.

598. Any examination of the issue of impact of the court fee amendment on access to justice would be incomplete without consideration of gender implications thereof. A study was also conducted by the Government of Uganda while developing a justice, law and order sector wide reform programme. In this study, a balance sheet of 15 barriers and a comparison of the implications of the same to men and women was drawn up.

599. Amongst the several barriers identified, the two which deserve to be extracted for the purposes of highlighting the gender implications of limited access on account of restricted financial capacity are: (i) with respect to access to justice delivery agencies, it must be recalled that a majority of women will have less time and money than men to pursue access; (ii) with respect to treatment in the justice delivery system, it must be recalled that women are more likely to be illiterate, less likely to have access to financial resources, and are often relegated to the domestic sphere which limits their interaction with, and comfort in, public institutions. We have discussed earlier the direct adverse effect of imposition of high court fee on the accessibility of the courts to women seeking

enforcement of basic rights as maintenance, residence etc.

600. The above discussion elucidates the difficult reality that for many in this country, access to justice may not be synonymous with access to courts. The position in Delhi would not be very different as it is the destination for lakhs from all over the country who make their way to the capital looking for opportunity and relief from social and economic subjugation and misery.

601. For a large percentage of the Delhi population as well there is really no understanding of their legal rights, or, if aware of their rights, are unable to understand the violations thereof, or to approach the court for enforcement for a host of reasons. To this large group, access to justice is not synonymous.

Court fee: an entry point financial barrier to access to justice?

602. It is now necessary to examine the impact of imposition of court fee. The court fee prescription undisputedly provides an entry point barrier to access to justice. Once again, international sources are instructive. For example, the United States Institute of Peace Report titled *Guiding Principles for Stablization and Reconstruction* defines financial access as a necessary condition of access to justice. The report goes to emphasize:

> *"Access to justice is more than improving an individual's access to courts or guaranteeing legal representatives. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for*

grievances in compliance with human rights standards. There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight ... Courthouses and police stations may only exist in urban, populated areas, leaving the rest of the country without proper access to the formal justice system. Bring judges, prosecutors, defense counsel, court administrative staff (including translators), police, and corrections officials, as well as logistical/security support and public information capacity to areas where the justice system has ceased to function. While mobile courts may be needed in the emergency phase to deal with the most acute needs, they can also provide a long-term solution to endemic access to justice challenges. Efforts to build and staff courthouses and police posts outside of urban areas should also be undertaken to increase access to justice."

603. It advocates equal access in para 7.8.3 in the following terms:

"In societies emerging from conflict, large segments of the population may not have had access justice. Equal access involves extending the reach of formal rule of law institutions to the population by removing barriers to their use. Strengthening access also involves engaging the informal sector to enhance its reach, effectiveness, and compliance with human

rights standards."

(Emphasis by us)

604. The Supreme Court of the United States, for example, has held that court fees that limit access to those judicial proceedings that are necessary to resolve disputes are unlawful. In ***Boddie v. Connecticut, 401 US 371 (1971)***, the Supreme Court of the United States considered a challenge by welfare recipients to certain state procedures, including the payment of court fees, that allegedly limited the plaintiffs' access to the courts for divorce. The plaintiffs were unable to commence divorce actions simply because they could not afford the court fees of approximately $60 (roughly 3600 INR). Mr. Justice Harlan, writing for the Court, emphasized that:

> "Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this court voiced the doctrine that 'wherever one is assailed in his person or his property, there he may defend.'"

The Court went on to hold:

> "We conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their

> marriages, and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process."
>
> (Underlining by us)

605. On this aspect, in the 189th Report, the Law Commission writing in February, 2004 has placed reliance on the following famous extract of the speech of Justice Brennan of the US Supreme Court delivered to the Legal Aid Society of New York:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness."

606. The 189th Report also stresses as follows:

> "The right of access to justice is integral to the rule of law and administration of courts in accordance with the Constitution. It serves as the guiding principle in regard to any measure that affects the administration of justice whether civil or criminal. The socio-economic realities of our country have thus far impacted every measure of legal reform. It assumes even greater significance when it involves an element of economic and financial reform."

607. The above discussion amply emphasises the essentiality of justice dispensation system not only for dispute redressal but also for ameliorating the plight of those whom development has left behind, and are struggling to survive.

608. Emerging jurisprudence from the Canadian province of British Columbia departs from the strict approach of the US Supreme Court, which appears to protect poor persons from court fees they cannot afford only when their dispute cannot be resolved by non-judicial means.

609. We are noting these significant facts and jurisprudence as they exhibit the profile of the litigant in our courts and manifest the court's concern, in India and abroad, with the ability of all citizens to access courts and justice, their fundamental human right.

610. Dr. B.R. Ambedkar (our first Union Law Minister) as Chairperson of the Constituent Assembly reminded us that social justice is the soul of the Constitution of India when he had stated the following on the floor of the Constituent Assembly on the 25th of November, 1949:

> "*On the 26th January, 1950, we are going to enter upon into a life of contradictions.*
>
> *In politics we will have equality and in social and economic life we will have inequality.*
>
> *In politics we will be recognizing the principle of one man one vote and one vote one value.*

In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value.

How long shall we continue to deny equality in our social and economic life?

If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy which this Constituent Assembly has so laboriously built up."

611. These words reflect the visionary appeal of the Constitution-makers when it was made. But if we look at the abject poverty, the social structures still in place, the deprivation that marks the daily lives of millions of people in this country (and this city), these words were certainly prophetic. The practices in vogue, the violations of the fundamental rights, the violence that marks daily lives of many and the events of today, the inadequate protection and incomplete propagation of constitutional values in reality reflects that much more needs to be done. It manifests that the concerns voiced by Dr. Ambedkar may very well be a stark account of why society is what it is today. This hard reality reinforces the essentiality of a responsive and adequate judicial system, and the significance of meaningful access to justice, militating against enhancement of court fee, a recognized barrier to its access.

612. The 189th Law Commission Report has also referred to the statement made by V.R. Krishna Iyer, J. in the article titled "Appointments and Disappointments" published in "The Hindu" dated 10th October, 2003 that "*Access to justice is basic to human rights and Directive Principles of State Policy become ropes of sand, teasing illusion and promise of unreality, unless there is effective means for the common people to reach the Court, seek remedy and enjoy the fruits of law and justice. Undeniably, the most strategic office in the overall scheme of governance of the country is the judiciary*."

613. Some of the problems which have been articulated in several writings on access to justice in India include economic barriers, illiteracy and lack of awareness; ignorance of rights and legal remedies; fear/lack of trust in judicial institution; fear of reprisal/social ostracism; legal complexity and technicalities; psychological bars; lack of uniformity; delays in the legal system; lastly but most important, the circumstance that courts are the last resort for most people who first access resources closest to them that is their family, extended family, friend circles, social systems or groups and perhaps only thereafter, legal systems - after all else fails. This discussion is relevant to understand the Indian reality, which is the Delhi reality as well, that for several, any additional financial burden in the nature of enhanced court fee would completely shut out legal remedy for relief and redressal.

614. Given the above noted severe limitations faced by huge body

of Indian population, the requirement of payment of court fee for a claim to access adjudication is an insurmountable barrier at the very entry point of the court. Raising court fees to such an extent that not only the poor but the disadvantaged and marginalized (whether be it on account of caste, gender, disability, age, education or any other reason) can no longer access courts, rendering their several constitutional and human rights meaningless.

615. It is well settled that the level of access afforded to individuals, groups, and communities, can be evaluated on three standards:

(i) Physical access, including the geographic proximity of, as well as ease of entry afforded to, law enforcement agencies and more importantly, the courts;

(ii) Financial access, including the affordability of legal services and court processes;

(iii) Technical access, including the relative complexity of procedural requirements and legal language, the treatment public officials afford those attempting to access the justice system, and other practical obstacles that may stand in the way of those who wish to make proper use of the courts.

616. A dynamic relationship exists between these parameters and, they cannot be considered in isolation. For instance, if the cost of navigating the justice system is too high, physical or technical access to courts becomes irrelevant. Conversely, financial access

becomes irrelevant if users cannot reach courthouses or other physical structures in which justice is meted out. Likewise, a justice system that is too complex will deter prospective litigants, irrespective of the affordability of litigation or the accessibility of the physical structures that make up the justice system.

617. The instant case is concerned with financial barriers to access to the court system. In ***(2009) 13 SCC 729, Vishnu Dutt Sharma v. Daya Sapra***, the Supreme Court of India opined that "*any person may as of right have access to the courts of justice*." Moreover, in ***(2003) 6 SCC 230, Dwarka Prasad Agarwal v. B.D. Agarwal***, the Court also held that "*any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India*." Finally, in ***(2011) 8 SCC 568, Delhi Jal Board v. National Campaign For Dignity and Rights of Sewerage and Allied Workers***, the Supreme Court clarified that Article 39A of the Constitution of India requires the state to secure the just operation of the legal system "*on a basis of equal opportunity"* and to *"ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities*." It appears to be settled law, then, that access to courts, which would include financial access amongst others, is an essential part of the fundamental and constitutionally protected rights of the rights to access to justice and to equal treatment before the law.

618. Although the approach to the issue of court fees and its

impact on access to justice varies from jurisdiction to jurisdiction, courts throughout the common law world consistently note the potentially deleterious effect court fees may have on potential, especially indigent litigants.

619. While it is trite law that regard for public welfare is the highest law (*salus populi est suprema lex*), it is necessary to outline judicial standards by which this principle may be evaluated. In the context of access to justice, again international sources provide helpful guides to outline the basic content of the right to access.

620. American jurisprudence also clearly demonstrates that access to courts is a valued and protected right. In ***541 US 509 (2004), Tennessee v. Lane***, the Supreme Court of the United States had opportunity to consider the claim of two paraplegic claimants who relied on wheelchairs for mobility. They claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. One claimant, Lane, alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the court room. When Lane returned to the courthouse for a subsequent hearing, he refused to crawl again or to be carried by officers to the courtroom and was consequently arrested and jailed for failure to appear. The other claimant, Jones, was a certified court reporter and alleged that she has not been able to gain access to a number of county courthouses that were not accessible to the

disabled. As a result, she lost the opportunity to work and earn and to participate in the judicial process. In considering their claims, the US Supreme Court confirmed the right of physical access in a number of contexts, and asserted that these were constitutionally guaranteed and subject "to more searching judicial review." Thus, in the US context, physical access includes access of disabled persons to the courts, the right of a criminal defendant to be present "at all stages of the trial where his absence might frustrate the fairness of the proceedings," the right of civil litigants to a "meaningful opportunity to be heard" by removing obstacles to their participation in judicial proceedings, and the right of access of members of the public to criminal proceedings.

621. Some of the cases filed before the European Court of Human Rights also consider the contours of the right of access to courts. The source of the right is drawn from Article 6 of the European Convention of Human Rights which reads as follows:-

> **"ARTICLE 6**
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in

> the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

622. In the decision dated 21st February, 1975 reported at ***(1979-80) 1 EHRR 524, Golder v. United Kingdom,*** there was a serious disturbance in October 1969 in prison where the applicant was imprisoned. The next day, the applicant was tentatively identified by a prison officer as a participant in the incident, following which he was placed in segregation and given notice that disciplinary proceedings might be brought against him. The letters that he wrote to his Member of Parliament and a Chief Constable, about the incident were stopped by the prison governor. In November, the prison officer withdrew his allegation and the applicant was returned to his ordinary cell. The charges against the applicant were not proceeded with and a note to this effect was placed in his prison record which nevertheless carried entries about the incident. In March 1970, the applicant sought permission to consult a solicitor with a view to instituting libel proceedings against the prison officer. Before the European Commission of Human Rights, the applicant filed a complaint alleging breaches of Articles 6(1) and 8. The Court noted that in petitioning the Home Secretary for leave to consult a solicitor with a view to suing the official for libel, Golder was seeking to exculpate himself of the charge made against him by that prison officer on 25th October, 1969 and which had entailed for him unpleasant consequences, some of which still

subsisted by 20th March, 1970. Furthermore, the contemplated legal proceedings would have concerned an incident which was connected with prison life and had occurred while the applicant was imprisoned. The intended proceedings would have been directed against a member of the prison staff who had made the charge in the course of his duties and who was subject to the Home Secretary's authority.

623. In these circumstances, the Court held that Golder could justifiably wish to consult a solicitor with a view to instituting legal proceedings. It was not for the Home Secretary to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6(1). It was observed that the right of access constitutes an element which is inherent in the right stated by Article 6(1) and that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, the article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6(1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair

hearing.

624. It had been further observed that in civil matters, "*one can scarcely conceive of the rule of law without there being a possibility of having access to the courts*." In ***Golder***, the court was concerned with an impediment caused by the prohibition imposed by the Home Secretary. The court emphasized the importance of the accessibility of the court as a constituent of the rights guaranteed by Article 6 of the European Convention of Human Rights.

625. In yet another decision of the European Convention of Human Rights reported at ***(1979-80) 2 EHR 305, Airey v. Ireland***, the applicant Mrs. Airey was seeking judicial separation from a physically abusive husband. As she was unable to conclude a separation, the applicant wished to petition for a judicial separation in the Irish High Court but she lacked the means to employ the services of a lawyer and in the absence of legal aid, civil proceedings was not available to her. She was unable to conclude a separation agreement with her husband despite trying for eight years prior to 1972 for which reason she was compelled to seek redressal from the court. Since June 1972, she was endeavouring to obtain a decree of judicial separation on the grounds of Mr. Airey's alleged physical and mental cruelty to her and her children and she had consulted several solicitors in this connection. However, she had been unable, in the absence of legal aid and not being in a financial position to meet herself the costs involved, to

find a solicitor willing to act for her. In an application to the Commission, Mrs. Airey urged that these facts constituted violation of Article 6 (i.e. the right to fair hearing in the determination of civil rights) by reason of the fact that her right to access to court was effectively denied as she lacked the financial means, in the absence of legal aid to retain a solicitor.

626. Her complaint was investigated by the commission which reported that the approximate range of costs incurred by a legally represented petitioner was £500 - £700 in an uncontested action and £800 - £1,200 in a contested action, the exact amount depending on such factors as the number of witnesses and the complexity of the issues involved. In the case of a successful petition by a wife, the general rule is that the husband will be ordered to pay all costs reasonably and properly incurred by her, the precise figure being fixed by a Taxing Master. Legal aid was not available in Ireland for the purpose of seeking a judicial separation, nor indeed for any civil matters.

627. Mrs. Airey had made an application on 14th June, 1983 to the European Commissioner for Human Rights making various complaints in connection with the 1972 proceedings against her husband. So far as violation of Article 6(1) was concerned, it was urged that her rights under the said Article were violated by the reason that the right to access to court was effectively denied. The European Commission accepted her application on 7th July, 1977 so far as her complaint of inaccessibility of the remedy of judicial

separation was concerned. The government took up the plea that Mrs. Airey's claim was a civil action and that there was no prohibition to her access to the court inasmuch as it was open to her to appear in person therefore, there was no deliberate attempt by the State to impede access. The court considered the issue and held as follows:-

> "The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.
>
> The Court does not, moreover, share the Government's view as to the consequence of the Commission's opinion.
>
> It would be erroneous to generalize the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning "civil rights and obligations" or for everyone involved therein. In

> certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6(1); there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances.
>
> In addition, whilst Article 6(1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme - which Ireland now envisages in family law matters - constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1).
>
> The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".”

This case in fact obliterates the obligations which the State discharges so far as the distinction between civil and criminal rights of litigants in civil and criminal action were concerned.

628. Judgments have been passed under Article 6 of the ECHR wherein applicants have complained that their right to access

justice had been violated by state parties because of court fee levies, shed light on the issue before us. In this regard reference may be made to the decision of the European Court of Human rights in ***Kreuz v Poland (Application No.28249/95 decided on 19th June, 2001***. In this case, the applicant alleged a breach of Article 6.1 of the Convention stating that he had not enjoyed the right of access to a 'tribunal' because he had to desist from making his claim to a civil court on account of his inability to pay the excessively high court fees required under the Polish Law for lodging that claim. This contention of the applicant was decided by ECHR in the following terms:

> "60. The Court accordingly holds that the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 and 1 of the Convention.
>
> It reiterates, however, that the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access and had "a… hearing by a tribunal"…
>
> 66. Assessing the facts of the case as a whole and having regard to the prominent place held by the right to a court in a democratic society, the Court considers that the judicial authorities failed to secure a proper balance between, on the one hand, the interest of the

State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts.

The fee required from the applicant for proceeding with his action was excessive. It resulted in his desisting from his claim and in his case never being heard by a court. That, in the Court's opinion, impaired the very essence of his right of access.

67. For the above reasons, the Court concludes that the imposition of the court fees on the applicant constituted a disproportionate restriction on his right of access to a court. It accordingly finds that there has been a breach of Article 6.1 of the Convention."

The ***Kreuz's*** case involved the cost of the initial audience of the court for redressal of the applicant's grievance.

629. In ***Stankov v. Bulgaria (Application No.68490/01 decided on 12th July, 2007***, the ECHR was concerned with the recovery of court fee from the compensation awarded by the court for 'unlawful pre trial detention' and the 'unlawful bringing of charges'. The ECHR held as follows:

"20. By section 10 and 2 of the State Responsibility for Damage Act, in proceedings under the Act, no court fees or costs are payable by the plaintiff upon the submission of the claim. However, in circumstances where the claim is eventually wholly or partly dismissed, the court is to order the plaintiff to pay "the court fees and costs due"…

21. … where the plaintiff indicted too high an amount in the claim form, the court fees may exceed

> the sum awarded in damages, the overall financial award being in favour of the State despite the finding that the plaintiff suffered damage which called for compensation under the Act…
>
> 52. The requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible *per se* with Article 6 and 1 of the Convention. However, the amount of the fees assessed in the light of the particular circumstances of a given case is a material factor in determining whether or not a person enjoyed his right of access…
>
> 54. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective…"
>
> (Underlining by us)

The court was of the view that the applicant must have suffered distress in the court process and would have suffered damages on account of violation of Article 6 of the European Human Rights Convention.

630. In another case before the ECHR, ***Kijewska v. Poland (Application No.73002/01, decided on 6th December, 2007)*** the applicant was unable to pay court fees in the first and second attempt rectifying an entry in the local land register. Her request for exemption from court fees on the basis that she was at that time receiving benefits from the State did not allow her to put aside money towards court fees was denied by the court twice. On third

attempt, she did not ask to be exempted and paid the relevant court fees. The judicial authorities had refused to accept the petitioner's argument that she was unable to pay the court fee and they assessed her financial situation solely on the ground that she was a lawyer and for that reason could not be considered poor. Her yearly income was equated to the monthly income. The judicial authorities therefore concluded that the applicant had sufficient funds to pay the court fee in question.

The ECHR considered the matter and observed that the monthly amount being received by her from the State was her only asset and it did not seem reasonable to demand that she spend it on the payment of court fees rather than on her basic living needs. It was further observed that domestic courts could have and should have considered the possibility of partially exempting the applicant from payment of the court fees due in the proceedings. The ECHR further considered the right to access to justice of the applicant and made the following observations:-

> "46. Under the circumstances and having regard to the importance of the right to a court in a democratic society, the Court considers that the judicial authorities failed to secure a proper balance between the interest of the State in collecting court fees on the one hand, and the interest of the applicant in pursuing her civil claim on the other.
>
> 47. For the above reasons, the Court concludes that the refusal to reduce the fee for lodging the applicant's claim constituted a disproportionate

> restriction on her right of access to a court. It accordingly finds that there has been a breach of Article 6 and 1 of the Convention."

It has therefore been held that the refusal to reduce the fee for lodging the applicant's claim constituted a disproportionate restriction on her right to access to a court and, therefore, there has been a breach of Article 6(1) of the Convention. The above discussion abundantly establishes that imposition of court fee adversely impacts the right of access to justice of a large population in Delhi. Its enhancement shall effectively shut the doors of legal redressal for violation or denial of the rights of this group.

Ensuring access to justice and impact of court fee

631. So far as enforcement of the right to access justice in India is concerned, a discussion of recognized State obligations on this issue is necessary. Certain constitutional provisions are relevant to this consideration. First, the Preamble and Article 38 mandate that the State must secure and protect as effectively as it may, a social order in which justice (social, economic and political) shall be available to its citizens. Article 39A was introduced into the Constitution in 1976 for the purpose of making this promise a reality. Reference is made to Article 38 as well. These constitutional provisions read as follows:

> "**38. State to secure a social order for the**

> **promotion of welfare of the people.**—(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
>
> (2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.
>
> **39A. – Equal Justice and Free Legal Aid**
>
> The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

632. 'Due process' was consciously disembodied from Article 21. However, Article 22 was incorporated which provided protection against arrest and detention in certain cases.

633. In ***AIR 1990 Cal*** 146***, United Bank of India v. Rashyan Udyog and Others***, the Calcutta High Court, has held as follows:

> "The principles enshrined in Art. 38 and 39A, like all other directive principles in Part IV of the Constitution, are, as declared in Art. 37 itself, "fundamental in the governance of the country" and

> the judiciary also…these principles as enshrined in Art. 38 and Art. 39A must also be taken to be fundamental in the administration of justice..."

634. The 189th Report of the Law Commission notes that the right to access to courts includes the right to legal aid and engaging counsel.

635. In ***(1980) 1 SCC 81, Hussainara Khatoon v. Home Secy.,State of Bihar***, the Supreme Court pointed out that Article 39A comprises the right to free legal services, and that this right is an inalienable element of "reasonable, fair and just" procedure and that the right to free legal services was implicit in the guarantee of Article 21. This pronouncement is recognition of the right to free legal services as an essential component of access to justice.

636. This position was reiterated by Bhagwati, J. in ***(1986) 2 SCC 401, Suk Das v. Union Territory of Arunachal Pradesh*** stating that:

> "5. …It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. …"

637. The court also established the linkage between Article 21 and the right to expeditious trial in ***Hussainara Khatoon v. State of***

Bihar, (supra). In the course of expressing its astonishment at the plight of thousands of accused languishing in the jails of Bihar for years on end without legal representation, the Court declared expeditious trial also as part of right to life. It would thus also be an important fact of access to justice. It was held that:

> "There can be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."

638. In a celebrated pronouncement authored by Justice V.R. Krishna Iyer reported at ***(1978) 3 SCC 544, M.H. Hoskot v. State of Maharashtra,*** it was declared that "*if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article 142, read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice…*" The court yet again reiterated the importance of ensuring access to justice in the real sense.

639. We may note the right to legal aid as an essential component of meaningful access to justice is now firmly entrenched in Section 12 of the Legal Services Authorities Act, 1987 which provides that legal aid shall be available both on the means test as well as the merits test. The above narration and developments only underline the concerns in this country to ensure access to justice to the

disadvantaged who are economically deprived as well. The numbers are not small and the challenge is certainly daunting.

640. The question which brooks an answer is that would not imposing court fees that restricts access to courts of the very persons targeted by the legal aid schemes be contradictory to the spirit, intendment and purpose of the Legal Services Authorities Act 1987? Availability of the statutory right to legal aid would thereby be rendered inconsequential.

641. The right to access justice is recognized as a basic human right which has to be in ensured to all litigants. It is equally well recognized that this right is not absolute, and that some limitations on the right to access courts may be permissible if they have a legitimate purpose and are proportional to the objectives sought to be achieved.

642. It is noteworthy that limits on access to courts including those imposed by court fees clearly disproportionately affect the right of the poor to access justice vis-a-vis the rights of those economically empowered to approach the courts.

643. The above facts, the recommendations of the Law Commission and the articulations by the Supreme Court reflect the considerations and concerns which must weigh with the executive while framing policies and the legislature while enacting legislation. The approach and objective can be no different, be it the legislature or the executive. Every action of the executive and

the legislature has to meet the standards and benchmarks constitutionally recognized as well as interpreted and expanded by the Supreme Court.

644. It is well settled that any barrier to access to the court must therefore ensure that it does not have the effect of unreasonably adversely impacting the constitutional right of access to justice of any person. Any action which adversely impacts constitutional rights, especially access to justice to and of all, would thus not be legally sustainable.

Administration of justice – a State responsibility

645. The constitutional scheme noted by us and the dicta from the Supreme Court underlines the responsibility of the State to maintain a system for the administration of justice in order to make practical the principle of access to justice.

646. The three essential functions of the State are entrusted to the three organs of the State- the legislature, executive and judiciary and each one of them represents the authority of the State. It has been repeatedly held that administration of justice is a sovereign function of the State. Judicial service is also not considered as service in the sense of employment and all judges are discharging functions while exercising sovereign judicial power of the State. (Ref : ***AIR 2003 SC 4303, Nawal Singh v. State of U.P. and (1978)2 SCC 213, Bangalore Water Supply and Sewerage Board v. A. Rajappa)***

647. In the 114th Report on the "Gram Nyayalaya" (1986), the Law Commission had reiterated that it was the fundamental duty of every government to provide a mechanism for dispute resolution and had observed as follows:-

> "**It is the fundamental obligation of every centralized governmental administration to provide for mechanism for resolution of disputes arising within their jurisdiction**. No civilized government can escape this responsibility. No government can afford to have their citizens perpetually engaged in finding solution to their disputes by an unending process which may be simultaneously costly and open ended. **This fundamental duty cannot be disowned under the pretext of non-availability of requisite finance**."

648. In making this point, the Commission is also supported by the Supreme Court of USA which has also held that "*ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts*" [***Tennesse v. Lane*** 541 US 509]. The above discussion would show that in American jurisprudence, the right of access is not only well established in law, but also places certain positive obligations on the state. These include: (i) the duty to waive filing fees in certain family-law and criminal cases; (ii) the duty to provide transcripts to criminal defendants seeking review of their convictions; (iii) the duty to provide counsel to certain criminal defendants; and (iv) the obligation to accommodate

persons with disabilities in the courtroom. Based on the foregoing, American jurisprudence supports the existence of a positive duty on the state to guarantee access to the courts, and especially with respect to those individuals who may face systemic barriers to entry (including financial), as in the instant case.

649. With respect to the State's positive obligation to provide a system for the administration of justice and an appropriate court fee regime, in para 42, Chapter 22, the 14th Report of the Law Commission in 1958 noted that:

> "(1) It is one of the **primary duties** of the **State** to **provide the machinery for the administration of justice and on principle it is not proper for the state to charge fees from suitors in courts.**
>
> (2) Even if court fees are charged, the revenue derived from them should not exceed the cost of the administration of civil justice.
>
> (3) The making of a profit by the State from the administration of justice is not justified.
>
> (4) Steps should be taken to reduce court fees so that the revenue from it is sufficient to cover the cost of the civil judicial establishment. Principles analogous to those applied in England should be applied to measure the cost of such establishment. The salaries of judicial officers should be a charge on the general tax-payer.
>
> (5) There should be a broad measure of equality in the scales of court fees all over the country. There should also be a fixed maximum to the fee chargeable.

(6) The rates of court fees on petitions under Articles 32 and 226 of the Constitution should be very low if not nominal.

(7) The fees which are now levied at various stages such as the stamp to be affixed on certified copies and exhibits and the like should be abolished.

(8) When a case is disposed of ex parte or is compromised before the actual hearing, half the court fee should be refunded to the plaintiff.

(9) The court fee payable in an appeal should be half the amount levied in the trial court."

650. It is necessary to note the significant general observations made by the Supreme Court in ***(1996) 1 SCC 345, Secretary of Govt. of Madras & Anr. v. P.R. Sriramulu***, which the respondents were bound to have considered. The Supreme Court had observed as follows:

"Before parting with these matters, we me may point out that it could not be disputed ***that the administration of justice is a service which the State is under an obligation to render to its subject***. There can be no two opinions that the amount raised from the suitors by way of way of fee should not normally exceed the cost of the administration of justice because possibly there could be no justification with the State to enrich itself from high court fees of to secure revenue for general administration. The total receipts from the Court fees should be such as by and large can cover the cost of administration of justice. There should also be some measure of uniformity in

> the scales of Court fees throughout the country as there appears to be a vast difference in the scales of court fees in various States of the country. The feasibility of a fixed maximum chargeable fee also deserves serious consideration." ***(para 22)***

651. With regard to the propounded financial constraints to ensure fundamental rights to citizens which include access to justice as part of right to life; right to education etc., in paras 144 and 145 of ***(2012) 6 SCC 502 Brij Mohan Lal v. Union of India,*** the Supreme Court reiterated the view taken in ***(2008) 6 SCC 1 Asoka Kumar Thakur v. Union of India*** observing as follows:-

> "144. It is in this context that this Court, in Ashoka Kumar Thakur v. Union of India & Ors. (2008) 6 SCC 1, while dealing with Right to Education in terms of Article 21A of the Constitution, held that **financial constraints upon the State cannot be a ground to deny fundamental rights to citizens.**
>
> 145. On a proper examination of the above principles, it can be stated without hesitation that **wherever the right which is being affected is a basic or a fundamental right, the State cannot be permitted to advance an argument of financial constraints in such matters.** The policy of the State has to be in the larger public interest and free from arbitrariness. Adhocism and uncertainty are the twin factors which are bound to adversely affect any State policy and its results. The State cannot, in an ad hoc manner, create new systems while simultaneously giving up or demolishing the existing systems when the latter have even statistically shown achievement of results."

After a detailed consideration, the following directions were issued by the court:-

> "207.8. We hereby direct that it shall be for the Central Government to provide funds for carrying out the directions contained in this judgment and, if necessary, by re allocation of funds already allocated under the 13th Finance Commission for Judiciary. We further direct that for creation of additional 10 per cent posts of the existing cadre, the burden shall be equally shared by the Centre and the State Governments & funds be provided without any undue delay so that the courts can be established as per the schedule directed in this judgment."
>
> (Emphasis by us)

652. In the judgment reported at ***(2002) 4 SCC 247, All India Judges Association v. Union of India***, the Supreme Court reiterated the position that administration of justice is the responsibility of State. So far as any increase in expenditure was concerned, the States would mobilise the resources. In para 23 the Supreme Court stated that whenever the State government will approach the Central government or Planning Commission for more funds, such request shall be considered favourably. The observations of the court usefully deserve to be extracted and read as follows:

> "23. It has not been disputed that at present the entire expense on the administration of justice in the States is incurred by the respective States. It is their responsibility and they discharge the same. Logically, if there is to be any increase in the expenditure on the

judiciary, then it would be for the States to mobilise the resources in such a way whereby they can meet the expenditure on the judiciary for discharging their constitutional obligations. Merely because there is an increase in the financial burden as a result of the Setty Commission Report being accepted, can be no ground for fastening liability on the Union of India when none exists at present. Accordingly, disagreeing on this point with Justice Setty Commission recommendations, we direct that the entire expenditure on account of the recommendations of the Justice Setty Commission, as accepted, be borne by the respective States. It is for the States to increase the court fee or to approach the Finance Commission or the Union of India for more allocation of funds. They can also mobilise their resources in order to meet the financial obligation. If such a need arises and the States approach the Finance Commission or the Union of India for allocation of more funds, we have no doubt that such a request shall be favourably considered."

(Emphasis supplied)

653. The manner of giving grants by the Central government has been criticized by the **National Commission to Review the Working of Constitution** ('NCRWC' hereafter). In its Consultation Paper on **"Financial Autonomy of the Indian Judiciary"**, in paras 9.15.1 to 9.15.2, the NCRWC has stated as follows:-

"…There is no exclusive grant by the Centre for Court expenditure. All that we have is an insignificant 'Centrally Sponsored Scheme' for Courts prepared by the Planning Commission which allots some monies

for each State on population basis.

xxx

Further, the present scheme has become nothing but an eye wash for it requires the States to provide a matching grant, or else the central grants lapses. Most States are not able to provide the matching grants and the result is that the central grant lapses. To put it bluntly, **the so called inclusion of Judiciary as a plan subject is no inclusion at all as it is totally unrealistic, unplanned and unrelated to the scenario at the grass root level and also at the level of appellate and superior courts.**"

(Emphasis by us)

654. We have drawn these references from the 189th Report of the Law Commission of India on the Revision of Court Fees Structure (February, 2004) which also notes that the NCRWC in its report in volume I at para 7.6.1 has further stated thus:-

> **"Judicial administration in the country suffers from deficiencies due to lack of proper planning and adequate financial support for establishing more courts and providing them with adequate infrastructure. For several decades the courts have not been provided with any funds under the five year plans nor has the Finance Commission been making any separate provision to serve the financial needs of the courts."**
>
> (Emphasis supplied)

655. So far as the need for providing financial support to the

judiciary is concerned, in its report in para 7.8.2, the NCRWC has also emphasized the need for provision of financial support by the Central government in the administration of justice in the following terms:-

> "Government of India should not throw the entire burden of establishing the subordinate Courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure on subordinate Courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demand of the State judiciary in each of the States."

656. In support of the above proposition, our attention has been drawn to the recent pronouncement of the Supreme Court reported at ***(2012) 6 SCC 502, Brij Mohan Lal v. Union of India & Ors.*** In this writ petition, the court was concerned with creation of fast track courts ('FTC's). The observations of the court on the impact of government policy or decision on the independence of judiciary were noted in the following terms:-

> "105. The independence of the Indian Judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution. It has to be clearly understood that the State policies should neither defeat nor cause impediment in discharge of judicial functions. To

preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the judiciary and that too, effectively."

(underlining by us)

657. The court considered the objection on the refusal by the Union of India to finance the expenditure on fast track court scheme beyond a particular date and made the following observations:-

"130. The Union of India, of course, has stated that it would not, in any case, finance expenditure of the FTC Scheme beyond 30th March, 2011 but some of the States have resolved to continue the FTC Scheme upto 2012, 2013 and even 2016. A few States are even considering the continuation of the FTC Scheme as a permanent feature in their respective States. This, to a large extent, has created an anomaly in the administration of justice in the States and the entire country. Some of the States would continue with the FTC Scheme while others have been forced to discontinue or close it because of non-availability of funds.

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135. Normally, the Government exercises various controls over its instrumentalities and the organizations involved in the governance of the State. This would be through financial, administrative or managerial and functional controls. These parameters of control may be applied to determine whether or not a particular organization or a body is a "State" within the meaning of Article 12 of the Constitution. **We have noticed these aspects primarily with the**

purpose of demonstrating that judicial functions and judicial powers are one of the essential attributes of a sovereign State and on considerations of policy, the State transfers its judicial functions and powers, mainly to the Courts established by the Constitution, but that does not affect competence of the State to, by appropriate measures, transfer a part of its judicial functions or powers to the tribunals or other such bodies. This view is expressed by this Court, in *Associated Cements Companies Ltd. v. P.N. Sharma : AIR 1965 SC 1595*.

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137. **Article 21 of the Constitution of India takes in its sweep the right to expeditious and fair trial.** Even **Article 39-A** of the Constitution **recognizes the right of citizens to equal justice and free legal aid**. To put it simply, **it is the constitutional duty of the Government to provide the citizens of the country with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive and fair trial. The plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens**."

(Emphasis by us)

658. In (**1994) 6 SCC 205, *N. Nagendra Rao & Co. Ltd. v. State of A.P.,*** the Supreme Court observed that in a welfare State, the functions of the State are not only the defence of the country or administration of justice or maintenance of law and order but it

extends to regulating and controlling the activities of the people in almost every sphere – educational, commercial, social, economic and political etc. It further observed that demarcating the line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. The court observed that functions such as administration of justice, maintenance of law and order and repression of crime etc. which are primary and inalienable functions of a constitutional government, the State cannot claim any immunity.

659. The issue of the right of the citizens to equal justice as well as expeditious justice is an essential part of right to life under Article 21 as well as Article 39 A of the Constitution of India and this was considered by the Supreme Court in the judgment reported at ***(2012) 6 SCC 502 Brij Mohan Lal v. Union of India*****.** Principles provided in prior judgments on the issue of responsibility of the state to set up court infrastructure and facilities, the directions in previous judgments were reiterated as well. Para 185, 186 and 189 of this judgment may be considered in extenso and reads as follows:-

> "185. In ***Hussainara Khatoon (4) v. State of Bihar [(1980) 1 SCC 98 : 1980 SCC (Cri) 40]*** this Court held that: (SCC pp. 107-08, para 10)
>
> > "10. … it is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the

> fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial."

186. This Court in ***Sheela Barse (2) v. Union of India [(1986) 3 SCC 632 : 1986 SCC (Cri) 352]*** , while expressing its anguish over mounting arrears of criminal cases, particularly in relation to retarded, abandoned or destitute children who were facing trial and lodged in protection homes for years, issued various directions and held as under: (SCC p. 635, para 3)

> "3. … We are, therefore, firmly of the view that every State Government must take necessary measures for the purpose of setting up adequate number of courts, appointing requisite number of judges and providing them the necessary facilities. It is also necessary to set up an institute or academy for training of Judicial Officers so that their efficiency may be improved and they may be able to regulate and control the flow of cases in their respective courts. The problem of arrears of criminal cases in the Courts of Magistrates and Additional Sessions Judges has assumed rather disturbing proportions and it is a matter of grave urgency to which no State Government can afford to be oblivious. But, here, we are not concerned with the question of speedy trial for an accused who is not a

> child below the age of 16 years. That is a question which may have to be considered in some other case where this Court may be called upon to examine as to what is reasonable length of time for a trial beyond which the court would regard the right to speedy trial as violated."
>
> 189. Keeping in view its constitutional duty, the constitutional rights of citizens of this country at large and with reference to the facts of a given case, this Court may be duty-bound to amplify and extend the arm of justice in accordance with the principle *est boni judicis ampliare justiciam non-jurisdictionem*. The argument that matters of policy are, as a rule, beyond the power of judicial review has to be dispelled in light of the consistent view of this Court. This Court would be required to take unto itself the task of issuing appropriate directions to ensure that the rule of law prevails and the constitutional goals are not defeated by inaction either when the law requires action or when the policy in question is so arbitrary that it defeats the larger public interest."

660. Reference may usefully be made to the pronouncement of the Supreme Court reported at (***1993) 4 SCC 288, All India Judges Association (I) v. Union of India*** wherein the court was considering conditions of service of the subordinate judiciary. The Supreme Court referred to the 14th Report (1958) of the Law Commission of India wherein the Commission had noted that though we have been pouring money into a number of activities, the administration of justice has not seemed to be of enough

importance to deserve more financial assistance. On the contrary, in a number of States not only had the administration of justice been starved so as to affect its efficiency, but it has also been made to yield revenue to the State. The Supreme Court also noticed the arguments on behalf of the Government with regard to inability to bear additional financial burden to comply with the directions and observed thus:-

> "16. The contention with regard to the financial burden likely to be imposed by the directions in question, is equally misconceived. Firstly, the courts do from time to time hand down decisions which have financial implications and the Government is obligated to loosen its purse recurrently pursuant to such decisions. Secondly, when the duties are obligatory, no grievance can be heard that they cast financial burden. Thirdly, compared to the other plan and non-plan expenditure, we find that the financial burden caused on account of the said directions is negligible. We should have thought that such plea was not raised to resist the discharge of the mandatory duties. The contention that the resources of all the States are not uniform has also to be rejected for the same reasons. The directions prescribe the minimum necessary service conditions and facilities for the proper administration of justice. We believe that the quality of justice administered and the calibre of the persons appointed to administer it are not of different grades in different States. Such contentions are ill-suited to the issues involved in the present case."

661. The Constitution of India and Supreme Court by judicial

pronouncements have thus unequivocally declared the obligation of State to provide an arbitrarily and unreasonably effective and adequate administration of justice system. This constitutional responsibility cannot be diverted to the consumers of justice.

Differing obligations of the State to provide Civil and Criminal Justice.

662. This discussion shall be incomplete without noting the distinction which is drawn between the obligations of the state to provide for a civil and a criminal justice administration system. Mr. Krishnamani, learned Senior counsel and Mr. Amit Khemka, learned counsel for the petitioners have relied extensively on the reports of Law Commission to emphasise the constitutional duty of the state in this regard.

663. So far as criminal justice dispensation is concerned, the opinion and recommendations of the Law Commission are unequivocal. In the 14th Report of the Law Commission, the Law Commission had recommended that the cost of administration of public justice (criminal justice) should be borne entirely by the state. In para 5.1 of the 127th Report, the Law Commission also stated that it is the duty and obligation of the State to set up courts for administration of criminal justice and that the State must pay the entire cost of administration of criminal justice.

664. The Law Commission has also clarified the differing

obligations of the State in the context of the civil and the criminal justice system. Regarding the obligation of the State in the administration of criminal justice, the Commission has noted:

> "It is the State which must ensure internal peace. It is part of its duty to adopt regulatory measures and it is equally part of its duty to set up forum for determining whether a violation of regulatory measures has or has not taken place and a punishment need or need not be imposed. This is the obligatory duty of the State as part of its sovereign functions. This can be broadly comprehended in the expression 'administration of criminal justice.' Ordinarily this being the part of the sovereign functions of the State, no fee can be levied for performing the same and also because the system does not render any service to the litigant." (128th Report of 1988, 'Cost of Litigation' at para 3.11)

665. In its 189th Report of 2004 the Law Commission at page 65 writes that:

> "Just as the State has to maintain a police force to maintain law and order within the country and for which no special tax or fee is contemplated, the position with regard to the duty of the State to provide a system for 'administration of justice' is no different."

666. The 189th Report on page 71 lays emphasis that since criminal justice is a sovereign function therefore no court fee is payable. The 189th Law Commission noted:

> "Administration of justice has two broad wings: (1) Civil Justice and (2) Criminal Justice. The Law Commission in its 127th Report on 'Resource Allocation for Infrastructural Service in Judicial Administration' (1988) discussed distinction between civil and criminal justice system. The Commission observed at para 5.1 as follows:
>
> > "The distinguishing feature between the civil justice system and criminal justice system lies in the fact that civil justice system provides fora for resolution of disputes between individuals, between individuals and the State, and even between the State and the States where a party complains of wrong being done to it and seeks redress. Administration of criminal justice system partakes the character of a regulatory mechanism of the society whereby the State enforces discipline in the society by providing fora for investigation of crime and punishment."

667. It was thus categorically stated that administration of criminal justice is the obligatory duty of the State as part of its sovereign functions and that no fee can be levied for performing the same and also because the system does not render any service to the litigants.

668. Regarding the obligation of the State in the <u>administration of civil justice</u>, the Law Commission had further observed: (128th Report (1988), para 3.12)

> "When it comes to **civil justice**, the approach has to undergo change. Civil disputes include disputes

between an individual and individual, between individual and groups of individuals, between group of individuals on one hand and group of individuals on the other hand and between individuals and group of individuals on one hand and State on the other.…These disputes have to be resolved because a continuous simmering dispute is not conducive to growth and development of society. However, when the disputes are between two individuals, say an employer and an employee, a husband and a wife, or between members of the same family, it is open to them to choose their own forum to get the dispute resolved. An arbitrator appointed by the parties for resolution of dispute partakes the character of the court because parties agree to treat its decision binding. The costs of such arbitrator has to be met by the parties who agree to refer the disputes to arbitrator. The arbitrator renders service to the disputes and charges fees. The position of the State [in civil disputes] is identical to that of an arbitrator. All parties cannot go continuously in search of an arbitrator. Parties to a dispute may not agree to go for arbitration. The State, therefore, sets up courts for administration of civil justice which term will comprehend all disputes other than those comprehended in administration of criminal justice. The court would be a readily accessible forum for a party complaining of violation of his right or a threatened invasion of his right or denial of his right and he may approach the court and seek redress of his right grievance. The court enjoys the judicial power of the State and can force the attendance of the other side to the dispute and adjudicate the dispute. Nonetheless, the court renders service. And to the extent this is service, fees, for service is chargeable." (128th Report at para 3.12)

(Emphasis by us)

The 189th Law Commission however notes specifically that collection of court fees cannot impede access to civil justice.

669. So far as Delhi is concerned, the demarcation between courts dealing with civil matters and criminal matters is absolute and inviolable. There is no inter-mingling or mixing of the two jurisdictions in allocation of work between Civil Judges and Magistrates. This demarcation is largely maintained even in the roster allocation in the High Court. Therefore, the reasons which weighed with the Supreme Court in the case reported at (***1996) 1 SCC 345, Secretary to Government of Madras v. P.R. Sriramulu*** in rejecting the challenge to the court fee enactment on the ground that the expenditure which had been considered for increasing the court fee included the costs of the criminal jurisdiction system, would have no application to the factual situation in Delhi. As a result of the clear demarcation, while evaluating the expenditure incurred by the State on the justice administration system in Delhi, the State can and has to separately account for the expenditure incurred on the criminal justice system and that incurred on the civil justice system.

670. It is also noteworthy that the respondents have not informed us of the computation of the expenditure which is reflected in the tabulations placed before the court. The expenditure on the criminal justice system has to be excluded completely. Also other areas such as the expenditure on lawyers conducting the cases of the government etc., cannot be included in the cost of

administration of justice. For these reasons as well, the tabulation placed before the court does not reflect the distinction required to be maintained between the civil and criminal justice dispensation system while recovering costs of the service which may be provided. It is certainly not the disclosure required to be made in order to justify the need for enhancement of the court fee in accordance with law.

Can access to justice be for a price by way of court fee

671. Court fee is the 'price' a litigant is compelled to pay to seek adjudication from the court of his claim. Having noted the constitutional and statutory basis for establishing courts, it is necessary to examine whether access to justice can be for a price. If so, to what extent.

672. In ***2012 BCSC 748, Vilardell v. Dunham***, the Supreme Court of British Columbia also rejected the argument that court fees were necessary thus:

> "The state's anxious concern for trial efficiency is misplaced. Courts of inherent jurisdiction are equipped with all the tools they need to manage trials and to deter time wasting, and they use them. It is an **incursion upon judicial independence for the government to purport to influence the courts by manipulating fees**. In their focus on particular facts, on individual circumstances and on scrupulous adherence to due process, the courts will never satisfy the norms of efficiency expected by those who imagine them as part of a government run "justice

> system." However the "justice system" is conceived by government, it makes its deliveries to the courthouse door, and a different branch takes it from there."

The court thus concluded:

> ***"Hearing fees are a barrier to access imposed by one branch of government over another.*** For the reasons I have set out, this creates a **constitutionally untenable appearance of hierarchy.** The court cannot fulfil its democratic function as an independent and impartial arbiter between government and the individual, or between individuals, if the government limits those who may come before the court by means of financial or procedural deterrents."

673. Since as early as 1958 in its 14th Report of the Law Commission of India on the 'Reform of Judicial Administration', the Law Commission has consistently urged that: (i) the provision of a system for the administration of justice is the duty of the State; (ii) that increasing court fees deters litigants and therefore represents a barrier to access to justice; and (iii) that it is not appropriate to administer court fees for the purposes of generating revenue for the State.

674. The Law Commission further observed in para 8 at chapter 22 thus:

> **"A modern welfare State cannot with any**

> **justification sell the dispensation of justice at a price. Perhaps a small regulatory fee may be justified; but the present scales of court-fees are wholly indefensible."**

675. The Law Commission has consistently asserted that raising court fees has a dangerous deterrent effect on prospective litigants:

> "Equality in the administration of justice thus forms the basis of our Constitution. Such equality is the basis of all modern systems of jurisprudence and administration of justice. Equality before the law necessarily involves the concept that all the parties to a proceeding in which justice is sought must have an equal opportunity of access to the Court and of presenting their cases to the Court. But access to the Courts is by law made dependent upon the payment of court fees, and the assistance of skilled lawyers is in most cases necessary for the proper presentation of a party's case in a court of law. In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose." (14th Report, at pp. 587)

676. The Law Commission has thus consistently argued that the rate of court fees charged should depend only on the costs associated with administering justice. On this point, the Commission has been unequivocal: in view of the deleterious effect increased court fees have on access to justice, court fees

should not be used to generate revenue for the state.

677. In the past, in England, the principle governing the levy of court fee was that the salaries and pensions of judges were paid by the State out of public funds. It was being accepted that it is the obligation of the State to provide the machinery for the dispensation of justice in all its courts – civil, criminal and revenue – and that only the other expenses of administration of justice shall be borne by the litigants. (14th Report of Law Commission, p. 505) In this regard, the Committee on Court Fees in England presided over by Mr. Justice Macnaughten observed as follows:

> "The Supreme Court is not merely engaged in the work of dispensing justice to the private suitors who resort there; it administers public justice not only in criminal cases but also in civil matters, such as proceedings on the crown side of the King's Bench. For the cost of administration of justice, where the public itself is directly concerned, the State ought, it is suggested to provide the necessary funds, since there can be no reason why the private suitors should do so. Though it would no doubt be difficult to calculate exactly how much of the expenditure of the Supreme Court is attributable to the administration of public, as distinguished from private justice, the salaries and pensions paid to the judges may perhaps be taken to represent fairly that figure." (quoted in the Second Interim Report of the Committee on Supreme Court Practice and Procedure, p. 43)

678. A learned author Dr. R.M. Jackson points out the dependence of Royal Justice in England in part at least, on the

profits earned out of the administration of justice:

> "In the past the growth of royal justice was partly due to the profits that accrued from exercising jurisdiction. The early inherent justice were more concerned with safeguarding the king's fiscal rights than with the trial of ordinary actions. A law Court was expected to pay for itself and show a profit for the king. It is some time since justice has been a substantial source of income, but the old idea survives in the idea that the Courts ought not to be run at a loss." (see 'Machinery of Justice in England', 5th Ed. p. 324)

This was the experience in the United Kingdom.

679. Justice Krishna Iyer in his speech "The Judicial System- has it a functional future in a constitutional order?" (1979) 3 SCC (Jour) 1, states:

> *"A system of court fees is contrary even to the Magna Carta signed centuries ago on the meadows of Runnemede and it sometimes happens that court directs suitors to claim justice by selling his small house or forgoing his treatment for cancer by diverting his only means of survival for payment of court fees. If this be the rule of law upheld by the temples of justice, impeachment of Court Law by Social Justice is inevitable. But the lethargic legislatures don't act. To make or amend the law is within their power but..... the cost of litigation, in a societal impecuniousness, shuttles justice say for the well to do."*

680. As back as in the 1980s, Krishna Iyer, J. in ***1980 Supp SCC***

471, Central Coal Fields Ltd. v Jaiswal Coal Co., had categorically also observed that effective access to justice is one of the basic requirements of a system and high amount of court fee may amount to sale of justice when he stated thus:

> "2. ...it is more deplorable that the culture of the *magna carta* notwithstanding the Anglo-Indian forensic system — and currently free India's court process — should insist on payment of court fee on such a profiteering scale without correlative expenditure on the administration of civil justice that the levies often smack of sale of justice in the Indian Republic where equality before the law is a guaranteed constitutional fundamental and the legal system has been directed by Article 39-A "to ensure that opportunities for securing justice are not denied to any citizen by reason of economic . . . disabilities". The right of effective access to justice has emerged in the Third World countries as the first among the new social rights what with public interest litigation, community based actions and pro bono publico proceedings. "Effective access to justice can thus be seen as the most basic requirement — the most basic 'human right' — of a system which purports to guarantee legal rights."
>
> xxx xxx xxx
>
> 3. ...The State, and failing it someday, the court, may have to consider, from the point of view of policy and constitutionality, whether such an inflated price for access to court justice is just or legal..."

681. A substantially large percentage of our population still suffers from extreme poverty and deprivation in areas of food,

nutrition and public health, education, social security as well as legal services. At the same time there is a large percentage of people who may not be poverty stricken, but are struggling to make ends meet; who certainly do not have that extra rupee in their kitty to pay court fees if they had to seek legal redressal.

682. Interestingly, the high cost of seeking justice by imposition of a special court fee regime has several negative impacts. If the cost of seeking compensation by an affected party, upon violation of a contract, is kept prohibitive, no contract may be entered into at all. To elucidate, several people prefer to keep their immovable property vacant rather than renting or licensing it out. This is because they apprehend that it would be extremely costly for them to get the premises vacated when they need it as litigation costs which include court fees could be very high in case they had to access the justice system to get the premises vacated. High cost of seeking justice, therefore, may effectively curtail trade and economic activity.

683. If the cost of accessing the courts is high, it is possible that many may try to resolve their disputes by violent means. The high court fees could also encourage larger violation of contracts as the violators would know that the other party would find it too costly to approach the court for seeking a performance of the contract or compensation for its breach. A case in hand would be the non-payment of expenses incurred through credit cards to the credit card company.

684. It is urged that administration of justice to the citizens of India cannot have any relation to the cost of doing so. There is merit in this submission. The burden of rising prices and costs cannot be shifted to the litigant. Public funds planned and non-planned, should be provided for the functioning of the judiciary. This is the constitutional mandate.

685. The government incurs expenditure for discharge of its sovereign functions from the revenues collected by it from the public. The Delhi Government receives grants from the Central Government. In the present case it does not even venture to give a tenable explanation or the justification for charging for access to justice.

686. It is a fundamental principle that persons with higher income pay more taxes so that essential services such as health, primary education, defence etc. may be provided to the low income citizens. In case cost recovery is considered the very rationale for court fees, then as costs increase, the State may be tempted to peg the court fee levels higher and higher and as a result, legal services could go well beyond the reach of a large section of the population. However, if the rationale for court fees is to act as an entry barrier for non-serious litigation, then the court fee level would require to be fixed at a very different level. The two rationales and objectives for the fee lead to a completely different basis for setting the court fee.

687. The financial independence of the judiciary is integral to its functioning as an independent organ of the State. It has been concluded that "available data reveals that it invariably earns more by way of fees and judicial stamps than what is spent on its upkeep".

688. The Law Commission in its 189th Report has recommended that "we must have an adequate number of trial and appellate Courts, civil and criminal, established by the Central Government and State Governments" and "adequate budgetary provision must be made before the enactment of any legislation, by making a judicial impact assessment. The expenditure must be borne from the general taxes collected by the Central and the State Governments."

689. In the judgment of the Supreme Court reported at ***1989 Supp (1) SCC 696, P.M. Ashwathanarayana Setty v. State of Karnataka***, while dealing with the issue of constitutionality of fixation of ad valorem court fees without any upper limit in the Rajasthan and Karnataka Court Fees Act, the Court quoted A.P. Herbert's 'More Uncommon Law' referring to the words of the Judge in the fictional case of ***Hogby v. Hogby*** thus:-

> "That if the Crown must charge for justice, at least the fee should be like the fee for postage: that is to say, it should be the same, however long the journey may be. For it is no fault of one litigant that his plea to the King's Judges raises questions more difficult to determine than another's and will require a longer

> hearing in Court. He is asking for justice, not renting house property."
>
> The Judge in the fictional case asked the Attorney General:
>
> "Everybody pays for the police, but some people use them more than others. Nobody complains. You don't have to pay a special fee every time you have a burglary, or ask a policeman the way."

690. The view of the Supreme Court regarding court fee as a limitation on access to justice expressed in ***P.M. Ashwathanarayana Setty v. State of Karnataka*** (supra), requires recalling. The Court said:

> "22. The court fee as a limitation on access to justice is inextricably intertwined with a "highly emotional and even evocative subject stimulating visions of a social order in which justice will be brought within the reach of all citizens of all ranks in society, both those blessed with affluence and those depressed with their poverty". It is, it is said, like a clarion call to make the administration of civil justice available to all on the basis of equality, equity and fairness with its corollary that no one should suffer injustice by reason of his not affording or is deterred from, access to justice. The need for access to justice, recognizes the primordial need to maintain order in society as disincentive of inclination towards extra-judicial and violent means of setting disputes..."

The court further observed in para 23:

> **"The stipulation of court fee is, undoubtedly a deterrent**

to free "access to justice."

691. It is noteworthy that though the Supreme Court upheld the constitutionality of the legislation in ***P.M. Ashwathanarayanaa Setty v. State of Karnataka*** (supra) but it is necessary to note that the rejection of the challenge was in the facts of the case. In para 98, the Supreme Court suggested rationalization of the levy of the court fee by the States and more particularly lower fees for the litigants at lower level on the principle that those who have less in life should have more in law. In para 29, the Supreme Court noted the well settled international position that "***all civilized governments recognize the need for access to justice being free***". The observations of the Court in paras 95 to 98 shed valuable light on our considerations and are therefore set down hereafter:

> "95. Now at the end of the day, what remains is the suggestion necessary in regard to the rationalisation of the court fees under the "Rajasthan Act" and the "Karnataka Act". The arguments in the case highlight an important aspect. **The levy of court fee at rates reaching 10 per cent ad valorem operates harshly and almost tends to price justice out of the reach of many distressed litigants.** The Directive Principles of State Policy, though not strictly enforceable in courts of law, are yet fundamental in the governance in the country. They constitute fons juris in a Welfare State. **The prescription of such high rates of court fees even in small claims as also without an upper limit in larger claims is perilously close to arbitrariness, an unconstitutionality. <u>The ideal is, of course, a state</u>**

of affairs where the State is enabled to do away with the pricing of justice in its courts of justice. In this reach for the ideal it serves to recall the words of Robert Kennedy: "Some men see things as they are and say why, I dream things that never were and say why not?"

96. **The power to raise funds through the fiscal tool of a fee is not to be confused with a compulsion so to do.** While "fee" meant to defray expenses of services cannot be applied towards objects of general public utility as part of general revenues, the converse is not valid. General public revenues can, with justification, be utilised to meet, wholly or in substantial part, the expenses on the administration of civil justice. Many States including Karnataka and Rajasthan had, earlier, statutory upper limits fixed for the court fee. But later legislation has sought to do away with the prescription of an upper limit. The insistence on raising court fees at high rates recalls of what Adam Smith ["Wealth of Nations"] said:

> ""There is no art which one government sooner learns of another than that of drawing money from the pockets of the people."

97. Fees are levied no doubt to defray the cost of services but as observed by Findlay Shirras ["Science of Public Finance" Vol. II, pp. 674-75] :

> "Fees are levied in order *to defray usually a part, in rare cases the whole of the cost of services* done in public interest and conferring some degree of advantage on the fee payer."
>
> *(Emphasis supplied)*

692. A five Judge Bench of the Supreme Court had occasion to

consider the validity of Rule 12 of Order XXXV of the Supreme Court Rules, 1950 so far as it related to imposition of terms as to costs and as to giving a security as deemed fit by the court in a petition under Article 32 of the Constitution of India. This challenge was decided by a five Judge Bench in the judgment reported at ***1963 SCR Supp (1) 885, Prem Chand Garg & Anr. v. Excise Commissioner, U.P. & Ors.*** The petitioners Prem Chand and another who were partners of an industrial chemical corporation had filed a petition under Article 32 of the Constitution of India impeaching the validity of an order passed by the Excise Commissioner refusing permission to a distillery to supply power alcohol to the petitioners. While admitting the petition on the 12th of December 1961, a direction was made that the petitioner should deposit a security of Rs.2,500/- in cash within six weeks. As the petitioners found it difficult to comply with this order, they moved an application for extension of time to the petitioners to deposit the amount which was rejected. As the petitioners failed to collect the requisite amount, they filed a writ petition under Article 32 of the Constitution contending that the rule so far as it relates to giving of security was ultra vires as it contravenes the fundamental rights guaranteed to the petitioners to move the Supreme Court under Article 32.

693. The Court was called upon to consider the question as to whether the order for security could be said to retard or obstruct the assertion or vindication of a fundamental right under Article 32.

Speaking for the majority, Gajendragadkar, J., (as his Lordship then was) had considered the question as to whether the order which the court could make in order to do complete justice between the parties, "*must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws*". So far as the rule making power of the Supreme Court under Article 145 is concerned, the contours thereof in the context of a direction to furnish security were considered in para 15 of the pronouncement in the following terms:-

> "15. Let us now consider whether a rule can be made under Article 145(1) providing for the making of an order for furnishing security in cases of petitions under Article 32 where the court is satisfied that in case the petition fails, the petitioner may not be able to pay the costs of the respondent. The impugned rule is presumably based upon the provisions of Article 145(l)(*f*). It may be assumed that the expression "costs of and incidental to any proceedings in the court" used in clause (*f*) may cover an order of security; ***but if an order for security amounts to a contravention of Article 32, there would be no power to make such a rule under Article 145(l)(f). After all, rules framed under Article 145 are in exercise of the delegated power of legislation, and the said power cannot be exercised so as to affect the fundamental rights.*** If the wide words used in Article 142 cannot justify an order of security in an Article 32 petition, it follows that a rule made under Article 145 cannot authorise the making of such an order. We ought to add that cases of frivolous petitions filed under Article 32 can be eliminated at the preliminary hearing of such petitions. Since 1959, petitions filed

under Article 32 are set down for a preliminary hearing and it is only after the court is satisfied that a prima facie case has been made out by the petitioner that a rule nisi is ordered to be issued against the respondent. In order to decide this question, sometime notice is issued to the respondent even at the preliminary hearing and it is after hearing the respondent that a rule is issued on the petition. It may be that in some cases, the respondent may not be able to recover its costs from the petitioner even if the petition is dismissed on the merits. But that, in our opinion, cannot justify the making of an order for security, because ***even impecunious citizens, or citizens living abroad, must be entitled to move this Court if they feel that their fundamental rights have been contravened. Similarly, women who own no property would be entitled to move this Court in case their fundamental rights are contravened,*** and following the analogy of Order 25 Rule 1(3), no order for security can be made against them because that would make their right illusory. That obviously is the content of the fundamental right guaranteed under Article 32, and since the impugned rule, insofar as it relates to security for costs, impairs the content of that right, it must be struck down as being unconstitutional. Rules framed under Article 145 which govern the practice and procedure in respect of the petitions under Article 32 with the object of aiding and facilitating the orderly course of their presentation, and further progress until their decision, cannot be said to contravene Article 32. All proceedings in Court must be orderly and must follow the well recognised pattern usually adopted for a fair and satisfactory hearing; petitions under Article 32 are no exception in that behalf. Besides, orders can be passed on the merits of the petitions either at an interlocutory stage or after their final decision, and no objection can be taken against such orders on the

> ground that they contravene Article 32. In a proper case, proceedings threatened against the petitioners may be stayed unconditionally or on conditions or may not be stayed, or a Receiver may be appointed in respect of the property in dispute, or at the end of the final hearing if the petition fails, the petitioner may be ordered to pay the costs of the respondent. ***All these are matters whose validity cannot be challenged on the ground that they contravene Article 32. <u>But if a rule or an order imposes a financial liability on the petitioner at the thresh hold of his petition and that too for the benefit of the respondent, and non-compliance with the said rule or order brings to an end the career of the said petition, that must be held to constitute an infringement of the fundamental right</u> guaranteed to the citizens to move this Court under Article 32. That is why we think Rule 12 in respect of the imposing of security is invalid.***

694. The Supreme Court observed that the rights guaranteed under Part III are not absolute and have to be adjusted in relation to the interests of general public and that the difficult task of determining the propriety or validity of adjustments made either legislatively or by executive action between the fundamental rights and the demands of the socio-economic welfare has been ultimately left in the charge of the Supreme Court and the High Court by the Constitution. In this background, the Constitution makers had thought it advisable to treat the citizen's right to move the court for enforcement of a fundamental right as being a fundamental right by itself which right had been described as *"the cornerstone of the democratic edifice raised by the Constitution".*

695. The Supreme Court has noted that the right to move the Court conferred on the citizens of India by Article 32 is itself a guaranteed right and it holds the same place of pride in the Constitution as other provisions in respect of citizen's fundamental rights; that the right shall not be suspended, except as otherwise provided for by the Constitution. An order that the petitioner should furnish security for the costs of the respondent, made against the petitioner, would be an insurmountable barrier for the petitioner in his accessing the Supreme Court under Article 32 of the Constitution. Thus the very rule so prescribing was held to be unsustainable.

696. In ***(1979) 2 SCC 236, State of Haryana v. Smt. Darshana Devi,*** a Special Leave Petition was filed by the State of Haryana assailing the judgment of the High Court of Punjab & Haryana which had extended the pauper provisions under Order XXXIII of the Code of Civil Procedure to motor accident claims under the Motor Vehicles Act. The Supreme Court rejected the challenge with the following observations:-

> "2. **The poor shall not be priced out of the Justice market by insistence on court-fee and refusal to apply the exemptive provisions of Order 33, Code of Civil Procedure. So we are distressed that the State of Haryana, mindless of the mandate of equal justice to the indigent under the Magna Carta of our Republic, expressed in Article 14 and stressed in Article 39A of the Constitution, has sought leave to appeal against the order of the High Court which has rightly extended the "pauper" provisions to auto-accident claims.** The

> reasoning of the High Court in holding that Order 33 will apply to tribunals which have the trappings of the civil court finds our approval. We affirm the decision.
>
> xxx xxx xxx
>
> 5. **Two principles are involved. Access to court is an aspect of social justice and the State has no rational litigation policy if it forgets this fundamental..."**

697. The Supreme Court further relied on Cappelleti's perception, (also relied upon by the Australian Law Reform Commission), on access to justice being a 'basic human right' and further stated that:-

> "**We should expand the jurisprudence of access to justice as an integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved a second look at its policy is overdue.** The Court must give the benefit of doubt against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit-making through sale of civil justice, disguised as court-fee, is fully reviewed by this Court. …"

698. In the ***Darshana Devi case***, the Supreme Court has approved the liberal application and interpretation by the High Court of a

provision enacted to enable a poor ('indigent') person to seek redressal of his grievances in a civil court, extending its applicability to petitioners under the Motor Vehicles Act. The pronouncements of the Supreme Court underline the primacy which has to be accorded by the courts, tribunals, the executive as well as the legislature to actions especially levy of court fee which could interdict access to justice of any person.

699. The impact of the enhancement of the court fees in the present case has to be considered in the light of these illuminating and binding principles laid down by the Supreme Court. The spirit of socio-economic justice is enshrined in the Preamble in the recognition of the fundamental rights in Part III as well as the Directive Principles of State Policy in our Constitution. The Supreme Court has interpreted constitutional as well as statutory principles to accord primacy to and to secure socio-economic justice. We find ourselves bound by these principles while deciding the issues in the present writ petitions.

700. It is thus worth noting that raising court fees to such an extent as to restrict access to justice is at odds with the trend towards a relaxation of standing requirements designed to facilitate public interest litigation, and enhancing the capacity of the downtrodden to access justice by legal aid measures and mechanisms for expediting administration of justice.

701. The Law Commission of India in the 189th Report of

February, 2004 has gravely concluded that though "***with the passage of time the cost of administration of justice is increasing but to meet this increased cost of administration of justice enhancing the court fees is not the proper approach. On the contrary, it will be a roadblock to the access to justice, which is recognized as a basic right world over***".

702. Given the above discussion, we agree with the recommendations of the Law Commission that it is impermissible to meet the costs of administration of justice entirely through court fees levied on users, and that "full cost recovery" is unsupportable. At the most a notional recovery (akin to Hogby's 'postage stamp') would be legally permissible.

703. Some elements of this discussion are inherent in the argument that cost of provision of the criminal justice system has to be borne entirely by the State.

704. For evaluation of appropriate court fee, the 'cost' of the case is of utmost importance. We have discussed in the earlier part of this judgment that the 'cost' of a case to a judicial system may be the same, irrespective of the value of the claim while discussing the effect of ad valorem levy of court fee without a cap.

705. Even if it could be held that it was permissible to effect recoveries through court fee of amounts which are higher than the cost of maintaining the justice system, one more aspect of this problem deserves scrutiny. It is a standard business practice to

invest and expand activities that can generate profits. Therefore, from the purely economic point of view, it would be logical to invest all receipts from court fees in the justice dispensation system, be it for creating more number of judges or adding to the infrastructure. Unfortunately, this has not been contemplated nor is it proposed by the respondents.

706. The following observations of the Supreme Court in the judgment reported at ***AIR 1978 SC 1765, Gujarat State Financial Corporation v. Natson Manufacturing Co.***, are noteworthy in this regard:-

> "When dealing with a question of court fee, the perspective should be informed by the spirit of the magna carta and of equal access to justice which suggests that a heavy price tag on relief in Court should be regarded as unpalatable."

707. Similarly in ***(1992) 1 SCC 119 All India Judges' Association v. Union of India***, it was stated thus:-

> "54. It is not our intention to raise a dispute on this aspect. We adverted to these authorities and the views of this Court to bring support for the view that <u>what is collected as court fee at least be spent on the administration of justice instead of being utilised as a source of general revenue of the States</u>. Undoubtedly the income from court fees is more than the expenditure on the administration of justice. This is conspicuously noticeable from the figures available in the publication in the Ministry of Law and Justice."

708. The Law Commission and judicial precedents have thus asserted that the principle of access to justice animates the obligation of the state to provide a system for the administration of justice.

709. It is, therefore evident that the concerns voiced and recommendation made by the legislature in the Statement of Objects and Reasons for the Court Fees Act, 1870 and reiterated by the Supreme Court in the host of judicial pronouncements noted hereinabove; articulated in the reports of the Law Commission of India (including the 189th Report on the Revision of the Court Fee Structure) as late as in 2004 remain the same. These matters have been reiterated by the Supreme Court in the National Court Management Systems (NCMS) and 'Policy and Action Plan" dated 27th September, 2012.

710. These documents are in the public domain and available to the respondents. It cannot be disputed that the reports of the Law Commission are opinions and recommendations of experts. Lord Macaulay who headed the first Law Commission was instrumental in the enactment of some of the most important legislations in this country. The judicial pronouncements bind the respondents. The articulation of the applicable principles in the reports of the Law Commission are relevant and were required to be actively considered before effecting and amending the schedule of the Court Fees Act which results in its steep escalation.

711. The above narration would show that these important issues specifically on the issues relating to the court fees structure; the reinforcement by the Supreme Court in the Policy Statement and Action Plan of the NCMS as well as in the several judicial pronouncements noticed above which have gone completely unnoticed and unheeded by the respondents.

712. It is well established that administration of justice is a 'service' which the state is constitutionally mandated to ensure to its citizens. It is a fundamental duty of the state. The levy of exorbitant court fees imposes financial burden on litigants and operates as a barrier for them approaching the judicial system for redressal of their grievances. This is an established impediment to the exercise of the fundamental rights of access to justice. It adversely impacts the constitutional obligation for providing and ensuring a system for securing a just social order and promoting justice. Enhancement of court fee, payment whereof is a pre-condition for approaching the courts, without any evaluation of the realities noticed above, ignoring the principles laid down by the Supreme Court; overlooking the studies and reports of legal, social and economic experts is indubitably an anathema to social order and justice. The inevitable conclusion is that therefore, it is violative of the directive principles enshrined in Articles 38 and 39A of the Constitution of India.

(IX) Fee exemption and waivers-forma pauperis litigation

713. The respondents have placed strong reliance on the exemption from payment of court fee provision for indigent persons. Their submission is that an indigent person can file a suit *in forma pauperis* under Rule 1 Order XXXIII of the Code of Civil Procedure, 1908, or in the case of a writ petition, can file an application seeking exemption from paying the court fees.

714. It is also worth recognising that many common law jurisdictions have established procedures to exempt the indigent from court fees. These procedures are animated by the Latin principle '*in forma pauperis,*' literally meaning "in the form of the pauper," and they permit courts to designate persons without the necessary funds to pursue a criminal defence or civil suit and waive their court fees. This exemption by itself demonstrates a well-established assumption emerging from the common law, and now enshrined in statute, that court fees do unfairly limit the ability of the poor to access justice.

715. This provision is available only to proceedings to which the Code of Civil Procedure applies and renders eligible only persons who qualify under the stringent conditions of indigency. Thus, Order XXXIIII of our *Code of Civil Procedure*, 1908, provides for "suits by indigent persons." Where a court grants an applicant indigent status pursuant to Rule 1, court fees are waived, and the suit is allowed to proceed on an *in forma pauperis* basis. Where the

in forma pauperis plaintiff ultimately succeeds completely in his or her claim, the court fee becomes payable out of the judgment (Rule 10). Where the suit is only partly successful, the indigent person is only liable for the court fee in proportion to his or her success in the suit (Rule 10). However, where the suit is unsuccessful, the indigent plaintiff becomes liable for the entire court fee (Rule 11).

716. Similar provisions can be found in the civil procedure statutes of the United States at both the federal and state levels. For instance, Title 28 (Judiciary and Judicial Procedure) of the United States Code (federal statutory law) provides:

> "...Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor..." (USC § 1915(a)(1))

717. Canada's Supreme Court Act also vests the judges of the Supreme Court with the discretion to make rules and orders "for allowing appeals *in forma pauperis* by leave…and for allowing a respondent leave to defend *in forma pauperis*." [Supreme Court Act, R.S.C., 1985, c S-26, s. 97(1)(b)]

718. A Divisional Court in the Canadian province of Ontario has extended the *in forma pauperis* principle to a common law

constitutional right to access to the courts. This Court observed that court fees that prevent the poor from accessing courts for small claims violate this right, and held that any statute that authorizes court fees must include a provision waiving the payment of fees by those who cannot afford them. [Ref: ***Polewsky v. Home Hardware Stores*, (2003) 66 O.R. (3d) 600]**

719. South African law, too, provides for *in forma pauperis* proceedings. Hundreds of civil suits proceed on this basis in the High Court every year (See "Making Legal Aid a Reality," Public Interest Law Institute, 2009) under Rule 40 of the Uniform Rules of Court:

> "(1) (a) A person who desires to bring or defend proceedings in *forma pauperis*, may apply to the registrar who, if it appears to him that he is a person such as is contemplated by paragraph (a) of subrule (2), shall refer him to an attorney and at the same time inform the local society of advocates accordingly.
>
> (b) Such attorney shall thereupon inquire into such person's means and the merits of his cause and upon being satisfied that the matter is one in which he may properly act in *forma pauperis*, he shall request the said society to nominate an advocate who is willing and able to act, and upon being so nominated such advocate shall act therein.
>
> (c) Should such attorney or advocate thereafter become unable so to act, the registrar or the said society, as the case may be, may, upon request, nominate another practitioner to act in his stead."
>
> (2) If when proceedings are instituted there be lodged

with the registrar on behalf of such person-

(a) an affidavit setting forth fully his financial position and stating that, excepting household goods, wearing apparel and tools of trade, he is not possessed of property to the amount of R10 000 and will not be able within a reasonable time to provide such sum from his earnings;

xxx xxx xxx

(5) The said advocate and attorney shall thereafter act gratuitously for the said person in their respective capacities in the said proceedings, and shall not be at liberty to withdraw, settle or compromise such proceedings, or to discontinue their assistance, without the leave of a judge, who may in the latter event give directions as to the appointment of substitutes.

xxx xxx xxx

(7) If upon the conclusion of the proceedings a litigant in *forma pauperis* is awarded costs, his attorney may include in his bill of costs such fees and disbursements to which he would ordinarily have been entitled, and upon receipt thereof, in whole or in part, he shall pay out in the following order of preference: first, to the registrar, such amount in revenue stamps as would have been due in respect of his fees of office; second, to the sheriff, his charges for the service and execution of process; third, to himself and the advocate, their fees as allowed on taxation, *pro rata* if necessary."

720. As these *in forma pauperis* provisions demonstrate, common law jurisdictions are consistent in the view that court fees *prima*

facie threaten the accessibility of courts, and that mechanisms for waiving such fees are necessary in order to protect the rights of the poor to access justice.

721. It is worth noting, however, that governments would point to *in forma pauperis* mechanisms to defend increasing court fees. If the poor may still access courts via the waiver of court fees, the argument goes, how can it be said that increasing court fees impedes access to justice? This is the argument laid before us in the present case. Two points serve as a complete answer to this argument.

722. First, India is still grappling with discrimination and denial of constitutional rights relating to issues such as manual scavenging, caste discrimination, child marriage, bonded labour, homelessness, landlessness, those deprived of bare nutrition, honour killing and millions living in abject poverty. Surely we cannot say that these issues are not in existence in Delhi. It cannot be disputed that there is consensus on an appropriate definition of 'below poverty line' till date.

723. Also, no matter what monetary limit is used to determine whether a prospective litigant should be considered "indigent" in order to qualify for an exception to court fees, there will still be others who fall just above the line and yet for them, litigation will be prohibitively expensive.

724. The Supreme Court of British Columbia (Canada) traced the

history of court fee as a levy, its rationale and limitations in the judgment reported at ***2012 BCSC 748 Vilardell v. Dunham*** (decided on 22nd May, 2012). The court had concluded that asking for court fees from a party who did not fall within the definition of 'indigent', but required his available resources for more pressing everyday expenses, was denial of access of justice and the requirement of court fee for the hearing was declared unconstitutional. An appeal was filed before the Court of Appeal for British Columbia. It is noteworthy that in the meantime, there was a change in the Rules by which the word 'indigent' was replaced by expression 'otherwise impoverished'. The Court of Appeal based its decision on the changed rule position and read it up to more readily to allow exemption. A view was taken that Court of Appeal in the decision dated 15th February, 2013 reported at ***2013 BCCA 65*** that the statute ought to be construed in a manner that helps uphold its constitutionality. The Court of Appeal proceeded to do so and gave the statutory expression a wider meaning so as to also enable exemption from court fee for a typical middle class citizen. Having done so, the appeal was accepted and the rules since changed were upheld.

725. It was observed that:

> "A person who cannot afford a fee of $100 or $200 may properly be described as indigent, that is, as being "*destitute*," *needy*," "*in want*," "*poor*" or "*necessitous*" as the dictionaries define the term. It is an awkward word to use to describe a middle class

> family's inability to pay a month's net salary for the two-week "rent" of a courtroom. In its ordinary sense the word implies a level of fees that all but the truly poor should be able to pay. If that is not so, there may be something at odds between the indigency test and the level of the fees." (***Vilardell v. Dunham***)

726. The matter of exemption from payment of court fees to indigent persons deserves to be examined from another angle as well. The above discussion would show that this is left to the discretion of the individual judges, whereas we are concerned with the exercise of the right to access justice of the citizens. The rule conferring discretionary power on the court to direct a petitioner to furnish security as a pre-condition for orders on his petition was also considered by the Supreme Court in ***1963 SCR Supp (1) 885 Prem Chand Garg and another v. Excise Commissioner, UP and others*** and was disapproved by the Supreme Court in the following terms:

> "16. There is another aspect of the matter to which reference must incidentally be made. The Rule is obviously intended to secure the costs of the respondent in a proper case. Let us see how this Rule will work if it is interpreted and acted upon in the manner suggested by the learned Solicitor-General. In practice, at present, an order of security is normally made unless a request is made by the petitioner either for the reduction of the amount or for dispensing with the security altogether. If the petitioner is not impecunious, an order for security will not serve any essential purpose, because if the costs are awarded against him after the final hearing, the respondent

> may be able to secure his costs. If, however, the petitioner is impecunious, the court may not, after granting a rule on the petition, in its discretion, pass an order of security and in that sense, the very object of securing the respondent's costs would not be served. It is true that if the discretion is exercised by the court in favour of impecunious petitioners and orders for security are not passed in their cases, no hardship will be caused to them. But it seems to us that what would be left to the discretions of the court on this construction of the rule, is really a matter of the right of impecunious petitioners under Article 32. That is why we think that the impugned Rule insofar as it relates to the giving of security cannot be sustained."

727. By denying relief from court fees to all but the poorest of the poor, *in forma pauperis* exemptions preclude a wide range of potential litigants who cannot demonstrate indigency, such as the lower middle class, from accessing the courts. Thus, it cannot be said that even waiver provisions guarantee access to justice in the face of increased court fees. This is one reason why the Law Commission in its 128th Report argues that court fees should be abolished altogether.

728. Second, the nature of fee waivers requires courts to differentiate between persons on the basis of class and income. Those who can afford court fees do not have to face the humiliating procedural hurdles imposed on those who claim to be unable to afford fees. As one Bar Association has argued in ***Vilardell v. Dunham*** (supra) at page 115:

> "[Fees] oblige some people who have a right to come to court to disclose their financial affairs and **seek to be declared impoverished as a precondition to coming to court. A person of modest means who cannot afford the fees must beg the court to acknowledge his status as poor, an awkward and embarrassing exercise for a person whose unresolved legal difficulties may already be causing stress**."

729. Liberal application of fee exemption and waivers is often discouraged on the ground that the "court registry staff could have real difficulties investigating and evaluating broader discretionary categories for exemption and waiver".

730. The access to judicial system cannot be made contingent on being able to pay a higher court fee or providing "proof of being a pauper".

731. The above discussion would show the growing realization that strict rules of procedure impede access to justice, and more unequivocal access to courts. Given the large percentage of the population which survives below poverty line or forms the middle class struggling to make ends meet enhancement of court fee which provides the doorstep barrier to accessing the court, is at complete odds with the constitutional mandate of enhancing the capacity of the disadvantage including the economically poor to access justice. Many litigants find themselves in a constant spiral of having to pay, without really having the ability to pay, and such class of litigants includes not just the people below poverty line, but also

the people who are just above it.

732. Access to justice is a right. It is not a privilege or a conditional ground. The critical issue while considering the appropriate level of court fee must be to preserve access to justice. This can be ensured either by keeping the court fee low or provide for exemption at a level where those who cannot pay, are exempt. Just as all grants and privileges that are given on the basis of poverty are implementationally complicated, it would be logical therefore, to keep the fee at an affordable level rather than attempting to compute a level at which those who cannot pay are exempt.

733. As the issue of court fee ought not to be relatable to costs, the balance drawn between receipts from the court fee and expenditure on administration of justice becomes irrelevant. The relevant question which is required to be asked is what is an appropriate level of court fee which lower income people, those who are not "paupers" can afford to pay? Is the fee pegged at a level where the families just above the stringent poverty line in India, can afford to pay? Another relevant question which the policy makers and the legislature would consider is what is the level that creates an effective barrier for filing a suit? These relevant and material questions can be answered only by an examination of the levels of cost of living of the people and their ability to pay; not to the cost that the State may wish to recover.

734. The above discussion would show that access to justice is a constitutional right. Thus the law to charge court fee not only undermines but interferes with enjoyment of such rights. The very factum that provisions for exemptions and waiver from court fees have to be made establishes the existence of the barrier. It follows therefrom that such barrier would be removed if you are able to prove poverty. However, if you are economically so-placed that you are above the level of poverty but do not have means to pay the court fee, then your lack of poverty becomes barrier to access to justice. The barrier is removed only if you can prove your indigency or pauperism.

735. We would say that when existence of the barrier is established, its extent becomes a non-issue. Removal of the barrier to access to justice is of prime importance; not negotiation of the extent to which court fee is a barrier nor the conditions for removal of the barrier.

736. So far as the administration of justice and the court fee is concerned, therefore, the cost recovery paradigm must apply only vis-a-vis public funds and not vis-a-vis the litigant.

737. It would appear that the discriminatory nature of court fees is only exacerbated by waiver provisions that subject the poor to humiliating procedures in order to realize the rights they have in common with all citizens. The rich are not exposed to such procedures. Thus to access the courts, a person without means

goes through the indignity of not only disclosing the level of his impoverishment but often the degradation of an incisive cross-examination at the hands of a defendant who contests the pauperism! The poor are thereby compelled to publicly establish such level of poverty as would bring them within the definition of *forma pauperis* – a violation of their valuable rights under Articles 14 and 21 of the Constitution. In other words, court fees do not treat all prospective litigants equally despite the constitutional guarantee to equal treatment before the law, and despite the reality that access to justice is a right that inheres in all individuals irrespective of their race, class, sex, financial standing or other immutable characteristics.

(X) Expenditure on the judiciary

738. In the present proceedings, one of the reasons put forth by the respondents to support the enhancement of court fees is that there is a deficit between the court fee which is recovered and the expenditure on the judiciary.

739. We find that the Supreme Court has noted that the income from court fees is more than the expenditure made in the administration of justice as per figures made available in the publication of the Ministry of Law and Justice. The Supreme Court has thus also noted the view that the amount recovered as court fee deserves to be spent on administration of justice and not used as a source of general revenue.

740. In the judgment reported at (***1992) 1 SCC 119, All India Judges Association v. Union of India,*** the court quoted and analysed the concept of court fees thus:

> "54. …We adverted to these authorities and the views of this Court to bring support for the view that what is collected as court fee at least be spent on the administration of justice instead of being utilized as a source of general revenue of the States. **Undoubtedly the income from court fees is more than the expenditure on the administration of justice.** This is conspicuously noticeable from the figures available in the publication in the Ministry of Law and Justice."
>
> (emphasis by us)

741. So far as expenditure incurred by the State on the provision of a system for administration of justice is concerned, in the 127th Report of the Law Commission on "**Resource Allocation for Infrastructural Services in Judicial Administration**" (1988), it is stated in para 5.8 that "it is imperative to point out that the **State today spends precious little or, to say the least, practically nothing on the administration of justice**". The Commission has pointed out that during 1981-82, barring Manipur and Tripura most of the States spent only between 0.15% (A.P.) to 3.53% (M.P.) of the total tax receipts of the State, on the administration of justice. These figures show that administration of justice has received negligible funds for upkeep as well as its growth.

742. The 189th Report of the Law Commission further states that the First National Judicial Pay Commission which was chaired by

Justice K.J. Setty in its report of 11th November, 1999, has stated that the expenditure on judiciary in India in terms of the Gross National Product (GNP) is relatively low. It is not more than 0.2% only. Our attention has been drawn also to the recommendation of the Setty Commission that as the administration of justice is the joint responsibility of the Centre and the State Governments, the Central Government must, in every state, share half on the annual expenditure on subordinate courts.

743. Despite repeated queries to the respondents before us to give some details of the expenditure which is incurred on the administration of justice and the receipts from court fee in the National Capital Territory of Delhi, no details at all have been furnished.

744. With the counter affidavit dated 6th September, 2012, respondent no.1 has placed on record the documents titled as "Major Head : 2014 : Administration of Justice (Demand no.60, Legal Department, Sector A – General Services)". So far as budget estimates for the year 2012 – 2013 of the Govt. of NCT of Delhi are concerned, it appears that against the plan outlay of Rs.12,40,63,000 which had been sought, however the amount voted was Rs.1,23,52,77,000. The non-plan expenditure sought under minor heads charged was Rs.52,22,90,000 while the amount of Rs.4,41,46,00,000 was voted. As such, a total of Rs.5,64,98,77,000 was allocated as planned and non-planned expenditure for the judiciary. However the different heads covered

in this demand included the High Court; Special Courts; Civil and Sessions Courts; Small Causes Courts; Criminal Courts; Administrator General and Official Trustees; Legal Advisors and Counsels; Other State Administrative Tribunal and Other Expenditure.

745. The respondents have placed a comparison of the plan outlays of some States on record. As noticed above, this comparative chart was the sole material which was considered by the Government Sub-Committee when it made its recommendations which are the basis of the impugned amendment. This comparative statement does not indicate the population, the demographic profile, the nature of the litigation, the number of cases or any of the other indicators essential to analyse the comparison. Simply looking at the percentage expenditure of the state budget on the judiciary is completely insufficient, and in our view, a useless exercise.

746. So far as consideration of the court fee enhancement in Delhi is concerned, a tabulation has been enclosed as Annexure – B to the counter affidavit dated 6th September, 2012 captioned as "Expenditure on Administration of Justice" in NCT of Delhi which reads as follows:-

Year	Sale of Court Fees	**Expenditure on Administration of Justice In NCT of Delhi (in Rupees Crores)**			Percentage of expenditure recovered through court fees
		Planned Expenditure	Unplanned Expenditure	Total Expenditure of GNCTD	
2001-02		15.09	62.72	77.81	
2003-04	15.95	22.39	80.23	102.62	15.50%
2010-11	61.53	106.3	322.72	429.02	14.34%
2011-12	59.62	84.32	491.6	575.92	10.35%
2012-13	60 (assumed)	100.5	490.14	590.64	10.16%
	137.1			**1698.2**	**11.60%**

747. The incomplete information furnished by the respondents is a telling story by itself. The respondents do not disclose in the second column, the sale of court fees for the year 2001-02. All figures relating to the year 2002-03 are missing. For the year 2003-04, the unplanned expenditure of Rs. 80.23 crores far exceeds the planned expenditure of Rs.22.39 crores. The respondents have withheld all statistics for the period from 2004 to 2010. Mr. Chandhiok, learned Senior Counsel for the petitioner has urged at length that it has to be presumed that this concealment is because for these periods the court fee recovered was in excess of the

expenditure.

748. Mr. Kalia, learned counsel has sought to place reliance on a chart extracted in the 'Synopsis and List of Dates' filed with the Special Leave Petition before the Supreme Court of India.

749. Mr. Chandhiok, learned Senior Counsel for the petitioner submits that there is variance of the figures placed before this court and that before the Supreme Court. Be that as it may, even if this tabulation was to be accepted, the information disclosed is insufficient to enable any reasonable person to take the view that the amendment to the court fee regime was appropriate or based on relevant material.

750. An article "Speeding Up Trials" published in the Hindu dated 22nd July, 2003 by Surendra Nath, Advisor (Union Planning Commission) enables us to understand the manner in which financial responsibility for administration of justice has been apportioned between the Central Government and the State Governments. This article contains the following details of the budgeting of expenditure on the judiciary:-

> "Under the Seventh Schedule of the Constitution, administration of justice has been a concurrent responsibility of the Centre and the State Governments since 1977. The Centre's Plan investment in Justice started in the Eighth Five Year Plan (1992-97) in compliance with a Supreme Court direction of 1993-94. During the Eighth Plan, the Centre spent about Rs. 110 crores on improving

judicial infrastructure, such as constructing court rooms. An equal amount was spent by the States. In the Ninth Plan, Rs. 385 crores were spent by the Centre, and the States made a matching contribution. This was 0.071 per cent of the Centre's Ninth Plan expenditure of Rs. 5,41,207 crores. During the Tenth Plan (2002-07), the allocation for Justice is Rs. 700 crores, which is 0.078 per cent of the total Plan outlay of Rs. 8,93,183 crores…

As adequate Plan investment in Justice was not forthcoming, in April 2000 the Department approached the Eleventh Finance Commission for non-Plan assistance to set up additional courts for expediting the trial of long-pending sessions cases. A meeting was convened, at the instance of the Department of Justice on April 4, 2000, with the full Finance Commission and the Law Secretaries of major States. It was proposed that the State Governments respond to the suggestion of creating temporary additional posts of judges to clear the backlog. The suggestion was approved and a grant of Rs. 502.9 crores was recommended by the Finance Commission under Article 275 of the Constitution to set up 1,734 additional courts, which came to be known as fast track courts. These courts are to continue till 2005.

The grant covers the entire functioning of fast track courts."
(Also referred to in the 189th report of the Law Commission)

751. The 189th Report of the Law Commission on the Revision of Court Fees Structure (February, 2004) has noted empirical evidence that the judiciary earns more than it spends. An analysis

of the budgets and working of the Supreme Court and the Allahabad High Court in 1984 was published under the title "Litigation Explosion in India" which was prepared by Dr. Rajeev Dhavan and published by the Indian Law Institute. The figures from 1957-77 show that the Supreme Court invariably spent less than the sum it received under the head "grant allocated" and "other receipts".

As regards the judiciary in Uttar Pradesh, figures for the years 1961-62 to 1978-79 also showed that the income earned by the courts (from judicial stamps and fees on writs, vakalatnama etc.) was always in excess of what was spent on them thus leaving a substantial surplus in each year. No other study on these issues is available.

So far as Delhi is concerned, no study at all appears to have been undertaken by the respondents.

752. The Law Commission (189th Report) has quoted the following comments of Dr. Dhavan on page 112 of the book. He has stated that "*the judiciary is India's best nationalized industry. As a whole it earns more than it spends. In that sense, it can also be described as the `least expensive branch*".

753. The 189th Report of Law Commission (2004) noted the following:-

> "It is well-known that the Law Commission had stated in its 120th Report that we in India have only

> 10.5 judges per million population while countries like US and UK and others have between 100 to 150 Judges per million population. The Union Government and the States in India had not toned up the judicial system in the last five decades so that today we are faced with tremendous backlog of cases in our Courts."
>
> (Emphasis by us)

754. It has thus been repeatedly emphasized that one of the main reasons for delay in administering justice, which is another violation of fundamental rights, is for the reason that the number of cases being filed every year is not static but on the increase while the number of judges remains static and insufficient.

755. The 189th Law Commission Report has clearly concluded that the plan investment in the administration of justice is totally inadequate. It is for this reason that the Department of Justice had approached the 11th Finance Commission for non-plan assistance to set up additional courts for expediting the trial of long pending cases. The 11th Finance Commission, after discussing with Law Secretaries of major States, had made recommendations for grant of Rs.502.9 crores under Art. 275 of the Constitution of India to set up 1,734 additional courts known as Fast Track Courts which were to continue only till 2005. The reluctance to provide (if not refusal) the funding for this essential state function has necessitated the consideration and directions in the ***All India Judge's*** case (supra) and recently in ***Brij Lal's case*** (supra).

756. To meet all these challenges facing the judiciary effectively, the then Chief Justice of India, Justice S. H. Kapadia, after consulting the Minister of Law and Justice in the Government of India established the **National Court Management Systems (NCMS)** in May, 2012 and released a **'Policy & Action Plan'** document on **27th September, 2012** to implement it. The National Court Management Systems will function under the overall control of the Chief Justice of India to primarily deal with policy issues relating to the judiciary.

757. The **'NCMS Policy & Action Plan'** document lays emphasis on the role of the government. It notes certain essential facts which are relevant for the present consideration. It has noted that India has one of the largest judicial systems in the world – with over 3 crore cases and sanctioned strength of some 18,871 Judges (as on 31.12.2011). The system has expanded rapidly in the last three decades, reflecting India's social, economic and political development in this period. It is estimated that the number of Judges/Courts expanded six fold while the number of cases expanded by double that number – twelve fold. The judicial system is set to continue to expand significantly over the next three decades, rising, by the most conservative estimate, to at least about 15 crore of cases requiring at least some 75,000 Courts/Judges.

758. The action plan is premised on the urgent need to make the judicial system free of cases more than five years old; shorten the average life cycle of all cases – not only time spent within each

court, but also total time in the judicial system as a whole, to bring the average to no more than about one year in each court and the need to systematically maintain and continuously seek to enhance quality and responsiveness of justice has been agitating the minds of all concerned. That is the necessity and importance of ensuring the fundamental right of access to justice to all.

759. So far as the issue of resources and funds for justice dispensation is concerned, the Action Plan notes the following important facts:

> "4.7 Judicial independence cannot be interpreted only as a right to decide a matter without interference. **If the institution of Judiciary is not independent resource-wise and/or in relation to funds, from the interference of the Executive, judicial independence will become redundant and inconsequential.** ***Executive cannot be allowed to interfere in the administration of Justice by holding back funds for development of judicial infrastructure and expansion of Courts and declining right to appoint sufficient staff, etc. The concept of independence of judiciary further conceives that Judges cannot be allowed to be overburdened by continuous pressure of deciding large number cases at the cost of quality of adjudication.***
>
> 4.8 Entry 11A was introduced in the Concurrent List of Schedule 7 of the Constitution of India in 1977 vide 42nd Amendment Act of 1976. By this Amendment, subject of "Administration of Justice; constitution and organization of all Courts, except Supreme Court and High Courts" was brought in the

Concurrent List of the Constitution. It has become ***incumbent on the Central Government to make sufficient and appropriate provisions in Budget, keeping in view the Central Laws so as to share the burden of States. As far as possible, the sharing between Centre and the State should be in the ratio of 50-50 %. Policies may have to be framed in such a way that Centre and State do not play blame-game against each other at the cost of administration of justice."***

760. The 'NCMS Policy & Action Plan' document further notes the following:

"4.10 For the ***development of judicial infrastructure, time has come when States should provide requisite resources to the Judiciary*** without cutting/rejecting the demands made by it so that it is ***able to smoothly discharge its judicial functions.*** **Legislature enacts new legislations and increases the workload of Judiciary and, on the other hand, Executive holds back funds and facilities as required for administration of Justice which tantamounts to interference in the administration of justice.** One Branch of the Constitution should not ideally decline the needs of another parallel Branch thereby creating difficulties in discharge of its constitutional responsibilities.

4.11 The Government may not enact new Laws without assessing the judicial impact and without assessing the number of new cases the new Legislation would generate. ***Enactment of new Laws results in floodgates of new cases generated by new Legislations and refusal of resources towards litigation generated by such new Legislations may not be in the interest of the country.*** In case the State

> does not provide necessary support of sufficient and fully furnished infrastructure and trained and sufficient personnel by way of Judges/Judicial Officers and Staff, the blame on the judiciary would be misplaced on account of pending number of cases in courts.
>
> xxx xxx xxx
>
> 4.14 ***It is bounden duty of the Central Government and State Governments to make adequate provisions for sufficient and furnished infrastructure for High Courts as well as Subordinate Courts.”***
>
> (Emphasis by us)

761. In the chapter 10, titled, “BUDGET”, the document notes the fact that:

> “10.2 ***Providing sufficient Budget to Judiciary has to be the highest priority of the State***. **Appropriate facilities have to be made available to maintain judicial independence, efficiency and dignity**.”
>
> (Emphasis by us)

It is essential to note that even this document makes no reference to court fee as a source for funding the judiciary. The linkage between provision of adequate funds by the state and independence of the judiciary is reiterated.

762. We find that in other jurisdictions as well, a similar view has been taken. The Judicial Conference of the United States (JCUS),

concerned with all issues concerning the judiciary as a whole, has suggested a ***Long Range Plan*** for the Federal Courts to guide future administrative action and policy development by it and other authorities. The JCUS has recommended that "the Federal courts should obtain resources adequate to ensure the proper discharge of their constitutional and statutory mandates" (in Chapter 8, titled 'Resources').

763. The JCUS noted that "*chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds*".

764. The JCUS has also commented on the effect of enacting new legislation connecting the same to the added burden on the judiciary and suggested that the Congress should "refrain from enacting new legislation that adds to the workload of the federal courts without also approving sufficient funds for the judiciary to meet its obligations under that legislation".

765. The Judicial Conference of the US has alternatively recommended that "Congress should be urged to reduce the judiciary's existing obligations sufficiently to offset the impact of any new legislation with a quantifiable judicial impact".

766. So far as courts in the Union Territories (including Delhi) are concerned, there is another difficulty. As grants under Article 275 of the Constitution are a devolution to the States, the Union Territories were left out of the purview of the grant. The Delhi

High Court proposed setting up fast track courts in Delhi and so did the Union Territory of Chandigarh. Funds were provided in the current financial year for setting up fast track courts in Delhi as a Union Territory.

767. The respondents do not provide details of amounts received from the Central Government. However, the **Action Plan 2012** of the **NCMS** makes the following important recommendation with regard to the finances for the judiciary:-

> "4.9 ***Judiciary needs to be separately dealt with in the Plans by the Planning Commission and separate allocation is necessary by the Planning Commission and the Finance Commission. Experience shows that States have been making negligible provision in the Budgets to the third pillar of democracy, i.e., Judiciary.*** This is revealed from the following figures:

Yearwise percentage allocation of Budget to Judiciary and few other major Departments in each State (as available) for the years 2006-09 to 2010-11

Delhi

Sl. No.	Year	Judiciary	Social Welfare	Health	Education
1	2006-07	1.08	1.38	6.89	13.52
2	2007-08	0.92	1.20	6.59	11.81
3	2008-09	1.23	1.73	6.24	11.98
4	2009-10	1.12	2.67	7.28	14.94
5	2010-11	1.41	3.10	7.35	13.92

(Emphasis by us)

768. The 'Policy and Action Plan' statement 2012 of the **NCMS** has also collated information regarding developments since 12.07.2010 when the Supreme Court of India started monitoring infrastructure till date mentioned. So far as Delhi is concerned, the information received and tabulated by the NCMS is as below:-

[FIGURE - 5]
Updated as on 16/9/2012
FORMAT-E
Developments between 12.07.2010 till date.
(Court Buildings)

Sl. No	Name of State / Union Territories	Total number of proposals cleared by Collectors and land acquired	Total number of Proposals cleared by the High Court for construction of new court buildings	Total number of proposals cleared by the State Governments/ Administrators for construction of new court buildings granting administrative and financial sanction	Total amounts sanctioned (in lakhs) for infrastructure (including new construction; repairs; and maintenance)	Total number of court buildings of which construction has been got completed	Remarks (detailing problems, if any, being faced for early progress in proceeding with projects)
1	2	3	4	5	6	7	8
xxx							
@10	**Govt. Of NCT of Delhi**	**0**	**0**	**0**	**0.000**	**1**	
Xxx							

@ Data has not yet been received, hence the data of previous year has been included.
*** Column No. 6 contains the amount for the Financial year 2010-11 to 2012-13.**

[FIGURE - 6]

FORMAT-F
Developments between 12.07.2010 till date.
(Residential Quarters)

Sl. No	Name of State / Union Territories	Total number of proposals cleared by Collectors and land acquired	Total number of Proposals cleared by the High Court for construction of new court buildings	Total number of proposals cleared by the State Governments/ Administrators for construction of new court buildings granting administrative and financial sanction	Total amounts sanctioned (in lakhs) for infrastructure (including new construction; repairs; and maintenance)	Total number of court buildings of which construction has been got completed	Remarks (detailing problems, if any, being faced for early progress in proceeding with projects)
1	2	3	4	5	6	7	8
xxx							
@10	**Govt. Of NCT of Delhi**	**0**	**0**	**0**	**0.000**	**0**	
xxx							

@ Data has not yet been received, hence the data of previous year has been updated.
*** Column No. 6 contains the amount for the Financial year 2010-11 to 2012-13.**

769. These recent tabulations manifest that the respondents have not furnished the required data about Delhi to enable formulation of policy and planning for the Delhi judiciary, supporting the petitioner's contention that the exercise to enhance the court fee is based on no assessment and evaluation of the relevant material and it has been effected arbitrarily. If the obligation to ensure a sound judiciary rests on the state and the Central Government is

constitutionally mandated ensure adequate funds to the Union Territory, it would be difficult to accept the impugned enhancement of court fee to recover the costs being incurred on the provision of the court system. It is evident that the Central Government has been releasing amounts under the Central Sponsored Scheme to the State Governments as well as Delhi for development of infrastructure, which given the disclosure in their affidavits, as well as the record placed before us establishes, has not been considered by the respondents while effecting the court fee enhancement.

770. Again the figures available from Department of Justice noted in the policy statement are as under:-

[FIGURE – 7]

STATEMENT GIVING GRANTS RELEASED UNDER CSS SCHEME FOR INFRASTRUCTURAL FACILITIES FOR JUDICIARY

Sl. No	State	Release from 1993-94 to 2010-11	Release in 2011-2012	Release in 2012-13	Total (1993-94 to 2012-13)
xxx					
5.	**Delhi**	**3647.08**	**2250.00**	**2000.00**	**7897.08**

771. Significantly, the respondents disclose no aspect of the funding or expenditure and no deficit to justify enhancement of the court fee.

772. Interestingly, as per the "Analysis of the Budgetary Transactions of State Government" of the Government of NCT of Delhi, the Delhi Government is treating administration of justice under the head of *"public order and safety"*.

773. Under Article 266 of the Constitution of India, all revenues received by the Government of India form the Consolidated Fund of India whereas all revenues received by the State form the Consolidated Fund of the State. The expenditure incurred for the purposes of the Supreme Court and the High Courts is charged upon the Consolidated Fund of India whereas the expenditure for the purposes of the subordinate courts and the administration expenses of the High Courts is charged upon the Consolidated Fund of the State.

774. The respondents have made no claim at all before us that they are not in a position to bear the costs which are incurred in Delhi on the administration of justice. Even if made, such a submission, in the light of the repeated reiteration responsibility of the State to maintain the judiciary, by the Supreme Court, is constitutionally untenable.

On the contrary, the counter affidavit has stated that the enhancement of the court fee is for reasons of increasing the *"general revenue"* of the Government of NCT of Delhi. This reason for enhancement of the court fee colours the levy with the lines of 'taxation' rather than a 'fee'.

775. In para 3 of the counter affidavit, the respondents have categorically urged that "*court fee is a source of recovery of expenses for the Government, which is made to ensure the provision of an appropriate and sufficient infrastructure and financial support for consistent and effective administration of justice*". In para 4 of the counter affidavit, after noticing the aforesaid reasons stated, the respondents have stated that "*it was only logical and financially prudent and indeed imperative that the court fee structure be revised to make them realistic*". The given reasons are constitutionally impressible to effect enhancement of court fee, given the impact on the right of access to justice.

776. The respondents have taken a position that government can recover fees for "*services rendered*". It has further been submitted by the respondents that the "*fee is payable only by a consumer of justice and is not levied on all residents/domiciles in the NCT of Delhi. It is also a policy of good governance that these expenses should be recovered to a reasonable extent so as to facilitate the strengthening of infrastructure and system of justice in the NCT of Delhi*". This stand has also been emphasized in para 13 of the written submissions filed on 21st September, 2012. The stand taken is not supported by any empirical data or research. The above discussion would show that this submission is completely untenable and is violative of the Constitutional mandate.

777. It is noteworthy that the Central government grant covered the functioning of the Fast Track Sessions Courts only. However,

a large number of criminal cases are pending in the regular courts which are triable by the Magistrates. Therefore, the Department of Justice had approached the 12th Finance Commission with a proposal to set up fast track magisterial courts as well. Nothing is known as to what became of this proposal. A reflection on the engagement with administration of justice!

778. It has been pointed out by Mr. Chandhiok, learned Senior Counsel that in ***Brij Lal*** (supra)the Supreme Court did not even remotely suggest that the respondents could enhance court fee to recover the cost of provision of fast track courts while issuing the mandamus to the Government. It is, therefore, trite that to provide an expeditious and fair trial mechanism, a basic constitutionally recognized right which inheres in every person, it is the constitutional duty of the state which is required to provide the adequate finances to the institution to ensure the independence and impartiality of the judiciary. The burden of bearing the cost thereof cannot ideally be transferred to the citizens.

779. The above narration would show that there is no holistic planning for the administration of justice in the country or for the expenditure thereon. There appears to be no budgetary allocation or division of liability for administration of justice between the Centre and the State. No heed is paid to the constitutional mandate. The dicta in the binding judicial pronouncements noted above sees no compliance, while the reports of the Law Commission of India on the issue gather dust! So far as States and Union Territories and

court fee impositions are concerned, there is no cohesion. There are sharp deviations from one State/Union Territory to another. It is however noteworthy that neither the documents and reports noticed by us nor the jurisprudence on the subjects suggest that court fee can be used as a source for funding administration of justice. In fact the same adversely impacts the fundamental rights of the persons under Articles 4, 16, 21 and is in violation of the constitutional mandate which requires the State to ensure an adequate and efficient justice dispensation mechanism for the nation- a judiciary which the Constitution recognizes as one of the pillars on which the edifice of democracy rests.

780. It is trite that administration of justice is a sovereign function and the responsibility for providing an adequate system of justice rests squarely on the State. It has been held that it is acceptable for the State to recover some amount as court fee. However, the court fee regime is necessarily to be based on some empirical data and consideration of essential inputs and an appropriate expert evaluation. A mere differential between the amount recovered through court fee and the total expenditure incurred on the judiciary is by itself insufficient to permit the State to impose a particular court fee regime or enhance the existing regime to such levels so as to make good the differential or, as the above discussion of the amended entries in the instant case would show, to make a profit.

781. To support a plea of a considered view having been taken on

the relevant material, the respondents were bound to have disclosed the funds made available by the Central Government in addition to the dispensation by the Government of NCT of Delhi for the administration of justice in the present case. The respondents have scrupulously withheld even a reference to these details in the counter affidavit. None of the tabulations placed before the court make any disclosure of the funds which are in the hands of the Government of NCT of Delhi.

782. The above tabulations of comparative percentages of expenditure of administration of justice in Delhi viz a vis that in other States. This exercise in our view is completely irrelevant as given the disparate situations in different States, there can be no meaningful comparison. Furthermore Delhi as the capital of the country, would be in a privileged position so far as Central dispensation is concerned. What is relevant, and of concern, is the miniscule percentage of the total budgeting, which is spent on administration of justice – clearly a wholly inadequate amount. The respondents were required to establish that they have discharged their constitutional obligations, which they have failed to do so.

(XI) Past recommendations for total abolition, or, in any case, reduction of court fee need reiteration

783. It appears that there was, indeed, a move at one time, for abolition of court fees altogether. The Consultative Committee attached to the Ministry of Law and Justice, at its meeting in June

1980, set up a Sub-Committee to go into the question of court fees in trial Courts. **The Sub-Committee in its report recommended abolition of court fees**. The exercise was again undertaken by a Sub-Committee set up by the Conference of Law Ministers which submitted its report in October 1984. This Sub Committee did not recommend abolition of court fees but recommended rationalization in the structure of court fee, broadly through reduction in ad valorem fee, exemption of certain categories of litigants and certain categories of cases from payment/levy of court fee and refund of court fee under certain circumstances.

784. The Law Commission in its 128th Report on **Cost of Litigation** (1988) expressed its views in favour of abolition of court fees. The Commission stated (para 4.6):

> "However, the Law Commission would be extremely happy if the State Governments or the Government of India, as the case may be, view the **court fees as something incompatible with a society governed by rule of law and would, therefore, like to abolish it**."
> (Emphasis supplied)

785. It also appears that there was a proposal to amend the Court Fees Act, 1870 which was examined in detail in 1999 by the Department of Justice. The exercise was undertaken in pursuance of the recommendations of the Expert Group appointed by the Ministry of Home Affairs to review Acts etc. administered by the said Ministry. However, with the approval of the then Minister of

Law and Justice, it was decided not to amend the Act.

786. The Law Commission of India and the courts have consistently opposed the idea that raising court fees can be justified in the name of reducing the number of litigants who come to court. In other words, to discourage vexatious litigation, the preamble to the Bengal Regulation of 1795 stated that increased court fees were necessary to drive away unmeritorious litigants. Lord Macaulay, Chairman of the First Law Commission of India had declared that this was "absurd". He stated that that such increase will also drive away honest plaintiffs who are unable to pay court fees.

787. We have noted that the Court Fees Act, 1870 also does not have a preamble, but the legislative purpose of the statute is discernible from the language of the Act, the Statement of Objects and Reasons in the enactment and the numerous pronouncements on this subject. Four points run through the jurisprudence on the subject and are worth highlighting with respect to the legislative purpose: (a) the desire to ensure that high court fees do not deter prospective litigants; (b) the goal of generating revenue for the state; (c) the legislative intent not to discriminate between litigants by imposing a uniform court fee; and (d) the intent to keep out vexatious litigation.

a. Limiting the Deterrent Effect of Increased Court Fees

788. First, a close reading of the Statement of Objects and Reasons ('SOR') of the 1870 Act points to a legislative intent to

reduce the deterrent effect of higher court fees imposed by preceding court fees statutes. The SOR makes clear that the higher fees imposed by the preceding Court Fees Act, 1867, were tentative, and that time had shown that these higher fees were having a deterrent effect on litigation. The legislative response to this inhibiting effect was to reduce the rates of fees charged for the institution of civil suits and install a cap on the maximum chargeable fee.

789. The above narration manifests the legislative objective of reducing court fees in order to ensure that litigation is not inhibited is evident throughout the SOR. Thus, the SOR highlights the need for: fee reductions for suits relating to land, for petitions in the Criminal Courts, and suits for the restitution of wives; a fixed valuation for certain types of common suits; a fee exception in the case of petitions to a Revenue Officer or magistrate by individuals who have dealings with Government, and for suits instituted in Military Courts; and the establishment of a fixed fee rather than the previous *ad volorem* fee charged to certain summary suits.

790. Similar sentiments were expressed by the Supreme Court in ***1989 Supp (1) SCC 696, P.M. Ashwathanarayanaa Setty v. State of Karnataka***, where *ad valorem* and unlimited court fees proposed by legislation introduced in Rajasthan and Karnataka were at issue. Quoting from A.P. Herbert's 'More Uncommon Law,' Venkatachaliah J (as he then was), wrote:

> "That if the Crown must charge for justice, at least the fee should be like the fee for postage: that is to say, it should be the same, however long the journey may be. For it is no fault of one litigant that his plea to the King's Judges raises questions more difficult to determine than another's and will require a longer hearing in Court. He is asking for justice, not renting house property."

791. Thus, it appears that the language of the Court Fees Act, 1870 indicates a legislative intent to ensure that court fees are not increased for the purpose of deterring prospective litigants.

b. Generating Revenue

792. Second, early decisions also suggest that one legislative purpose of the Act is the generation of revenue. Thus, the Privy Council observed in ***(1919) 21 BOMLR 489, Rachappa v. Sidappa*** as follows:

> "The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by Section 12, which makes the decision of the First Court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue." (Emphasis added)

This passage has subsequently been cited as an authority for the proposition that the legislative purpose of the Court Fees Act,

1870 is revenue generation. (For instance, also in ***1991 (0) MPLJ 774, Mahamdoo v. Shiekh Gafoor***).

793. This position was reiterated thereafter in ***AIR 1955 Cal 258, Tarachand Ghanshyamdas v. State of West Bengal; (1955) ILR MAD 1179, Perumal Chetti v. Province of Madras & Ors.; AIR 1955 MAD. 382 (384), Perumal Chetti v. Province of Madras and Ors.; and 1980 MPLJ 618 (620), Manorma Sharma v Suresh Kumar Sharma.*** However, this objective has been held to be unacceptable as would be evident from the following discussion.

c. Non-Discrimination of Litigants

794. The language of the Court Fees Act, 1870 also makes clear that the legislature intended that wheresoever permissible and possible, at least one type of court fee (process fees) to apply equally to all litigants. This is evident from the following statement in the Statement of Objects and Reasons of the Act:

> "In lieu of the existing rates of process-fees, which vary according to the distance of the Court by which the processes are issued from the place where they are to be served or executed, it is proposed to levy, by means of stamps, a uniform rate in all cases. All suitors will thus be required to contribute in equal proportion to the maintenance of the establishment employed in the serving of processes, without reference to the length of time occupied in each service and the consequent amount of work rendered on behalf of each person at whose instance any process is served or executed."
>
> (Emphasis added)

This language suggests that the legislature intended process fees, and perhaps court fees generally, to operate in a non-discriminatory fashion. The Law Commission of India in its 189th Report has also noted, the Act "*implicitly recognized the principle of non-discrimination among litigants in the matter of process fees*." This reading of the legislative purpose is supported by the Supreme Court's view in a catena of judgments that all fees charged must be uniform in order not to be considered a tax. It is therefore well settled that court fee cannot be fixed at such level as would deter prospective litigants; it must not discriminate between litigants by a uniform imposition.

(XII) <u>Impact of new legislation</u>

795. There is another important factor impacting justice dispensation and therefore access to justice which has not been given the deserved attention. It needs no elaboration that the number of cases directly impacts dispensation of justice. The inevitable consequence of additional litigation is increased need to additional infrastructure by way of more courts and facilities and hence the need for finances. The Courts in India work rights and violations under laws enacted by the Central Government as well as those by the State Legislatures. These laws may create new civil rights and obligations or create new criminal offences. Unfortunately before introduction of such legislations, no judicial impact assessment is undertaken by the legislature or the executive.

Therefore, there can be no planning as to how many civil cases the proposed legislation may generate or how many criminal cases will go before the Courts.

796. The 189th Report of Law Commission advised that before any new law is made by Parliament or a State Legislature may be introduced, a judicial impact assessment that estimates the impact of the proposed statute on the courts must be completed. Central to such an assessment is an estimate of the number of new civil and criminal cases that will be generated should the proposed statute be enacted.

797. The Supreme Court in ***(2005) 6 SCC 344 Salem Advocate Bar Assn (II). v. Union of India*** took note of a recommendation made by an ad hoc Committee for judicial impact assessments for new legislation noting as follows:-

> "49. The Committee has also suggested that: "Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such a judicial impact

> assessment has never been made by any legislature or by Parliament in our country.'"

798. Whether it can be said that the law now requires a judicial impact assessment to be incorporated into all proposed legislation is unclear. However, recent obiter of the Supreme Court suggests a growing concern with the need for judicial impact assessments.

799. The relevance of this assessment in the present context cannot be sufficiently emphasised. In ***(2012) 6 SCC 502, Brij Mohan Lal v. Union of India,*** the Court had occasion to consider the question of staffing of newly instituted fast-track courts. In the course of discussing the backlog of cases in the country, the Court observed:

> "148. Another very important aspect, which has often been noticed by this Court, is that the legislature, in exercise of its power, has enacted various Central and State laws. The disputes arising under these laws are to be adjudicated upon by the courts. It is a known fact that such legislations are not preceded by judicial impact assessment by the authorities concerned."

800. The Law Commission has also noted that the Central Government is bringing forward legislation in Parliament and burdening the subordinate Courts established by the State Governments with cases arising out of the Central legislation. It was noted that the Central Government has however not been making any contribution for establishing trial and appellate courts

in the States. This lacuna has been pointed out by the National Commission for Review of the Constitution as well.

801. The same position exists in Delhi. No information in this regard has been provided by the Delhi Government in this regard.

802. Judicial impact assessment is therefore of primary concern in the case of a proposed Central or State legislation that will affect the amount of litigation. It would seem that a judicial impact assessment would be of special concern in the case of a statute that will unquestionably affect the volume of litigation, and hence, the costs of providing the justice administration system.

803. Before enhancing court fee, this important aspect of the matter deserved attention. But have the respondents considered this aspect of the matter? Unfortunately, the answer is an absolute 'no'.

804. The responsibility for funding litigation so generated thus cannot be diverted to those seeking to access justice dispensation by imposition of or enhancement of the court fee regime.

(XIII) Mere hardship would not ipso facto be a ground for striking down a statutory provision

805. It is trite that mere hardship cannot be a ground for striking down a statutory provision and that there is a presumption of constitutionality attached to a legislation.

806. Hardship or inconvenience caused to any party by a statutory provision cannot also be used as a basis to alter the meaning of the language of the legislation, if its meaning is clear upon a bare perusal of the enactment. If the language is clean and hence allows only one meaning, the same is to be effected to, even it causes hardship or possible injustice.

(XIV) <u>Presumption of constitutionality in favour of a legislation</u>

807. Placing reliance on ***(1981) 4 SCC 675, R.K. Garg v. Union of India***, the respondents have submitted that there is a presumption in favour of the constitutionality of a statute and the burden is on the party that seeks to challenge it to show that there has been a transgression of constitutional principles. The respondents have further urged that the petitioner's challenge to the constitutionality of a legislative enactment must be clear, specific and unambiguous and must contain sufficient particulars (**Ref: *1989 (4) SCC 470, Bank of Baroda v. Rednam Nagachaya Devi)*** and that is for the petitioners to submit before the court material establishing that the impugned law is irreconcilable with the constitutional guarantees under Article 14.

808. The respondents press the argument that keeping in view the presumption in favour of the constitutionality of the impugned statute, this Court must presume that the legislature was aware and considered the possible consequences of an increase in court fees as well as the sharp increase in the costs of maintaining the

machinery for the administration of justice. They submit that it is the legislature and not the judiciary which is best placed to consider competing policy consideration and the court cannot substitute its judgment for that of the legislature in such matters.

809. The petitioners have specifically set up a plea that the impugned legislation violates Article 14 as well as other constitutional provisions.

810. In ***(1981) 4 SCC 675, R.K. Garg v. Union of India***, the petitioner challenged the constitutionality of the provisions of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 inter alia on the ground that by conferring immunities and exemptions in favour of black money holders had discriminated against honest tax payers and therefore violative of Article 14. It was argued that the classification made under it was motivated to condone concentration of black wealth which is destructive. The court rejected the challenge on the ground that the immunity was a severely restricted one and is the bare minimum immunity necessary in order to induce holders of black money to bring out in the open and invest it in the special bearer bonds, making it available to the State for productive purposes. The petitioner's argument was held to be highly theoretical. The petitioners had also challenged the enactment on the ground that it offended against morality. The factual matrix laid down hereinabove clearly shows that it has no application so far as the present consideration is concerned. In para 7 of ***R.K. Garg v. Union of India*** (supra), the

court held and pronounced as follows:-

> **"7.** Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

811. While drawing up "common knowledge, matter of common report, history of the times and assumption of every State of fact which can be conceived existing at the time of legislation" in the present case, it is impossible to ignore the deleterious effect on litigation of the court fee enhancement by the Act of 1867 necessitating its reduction by the Act of 1870. The detailed reports of the Law Commission of India and observations in jurisprudence from India and abroad amply militate against enhancement of court

fee. The respondents have examined no material at all before proceeding with the proposal of the court fee enhancement. Under the shield of 'rationalization', the respondents have proceeded to enhance the court fee, in some instances by many hundred times. The violation of the several constitutional principles have been noticed by us in the earlier part of this judgment. In this background, the consideration by the Supreme Court in ***R.K. Garg v. Union of India*** (supra) has no application to the instant case.

812. The basis of the constitutional violations has also been pleaded in the writ petitions. It is well settled that an objection in law can be raised and urged in support of a Constitutional challenge. The respondents have understood the pleas raised by the petitioners and attempted to respond in the counter affidavit. As such the objection that the petitioners have not adequately pleaded the constitutional violations is misconceived and untenable.

813. The respondents further state that the Supreme Court in ***Bank of Baroda*** (supra) held that if the existence of certain facts and circumstances was necessary to preserve the constitutionality of an impugned law, those facts and circumstances could be presumed to exist by the court. The principles laid down in a judgment have to be read and applied in the light of the facts of case. In ***Bank of Baroda*** (supra), to the appellant's suit for recovery of money, the respondent had set up the defence that Section 13 of the Andhra Pradesh (Andhra Area) Agriculturist

Relief Act (4 of 1938) prohibited charging of compound interest as a defence. No challenge to the constitutionality of any provision of Andhra Pradesh (Andhra Area) Agriculturist Relief Act (4 of 1938) was laid. Yet the court had ruled that the classification under the statutory provision was violative of Article 14. Hence, the objection by the Supreme Court to the ruling by the appellate court. In the present case, this court is considering constitutional challenge to the validity of the statutory enactment which is premised on grounds of violation of the provisions. As such the judgment in ***Bank of Baroda*** (supra) also has no application to the instant case.

814. Conscious of the above well settled principle, we have examined the challenge in these writ petitions within the parameters of permissible judicial review.

(XV) Court Fee – a matter of fiscal policy - Scope of judicial review

815. The respondents have raised an objection to the challenge in these writ petitions submitting that court fee is a matter of fiscal policy which is beyond the scope of judicial review.

816. It was held in ***A. Setty*** (supra) that the question of the appropriateness of the measure of a tax or a fee is a matter of fiscal policy. The Supreme Court also considered the discretion given to the legislature in matters of economic and fiscal policy and regulation. In ***A Setty*** (supra) the Supreme Court ruled on the

question of whether the measure of the fee should be ad valorem, is a matter of fiscal policy in the following terms:-

> "The problem is, indeed, a complex one not free from its own peculiar difficulties. Though other legislative measures dealing with economic regulation are not outside Article 14, it is well recognized that the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the Legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustments of an economic measure are available, the Legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or that there were better ways of adjusting the competing interests and claims. ***(para 79 of A. Setty) [Also quoted in para 12 of P.R. Sriramulu (supra)]***

817. Certain important observations on this aspect in the judgment ***(1996) 1 SCC 345, Secretary of Govt. of Madras & Ors. V. Shri P.R. Sriramulu & Ors.*** may also be usefully extracted and read as under:-

"It cannot be disputed that the administration of justice is one of the main functions of the State. It is also a fact that the functions of the State in the modern times have become too extensive encompassing a large area of activity. Now the State has not only to maintain system of administration of justice for the maintenance of law and order, but it has also to provide a system to enable its citizens to convass their rights against wrongs done to them as well as to the State itself, statutory parties and Government Corporations, they being now the largest litigants by reason of the growing tendency of all the States to project themselves into various social, economic and industrial spheres of the society, which during pre- independence days, was a rare phenomena. It is for all these reasons that the States came forward to levy fee by legislative amendments in order to cover up the expenses towards the pay, allowances and pensions of Judicial Officers and establishment staff, their residential accommodations. Court buildings repairs and maintenance thereof as well as provision for transport, libraries and stationery, besides other expenses under various heads and machinery engaged and employed for the administration of justice. ***(para 7)***

xxx xxx xxx

It is also well settled that lack of perfection in a legislative measure does not necessarily imply its constitutionality as no economic measure has so far been discovered which is free from all discriminatory impact and that in such a complex area in which no fool proof device exists, the Court should be slow in imposing strict and rigorous standard of scrutiny by reason of which all local fiscal schemes may be subjected to criticism under the Equal Protection clause. Having regard to these settled principles the

impugned Judgment of the High Court could not be sustained. ***(para 15)***

xxx xxx xxx

818. The above discussion would show that mere legislative imperfection would not necessarily imply that law was not constitutional. The Supreme Court however is clearly of the view that the value of the suit alone could not justify, the levy of the court fee; that for a court fee levy to be appropriate, it has to strictly satisfy all the relevant factors. Given the impact of court fee regime on the fundamental right of access to justice, it cannot simply be treated as an economic or a fiscal policy.

819. It has been urged by Mr. A.S. Chandhiok, learned Senior counsel that the issue of court fee does not fall under fiscal or economic policy but directly relates to administration of justice. The petitioner has contended violation of Article 14, 21 and 39A of the Constitution of India and as such this court is fully justified in examining the challenged raised by the petitioner to the enhancement of the court fee by the impugned legislation. In this regard reliance is placed on the pronouncement of the Supreme Court reported at ***(2012) 6 SCC 312, State of M.P. v. Rakesh Kohli.***

820. We may usefully advert to the distinction drawn by the Supreme Court so far as legislation impacting fundamental rights is

involved. This was pointed out in the following terms in ***(2008) 4 SCC 720*** (at page 750), ***Government of A.P. v. P. Laxmi Devi*** thus:

> "77. However, though while considering economic or most other legislation the court gives great latitude to the legislature when adjudging its constitutionality, a very different approach has to be adopted by the court when the question of civil liberties and the fundamental rights under Part III of the Constitution arise.
>
> 78. In para 8 of the Constitution Bench decision in *R.K. Garg case* [*R.K. Garg* v. *Union of India*, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] it was observed (as quoted above) that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, freedom of religion, etc. Thus, the Constitution Bench decision in *R.K. Garg case* [AIR 1960 SC 554] is an authority for the proposition which has been stated herein, namely, when a law of the legislature encroaches on the civil rights and civil liberties of the people mentioned in Part III of the Constitution (the fundamental rights), such as freedom of speech, freedom of movement, equality before law, liberty, freedom of religion, etc., the Court will not grant such latitude to the legislature as in the case of economic measures, but will carefully scrutinise whether the legislation on these subjects is violative of the rights and liberties of the citizens, and its approach must be to uphold those rights and liberties, for which it may sometimes even have to declare a statute to be unconstitutional."

821. We find that even in matters relating to policy wherein a

case of violation of constitutional principles is made out is concerned, the Supreme Court has drawn a distinction with regard to the duty of the court. In this regard, reference deserves to be made to the pronouncement of the Supreme Court reported at ***(2012) 3 SCC 1, Centre for Public Interest Litigation v. Union of India***. The relevant extract whereof reads as follows:-

> "99**.** In majority of the judgments relied upon by the learned Attorney General and the learned counsel for the respondents, it has been held that the power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State. However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters."

822. Therefore all the elements of ensuring the right of access to justice to the citizens as well as social justice are quintessential to the present consideration. The present challenge to the

enhancement of the court fee cannot be brushed aside by terming it as matter of economic or fiscal policy. When such a policy negatively impacts the fundamental right of access to justice amongst others, this court is bound to examine the challenge to protect essential constitutionally recognized rights of the people.

(XVI) Whether amount collected as court fee to be spent entirely on administration of justice?

823. Learned Senior Counsel for the petitioner has vehemently challenged this claim of the respondents, contending that access to justice is a constitutional right granted to the citizens and that the judiciary does not provide a "service" as in common parlance. Placing reliance on Article 39A, it is contended that equal justice and free legal aid is mandated to all persons in the country so that 'opportunities for securing justice' are not denied to any citizen by reason of economic or other disabilities.

824. Given the spirit, intendment and objects of recovery of court fee as well as nature of the right which is directly impacted thereby, the right of access to justice and courts; no increase of court fee can also be justified merely on the ground that the government wishes to enhance the position of its general revenue. It is astonishing that such an exercise to enhance the court fee has been undertaken without any evaluation of the expenditure; heads of expenditure; distribution of amounts spent on civil or criminal justice dispensation; amounts spent on infrastructure.

825. It also needs no elaboration that so far as administration of justice is concerned, a mere shortfall or gap between amount currently being expended by the State and amount being recovered as court fee from the litigant does not ipso facto provide the requisite correlation for basing an enhancement of the court fees payable by the litigants. The State must establish that it has discharged at least its minimal responsibility towards ensuring an adequate and efficacious justice dispensation system before it can look towards court fee as a form of cost recovery from the litigants.

826. Critical areas of justice administration thus remain in unplanned categories of the State's financial planning. The judge to population ratio in our country remains probably the worst in the world. Even essential requirements for justice dispensation (say, computers, legal journals, transportation, and stationery even) require judicial intervention, as manifested in the several judgments and court directions on these matters. Despite repeated directions of the Supreme Court and recommendations of the Law Commission (since Lord Macaulay who headed the First Law Commission to those given by Justice M.J. Rao in 2004 in the 189th Report on Court Fees), hardly any effective steps towards capacity enhancement of the judiciary have been undertaken. This dependence on arbitrary dispensations on a totally essential government function is recognized as having a strong and deleterious impact on judicial independence.

827. The Supreme Court has categorically declared that the

Central Government must bear fifty percent of the expense of justice administration. So far as the criminal justice dispensation is concerned, the same has to be established and maintained by the State as its own cost. These factors would form an essential part of the evaluation by the State of utilizing court fee as a tool for recoverable component of expenditure incurred on the justice dispensation system.

Of course, the ideal situation being that of administration of justice is recognized as the absolute and exclusive responsibility of the State.

(XVII) Judicial precedents on challenges to enhancement of court fee

828. Mr. Harish Salve, learned senior counsel for the respondents has contended that the contentions of the petitioners are not res integra and stand concluded against them by authoritative pronouncements of the Supreme Court. In this regard, our attention has been to the judgments reported at ***(1973) 1 SCC 162, Secretary, Government of Madras v. Zenith Lamp and Electrical*** (hereinafter referred to as the '***Zenith Lamp*** case'); ***1989 Suppl. (1) SCC 696, P.M. Ashwathanarayana Setty v. State of Karnataka*** (hereinafter referred to as '***A. Setty***') and; ***(1996) 1 SCC 345, Secretary to the Govt. of Madras, Home Deptt. v. P.R. Sriramulu and Anr.*** (hereinafter referred to as '***P.R. Sriramulu***').

829. In the ***Zenith Lamp case***, the respondent had intended to file

a suit in the Madras High Court on the original side valued at Rs.2,06,552/- against the Revenue. On the question of court fee payable in the intended suit, the petitioner filed a writ petition in the High Court, praying that the High Court may be pleased to issue a writ of mandamus or other direction or order declaring Rule 1 of the High Court Fee Rules 1956 and the provisions of the Madras High Court Fees and Suits Valuation Act 14 of 1955 to be invalid and ultra vires insofar as they related to the levy of fees on an ad valorem scale. It was urged that the increase made in 1955 and 1956 in the court fees payable was unjustifiable in the light of the expenditure actually incurred in the administration of civil justice. In its counter affidavit the State urged that the rates of fee prescribed under the Court Fees Act of 1955 were not excessive and that the levy did not amount to a tax on litigation. A supplemental affidavit was filed on behalf of the State on 11th October, 1966 in which various statements were given to show that the expenditure on the administration of justice was higher than the receipts. The petitioner objected that there were several inadmissible items which had been taken into account. The High Court struck down the levy found in Article 1 of Schedule 1 of the Madras Court Fees and Suits Valuation Act 1955 in its application to the High Court. With certificate, appeal was filed in the Supreme Court. The Supreme Court had to consider whether the "fees taken in court" in Entry 3 List II (Schedule VII) of the Constitution are taxes or fees or whether they are sui generis in nature.

830. In the ***Zenith Lamp case*** (supra), the Supreme Court remanded the case to the High Court and directed the High Court to give an opportunity to the writ petitioners to file an affidavit or affidavits in reply to the affidavit dated October 11, 1966.

831. We may usefully extract the following portions of the judgment which set the basis for the findings returned by the court as well as lay down the applicable principle:-

> "48. We agree with the Madras High Court in the present case that the **fees taken in Courts are not a category by themselves and must contain 'the essential elements of the fees as** laid down by this Court. We also agree with the following observation:
>
> > "**If the element of revenue for the general purposes of the State predominates, then the taxing element takes hold of the levy and it ceases to have any relation to the cost of administration of the laws to which it relates; it becomes a tax. Its validity has then to be determined with reference to its character as a tax and it has to be seen whether the Legislature has the power to impose the particular tax.** When a levy is impugned as a colourable exercise of legislative power, the State being charged with raising a tax under the guise of levying a fee, **Courts have to scrutinize the scheme of the levy carefully, and determine whether, in fact, there is correlation between the services and the levy, or whether the levy is excessive to such an extent as to be a pretence of a fee and not a fee in reality**. If, in substance, the levy is not to raise revenues also for the general

> purposes of the State, the mere absence of uniformity or the fact that it has no direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service, or that some of the contributories do not obtain the same degree of service as others may, will not change the essential character of the levy."
>
> xxx xxx xxx
>
> **52. It is true, as held by the High Court, that it is for the State to establish that what has been levied is court-fees properly so-called and if there is any enhancement the State must justify the enhancement."**
>
> (Emphasis by us)

832. So far as the important findings of the court in ***Zenith Lamps*** (supra) are concerned, the same can be summed up thus:-

> (i) The history of court fees in England as well as in India, shows that fees taken in court were not levied as taxes and "**the costs of administration was always one of the factors that was present."**
>
> (ii) It seems plain that "fees taken in court" are not taxes, for, if it were so, the word "taxes" would have been used or some other indication given. This conclusion is strengthened by two considerations. First, taxes that can be levied by the Union are mentioned in List I from Entry 82 and in List II taxes that can be imposed start from Entry 45. Secondly, the very use of the words "not including fees taken in any court" in Entry 96 List I and Entry 66 List II shows that they would otherwise have fallen within these Entries. It follows that "fees taken in

court" cannot be equated to “taxes”. There is no essential difference between fees taken in court and other fees. It is difficult to appreciate why the word “fees” bears a different meaning in Entries 77 List I and Entry 96 List I or Entry 3 List II and Entry 66 List II.

(iii) But even if the meaning is the same, what is “fees” in a particular case depends on the subject-matter in relation to which the fees are imposed. The present case related to the administration of civil justice in a State.

(iv) The fees must have relation to the administration of civil justice. While levying fees the appropriate legislature is competent to take into account all ***relevant factors, the value of the subject matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of courts and officers administering civil justice, the vexatious nature of certain types of litigation and other relevant matters.*** It is ***free to levy a small fee in some cases, a large fee in others, subject of course to the provisions of Art. 14***. But **one thing the legislature is not competent to do, and that is to make litigants contribute to the increase of general public revenue**. In other words, it cannot tax litigation and make litigations pay, say for road building or education or other beneficial schemes that a State may have. ***There must be a co-relationship between the fees collected and the cost of administration of civil justice.***

(v) The phrase 'fees taken in court' cannot be interpreted to mean that it described fees which were actually being taken before the Constitution came into force. If that was the meaning, no fees could be levied in the Supreme Court because the Supreme Court did not exist before the Constitution came into force and no fees were being taken therein. This would render part of the Entry of List nugatory. ***(para 32)***

(vi) The contention that fees taken in court are taxes because by virtue of Art. 266 all fees, being revenues of the State will be credited to the Consolidated Fund, could not be accepted. This Court has held that the fact that an item of revenue is credited to the Consolidated Fund is not conclusive to show that it is an item of tax. As Art. 266 requires that all revenues received by the State have to go to the Consolidated Fund, not much stress can be laid on this point. Fees and taxes are both revenue for the State.

(vii) The fees taken in Courts are not a category by themselves and must contain the essential elements of the fees as laid down by this Court. **It is for the State to establish that what has been levied is court-fees properly so-called and if there is any enhancement the State must justify the enhancement.** ***(para 48 and 52. Also quoted in para 3 of P.R. Sriramulu)***

(viii) ***For determination of the question that the State was not making any profit out of the administration of civil justice, various items both on the receipts side and the expenditure side must be carefully analysed to see what items or portion of items should be credited or debited to the administration of civil justice***. ***(para 51)***

833. The second case cited before us is ***1989 Supp.(1) SCC 696, P.M. Ashwathanarayana Setty v. State of Karnataka***. By this judgment, the Supreme Court decided three groups of Special Leave Petitions/appeals/writ petitions which concerned the policy and legality of the levy of court fees in the States of Karnataka, Rajasthan and Maharashtra under the provisions of the Karnataka Court Fees and Suits Valuation Act, 1958, the Rajasthan Court Fees and Suits Valuation Act, 1961 and the Bombay Court Fees

Act, 1959 respectively.

834. The petitioners from Rajasthan had challenged before the High Court of Rajasthan the constitutional validity of the provisions of Section 20 read with Article 1 Schedule 1 of the Rajasthan Act which **prescribed and authorised the levy of court-fees on a uniform ad valorem basis without the prescription of any upper limit.** The High Court upheld the constitutionality of the impugned provision which was then challenged before the Supreme Court.

835. The appeal and the Special Leave Petitions from Karnataka were directed against the common order of the Karnataka High Court upholding the validity of the corresponding provisions of the **Karnataka Act which similarly imposed an ad-valorem court fee without prescribing any upper limit.** The writ petitions challenged the respective provisions directly in Supreme Court.

836. So far as the Bombay Act was concerned, the State of Maharashtra came up in appeal against the judgment of the Division Bench of the Bombay High Court affirming the order of the learned Single Judge striking down the provisions of Section 29(1) read with Entry 10 of Schedule I of the Act in so far as they purported to prescribe **an ad- valorem court fee, without any upper limit, on grants of probate, letters of administration etc., while in respect of all other suits, appeal and proceedings an upper limit of court-fee of Rs.15,000/- was prescribed. The**

High Court held that this prescription of ad-valorem court-fee without any upper limit on this class of proceedings alone was constitutionally impermissible in that it sought to single out this class of litigants to share a disproportionately higher share of the burden of fees. While other litigants are not required to pay beyond Rs.15,000/-.

837. It was contended on behalf of the petitioners/appellants that:

> "(i) the imposition of court fees at nearly 10% of the value of the subject matter in each of the courts through which the case sojourns before it reaches a finality would seriously detract from fairness and justness of the system;
>
> (ii) the exaction of ad-valorem fee uniformly at a certain percentage of the subject matter without an upper limit or without the tapering down after a certain stage onwards would negate the concept of a fee and partake of the character of a tax outside the boundaries of the State's power;
>
> (iii) the ad-valorem yardstick, which is relevant and appropriate to taxation, is wholly inappropriate because the principle or basis of distribution in the case of a fee should be the proportionate cost of services inter-se amongst the beneficiaries;
>
> (iv) in the very nature of the judicial process, a stage is reached beyond which there could be no proportionate or progressive increase in the services rendered to a litigant either qualitatively or quantitatively; ***(para 66 of A. Setty)***
>
> (v) in the process of adjudication of disputes before courts, judicial-time and the machinery of justice are not utilised in direct proportion to the value or the

amount of the subject matter of the controversy; ***(para 66)***

(vi) a recognition of the outermost limit of the possible services and a prescription of a corresponding upper limit of court fee should be made, lest the levy, in excess of that conceptual limit, becomes a tax; and

(vii) though India is a federal polity, the judicial system, however, is an integrated one and that therefore different standards of court fee in different States would be unconstitutional.***"***

838. The contentions of the State were noted in para 29. On the issues raised, the Supreme Court held as follows:

"(i) as long as their power to raise the funds to meet the expenses of administration of civil justice was not disputed and as long as the funds raised show a correlation to such expenses, the States should have sufficient play at the joints to work-out the incidents of the levy in some reasonable and practical way; ***(para 77 of A. Setty)***

(ii) it would, quite obviously, be impracticable to measure-out the levy directly in proportion to the actual judicial time consumed in each individual case, hence the need to tailor some rough and ready workable basis which, though may not be an ideal or the most perfect one, would at least be the least hostile; ***(para 77 of A. Setty)***

(iii) if an upper limit is fixed and the collection fell short of what the Government intends and is entitled to collect, this would eventually result in the enhancement of the general rates of court-fee for all categories; ***(para 77 of A. Setty)***

> (iv) if the value of the subject matter is a relevant factor in proportioning the burden of the court fee, where the line should be drawn in applying the principle is more a matter of legislative wisdom and preference than of the strict judicial evaluation and adjudication; ***(para 77 of A. Setty)***
>
> and (v) courts cannot-compel the State to bring-forth any legislation to implement and effectuate a Directive Principle."

839. The court finally observed that though the impugned court fee scheme could not be upheld, at the same time it "cannot be struck-down".

> "Having regard to the nature and complexity of this matter it is, perhaps**, difficult to say that the ad-valorem principle which may not be an ideal basis for distribution of a fee can at the same time be said to be so irrational as to incur any unconstitutional infirmity**. The **presumption of constitutionality** of laws requires that any doubt as to the constitutionality of a law has to be resolved in favour of constitutionality. **Though the scheme cannot be upheld, at the same time, it cannot be struck down either**. ***(para 88 of A. Setty)***
>
> The State is in theory entitled to raise the totality of the expenses by way of fee. Any interference with the present yardstick for sharing the burden might in turn produce a yardstick less advantageous to litigants at lower levels. Subject to certain observations and suggestions we propose to make in regard to the rationalization of the levies in view of the general importance of the matter to the **administration of civil justice**, we think we should decline to strike

down the law." ***(para 89 of A. Setty)***

840. It is noteworthy that while considering the prescription of ad valorem court fee on probate without an upper limit, the court made the following observations:-

> "Plaintiffs who go to civil courts claiming decrees are not required to pay court-fees in excess of Rs. 15,000. This is irrespective of the amounts claimed over and above Rs. 15 lacs. As against this, persons claiming probates have no such relief in the form of an upper limit to fee payable." ***(para 90 of A. Setty)***
>
> This contention was accepted by the Learned Single Judge who has upheld the appeal. Indeed, where a proceeding for grant of probate and letters of administration becomes a contentious matter, it is registered as a suit and proceeded with accordingly. If in respect of all other suits of whatever nature and complexity an upper limit of Rs. 15,000 on the court fees is fixed, there is no logical justification for singling out this proceeding for an ad- valorem impost without the benefit of some upper limit prescribed by the same statute respecting all other litigants. Neither before the High Court—nor before us here-was the impost sought to be supported or justified as something other than a mere fee, levy of which is otherwise within the State's power or as separate 'fee' from another distinct source. It is purported to be collected and sought to be justified only as court fee and nothing else." ***(para 91 of A. Setty)***
>
> "The discrimination brought about by the statute, in our opinion, fails to pass the constitutional muster as rightly pointed out by the High Court. The High

Court, in our opinion rightly, held:

> "There is no answer to this contention, except that the legislature has not thought it fit to grant relief to the seekers of probates, whereas plaintiffs in civil suits were thought deserving of such an upper limit. The discrimination is a piece of class legislation prohibited by the guarantee of equal protection of laws embodied in Article 14 of the Constitution. On this ground also item 10 cannot be sustained" ***(para 92 of A. Setty)***

> We approve this reasoning of the High Court and the decision of the High Court is sustained on this ground alone. In view of this any other ground urged against the constitutionality of the levy is unnecessary to be examined." ***(para 93 of A. Setty)***

841. In view of these observations, the court observed that though it had abstained from striking down the legislation, yet immediate steps were required to rationalise the levels. The following valuable suggestions were made by the court.

> "Though we have abstained from striking down the legislation, yet, it appears to us that **immediate steps are called for and are imperative to rationalize the levies. In doing so the States should realize the desirability of levying on the initial slab of the subject matter**—say upto Rs. 15,000—a **nominal court-fees** not exceeding **2 to 2½% so that small claims are not priced out of Courts. "Those who have less in life' it is said should have more in law". *(para 98 of A. Setty)***

> Claims in excess of Rs. 15,000 might admit of an ad-valorem levy at rates which, preferably, should not exceed 7½% **subject further to an upper limit which, having regard to all circumstances, could be envisaged** at Rs.75,000. The upper limit even prior to 1974 under the Bombay Act was Rs.15,000 and prior to 1961 under the Rajasthan Act' at Rs.7,500. Having regard to steep inflation over the two decades the upper limit could perhaps go upto Rs.75,000. **After that limit is reached, it is appropriate to impose on gradually increasing slabs of the value of the subject matter, progressively decreasing rates, say from 7½% down to ½% in graduated scales. The Governments concerned should bestow attention on these matters and bring about a rationalization of the levies.**" ***(para 98 of A. Setty)***

In this judgment pronounced in 1989, the Supreme Court has therefore recommended rationalisation of court fees and recommended progressively decreasing rates.

842. We may now come to the third judgment which is reported at ***(1996) 1 SCC 345, Secretary to the Govt. of Madras v. P.R. Sriramulu and another.*** After the remand of the case in the ***Zenith Lamps case*** (supra) by the Supreme Court, the matter was considered afresh by the Madras High Court.

843. It is noteworthy that Writ petition No. 139/1987 filed by a Bank was taken up also for consideration by the High Court of Madras. The said Bank had filed a civil suit for recovery of Rs. 6,50,40,605.12 against M/s. Mettur Textile Industries Ltd. and

others on which it had to pay Court Fee amounting to Rs. 48,78,054.25 on ad-valorem basis at the rate of 7 ½ per cent under Article 1 of Schedule 1 of the said Madras Act No. XIV of 1955. Certain other money suits were also contemplated by the Bank and having learnt that the Civil Appeal No. 736/1975 has been filed in this Court against the Madras judgment, the Bank has also filed the aforesaid writ petition under Article 32 of the Constitution of India challenging the said levy of Court Fees on the flat rate of 7 ½ percent ad-valorem, relying on the same grounds as are set out in the aforesaid appeal." This writ petition was heard along with the respondent's appeal and decided by this judgment.

844. After considering the affidavits filed on behalf of the parties and the material on record the High Court took the view in the impugned judgment that there was no element of quid pro quo in the levy at the rate of 7½ per cent flat rate without limit as there is no necessity to raise the court fees as compensation for the cost of service rendered and to meet any increased cost in the administration of civil justice and that there was no principle of rationalization justifying demand at a flat rate. The High Court further held that considering the circumstances the impost inherently falls more within the concept of tax than fee and the levy on a particular section of litigants is a grossly disproportionate part of the burden and the same is unreasonable and arbitrary. The expenditure incurred by the Government as shown in some of the items, in the opinion of the High Court could not be debited to the

cost of administration of justice which the litigant can be required to compensate and that the expenditure in the administration of criminal justice is also not debitable to the cost of administration of civil justice in courts. The High Court further held that the record indicated that for the year 1955-56 the State was making a profit varying between 9 to 21 lakhs. On the basis of these conclusions the High Court struck down Article 1 in Schedule 1 to the Tamil Nadu Court Fees and Suits Valuation Act and sub-rule 1 of Rule 1 of the High Court Rules, 1956 based on Article 1 of Schedule 1 to the Madras Act No. 14 of 1955 as invalid against which the aforementioned appeal has been directed. ***(para 4)***

845. The judgment of the Madras High Court after the remand in ***Zenith Lamps case*** (supra) was thus brought in a challenge before the Supreme Court in ***P.R. Sriramulu*** (supra).

846. The facts leading to the appeal in the Supreme Court as noted in the judgment are that certain lands belonging to the respondents No. 1 and 2 herein situated in Tondiarpet were acquired at the instance of Public Works Department in respect of which award No. 6 and 8 both of 1962 were made on 5.3.1962 and 10.3.1962. On a reference made under Section 18 of the Land Requisition Act, at the instance of respondents No. 1 and 2, IVth Assistant City Civil Judge, Madras enhanced the compensation. The respondents, being dis-satisfied, preferred appeals to the High Court for further enhancement of the compensation. The Court Fee payable according to Madras Court Fees and Suits Valuation Act,

1955 on such appeals was an ad-valorem Court Fee at the rate of 7 ½ per cent of the total claim without any upper limit for such levy irrespective of the amount. The respondents No. 1 and 2 challenged the validity of the aforesaid provisions of levy of Court Fees and Suits Valuation Act of 1955 with reference to levy of court fees ad-valorem working out at the rate of 7 ½ per cent without upper limit by contending that the levy is not only exorbitant but wholly arbitrary, unreasonable and unjustified bearing no relationship to the cost of administration of justice and that in fact it was not a levy of Court Fee but really a levy of tax though purporting to be a levy of fee. The respondents took the stand that the Court Fees must be related to the cost of administration of justice and cannot be used as a means of taxation for the purpose of raising the revenue to the Government for its general administration. Respondents further took the stand that the pattern of levy of court fees prior to 1955 was only to levy an ad-valorem fee up to a certain limit and thereafter the fee was on a reduced scale and that the scale of fees in other States of the country are also on a different basis and not on the basis of ad-valorem fee without limit. The said provisions therefore were sought to be declared invalid.

847. We may also extract some of the findings in ***P.M. Ashwathanarayana Setty*** (supra) which are to the following effect:

> (i) **All civilised Governments recognise the need for access to justice being free. Whether the whole of the** expenses of administration of civil justice also--in addition to those of criminal justice--should be

free and met entirely by public revenue or whether the litigants should contribute and if so, to what extent, **are matters of policy.** ***(para 29 of A. Setty)***

(ii) A fee is a charge for the special service rendered to a class of citizens by Government or Government agencies and is generally based on the expenses incurred in rendering the services. ***(para 36 of A. Setty)***

(iii) The power to raise funds through the fiscal tool of a `fee' is not to be confused with a compulsion to do so. **While `fee' meant to defray expenses of services cannot be applied towards objects of general public utility as part of general revenues, the converse is not valid. General public revenues can, with justification, be utilised to meet, wholly or in a substantial part, the expenses on the administration of civil justice.** ***(para 96 of A. Setty)***

(iv) **The Directive Principles of State Policy though not strictly enforceable in courts of law, are yet fundamental in the governance in the country. They constitute fons-juris in a Welfare State.** ***(para 37 of A. Setty)***

(v) The inherent complexity of these fiscal adjustments, courts give a larger discretion to the Legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. ***(para 79 of A. Setty) (Also quoted in para 12 of Sriramulu)***

(vi**) The lack of perfection in a legislative measure does not necessarily imply its unconstitutionality. It is rightly said that no economic measure has yet**

been devised which is free from all discriminatory impact and that is such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of criticism under the equal protection clause when *reviewing fiscal services*. *(para 82 of A. Setty) (Also quoted in para 15 of Sriramulu)*

(vii) It is for the governmental agencies imposing the fee to justify its impost and its quantum as a return for some special services. *(para 37 of A. Setty)*

(viii) Once **a broad correlation between the totality of the expenses on the services, conceived as a whole**, on the one hand and the **totality of the funds raised by way of the fee**, on the other, **is established**, it would be no part of the legitimate exercise in the examination of the constitutionality of the concept of the impost to embark its effect in individual cases. Such a grievance would be one of disproportionate nature of the distribution of the fees amongst those liable to contribute and not one touching the conceptual nature of the fee. The test is one of the comprehensive level of the value of the totality of the services, set off against the totality of the receipts. If the character of the `fee' is thus established, the **vagaries in its distribution amongst the class, do not detract from the concept of a `fee' as such, though a wholly arbitrary distribution of the burden might violate other constitutional limitations. *(para 67 & 72 of A. Setty) (Also quoted in para 12 of Sriramulu)***

(ix) The State is in theory entitled to raise the totality of the expenses by way of fee. Any interference with the present yardstick for sharing the burden might in turn produce a yardstick less advantageous to litigants

at lower levels. ***(para 89 of A. Setty)***

(x) Having regard to the nature and complexity of this matter it is, perhaps, difficult to say that the ad-valorem principle which may not be an ideal basis for distribution of a fee can at the same time be said to be so irrational as to incur any unconstitutional infirmity. The presumption of constitutionality of laws requires that any doubt as to the constitutionality of a law has to be resolved in favour of constitutionality. Though the scheme cannot be upheld, at the same time, it cannot be struck down either. ***(para 88 of A. Setty) (Also quoted in para 20 of Sriramulu)***

(xi) If in respect of all other suits of whatever nature and complexity an upper limit of Rs.15,000 on the court fee is fixed, there is no logical justification for singling out probate and letters of administration for an ad-valorem impost without the benefit of some upper limit prescribed by the same statute respecting all other litigants. ***(para 90 & 91 of A. Setty))***

(xii) The **prescription of such high rates of court-fees even in small claims as also without an upper limit in larger claims is perilously close to arbitrariness, an inconstitutionality.** ***(para 95 of A. Setty)***

(xiii) The view that ad-valorem levy of Court Fee in an individual case far exceeds the maximum value, in terms of money, qua that contributor and hence the concept of correlation fails and renders the levy invalid and illegal cannot be acceded for the simple reason that the correlation is not in the context of individual contributors, the test being its ascertainment on a comprehensive basis keeping in view the value of the totality of the service, qua, the totality of receipts. ***(para 14) [P.R. Sriramulu***

(supra)]

(xiv) It is trite that for purposes of testing a law enacted by one State in exercise of its own independent legislative powers for its alleged violation of Article 14 it cannot be contrasted with laws enacted by other States. ***(para 87 of A. Setty)***

(xv) Though the Court abstained from striking down the legislation, yet, it appears to the Court that immediate steps are called for and are imperative to rationalize the levies." ***(para 98 of A. Setty)***

Other important portions of these judgments have been noticed in the previous part of the present consideration. The authoritative and binding principles laid down by the Supreme Court bind this consideration and have guided the present adjudication.

(XVIII) Whether the above judgments on the challenges to court fees would preclude the present examination by this court

848. It has been contended on behalf of the respondents that the Supreme Court has upheld the enhancement of court fee by the State Legislatures in Tamil Nadu, Kerala, Rajasthan and Maharashtra in the aforesaid judgments. Therefore it is not open to the petitioners to maintain their challenge to the Court Fees (Delhi Amendment) Act, 2012. The respondents thus again urge an absolute prohibition to the examination of the challenge in the instant writ petitions.

849. The legislations examined by the Supreme Court had been enacted in the prevalent facts and circumstances in the States of Tamil Nadu, Kerala, Rajasthan and Maharashtra. It is the respondent's contention before us that the Delhi Government is spending more than the other States on administration of justice.

850. There is another dimension to this objection. Let us assume for the purposes of this consideration that a statutory enhancement in one of the four States (i.e. Tamil Nadu/Kerala/Rajasthan/ Maharashtra) was effected today and its constitutionality was challenged before the High Court, would it be correct to hold that such challenge had to be rejected because of the judicial precedents upholding the previous amendment? The position in law is that the challenge is maintainable and the issues raised have to be answered by application of the legal principles to the prevalent fact situation. On such examination, it is legally permissible to the court to take a different view from the previous one, with regard to the same legislation.

851. On this issue in (***2008) 5 SCC 287, Satyawati Sharma v. Union of India***, the Supreme court held as follows:-

> "32. It is trite to say that legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is

found that the rationale of classification has become non-existent. In *State of M.P.* v. *Bhopal Sugar Industries Ltd.* [AIR 1964 SC 1179] this Court while dealing with a question whether geographical classification due to historical reasons could be sustained for all times observed: (AIR p. 1182, para 6)

> "*6*. … Differential treatment arising out of the application of the laws so continued in different regions of the same reorganised State, did not, therefore immediately attract the clause of the Constitution prohibiting discrimination. But by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid. A purely temporary provision which because of compelling forces justified differential treatment when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency, so as to perpetuate that treatment without a rational basis to support it after the initial expediency and necessity have disappeared."

It is therefore trite that even legislation or regulation if once held valid, can also be successfully challenged if there is a significant change in circumstances.

852. In yet another pronouncement of Supreme Court reported at ***1984 (1) SCC 222***, ***Motor General Traders v. State of A.P.***, the

court was concerned with a challenge to the validity of the provisions of Section 32(b) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 which exempted all buildings constructed on or after a particular date, from the operation of the Act. It was observed by the court that a long period had elapsed after the passing of the Act which by itself served as a crucial factor in deciding the question whether the impugned law has become discriminatory or not because the ground on which the classification of buildings into the two categories is made is not a historical or geographical one but is an economic one. Exemption was granted by way of an incentive to encourage building activity and in the circumstances such exemption cannot be allowed to last forever. The court also found that there was no justification for continuance of the benefit to a class of persons without any rational basis whatsoever; that the evil effects flowing from the impugned exemption have caused more harm to the society than one could anticipate. In this background, the court observed as follows:-

> "24. ... What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad. "Time does not run in favour of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. Albeit, lateness in an attack upon the constitutionality of a statute is but a reason for exercising special caution in examining

> the arguments by which the attack is supported. [See W.A. Wynes: Legislative, Executive and Judicial Powers in Australia, Fifth Edition, p 33] We are constrained to pronounce upon the validity of the impugned provision at this late stage because the garb of constitutionality which it may have possessed earlier has become worn out and its unconstitutionality is now brought to a successful challenge."

853. In ***1980 (1) SCR 368, H.H. Shri Swamiji Shri Admar Mutt Etc. v. The Commissioner, Hindu Religious & Charitable Endowments Department,*** the court observed that:

> "31. ... An indefinite extension and application of unequal laws for all time to come will militate against their true character as temporary measures taken in order to serve a temporary purpose. Thereby the very foundation of their constitutionality shall have been destroyed. ...
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> xxx
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> **32. ...What may be unobjectionable as a transitional or temporary measure at an initial stage can still become discriminatory and hence violative of Article 14 of the Constitution if it is persisted in over a long period without any justification. ..."**

854. It is therefore well settled that even though the Supreme Court may have rejected challenges to court fee and sustained the prescriptions at particular points of time, however even the same

legislation, if challenged at a later point of time, would require to be independently assessed, having regard to the factual matrix in which it exists at the time of the challenge. It is abundantly clear therefore, that the challenge to a subsequent enactment (or an amendment to the legislation) has to be considered.

855. So far as court fees are concerned, we have noted above the impact of the levy. Court fee is per se an entry point barrier to accessing justice. Jurisprudence from India and all over the world as well as expert statements including those of the Law Commission of India have unequivocally declared that court fee provides an absolute impediment to a litigant approaching the court.

856. The Supreme Court in the celebrated pronouncement reported at ***AIR 1973 SC 1461 Kesavananda Bharti v. State of Kerala*** has recognized that judicial review was a part of the basic structure of the Constitution. This position has been reaffirmed by a seven Judges Bench of the Supreme Court in ***(1997) 3 SCC 261, L. Chandra Kumar v. Union of India.***

857. In ***(1980) 3 SCC 625*** (at page 677) ***Minerva Mills Limited Vs. Union of India & Ors.,*** the Supreme Court observed thus:-

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

limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded...But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution..."

858. In ***(2007) 6 SCC 120, Arunima Baruah v. Union of India,*** it was held that:

> **"10.** On the one hand, judicial review is a basic feature of the Constitution, on the other, it provides for a discretionary remedy. Access to justice is a human right. (See *Dwarka Prasad Agarwal* v. *B.D. Agarwal* [(2003) 6 SCC 230] and *Bhagubhai Dhanabhai Khalasi* v. *State of Gujarat* [(2007) 4 SCC 241 : (2007) 2 SCC (Cri) 260 : (2007) 5 Scale 357]) A person who has a grievance against a State, a forum must be provided for redressal thereof. (See *Hatton* v. *United Kingdom* [15 BHRC 259] . For reference see also *Zee Telefilms Ltd.* v. *Union of India* [(2005) 4 SCC 649])
>
> **11.** The court's jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands; but to what extent such relief should be denied is the question."

859. The judgment reported at ***(2007) 9 SCC 257, Sardar Associates v. Punjab and Sind Bank*** reiterates the above position.

860. In ***R. v. Secretary of State for the Home Department ExParte Leech*** reported at ***(1994) QB 198*** Steyn LJ said that it is a principle of our law that every citizen has an unimpeded access to a court.

861. Lord Willbord in ***(1983) 1 AC 1, Raymond v. Honey*** described the right of access as a "basic right".

862. As noticed above, the Supreme Court has laid down that the constitutionality of the amendment to court fee legislation can be challenged on the grounds of want of legislative competence as well as violation of Article 14 of the Constitution. The Supreme Court has also suggested that a no 'court fee' regime would be ideal and in para 95 of ***Ashwathanarayana Setty*** (supra) directed the legislatures to explore this possibility. Court fee if is to be levied, must take into its consideration the several factors noted above. In ***Zenith Lamps*** (supra), the Supreme Court has categorically stated the character of the levy (as to whether it is in the nature of a 'fee' or a 'tax' has to be examined on a case to case basis. It is further held that the State would have to justify that the levy is "court fees properly so called". In one voice, there is a call for reduction in court fee, and, even for no court fee. Enhancement of court fee is opposed.

863. Developments in the society also would impact constitutional validity of legislations. With passage of time, interpretation of statutes is known to change. Events subsequent to

the enactment of the legislation may impact its constitutionality. It has been noticed that social psyche, societal expectations and the social order result in transformation of the contours of constitutional rights. These are also relevant considerations while examining a challenge to the constitutional validity of a statute.

864. In this regard in the pronouncement reported at ***(2008) 3 SCC 1, Anuj Garg v. Hotel Association of India & Ors.***, the Court has held as under:

> "7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also in international arena, such a law can also be declared invalid.
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> 8. In *John Vallamattom* v. *Union of India* [(2003) 6 SCC 611] this Court, while referring to an amendment made in UK in relation to a provision which was in pari materia with Section 118 of the Indian Succession Act, observed: (SCC p. 624, para 28)
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> > "*28.* … The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time."

> Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, it was held: (*John Vallamattom case* [(2003) 6 SCC 611] , SCC p. 625, para 33)
>
> > "*33*. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation."
>
> 9. Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would not be out of place..."
>
> (Emphasis supplied)

865. In para 13 of the pronouncement in ***Charan Lal Sahu v. Union of India, (1990) 1 SCC 613***, the Supreme Court stated that in judging the constitutional validity of the Act, the subsequent events as to how the Act has worked itself out would require to be examined.

866. The judgments of the Supreme Court upholding the enhancement in court fee rendered in ***P.M. Ashwathanarayanaa Setty v. State of Karnataka*** (supra) and ***Secy. to Govt. of India v. P.R. Sriramulu*** (supra) came at the time when the Indian economy was struggling with operationalising the constitutional values in a welfare state, when the economy was not showing the growth rate as at present.

867. Several factors impact society. Economic, technology and infrastructure developments, social welfare measures undertaken by the State etc. may result in changes in the income standards of the people or lack of such measures or unequal destruction may adversely impact communities. Therefore, some of the relevant factors while evaluating the constitutionality of an enhancement in the court fees structure would necessarily include, amongst other factors, (a) whether there is a change in the profile of the persons who are accessing/entering the court system seeking protection of rights, enforcement of law or complaining against violations. Changes in the nature of the filings is another material circumstance. Without conducting an empirical study of these factors, no prescription about the optimum court fees scales or levels can or ought to be made.

(b) The impact on the litigation of the proposed increase had to be objectively considered. This would obviously be based on appropriate studies, assimilation of statistics and data from the filings in the various courts.

(c) Local conditions also have a bearing on filings.

868. It is noteworthy that the legislations which were the subject matter of challenges in the three judgments of the Supreme Court were enactments by State legislatures. The judgment in the ***Zenith Lamps*** case was pronounced in 1973; ***P.M.A. Setty*** (supra) came in 1989; while the judgment in ***P.R. Sriramulu*** (supra) has been reported in 1996. The factual scenario especially in the context of the socio-economic status of people living in these States vis-à-vis the inhabitants of Delhi is different. The vibrant status of the Indian economy in 2011-12 is also unparalleled. Additionally, the authoritative pronouncements of the Supreme Court on the vital issues of State responsibility to provide for the judiciary; the importance of ensuring judicial independence; the recommendations of the Law Commission of India have all come after the three pronouncements in question the last being in 1996.

869. The circumstances and conditions in Tamil Nadu; Karnataka; Rajasthan and Maharashtra, four large states, vary from the prevalent conditions in Delhi – a metropolis which is a Union Territory. The demographic profile of the persons residing in Delhi; the range of political and economic activity in the city; the nature of issues taken to courts for trial is sharply different from other regions. Delhi as the National capital, is the seat of the Union Government which adds to the diversity in the litigation profile of Delhi Courts. It also enjoys several benefits including special dispensations from the Central Government.

870. We find that in these precedents, the Supreme Court has reiterated that a challenge to legislation on grounds of violation of Article 14 and the unreasonableness of the classification in the legislation is maintainable. The Supreme Court has also reiterated the importance of judicial review as an essential part of the basic structure of the Constitution. It has reinforced the permissibility of an examination in judicial review of every legislative action on the grounds of want of legislative competence.

871. The objection of the respondents that the challenge in these writ petitions is precluded by the three judicial precedents is contrary to settled principles of law and untenable. The principles laid down by the court have to be applied to the facts of the case. In fact, we have applied the principles laid down by the Supreme Court in the three precedents, to arrive at the view we have taken so far as examination of the challenge by the petitioner to the Court Fees (Delhi Amendment) Act, 2012 is concerned.

872. So far as Delhi is concerned, it is claimed that Delhi has the highest per capita income in the country. The per capita income of the national Capital for 2012-13 has recorded a rise of over Rs 27,000 from previous year. The per capital income for 2011-12 was Rs 1.74 lakh, that has risen to Rs 2.1 lakh – the highest in the country. [Ref: The Pioneer, dated 09.05.2013]. So far as the demographic profile is concerned, the last available statistics are for the year 2004-05. At the same time, the other extreme is provided by the Delhi Economic Survey 2004-2005 which states

that 6% of the people living in Delhi are very poor and another 28% poor. If clubbed together, 34% would be considered as poor. On the other hand, nearly 6% people in Delhi would be considered as very rich and another 12% as rich. As such, 18% people in Delhi are those who would be considered as belonging to the rich class. There is thus a large middle class, which constitutes 48% of the population. Among the middle class, 28% belong to the upper middle class, while 20% fall in the lower middle class.

873. While the respondents are able to claim progress in the gross domestic product, however the benefits therefrom are unevenly distributed and the gap between the poor and the middle class, have sharply increased. It is so in Delhi as well. The submissions on the adverse judge to population ratio apply to Delhi as well.

874. Unfortunately, we do not have the benefit of any empirical data or studies which were required to be undertaken in order to assess the percentage levels of the poor, the lower income group, higher income group and those placed higher in the hierarchy or those economically well-off. Such data was necessary to establish that broad correlation between the object of the impugned litigation and the constitutional values.

875. The expenditure incurred on the justice dispensation system, as noticed above, is claimed by the respondents to be based on capacity enhancement of the justice dispensation system. However, from the above narration, it is clearly evident that the

respondents have undertaken no judicial planning, they do not appear to follow any judicial policy. We have extracted above the principles laid down by the Supreme Court in the judgments in ***Secretary, Government of Madras v. Zenith Lamp and Electrical*** (supra), ***P.M. Ashwathanarayana Setty v. State of Karnataka*** (supra) and ***Secretary to Government of Madras v. P.R. Sriramulu*** (supra) and applied them to the fact situation placed before us. For all these reasons, we find no interdiction of the present consideration by judicial precedents.

(XIX) Vexatious Litigation

876. Another argument advanced in support of the enhanced court fee is that the same is necessary to keep out vexatious litigation from courts. This is pressed also to emphasize the need to keep out vexatious litigation given the overburdening of the courts. We may now examine the system of demanding court fees from parties who move the courts and its impact on vexatious litigation. Vexatious litigation in the face of an overwhelming number of cases before the courts is not a new argument and has been contended to support the existence of court fees for over 150 years.

877. The preamble to the Bengal Regulation Act of 1795 stated that the purpose of prescribing higher court fee therein was to drive away "vexatious litigation". Lord Macaulay who was heading the first Law Commission debunked this argument. Vexatious and frivolous litigation, Lord Macaulay mentioned, was there long

before the system of levying 'court fee' came into vogue and it continued after the levy also. He settled down on the position that along with vexatious litigation, genuine and bona fide litigation would be shut out as well. In his minutes dated 25th June, 1835 he described the preamble as: "the most eminently absurd preamble, that was ever drawn."

878. Lord Macaulay made the following famous declarations:-

> "It is undoubtedly a great evil that frivolous and vexatious actions should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of providing a most sufficient remedy".
>
> He further stated:
>
> "Why did dishonest plaintiffs apply to the courts before the institution fee was imposed? Evidently because they thought that they had a chance of success. Does the institution of fee diminish that chance? Not in the smallest degree. It neither makes pleadings clearer, nor the law plain…."

These views of Lord Macaulay were accepted in 14th Report of the Law Commission (Chapter 22 para 6) where it was observed that the argument that it was necessary to impose higher court fee to prevent frivolous litigation has no substance. The same views were reiterated in the 128th Report of the Law Commission on cost of litigation.

879. The 189th Report of the Law Commission in its tenth

recommendation in Chapter IX has endorsed that a Central Act be enacted on the lines of the Vexatious Litigation (Prevention) Act, 1949 (Madras Act VIII of 1949) to curb vexatious or frivolous litigation. In the judgment reported at ***AIR 1965 SC 1827, Prabhakar Rao H. Mawle v. State of A.P.***, applicability and constitutional validity of the same Act was examined and upheld.

880. Significantly, the US Supreme Court in ***Boddie v. Connecticut, 401 US 371 (1971)*** also rejected the argument that charging such fees served as an effective deterrent to unmeritorious litigation and was necessary for the financial maintenance of the justice system:

> "The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable. In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit, but it is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few."

881. We find that in (***1996) 1 SCC 345, Secretary to Government of Madras v. P.R. Sriramulu*** also Supreme court observed as follows:-

> "In the beginning the imposition of the (court) fee was nominal but in the course of time, it was enhanced gradually under the impression that it would prevent the institution of frivolous and groundless litigation and as an effective deterrent to the abuse of process of the Court without causing any impediment in the institution of just claims. However significant this view may be that the levy of fees would have a tendency to put a restraint on frivolous litigation, that view, at any rate, had the merit of seeking to achieve a purpose which was believed to have some relevance to the administration of justice. Since about past two decades, the levy of court fee on higher scales would seem to find its justification, nor in any purpose related to the sound administration of justice but in the need of the State Government for revenue as a means for recompense."

882. The Law Commission has drawn a distinction between vexatious litigation and frivolous litigation. Vexatious litigation has been interpreted as "habitually or persistently filing cases on the issues which have already been decided once or more than once or against the same parties or their successors in interest or against different parties. But so far as 'frivolous' litigation is concerned, a litigation may be frivolous,- without the need for persistent filing of similar case,- even if it has no merits whatsoever and is intended to harass the defendant or is an abuse of the process of the Court.

Further, there are some existing provisions in the Code of Civil Procedure like Order 6 Rule 16, Order 7 Rule 1, sec 35A etc. which deal with 'frivolous' litigation." (Ref: 189th Report of Law Commission).

883. It is noteworthy that law to prohibit and penalize vexatious litigation was enacted in the former State of Madras as the Madras Vexatious Litigation (Prevention) Act, 1949. Post independence, in the State of Maharashtra, the Maharashtra Vexatious Litigation (Prevention) Act, 1971 was enacted. Nothing prevents the Delhi Legislative Assembly from examining this efficacious alternative, within a constitutionally acceptable mandate, to discourage vexatious litigation.

884. In this background, the purpose of keeping out the vexatious litigation by enhancing court fee is not justified and cannot be permitted.

(XX) <u>Insufficient pleadings and no material in support</u>

885. Mr. Chandhiok, learned Senior Counsel for the petitioner has contended that a point of law raised by a party is required to be substantiated by facts which are pleaded and establish such facts. This is more so in writ jurisdiction. In case this is not done, such point at its instance, is not entertainable by the writ court. In support of this contention reliance is placed on the pronouncement of the Supreme Court reported at ***AIR 1988 SC 2181, Bharat Singh & Ors. v. State of Haryana & Ors.*** Reliance is also placed

upon ***2006 (91) DRJ 324 (para 31), Ex. Sep. Roop Singh v. Union of India etc.*** as well.

886. In ***Bharat Singh*** (supra), the Supreme Court had not only laid down the principles governing adjudication in a writ petition but also pointed out the difference between writ petitions and suits as follows:-

> "13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly **a point of law is required to be substantiated by facts, the party raising the point**, if he is the writ petitioner, **must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit.** If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded

> and annexed to it. So, the point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit."
>
> (Emphasis by us)

887. Before us the respondents have contended that the decision to effectuate the legislative amendment rested on sufficient material and the legislation was finalized after due consideration and application of mind. The same stand is asserted by the respondents with regard to the Presidential consideration and assent. The respondents have vigorously objected to scrutiny by this court of their record.

888. We have noticed above the insufficient pleadings in the counter affidavit. Relevant dates are not mentioned. The position remains the same in the additional affidavit. No documents are enclosed. Before the Supreme Court some tabulations were put together and filed with the special leave petition. These were not filed before this Court with the counter affidavit. It is not disclosed as to whether this material was even in existence at the time of consideration by the authorities or the legislative assembly, let alone placed before it. It was certainly not placed before the President when the consideration and assent was sought or recorded.

889. Yet another stand has been put forth in the oral submissions by Mr. Salve, learned Senior Counsel for the respondents. It has

been urged that the President had accorded general assent to the statutory amendment. There is neither a whisper of a pleading on the part of the respondents to this effect nor any document to support this plea. The petitioners have also objected to the verification in the counter affidavit of respondent no.1 which is *"to the best of my (deponent's) knowledge."* It is contended such an affidavit has no sanctity in law and deserves to be rejected for this reason alone.

890. In para 31 of ***2006 (91) DRJ 324, Ex. Sep. Roop Singh v. UOI,*** this Court has observed that "a vague averment in the counter affidavit would be of no consequence."

891. It is well settled that the burden of establishing the existence of the pre-conditions and compliance with the legislative procedure rested squarely on the respondents. Therefore, such contentions of the respondents in the present case, whether it be the bald submissions in the counter affidavit unsupported by relevant material or be it the contentions orally made, again unsupported by pleadings or documentation, would thus require to be rejected on this short ground alone. However, given the nature and importance of the challenge under examination, our judicial conscience has compelled us to consider the submissions made before us.

(XXI) Whether the impugned legislation adversely impacts the rule making power as well as the jurisdiction of this court

892. It is contended by the petitioners that the impugned

Amendment Act impedes the jurisdiction of the High Court of Delhi and the administration of justice and, therefore, is violative of the constitutional scheme. There are two parts to this contention, first, that the unprecedented increase in court fee is a deterrent in invoking the original jurisdiction of the High Court of Delhi and second, the impugned amendment Act infringes the jurisdiction of the High Court in framing rules under the scheme of the Indian Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996.

893. Let us now examine this contention. It is relevant to mention that the Parliament alone is empowered to constitute a High Court under Article 241 of the Constitution of India. The Delhi High Court Act, 1966 was enacted by an Act of the Parliament. By virtue of the provisions of this statute, the Delhi High Court has original jurisdiction.

894. The Court Fee Act, 1870 was amended in 1967 by an Act of the Parliament, to ensure that it was in conformity with the Delhi High Court Act, 1966. We have noted above that the sharp increase in the court fee payable on suits would be a deterrent to litigants to invoke the original jurisdiction of the High Court of Delhi and would thus impact the jurisdiction of this court.

895. Learned Senior Counsel for the petitioners has also referred to the rule- making power of the High Courts under Section 122 of the Code of Civil Procedure (C.P.C.) whereby the High Courts are

empowered, from time to time, after previous publication, to make rules, to regulate their own procedure and the procedure of the civil courts subject to the superintendence of the High Court. Section 122 also enables the High Court to annul, alter or add to all or any of the rules in the schedule.

896. In ***AIR 1922 Mad 421 (422), H. Mahomed Ishaq Sahib v. Mahomed Moideen & Anr.*** as well as (***1935) 22 AIR Rang 460, Maung Ba Thaw & Ors. v. M.S.V.M.V. Chettyar,*** it has been held that provisions like Section 122 of the Code of Civil Procedure which empower the courts to make rules to regulate procedure, enable them to levy court fees, as the power to regulate procedure includes the power to impose fees in courts.

897. Section 129 of the Code of Civil Procedure prescribes the power of the High Courts to make rules as to their own civil procedure. This section contains a non-obstante clause and empowers the High Courts to make such rules which are not inconsistent with the Letters Patent or other law establishing it, to regulate its own procedure in the exercise of its original civil jurisdiction as it shall deem fit. This section stipulates that nothing contained in the Code of Civil Procedure shall affect the validity of such rules in force at the commencement of this Code.

898. It has been held that rules regulating procedure of the High Court on its original side need not be consistent with the provisions of the Code of Civil Procedure, 1908 (**Ref:** ***AIR 2005 SC 514,***

Iridium India Telecom Limited v. Motorola Inc.). Such is the extent of the rule making power of the High Court.

899. It is urged that where the legislature intended to permit the rule making power beyond the statutory provision, it has specifically stated so. There can be no dispute with this proposition. There is thus substance in the petitioner's submission that the impugned legislation impacts the rule making power and jurisdiction of this court.

Power to frame rules governing arbitration

900. The Code of Civil Procedure, 1908 contained Section 89 and Section 104 (a) to (f) (which relate to arbitration). These provisions in the Code of Civil Procedure were deleted upon the enactment of the Arbitration Act of 1940. Clause 18 of Schedule (2) of the Court Fees Act of 1870 was also deleted.

901. Ms. Neelam Rathore, learned counsel has drawn our attention to Section 44 of the Arbitration Act of 1940 which reads as follows:-

> "44. **Power to High Court to make rules**. The High Court may make rules consistent with this Act as to-
>
> (a) the filing of awards and all proceedings consequent thereon or incidental thereto ;
>
> (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto ;
>
> (c) the staying of any suit or proceeding in

contravention of an arbitration agreement ;

(d) the forms to be used for the purposes of this Act;

(e) generally, all proceedings in Court under this Act."

902. Such rules were framed and Rule 8 thereunder prescribed the fee payable. The Arbitration and Conciliation Act, 1996 vests the rule making power with the High Court under Section 82 which includes the power to prescribe court fee with respect to arbitration proceedings. The saving clause in Section 85(2)(b) further states that the rules framed under the 1940 Act are deemed to be applicable to proceedings under the 1996 Act as well. Thus it is clearly established that that the power to prescribe court fees in respect of proceedings under the 1996 Act exclusively rests with the High Court of Delhi.

903. Section 85(2)(b) of the Arbitration Act, 1996 contains the saving clause by virtue whereof the rules framed under the Arbitration Act, 1940 are deemed to be applicable to proceedings under the Arbitration Act, 1996.

904. Our attention has been drawn to the rules made by the Punjab and Haryana High Court under Section 44 of the Arbitration Act, 1940 which were published in its notification No.45-R/X-W-5, dated 9th March, 1945. Rule 8 thereunder prescribed the court fee and process fee which was payable. The

relevant extract thereof which prescribed the court fee reads as follows:-

> "**8. Court-fees and process fees.** - (a) The court fees and process-fees chargeable for all petitions shall be in accordance with the Court Fees Act and the rules for the levy of process-fees in force for the time being."

905. The law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards came to be consolidated and amended by the Arbitration and Conciliation Act of 1996 (Act of 1996) which is also an enactment by the Parliament. Section 82 of this statute conferred the power upon the High Court to make rules consistent with the Act as to all proceedings under the Act before the court.

906. Both Mr. Chandhiok as well as Ms. Rathore contend that for this reason, Item 8 of the impugned Schedule II in fact not only suffers from arbitrariness, but it encroaches upon the jurisdiction and statutory power conferred on the Delhi High Court to frame rules with regard to the matters relating to arbitration.

907. To this extent, there is substance in the petitioner's contention that by prescribing a new court fee structure for proceedings under the Arbitration Act, 1996 on ad valorem basis as noted above, the respondents have encroached upon the exclusive domain and jurisdiction of this court. The impugned amendment

impacting the proceedings under the Arbitration and Conciliation Act, 1996 tantamounts to usurpation of the powers of this court under Section 82 of the Arbitration Act, 1996 and for this reason as well is beyond the jurisdiction and legislative competence of the respondents.

(XXII) Legislative procedure prescribed under the Govt. of NCT of Delhi Act, 1991 and National Capital Territory of Delhi (Transaction of Business Rules), 1993 not followed by the Government of NCT of Delhi

908. The petitioners have contended that the Government of NCT of Delhi, in effecting the impugned amendment, has neither satisfied the requirements of the Government of National Capital Territory of Delhi Act, 1991, and nor has it complied with the Transaction of Business of National Capital Territory of Delhi Rules, 1993 framed under the Act. We now move on to a discussion of the relevant statutory provisions and rules, compliance of which has been challenged.

909. Mr. Chandhiok, learned Senior Counsel for the petitioner has contended that the respondents failed to comply with the requirements of Section 24 of Government of NCT of Delhi Act, 1991 which deals with assent to Bills passed by the Legislative Assembly of Delhi. They rely on Section 46 of GNCT of Delhi Act, 1991 to urge that court fee forms part of the Consolidated Fund. It is further contended that in terms of Section 27, which

deals with planned expenditure, previous sanction of the President is necessary. It is urged that the Government of NCT of Delhi has no power to spend any amount without prior approval of the President of India. Section 30 of the GNCT of Delhi Act, 1991 refers to unplanned expenditure.

910. It has been further contended that in order to establish the broad correlation necessary to justify increase in court fee, the respondents were required to place the statement under Section 27 and 30 of the Government of NCT of Delhi Act, 1991 before the court to justify the enactment and not just any tabulation without any basis.

911. The respondents have on the other hand relied on Section 22 of Government of NCT of Delhi Act, 1991 and Rule 55 of the Transaction of Business Rules to explain the circumstances for reference of the matter to the Central Government. They have contended that as per the requirements of Section 22 of the Government of the NCT of Delhi Act, 1991, the proposals to amend the schedule of court fee essentially being a Finance Bill, was referred to the Lt. Governor of Delhi as per law before introducing the Bill in the Delhi Legislative Assembly.

912. From the averments in the counter affidavit; the records produced before us; the constitutional provisions and the judicial precedents, the following is manifested:

(i) A request was made by the Lt. Governor of Delhi to the

Government of India (Ministry of Home Affairs) vide letter dated 12th August 2011 India for prior approval of the Central Government to amend the schedule of the Court Fees Act, as it sought to amend a Central Act.

(ii) A letter dated 20th April, 2012 was received from Central Government conveying the "prior approval of Central Government" and further directing the GNCT to get the Bill vetted by Law Department of GNCTD.

(iii) The Bill was passed by the Legislative Assembly of the NCT of Delhi on 4th July, 2012.

(iv) In accordance with Article 239AA read with Section 24 of the NCT of Delhi Act 1991, the Governor reserved the Bill for the consideration of the President.

(v) By letter dated 15th June, 2012, the Court Fees Amendment Bill, 2012 was referred to the President for her consideration, wherein it was stated as under:-

> *"As the Bill relates to amendment of the Court Fees Act, 1870, which is a law made by the Parliament, Lt. Governor, Delhi has reserved the said Bill as passed by the Legislative Assembly for consideration and assent of the President of India under proviso of sub-clause (c) of clause (3) of Article 239AA of the Constitution and Rule 55(1)(a) of the Transaction of Business of the National Capital Territory of Delhi Rules, 1993".*

(vi) Vide the letter dated 6th July, 2012 of Ministry of Home

Affairs, it was communicated to the GNCT of Delhi that the Court Fees (Delhi Amendment) Bill, 2012 has received the assent of the President on 4th July, 2012.

913. In exercise of the powers conferred by section 44 of the Government of National Capital Territory of Delhi Act, 1991 (1 of 1992) the President made the Transaction of Business of National Capital Territory of Delhi Rules, 1993 for the conduct of business of the NCT of Delhi.

914. It has been argued on behalf of the petitioners before us that the procedure under Article 239AA is distinct from the procedure under the Transaction of Business Rules of the Government of NCT of Delhi and that both have to be complied with. Mr. Chandhiok, learned Senior Counsel for the petitioner submits that the letter dated 20th April, 2012 from the Government of India noted above shows that the Law Department had not seen the Bill which reflects non-compliance of Rule 29 and 30 of the Transaction of Business of National Capital Territory of Delhi Rules, 1993. The submission is that in terms of this Rule, approval had to be sought for the draft which was to be placed before the Legislative Assembly. If the draft was yet to be vetted by the Law Department then the approval by a letter dated 20th April, 2012 was not to the draft Bill which was required to be vetted.

915. It is contended that Rule 30 mandated that a legislative proposal shall not be submitted to the Chief Minister until the

Department concerned has consulted the Law Department as to the need for the proposed legislation from legal point of view, the competence of the Legislature of the Capital to enact the measure proposed, any constitutional or legal requirement as to the obtaining of previous sanction of the President or recommendations of the Lieutenant Governor, and the consistency of the proposed measure with the provisions of the Constitution and in particular those relating to the fundamental rights. Rule 31 mandates that the proposal shall be forwarded to the Law Department, requesting it to draft the Bill accordingly. Thereafter, the Law Department shall prepare a draft Bill and return the proposal along with the draft Bill to the parent department concerned under Rule 32.

916. In the instant case, other than a token reference to it, the Law Department has not really been involved in the exercise undertaken for drafting of the Bill nor were information or inputs sought in compliance of these Rules.

917. The petitioners contend that the respondents also violated Rule 33 inasmuch as the Administrative Department did not obtain the opinion of such officers and bodies as it deems necessary on the draft Bill. It is contended that the opinions so received along with a copy of the draft Bill were required to be submitted to the Minister-in-charge. The factors which were relevant for proposing the enhancement of the court fee as well as the data which ought to have been considered by the authorities have been suggested as

necessary in several judicial precedents noticed by us heretofore. The reports of the Law Commission are important. Inputs from social scientists and economists were extremely relevant. Important human rights issues and the fundamental right of access to justice were involved. The impact on the authority of the High Court of the proposed legislation deserved a close scrutiny. In the present case, simply formal certificates have been endorsed by the authorities on the proposal. This certainly is no compliance with the spirit, purpose and intendment of the Rules.

918. Under the mandate of Rule 35, in case it was decided to proceed with the draft Bill with or without the amendments, the Administrative Department was mandatorily required to send the case to the Law Department requesting it to prepare a final draft of the Bill. The finalised draft bill was required to be sent by the Law Department under Rule 36 to the concerned Department communicating, if any, sanctions which are required for the Bill. The petitioners further pointed out that so far as repealing and amending Bills are concerned or measures designed solely to codify and consolidate existing enactments and legislation of a formal character, under Rule 38, the Law Department would initiate the same and forward a copy of the draft Bill to the Department which is concerned with the subject matter for consideration as an administrative measure. The concerned Department shall, thereafter, make such enquiries as are deemed fit and send to the Law Department its opinion thereon with a copy of

any other communication received by it on subject.

919. The proposal for amendment of the Court Fees Act, 1870 has not been initiated by the Law Department nor the draft Bill prepared by it. The Revenue Department appears to have motivated the impugned legislation. The record placed before us does not reflect that the binding jurisprudence and material in the public domain, which has been placed before us, was noticed or considered by it.

920. When a Bill has been passed by the Legislative Assembly, it is required under Rule 42(1) that it shall be examined in the Department concerned and the Law Department and this shall be presented to the Lieutenant Governor with the following:-

(i) a report of the Secretary of the department concerned as to the reasons, if any, why the Lieutenant Governor's assent should not be given;

(ii) a report of the Law Secretary as to the reasons, if any, why the Lieutenant Governor's assent should not be given or the Bill should not be reserved for consideration of the President.

These are also not forthcoming on the record.

921. It is further pointed out that under Rule 44(1), all administrative Departments are required to consult the Law Department on proposals for legislation. Such exercise does not appear to have been undertaken by the respondents.

922. We may note here the averments made on affidavit of the respondents after acceptance of the recommendations of the Sub-Committee by the Principal Secretary (Law, Justice and Legislative Affairs). It is stated as follows:-

> **"**The Committee under the chairmanship of the Principal Secretary (Law, Justice and Legislative Affairs), Government of NCT of Delhi accepted the recommendations of the sub-committee, subsequent to which, the approval of the Council of Ministers was obtained, and thereafter the bill was placed before the Delhi Vidhan Sabha. Pursuant to the advice of the Law and Justice Department, and taking into consideration that the Court Fees Act, 1870 is a Central legislation, a request was made to the Secretary (Home), Government of India, for obtaining prior approval of the Central Government. The Ministry of Home Affairs examined the matter in consultation with the Ministry of Law and Justice and thereafter the approval was granted. On receipt of the approval, the bill was again placed before the Cabinet of Ministers and thereafter the amended Bill was introduced before the Assembly, which was then passed unanimously. The Bill became an Act only after it received Presidential Assent and the date of amendment was notified as 01.08.2012, after the approval of the Lt. Governor."

923. The above narration discloses that the consideration of the matter by the Law Department appears to have been of the recommendations of the Revenue Department. The settled principles of law which govern the consideration of the matter have escaped notice. There is not a word about the planned or

unplanned outlay or grants received or the expenditure or receipts of court fee. There is not a remotest suggestion of the impact of the amended Bill on the several fundamental rights of the citizens or on the right of access to justice of a common man which had to be considered given the nature of the amendments.

924. The above discussion manifests the undue and completely unnecessary haste with which the respondents have proceeded in the matter, without examination of the relevant material on the issue, the binding judicial precedents, without following either the constitutional mandate or the procedure prescribed by statute and the above rules.

925. The counter affidavit and additional affidavit filed by the GNCT of Delhi state that the procedure as prescribed under Article 239AA has been followed. We, however, find that the documents produced by the respondent do not support this submission.

(XXIII) Conflict between substantive provisions of the Court Fees Act, 1870 and the impugned amendment

926. The petitioners have pointed out several instances where there is a conflict between the substantive provisions of the statute with the amendment to the schedules effected by the impugned legislation.

927. The current examination would be incomplete without extrapolating the provisions of the Court Fees (Delhi Amendment)

Act, 2012 with the provisions of the Court Fees Act, 1870. We find that the same results in a unique situation.

928. It is to be noted that Section 19 of the Court Fees Act, 1870 exempts payment of court fee on probate of properties where the value of the property in respect of which the probate shall be granted shall extend only up to Rs.1,000/-. No amendment has been effected to this statutory provision. However, under entry 11 of Schedule I of the Court Fees (Delhi Amendment) Act, 2012, court fee has been exempted on probate of property which is valued under Rs.1,00,000/-. This limit of exemption has been increased by way of amendment to the Schedule without amending the substantive provisions of the statute!

929. We have detailed above the erroneous provisions made in entry 22 of Schedule II of the amended Court Fees Act, 1870 wherein the respondents have stipulated the court fee payable on a petition for grant of anticipatory bail if filed before the Magistrate. Law does not permit any such petition. Similarly, the respondents have prescribed court fee on petitions under Section 437 of the Cr.P.C. if filed before the Sessions Court or the High Court. This provision is also contrary to law as such petitions are never filed before the High Court of Delhi.

930. Our attention has been drawn to the Section 19 of the Court Fees Act which provides the substantive legal provisions which render certain documents as exempt from court fee. Sub–Section

(xvii) of Section 19 of the Court Fees Act, 1870 stipulates that a petition by a prisoner or other person in duress or under restraint of any Court or its officers is exempt from fixation of court fee. By virtue of Entry 22 in the Schedule II of the impugned legislation noticed hereinabove, court fee has been prescribed even on petitions by persons who are in custody. It is noteworthy that no amendment has been effected to Section 19 of the Court Fees Act.

931. Section 11 of the Arbitration and Conciliation Act, 1996 (No.26 of 1996), is concerned with the appointment of arbitrators. Under sub-section 10 of Section 11, the Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-sections (4) or (5) or (6) to him. It is pointed out that in exercise of powers conferred by sub-section 10 of Section 11 of the Arbitration Act of 1996, the Chief Justice of the Delhi High Court had notified a comprehensive '<u>Scheme for Appointment of Arbitrators, 1996</u>' by notification No.16/Rules dated 29th January, 1996 which was further amended by notification No.174/Rules/DHC dated 18th August, 2003 and Notification No.391/Rules/DHC dated 9th November, 2009. Further amendment was affected in this scheme by the notification No.253/Rules/DHC dated 23rd July, 2010.

932. The Scheme dated 29th January, 1996 inter alia included the following :-

> "**3. Authority to deal with the request** – (i) For the purpose of dealing with the request made under

para 2, the Chief Justice hereby designates:

(a) the Civil Judge where the value of the subject matter does not exceed Rs.1 lakh;

(b) the District Judge/Additional District Judge where the value of the subject matter does not exceed Rs.5 lakh; and

(c) the Judge of the High Court exercising ordinary original civil jurisdiction, where the value of the subject matter exceeds Rs.5 lakh

(ii) The request falling under sub-para (a) of para 3 shall initially be placed before Senior Civil Judge for appropriate allotment; the requests falling under sub-para (b) of para 3 shall initially be placed before the District Judge for appropriate allotment; and the request made under sub-para (c) of para 3 shall initially be placed before the Judge-in-charge on the Original Side of the High Court for appropriate allotment."

933. In the later amendments to the Scheme, the above para 3 was substituted by the following:-

"3(i) All the Judges of the High Court exercising ordinary civil jurisdiction stand designated under Section 11(6) of the Arbitration and Conciliation Act, to make necessary measures for the purpose of dealing with the request made in para 2.

(ii) The request so made shall initially be placed before the Judge in charge of the Original Side for appropriate allocation."

934. Therefore, as per the amended Scheme for Appointment of

Arbitrators notified by the Delhi High Court in exercise of statutory powers, the petition under sub-section (5) or (6) of Section 11 of Arbitration and Conciliation Act, 1996 can be made only to the judges of the High Court exercising original civil jurisdiction and not to the district courts.

935. Despite the clear stipulation in the Scheme that petitions under Section 11 cannot be made to District or civil judges, the impugned amendment to the Court Fees Act, 1870 noticed hereinabove shows that the respondents have notified court fees payable on Section 11 of Arbitration Act petitions which may be filed before the District Judges in Delhi as well as the Civil Judges.

936. The above manifests that even the existing provisions of the Court Fees Act, 1870 were not examined before the enactment was proposed and effected. The respondents have certainly not considered the impact of the substantive statutory provisions, including those in special laws such as the Arbitration and Conciliation Act, 1996, when juxtaposed against the entries in the Schedules. The above narration reflects the resultant conflict.

(XXIV) Whether the Government of NCT of Delhi was prohibited from enhancing court fee by virtue of Section 35 of the Court Fees Act, 1870

937. The petitioners have urged that under Section 35 of the Court Fees Act, 1870, the appropriate Government is empowered only to reduce or remit the court fee from time to time by

notification in the Official Gazette. No amendment has been effected to this statutory provision. It is urged that with respect to the Delhi Legislature, there is therefore no statutory empowerment to effect enhancement of the court fee. The petitioners submit that the Amendment Act runs totally contrary to Section 35 of the Court Fees Act. Thus, it violates the mandate of the statute.

938. While the respondent accepts that it is the 'appropriate government' under Section 35 of the Court Fees Act 1870, they dispute that Section 35 could interdict legislative power and authority.

939. Reference has been made to the provisions of Section 35 of the Court Fees Act, 1870 which reads as follows:-

> **"35. Power to reduce or remit fees –**
>
> The Appropriate Government may, from time to time by notification in the Official Gazette, reduce or remit, in the whole or in any part of the territories under its administration, all or any of the fees mentioned in the First and Second Schedules to this Act annexed, and may in like manner cancel or vary such order."

940. The expression 'appropriate government' has been defined under Section 1A of the Act which states that the expression in relation to fees and stamps relating to documents presented or to be presented before any officer serving under the Central Government as relating to that government, and in relation to any other fees or

stamps, as the State Government.

941. So far as interpretation of the Court Fees Act is concerned, in ***AIR 1969 Delhi 130, Chief Controlling Revenue Authority and Anr. v. Fertilizer Corporation of India Ltd. and Ors.,*** it was ruled that the courts should put a liberal interpretation on fiscal statutes like the Court Fees Act.

942. In ***AIR 1924 Mad. 420 (430) (FB), AIR 1957 Andh Pra 706 (710) (DB), AIR 1955 Andhra 140 (140, 141)***, it has been further declared that it is not open to the court to narrow or whittle down the operation of the Act by seeming considerations of the hardship or business inconvenience or the like.

943. In ***AIR 1959 Punj 629 (at 631), Bhura Mal Dan Dayal v. Imperial Flour Mills Ltd. & Ors.,*** it was held that the courts should put a liberal interpretation on fiscal statutes like the Court Fees Act so as to lessen and not add to the burden of litigation.

944. The petitioner's submission is that the Court Fees Act, 1870 permitted only reduction or remission of court fees and does not confer the power to enhance court fees. It is contended that apart from violation of the constitutional mandate, the amendment suffers from a manifest error of exercise of jurisdiction which was not statutorily conferred on it.

945. Though these submissions of the petitioners remain un-rebutted by the respondents, we must note that Section 35 of the

Court Fees Act confers on the administration, the power to reduce or remit the court fee. Such power is conferred on the administrative authorities undertaking executive functions. However we are unable to hold that Section 35 of the Court Fees Act would prohibit a competent legislature from effecting a statutory amendment of Section 35 of the Court Fees Act, a legislative act.

(XXV) The Delhi High Court Committee's recommendations

946. The respondents have insisted that they have effected the impugned legislation based on recommendations of a committee of this court. To say the least, this submission is not supported by the records placed before us.

947. As per the report of the Sub-Committee appointed by the respondent, it appears that the committee of this court was concerned only with the examination of the feasibility for creation and providing of e-stamping for the convenience of the litigants. The recommendations of the committee were also restricted to this aspect alone. Rationalization for the purposes of e-stamping does not mean enhancement of court fee dehors the constitutional mandate and legal provisions. No such directions by the High Court Committee were issued or have been pointed out.

CONCLUSION

948. We have discussed at length the submissions made by both

sides serially and have recorded our findings individually. Some of the important conclusions which have persuaded us to decide can be summed up as follows:

I. Article 239AA of the Constitution of India does not empower the Delhi Legislative Assembly to effect amendment of the Court Fees Act, 1870, a Central legislation.

II. Even if it could be held that the Delhi Legislative Assembly had the legislative competence to legislate on the subject, the respondents have failed to abide by the legislative procedure constitutionally mandated. The respondents neither complied with the established essential pre-conditions for the Presidential consideration and assent under Article 239AA of the Constitution nor invited the Presidential attention to the repugnancy between the Central enactment and the proposed legislative amendment.

III. The State has failed to discharge the onus which rested on it to justify the increase in the court fee. No material has been placed on record to justify the exorbitant increase in the levy of court fees in most instances. It is not the respondents' plea that there is any deficit in the available funds for incurring the cost of administration of justice. By the impugned legislation, the respondents have created unreasonably two well defined classes of litigants – one, who will be required to pay fixed court fees and secondly, the respondents have introduced a second class of litigants who will be required to pay court fees equivalent to a fixed percentage based on the valuation of the litigation, that is, court fee on *ad valorem* basis, without a maximum limit. The levy has a

discriminatory impact on the litigants; the same is based on no intelligible differentia and is constitutionally impermissible classification. The impugned legislation, therefore, is *ex facie* substantively unreasonable, arbitrary and ultra vires Article 14 of the Constitution. The court fee levy has a disproportionate gender impact as well and is not sustainable for this reason.

IV. The imposition of the court fee by percentage without a maximum limit is unrelated to the cost of any service rendered. The *ad valorem* levy of court fee after a particular level, loses all elements of *quid pro quo* and, therefore, loses the characteristics of a 'fee'. It thus tantamounts to recovery of amounts towards general revenue under the guise of court fees and, therefore, partakes all characteristics of a 'tax' which is beyond the legislative competence of the Delhi Legislative Assembly.

V. The Court Fees (Delhi Amendment) Act, 2012 disproportionately impacts the fundamental right of access to justice under Article 21 of the Constitution of India and has a deleterious impact on litigation in courts. It results in violation of the obligations of the State to ensure an effective and efficient system for administration of justice. It is an absolute entry point financial barrier to the courts for not only those who are below the poverty line but also those on the 'border line' who are barely meeting the essentials of daily needs (that is, such persons who would not meet the *forma pauperis* definition disentitling them to court fee waivers and exemptions). The impugned legislation results in denial of equality before the law to parties to a

proceeding as it results in unequal opportunity of access to court to persons placed in different economic categories. The Court Fees (Delhi Amendment) Act, 2012 is unconstitutional as it adversely impacts the Part III rights as well as violates the Directive Principles of State Policy under Article 38 and 39A of the Constitution.

VI. The impugned legislation adversely impacts the rule making power of the Delhi High Court as well as its jurisdiction.

VII. The respondents have failed to comply with the procedure prescribed under the Government of NCT of Delhi Act, 1991 and the National Capital Territory of Delhi (Transaction of Business) Rules, 1993.

RESULT

949. We have held that the Delhi Legislative Assembly did not have the legislative competence to amend the Court Fees Act, 1870. We have also held that the Court Fees (Delhi Amendment) Act, 2012 adversely impacts the Part-III rights and results in violation of Article 38 and 39A of the Constitution of India. For these reasons, the Court Fees (Delhi Amendment) Act, 2012 as a whole has to be struck down. The Court Fees (Delhi Amendment) Act, 2012 is hereby declared as invalid and ultra vires the Constitution and therefore, struck down.

950. As a result, the respondents would be liable to refund court fee, which has been recovered from litigants based on the prescriptions contained in the Court Fees (Delhi Amendment) Act,

2012. Given the delay which may result in the cases if the parties were required to seek amendment of their respective pleadings on account of the refund of the court fees, we direct that the concerned courts may permit appropriate endorsements to be made in the pleadings so as to appropriately clarify the court fee affixed thereon. It is left to the judicial discretion of the court concerned to suo motu mould appropriate directions in this regard.

951. So far as CM Nos.11129/2012, 16545/2012, 16845/2012 and 16882/2012 seeking impleadments are concerned, we have heard learned senior counsel and counsels on merits on the writ petitions. The prayer made in these applications is, therefore, satisfied. These applications are so disposed of.

952. Before parting with the case, we place on record our appreciation for the valuable and effective assistance rendered by Mr.Amarjit Singh Chandhiok, learned senior counsel and Mr.Nakul Dewan, Advocate in these matters.

953. Since the main writ petitions have been filed in representative capacity, we are not inclined to award any cost on the petition.

The writ petitions are allowed in the above terms.

GITA MITTAL, J

OCTOBER 09, 2013/aj **J.R. MIDHA, J**