Shantilal Ambalal Mehta Vs M.A. Rangaswamy

Court: Bombay High Court

Date of Decision: April 25, 1977

Acts Referred: Bombay Police Act, 1951 â€" Section 56, 59
Cantonments Act, 1924 â€" Section 60
Civil Procedure Code, 1908 (CPC) â€" Section 9
Companies (Profits) Surtax Act, 1964 â€" Section 8
Constitution of India, 1950 â€" Article 13, 131A, 136, 14, 19
Customs Act, 1962 â€" Section 14
General Clauses Act, 1897 â€" Section 3
Income Tax Act, 1961 â€" Section 148, 153, 251, 255, 256
Industries (Development and Regulation) Act, 1951 â€" Section 15
Limitation Act, 1963 â€" Section 14
Usurious Loans Act, 1918 â€" Section 3

Citation: (1977) 79 BOMLR 633 : (1977) MhLj 587

Hon'ble Judges: V.D. Tulzapurkar, Acting C.J.; Shah, J; Chandurkar, J

Bench: Full Bench

Judgement

Chandurkar, J.
There are several petitions pending in this Court filed by litigants under Article 226 of the Constitution of India as it

originally stood before the Constitution of India was amended by the Constitution (Forty-second Amendment) Act, 1976, and the one question

which now faces not only the litigants and the counsel but also the Court is, what is the extent of the impact of the newly introduced provisions in

Articles 131A, 226, 226A and 228A of the Constitution of India read with the provisions of Section 58 of the Constitution (Forty-second

Amendment) Act, 1976 hereinafter referred to as ""The Amending Act"". These thirteen petitions are, therefore, placed before this Full Bench as

they raise certain questions which needed early authoritative determination and which were representative of some of the questions which arise in

almost all pending matters under Article 226 of the Constitution of India including matters in which interim orders have been made by this Court,

the urgency arising out1 of the rather drastic provisions with regard to abatement and vacating of the interim orders made in pending petitions in

Section 58 of the Amending Act.

2. It is not necessary to refer in detail to the facts out of which each of these thirteen petitions arose, but it is sufficient to point out that in some of

these petitions, either a Central Act or a State Act or some provisions thereof or a rule framed thereunder, or some action taken by the statutory

authorities has been challenged. In Miscellaneous Petition No. 407 of 1967, which arises out of an order of the Collector of Customs, Bombay,

assessing customs duty on the import of rough emeralds under the provisions of the) Customs Act, 1962, and the Customs Valuation Rules, 1963,

the provisions of Rule 8 of the Customs Valuation Rules have been challenged as violative of Articles 14 and 19(1)(f) and (g) of the Constitution.

Rule 8 is also challenged as being violative of the previsions of Section 14 of the Customs Act, 1962. There are also other grounds on which the

order of the customs authority is challenged. No interim order has been made in this case. In the second petition, being Miscellaneous Petition No.

1273 of 1975, the provisions of Section 5 of the Maharashtra Ordinance XI of 1975 in the matter of fixing of rateable values is challenged on the

ground that it violates Article 31(1) and Articles 265, 304(b) and 213 of the Constitution of India, In Miscellaneous Petition No. 277 of 1971, the

provisions of Maharashtra Regional Town Planning Act, 1966, are challenged as being violative of Articles 19(1)(f) and 31(2) of the Constitution.

In Miscellaneous Petition No. 282 of 1972, the petitioners have approached this Court on a notice being issued to them under the provisions of the

Employees'' State Insurance Act, 1948, threatening that action would be taken against the petitioners under the provisions of the Employees'' State

Insurance Act, 1948. The petition is thus directed'' at some action being threatened by the authorities under the Act. Miscellaneous Petition No.

1106 of 1973 relates to a challenge to the validity of Section 23F of the Foreign Exchange Regulations Act, 1947, which is a Central law, and the

petitioner has already obtained certain interim orders in his favour which were made after hearing the other side. Similarly in Miscellaneous Petition

No. 529 of 1976, three notices issued u/s 148 of the Income Tax Act, 1961, and three other notices u/s 8 of the Companies (Profits) Surtax Act,

1964, have been challenged as being violative of Article 31(1) of the Constitution of India and an ex parte order of stay of further proceedings has

been passed on April 2, 1976. In Miscellaneous Petition No. 771 of 1973 the petitioner has approached this Court challenging a show cause

notice issued by the Superintendent of Central Excise for the recovery of excise duty and penalty under Rule 10-A and Rule 173C of the Central

Excise Rules, 1944, and these notices have been challenged on the ground that they are violative of Article 31(1) of the Constitution. In this

petition also an interim order has been passed after hearing the respondents. Apart from these petitions Madon and Kania JJ. who were hearing

appeals arising out of petitions decided under the original Article 226 of the Constitution of India have also referred to the question whether the

words ""pending petition"" in Section 58 of the Ameding Act includes an appeal against a decision which finally decided a petition under Article 226

of the Constitution of India before the appointed day.

3. When these petitions were taken up for hearing parties naturally wanted a rather full and comprehensive discussion on the scope and the impact

of the provisions of Article 226 of the Constitution of India as amended (hereinafter referred to as ""the new Article 226""), but having regard to the

urgency of the situation arising out of the provisions of Section 58 of the Amending Act in the matter of abatement and the vacating of the interim

orders, it did not become possible to hear arguments on all the questions which were sought to be canvassed by the learned Counsel on both sides

in these petitions. We have, therefore, decided to take up for consideration only the following questions for the purposes of these petitions:

(1) Whether interim orders made before the appointed day after hearing the parties against whom such interim orders were made or after

opportunity had been given to such parties of being heard in the matter, which opportunity may or may not have been availed of and in respect of

which copies of the petition and of the documents in support of the plea for such interim order has been furnished to such parties, would remain

unaffected?

(2) Whether Articles 131A and 226A read with the amended Article 226 of the Constitution of India exclude the jurisdiction of the High Court to

admit and entertain a writ petition which raise the sole question of the constitutional validity of any central law and make interim order thereon, if

necessary?

(3) Whether on a true construction of Article 226(5) of the Constitution of India, the High Court is deprived of its jurisdiction to entertain a petition

under Article 226 in every case where the petitioner has another remedy for ""the redress of any injury"" referred to in Article 226(1)(b) and (c)?

(4) Would the remedy by way of civil suit under common law be considered to be ""other remedy for such redress provided by and under any

other law for the time being in force"" within the meaning of Article 226(3) of the Constitution of India?

(5) Whether on a true construction of the amended Articles 226(4), (5) and (6) of the Constitution of India, the provisions thereof do not apply in

the case of a petition for enforcement of fundamental rights conferred by Part III of the Constitution referred to in Clause 1(a)?

4. So far as the two appeals, being Appeal No. 6 of 1973 and Appeal No. 45 of 1976 are concerned, though the division Bench has referred four

questions in each of the two appeals having regard to the questions urgently needing consideration, we have retrained the questions as follows:

(1) Whether the words ""pending petition"" in Section 58 of the Amending Act include an appeal pending in this Court from an order finally deciding

the petition?

(2) Whether the provisions of Section 58 of the Amending Act apply to a pending appeal of the kind referred to in question No. 1?

5. For a proper appreciation of the learned and elaborate arguments advanced before us it is necessary to refer to the new provisions, material for

the purposes of this judgment, which have been inserted in the Constitution of India by the Amending Act. The first such provision is inserted as

Article 32A by Section 6 of the Amending Act. Article 32A reads as follows:

32A. Constitutional validity of State laws not to be considered in proceedings under Article 32.-Notwithstanding anything in article 32, the

Supreme Court shall not consider the constitutional validity of any State law in any proceedings under that article unless the constitutional validity of

any central law is also in issue in such proceedings.

Article 131A which was introduced by Section 23 of the Amending Act reads as follows:

131A. Exclusive jurisdiction of the Supreme Court in regard to questions as to Constitutional validity of Central laws.-(1) Notwithstanding anything

contained in any other provision of the Constitution, the Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine all

questions relating to the constitutional validity of any Central law.

(2) Where a High Court is satisfied-

(a) that a case pending before it or before a court subordinate to it involves questions as to the constitutional validity of any Central law or, as the

case may be, of both Central and State laws; and

(b) that the determination of such questions is necessary for the disposal of the case,

the High Court shall refer the questions for the decision of the Supreme Court.

(3) Without prejudice to the provisions of Clause (2), where, on an application made by the Attorney-General of India, the Supreme Court is

satisfied,-

(a) that a case pending before a High Court or before a court subordinate to a High Court involves questions as to the constitutional validity of any

Central law or, as the case may be, of both Central and State laws; and

(b) that the determination of such questions is necessary for the disposal of the case,

the Supreme Court may require the High Court to refer the questions to it for its decision.

(4) When a reference is made under Clause (2) or Clause (3), the High Court shall stay all proceedings in respect of the case until the Supreme

Court decides the questions so referred.

(5) The Supreme Court shall, after giving the parties an opportunity of being heard, decide the questions so referred, and may-

(a) either dispose of the case itself; or

(b) return the case to the High Court together with a copy of its judgment on such questions for disposal of the case in conformity with such

judgment by the High Court or, as the case may be, the court subordinate to it.

The next material and important provision was made in Section 38 of the Amending Act by substituting new Article 226 for the original Article 226

of the Constitution of India. The new Article reads as follows:

226. Power of High Courts to issue certain writs.-(1) Notwithstanding anything in Article 32 but subject to the provisions of Article 131A and

Article 226A, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction to, issue to any person or

authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas

corpus, mandamus, prohibition, quo warranto and certiorari, or any of them,-

(a) for the enforcement of any of the rights conferred by the provisions of Part III; or

(b) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of

any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder; or

(c) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in Sub-

clause (b) where such illegality has resulted in substantial failure of justice.

(2) The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any

High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in Article arises for the exercise of such

power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) No petition for the redress of any injury referred to in Sub-clause (b) or Sub-clause (c) of Clause (I) shall be entertained if any other remedy

for such redress is provided for by or under any other law for the time being in force.

(4) No interim order whether by way of injunction or stay or in any other manner, shall be made on, or in any proceedings relating to, a petition

under Clause (1) unless-

(a) copies of such petition and of all documents in support of the plea for such interim order are furnished to the party against whom such petition is

filed or proposed to be filed; and

(b) opportunity is given to such party to be heard in the matter.

(5) The High Court may dispense with the requirements of Sub-clauses (a) and (b) of Clause (4) and make an interim order as an exceptional

measure if it is satisfied for reasons to be recorded in writing that it is necessary so to do for preventing any loss being caused to the petitioner

which cannot be adequately compensated in money but any such interim order shall, if it is not vacated earlier, case to have effect on the expiry of

fourteen days from the date on which it is made unless the said requirements have been complied with before the expiry of that period and the High

Court has continued the operation of the interim order,

(6) Notwithstanding anything in Clause (4) or Clause (5), no interim order (whether by way of injunction or stay or in any other manner) shall be

made on, or in any proceedings relating to, a petition under Clause (1) where such order will have the effect of delaying any inquiry into a matter of

public importance or any investigation or inquiry into an offence punishable with imprisonment or any action for the execution of any work or

project of public utility, or the acquisition of any property for such execution by the Government or any corporation owned or controlled by the

Government.

(7) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of

Article 32.

By Section 39 of the Amending Act a new Article 226A was added in order to reiterate the position that the High Court is barred from

considering the constitutional validity of any Central Law in any proceedings under Article 226. This new Article 226A reads as follows:

226A. Constitutional validity of Central laws not to be considered in proceedings under Article 226.-Notwithstanding anything in Article 226, the

High Court shall not consider the constitutional validity of any Central law in any proceedings under that article.

Article 228A which was inserted by Section 42 of the Amending Act reads as follow:

228A. Special provisions as to disposal of questions relating to constitutional validity of State Laws.-(1) No High Court shall have jurisdiction to

declare any Central law to be constitutionally invalid.

(2) Subject to the provisions of Article 131A, the High Court may determine all questions relating to the constitutional validity of any State law.

(3) The minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law shall

be five:

Provided that where the High Court consists of less than five Judges, all the Judges of the High Court may sit and determine such question.

(4) A State law shall not be declared to be constitutionally invalid by the High Court unless-

(a) where the High Court consists of five Judges or more, not less than two-thirds of the Judges sitting for the purpose of determining the validity of

such law, hold it to be constitutionally invalid; and

(b) where the High Court consists of less than five Judges, all the Judges of the High Court sitting for the purpose hold it to be constitutionally

invalid.

(5) The provisions of this article shall have effect notwithstanding anything contained in this Part.

Explanation.-In computing the number of Judges of a High Court for the purposes of this article, a Judge who is disqualified by reason of personal

or pecuniary bias shall be excluded.

Article 228A once again refers to the bar of jurisdiction of the High Court to declare any Central law to be constitutionally invalid and enables the

High Court, subject to the provisions of Article 131A, to determine all questions relating to the constitutional validity of any State law. It also

prescribes that where the constitutional validity of any State law has to be decided, the minimum number of Judges who shall sit for this purpose

shall be five except where the Court consists of less than five Judges, in which case all the Judges of the High Court have to sit and determine such

questions.

6. There are two other provisions which do not have any direct impact at the moment on the powers of the High Court under the new Article 226

of the Constitution, but by the newly introduced provisions in Article 323A and Article 323B which have been inserted in the Constitution of India

by Section 46 of the Amending Act, provision is made to reserve power to the Parliament and the State Legislature to exclude the jurisdiction of

the High Court in cases relating to public services. Article 323A provides for the constitution of administrative tribunals for adjudication or trial of

disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with

the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India

or of any corporation owned and controlled by the Government. Express power is given to the Parliament in Sub-clause (d) of Clause (2) of

Article 323 to exclude by such legislation the jurisdiction of all Courts except the jurisdiction of the Supreme Court under Article 136 with respect

to the dispute or complaints referred to in Article 323A(1). Article 323B has provided for tribunals for other matters, power being given to

appropriate Legislature to provide by law for the adjudication or control by tribunals of any disputes, complaints or offences with respect to all or

any of the matters specified in Clause (2) with respect to which such Legislature has to make laws. The appropriate Legislature has been given

power in the case of such other tribunals provided by Article 323B to make a provision excluding the jurisdiction of all Courts except the

jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said tribunals.

7. There is one more important provision of the Amending Act to which a reference is necessary and that is to be found in Section 58 of that Act

which reads as follows:

58. Special provisions as to pending petitions under Article 226.-(1) Notwithstanding anything contained in the Constitution, every petition made

under Article 226 of the Constitution before the appointed day and pending before any High Court immediately before that day (such petition

being referred to in this section as a pending petition) and any interim order (whether by way of injunction or stay or in any other manner) made on,

or in any proceedings relating to, such petition before that day shall be dealt with in accordance with the provisions of Article 226 as substituted by

Section 38.

(2) In particular, and without prejudice to the generality of the provisions of Sub-section (1), every pending petition before a High Court which

would not have been admitted by the High Court under the provisions of Article 226 as substituted by Section 38 if such petition had been made

after the appointed day, shall abate and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any

proceedings relating to, such petition shall stand vacated:

Provided that nothing contained in this sub-section shall affect the right of the petitioner to seek relief under any other law for the time being in force

in respect of the matters to which such petition relates and in computing the period of limitation, if any, for seeking such relief, the period during

which the proceedings relating to such petition were pending in the High Court shall be excluded.

(3) Every interim order (whether by way of injunction or stay or in any other manner) which was made before the appointed day, on, or in any

proceedings relating to, a pending petition not being a pending petition which has abated under Sub-section (2), and which is in force on that day,

shall, unless before the appointed day copies of such pending petition and of documents in support of the plea for such interim order had been

furnished to the party against whom such interim order was made and an opportunity had been given to such party to be heard in the matter, cease

to have effect (if not vacated earlier),-

(a) on the expiry of a period of one month from the appointed day, if the copies of such pending petition and the documents in support of the plea

for the interim order are not furnished to such party before the expiry of the said period of one month; or

(b) on the expiry of a period of four months from the appointed day, if the copies referred to in Clause (a) have been furnished to such party within

the period of one month referred to in that clause but such party has not been given an opportunity to be heard in the matter before the expiry of

the said period of four months.

(4) Notwithstanding anything contained in Sub-section (3), every interim order (whether by way of injunction or stay or in any other manner) which

was made before the appointed day, on, or in any proceedings relating to, a pending petition not being a pending petition which has abated under

Sub-section (2), and which is in force on that day, shall, if such order has the effect of delaying any inquiry into a matter of public importance or

any investigation or inquiry into an offence punishable with imprisonment or any action for the execution of any work or project of public utility, or

the acquisition of any property for such execution, by the Government or any corporation owned or controlled by the Government, stand vacated.

Explanation.-In this section, ''appointed day'' means the date on which Section 38 comes into force.

8. It will be convenient now to notice the changes which have resulted from the replacement of the original Article 226 by the new Article 226 in

the Constitution of India. So far as the original Article 226 was concerned, in Sub-clause (1) power was given to the High Court, notwithstanding

anything in Article 32, to issue to any person or authority, including in appropriate cases any Government, within the territories in relation to which

the High Court exercised its jurisdiction, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo

warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. Consequent upon

the enactment of Article 131A which exclusively vests the jurisdiction to determine all questions relating to the constitutional validity of any Central

law in the Supreme Court, the powers under Article 226 were made subject to the provisions of Article 131A. Article 226A appears to us to be a

mere consequential provision necessitated by addition of Article 131A, and its object appears to be to make it expressly clear that the High Court

shall not consider the constitutional validity of any Central law in any proceeding under Article 226. The power of the High Court under new

Article 226 is also consequentially made subject to the provisions of Article 226A. So far as the persons or authorities to whom the writs could be

issued are concerned, there is no change in the new Article. The territorial jurisdiction of the High Court as it existed under original Clause (1) of

Article 226 also remains unaffected. Similarly, the nature of the directions, orders or writs including writs in the nature of habeas corpus,

mandamus, prohibition, quo warranto and certiorari which the High Court had full jurisdiction to issue under the original Article 226 has also not

been affected. The amplitude of writ jurisdiction of the High Court has, however, been considerably fettered in relation to matters other than those

involving violation of fundamental rights. The original power of the High Court to issue writs, orders or directions for the enforcement of any of the

rights conferred by Part III of the Constitution has now been separately provided for in Clause (a) of Article 226(1). However, the words ""for any

other purpose"" which were found in the original Article 226'' have been deleted. Purposes other than those covered by Clause (a) relating to

fundamental rights, for which writs, orders or directions can be issued by the High Court are now definitely and particularly specified in Clauses (b)

and (c) of Article 226(1). The effect of the newly added provisions in Clauses (b) and (c), therefore, is that the area of the jurisdiction of the High

Court is curtailed and if the petitioner does not complain of a violation of his fundamental right, which case would expressly fall under Clause (a), in

order that he would be entitled to ask for a writ to be issued, he must satisfy the Court that his case falls within Clause (b) or Clause (c) of Article

226(1). Under Clause (b) a writ can be asked for ""for the redress of any injury of a substantial nature by reason of the contravention of any other

provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made

thereunder"". Therefore for the purposes of Clause (b) the petitioner must show that there is a contravention either of some provision of the

Constitution or any provision of any enactment which means a law or Ordinance or any order, rule, regulation, bye-law or other instrument made

thereunder. The contravention contemplated by Clause (b) is, apart from the contravention of a constitutional provision, a contravention of some

legal provision which may be contained in an Act or an Ordinance or in any subordinate legislation made in exercise of a statutory or constitutional

power. The words ""made thereunder"" qualify the entire set of words ""any order, rule, regulation, bye-law or other instrument"" and it refers to the

words ""Constitution, enactment or Ordinance"" mentioned earlier in the same clause. The words ""order, rule, regulation, bye-law or other

instrument"" are found in the definition of Indian law in the General Clauses Act in Section 3(29). The definition of ""Indian law"" reads as follows:

''Indian Law'' shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the

Constitution had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or

part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such

Act:

The word "enactment'' is also denned in General Clauses Act in Section 3(19) as follows:

''enactment'' shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code, and shall also include

any provision contained in any Act or in any such Regulation as aforesaid:

The definition of ''enactment'' is an inclusive definition, but there is little doubt that it means an Act made by the Legislature or a part thereof. See

The Vishnu Pratap Sugar Works (P) Ltd. Vs. The Chief Inspector of Stamps, U.P., The ""order, rule, regulation, bye-law or, other instrument

referred to in Clause (b) of Article 226(1) must be such as has been made either under the Constitution or under any enactment or an Ordinance.

So far as an instrument'' is concerned, even that must be such as has the force of law and has been issued under either the Constitution or the

enactment or the Ordinance. The use of the word ''other'' clearly shows that the word ''instrument'' must take its colour from the words preceding

it, all of which indicate that they have reference to subordinate legislation which has the force of law. Orders, rules, regulations and bye-laws are in

legal parlance also referred to as statutory instruments. Craies on Statute Law, 7th edn., at p. 302, has while giving a nomenclature of statutory

instruments observed thus:

Statutory instruments are either (1) Orders in Council or (2) other instruments, which are variously described as orders, rules, regulations,

schemes, warrants, licences, instruments, etc.

In Sree Mohan Chowdhury Vs. The Chief Commissioner, Union Territory of Tripura, , the question which arose before the Supreme Court was

whether an order issued by the President of India under Article 352(1) was an "instrument'' and while answering that question in the affirmative the

Supreme Court has made the following observations in para. 11 (p.178):

...Is the President''s Order in question an ''instrument'' within the meaning of the section? The section referred to was Section 8 of the Defence of

India Act. The General Clauses Act does not define the expression ''instrument''. Therefore, the expression must be taken to have been used in the

sense in which it is generally understood m legal parlance... The expression is also used to signify a deed inter parti es or a charter or a record or

other writing of a formal nature. But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal

writing like an order made under a statute or subordinate legislation or any document of a formal character made under constitutional or statutory

authority.

Thus in the context in which the word ''instrument'' has been used following the words ""order, rule, regulation, bye-law"", in our view, the

''instrument'' has reference to a subordinate legislation or something which has the force of law made in the exercise of some authority under the

Constitution or any enactment or an Ordinance. Two things must, therefore, be shown before a litigant can invoke the jurisdiction of the High Court

under new Article 226(1)(b). There must be a contravention of either any provision of the Constitution or any law ordinance or any subordinate

legislation or any instrument having the force of law and that contravention must result in an injury of a substantial nature.

9. Mr. Singhavi has, however, contended that Clause (b) would take in its sweep even an executive order, a proposition which was seriously

disputed by Mr. Seervai. In support of the contention that the order contemplated by Clause (b) is not an executive order but is an order which

has the force of law in contradistinction with an order which is merely backed by law, Mr. Seervai has relied upon a decision of the Supreme

Court in The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another, . In that case the question was whether an

executive order was covered by the words ""Indian law"" in Section 3(29) of the General Clauses Act. Upholding the contention of Mr. Chatterjee

that an executive order does not come within the definition of law, the Supreme Court observed (p. 746):

...We agree with Mr. Chatterjee that an order must be a legislative and not an executive order before it can come within the definition of law.

Therefore Clause (b) covers cases of contravention of law and consequent injury of a substantial nature resulting from such contravention.

10. Mr. Bhabha, who appeared on behalf of the Union of India contended that the words ""injury of a substantial nature"" contemplated an injury of

an ""exceptional and monstrous nature"". While discussing the provisions of new Article 226 it will not only be difficult but almost impossible to

contemplate all kinds of cases which would be covered by Clause (b) or Clause (c) and whether a case falls under Clause (b) or Clause (c) will

have to be decided on the facts of each case. It is, however, difficult to accept the contention of Mr. Bhabha that the injury which is contemplated

as enabling a party to claim relief under new Article 226(1)(b) must be something of a monstrous or exceptional nature. It is important to note that

the word "injury" used in Clause (b) is of wide import. "Injuria" or "Injury" has been defined in Jowitt"s Dictionary of English Law as ""the

infringement of some right. Hence "injury" is opposed to "damage", because a right may be infringed without causing pecuniary loss (injuria sine

damno)"". The word "Injury" is a word of wide import and cannot be restricted to mean monetary injury. It denotes a violation of another"s right or

a breach of legal duty to another. It appears to us that it is in this wide sense that the word "injury" has been used in Clause (b) and it contemplates

that as a result of a contravention of the provisions referred to in Clause (b), there is an unlawful infringement or privation of a right of a person.

One of the dictionary meanings of the word "substantial" is "real". See Chamber"s Twentieth Century Dictionary. It appears to us that when

Article 226(1)(b) contemplated that the Court"s jurisdiction should be exercised in case a substantial injury has resulted by contravention of the

provisions enumerated therein, it was intended that the words ""substantial injury"" were used in the sense of a real injury. Whether in a given case

the injury or the infraction is of such nature that having regard to the extraordinary nature of the remedy and the extraordinary nature of the writ

jurisdiction under Article 226 of the Constitution, the High Court will interfere or not and grant relief to the litigant is a matter which will have to be

decided on the facts of each case. The remedy provided under Article 226 is of an extraordinary nature and, in our view, use of the word

"substantial" to qualify the word "injury" is intended to highlight this extraordinary nature of the remedy. In our view, the concept of monstrosity in

the context of infraction or violation of constitutional, non-fundamental or other legal rights is hardly a proper concept to apply when ascertaining

whether a citizen is entitled to seek redress while invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution.

11. While discussing the scope of Article 226(1)(b) of the Constitution it was contended by Mr. Seervai that where an order issued by an authority

is entirely without jurisdiction, that order must in terms be held to result in substantial injury or prejudice to a person for the purposes of Article

226(1)(b). In our view, this contention must be accepted. If an order is made by a person entirely without jurisdiction and it adversely affects a

person, it will not be open for the opposite party to contend that the order does not result in substantial injury to the party who is intended to be

affected by the said order. We may usefully refer to the decision in Harrington v. Croydon Corporation [1968] 1 Q.B. 856, relied upon by Mr.

Seervai. That was a case in which the question related to the validity of a notice calling upon a person in exercise of the power u/s 27(1) of the

Housing Act, 1964, to construct a brick-built ground floor extension as a bathroom which was estimated to cost about Ã¯Â¿Â½ 650. That notice was

challenged on the ground that the local authority had no power to compel the improvement of property by requiring the owner to construct a new

bathroom. The argument on behalf of the Corporation was that though the County Court in the exercise of its appellate jurisdiction u/s 27(3) of the

Act had power to consider the validity of the notice, even if the notice was invalid, it did not substantially prejudice the landlord. Section 27(3) of

the Act provided:

27.(3) In so far as an appeal under this section is based on the ground that the improvement notice is invalid, the court shall confirm the

improvement notice unless satisfied that the interests of the appellant have been substantially prejudiced by the facts relied on by him.

In this context Salmon L.J. observed as follows (p. 866):

It seems self-evident to me that, if a local authority seeks to exercise a non-existent power to compel a landlord to spend money which he does not

wish to spend, that is substantially to the prejudice of the landlord. If there were any doubt about that, such doubt would be removed by the

decision of this Court in De Rothschild v. Wing Rural District Council [1967] 1 W.L.R. 470 : [1967] 1 All E.R. 597.

In the case of De Rothschild relied upon in Harrington''s case cited supra a similar improvement notice u/s 27 of the Housing Act, 1964, was found

to be invalid on the ground that the person in occupation of the premises was not a tenant and the improvement notice could be served only when

the person in occupation of the premises was a tenant. The improvement notice could not be issued under law in respect of an empty house or an

owner-occupied house or in respect of a house where the tenancy had come to an end. The County Court Judge rejected the contention that the

notice had substantially prejudiced the owner. Reversing this decision in the Court of Appeal, Lord Denning observed (p. 472):

I can sympathise with the judge''s point of view, but I am afraid I cannot agree with it. It seems to me plain that Mr. de Rothschild''s interests have

been prejudiced. He has been directed to do a lot of work on this house, when it is plain that the Act never intended that he should be liable. One

of the statutory conditions is that the house should be occupied by a ''tenant'', and this house was not so occupied.

12. In our view, the concept of an ""injury of a substantial nature"" does not much differ in content from the concept of ""substantial prejudice"". In

Chamber''s Twentieth Century Dictionary one of the meanings of the word ''prejudice'' is given as ""injury or hurt"". Thus in our view, an order

issued in exercise of nonexistent power or, in other words, an order which is entirely without jurisdiction must in terms be deemed to result in an

injury of a substantial nature.

13. We may observe that the scope of Clause (b) cannot be restricted only to executive action, but it will also take in legislative action because it is

quite possible in a given case that either a legislative enactment or an ordinance or any subordinate legislation may contravene the provisions of the

Constitution itself or a subordinate legislation may itself be in excess of the power given under the parent legislation.

14. Coming to Clause (c) of Article 226(1) it uses the words ""for the redress of any injury"" which are also to be found in Clause (b), but for the

purposes of Clause (c) injury must result from some illegality in any proceedings by or before any authority under the provisions referred to in

Clause (b) and the illegality must result in substantial failure of justice. While Clause (b) refers to an injury resulting from a contravention of the

provisions referred to in Clause (b), the injury in Clause (c) is contemplated as resulting from any illegality in any proceedings under the provisions

referred to in Clause (b). The word ''proceeding'' is a very comprehensive term and generally means a prescribed course of action for enforcing a

legal right. It will also embrace the requisite steps by which a judicial action is invoked and will include the form and the manner of conducting

judicial business before a Court or a judicial officer. The word ''proceeding'' is wider than the word ''case'' and may also include an administrative

proceeding. In Aiyer''s Law Lexicon the meaning of the word ''proceeding'' is given as ""an act necessary to be done in order to attain a given end;

a prescribed mode of action for carrying into effect a legal right"". It is in this wide sense that the word ''proceeding'' has been used in Clauses (c).

What is, however, necessary is that the proceeding must be under any of the provisions of the Constitution or other law referred to in Clause (b)

and illegality in such proceedings should have resulted in substantial failure of justice. Here again the words used are ""substantial failure of justice

which highlight the fact that the jurisdiction which is exercised by the High Court is not of an ordinary nature, but it is an extraordinary jurisdiction

exercised in order to further the ends of justice. Where justice is denied, there will be failure of justice, but again it will be for the High Court in the

exercise of its discretion to decide whether there is real failure of justice which necessitates its interference in a given case. Failure of justice

necessarily contemplates that some injury is caused to the person complaining thereof. The scheme of both Clauses (b) and (c) clearly indicates

that it is only the person whose rights have been violated or who is adversely affected by the illegality in any proceedings contemplated by Clauses

(b) and (c) who can complain of the contravention referred to in Clause (b) or the failure of justice contemplated by Clause (c). The phrase

illegality in any proceedings"" need'' not be restricted only to procedural illegality in the course of the proceedings and while, in our view, an

illegality could be challenged even while the proceedings are pending, if that illegality has resulted in substantial failure of justice, the final order

passed in such proceedings could also be challenged as being vitiated by an illegality resulting in substantial failure.

15. It is important to note that the writs which are contemplated by Article 226 include a writ of prohibition and if any illegality in the nature of the

wrongful assumption of jurisdiction by the inferior tribunal or the authority is complained of, then in a given case, in our view, it would be possible

for a person to approach the High Court invoking the writ of prohibition without waiting for the completion of the proceedings, if there is no other

bar which stands in his way, to seek the writ of prohibition. Illegality may, therefore, have different facets including wrongful assumption of

jurisdiction, which in a given case fall even under Clause (b). To a certain extent, therefore, it appears to be unavoidable that within a small area the

remedies provided by Clauses (b) and (c) may overlap. The fact, however, remains that now the area of jurisdiction of the High Court under new

Article 226 stands limited to Clauses (b) and (c) in cases which do not deal with the enforcement of fundamental rights.

16. Clause (2) of Article 226 is identical to the original Article 226(1A) and no change is made in respect of jurisdiction of the High Court to issue

writs in respect of Government or authority or a person where the cause of action wholly or in part arises for the exercise of such power within the

jurisdiction of the High Court notwithstanding that the seat of such Government or authority or the residence of such person is not within those

territories.

17. Clause (3) of the new Article 226 is a newly added provision the like of which was not to be found in the original Article 226.

18. There was elaborate argument at the Bar on the scope of the provision in Article 226(3). Plainly read Clause (3) provides that no petition for

the redress of any injury referred to in Sub-clause (b) or Sub-clause (c) of Clause (1) shall be entertained if any other remedy for such redress is

provided for by or under any other law for the time being in force. The bar against entertaining a petition is expressly restricted to a case which falls

only in Sub-clause (b) or Sub-clause (c) of Clause (1) which is referred to as Clause (1). The bar operates if any other remedy for the redress of

injury referred to in Clauses (b) or (c) is provided for by or under any other law for the time being in force.

19. According to the learned Counsel for the petitioners the mere fact that there is a remedy provided for the redress of an injury which is

contemplated by Clauses (b) and (c) is not sufficient to deprive the High Court of its jurisdiction to entertain the petition. According to Mr. Seervai,

who was appearing for the petitioners, it is not enough to merely find that there is a remedy provided but that the remedy must be adequate,

efficacious, beneficial and convenient and it is only in such cases where the alternative remedy is found to be adequate and efficacious that the bar

provided for in Clause (3) could be attracted. Mr. Seervai also contended that a suit cannot be considered as ""any other remedy"" for the purposes

of Clause (5) because, according to the learned Counsel, the suit is neither provided for ""by any law"" nor provided for ""under any other law"". In

other words, according to Mr. Seervai, unless remedy of a suit is found to be expressly provided by some substantive law or provided under such

law by any subordinate legislation, the right to file a petition under Article 226 cannot be negatived on the ground that the remedy by way of a suit

is open to the petitioner. The learned Counsel contends that Clause (3) must not be so construed as to nullify the whole or part of the nature of the

writs provided for under Article 226. It is argued that the nature and the character of the writs have not been altered in any sense even after the old

provision was repealed and new Article 226 was substituted in its place and since in connection with the exercise of writ jurisdiction the words

other remedy"" had acquired a well recognised meaning, namely, remedies which were adequate alternative remedies, that same meaning should be

put upon the words ""any other remedy"" in Clause (3).

20. The learned Counsel referred to the provisions of Section 45 of the Specific Relief Act (I of 1877) which empowered the High Courts of

Calcutta, Madras and Bombay to make an order ""requiring any specific act to be done or forborne,...by any person holding a public office,...or by

any corporation or inferior Court of Judicature : Provided...(d) that the applicant has no other specific and adequate legal remedy."" According to

the learned Counsel, Sections 45 and 46 of the Specific Relief Act substantially reproduced the law of mandamus in England and the principles

governing those writs in England were applied under Sections 45 and 46. The learned Counsel further contends that the provisions of Article 226

were intended to give enlarged powers to the High Court than what they possessed u/s 45 of the Specific Relief Act and intention could not be

attributed to those who introduced Clause (3) that the powers of the High Court should be so curtailed that they would be lesser in; extent than

those u/s 45 of the Specific Relief Act. According to the learned Counsel, even originally the existence of an alternative remedy was a factor taken

into account by the High Court while exercising its writ jurisdiction and where adequate alternative remedy was available to a litigant, the High

Court did not normally exercise its writ jurisdiction and it is this rule of self-limitation, as it is sometimes called, that has now been codified into a

rule going to the jurisdiction of the High Court. The learned Counsel contends that under the original provisions of Article 226 of the Constitution in

a given case even where the litigants had an alternative adequate remedy, it was open to the High Court to exercise its discretion in favour of the

litigant but what Article 226 now does is that this jurisdiction which was exercised by the High Court to issue writs even in a case where there was

alternative adequate remedy, has been taken away by the introduction of Article 226(3).

21. Mr. Dhanuka, who appears on behalf of the Union of India, contended that having regard to the provisions of Article 226(3), it is not now

necessary that the alternative remedy should be equally efficacious. According to him, the change made in Article 226(3) is a deliberate one. At the

same time he contended that the remedy should not be illusory, e.g., according to the learned Counsel, there may be a case where conditions

precedent to invoking the alternative remedy may be incapable of compliance qua a particular individual, in which case, according to the learned

Counsel, so far as that individual is concerned, there is no remedy though a remedy is expressly provided by or under the law as for that individual

the remedy will be illusory. The learned Counsel contended that if it is possible for a Court to hold that there is in effect no remedy which can be

effectively availed of by a person, the bar under Article 226(3) will not apply. In other words, according to the learned Counsel, though in terms

the concept of an ""equally efficacious remedy"" cannot be said to be included in Clause (3), in a case where the remedy can be said to be a ""real

remedy"", the petition cannot be entertained by the High Court in spite of provisions in Article 226(3). Mr. Dhanuka went to the extent of

contending, to quote his own words from the written note of argument, ""In a given case the respondents may feel that to get the decision of the writ

Court on merits would be much better in public interest and it would be unjust to drive the petitioner to the remedy of a suit and prolong the

litigation and in such a case it should be open to the respondents not to urge the bar sought to be created under Article 226(3) of the Constitution.

This argument shows that even the Union of India found it difficult to contend that the jurisdiction of the High Court to entertain a petition under

Article 226 is taken away in every case where the petitioner had another remedy. However, in spite of the above contention, Mr. Dhanuka placed

heavy reliance on a division Bench judgment of this Court in Prabhakar v. State of Mah [1977] Mh. L.J. 269, in support of his contention that

considerations of adequacy and efficaciousness are irrelevant.

22. Mr. Singhavi has addressed elaborate arguments as to the scope of Article 226(3). His contention is that Article 226(3) must be literally

construed and once the Court conies to the conclusion that the petitioner has another remedy, no further enquiry into the question whether the

remedy is equally efficacious and beneficial or whether the impugned order is a nullity can be made. According to the learned Counsel, the

Parliament wanted to curtail the power of the High Court and, therefore, deliberately did not use the words ""adequate alternate legal remedy"".

According to Mr. Singhavi, the existence of other remedy must be determined having regard to the redress which a party is seeking. He contended

that the words used in Clause (3) are ""any other remedy for such redress"", the reference being to the redress contemplated by Clauses (b) and (c),

and if in a given case the redress which is sought in the petition is not available by taking recourse to the alternative remedy, then the bar in Clause

(3) will not apply. Giving an illustration the learned Counsel contended that if immediate relief necessary at the interim stage is not possible in a suit,

then the remedy of a suit is not available for such redress and the petition could be entertained by the High Court.

23. Elaborate arguments were also advanced by Mr. Singhavi and by Mr. Dhanuka on the question whether a suit is an alternative remedy to

which we shall refer a little later.

24. Mr. Singhavi also read to us certain passages from a treatise on ""Legal Control of Government"" by Bernard Schwartz and H.W.R. Wade to

show that in the United States exhaustion of alternative remedy is the rule before a person seeks a public law remedy. Mr. Singhavi has also drawn

our attention to the Notes on clauses attached to the Constitution (Forty-fourth Amendment) Bill, 1976. The relevant part which deals with the first

three clauses of Article 226 in the Notes on clauses is in Clause 38. it is stated therein that the jurisdiction vested in the High Court is now a

restricted jurisdiction, and ""They can exercise jurisdiction in (a) cases where there is a contravention of a statutory provision causing substantial

injury to the petitioner, and (b) cases where; there is an illegality resulting in substantial failure of justice. In either case, the petitioner has to satisfy

the Court that he has no other remedy.

25. The question which really falls for determination is whether Clause (3) was intended to deprive the High Court of its jurisdiction under Article

226(1) and consequently also to deprive a citizen of his remedy which was provided under Article 226 once it is found that there was other

remedy available to a party for seeking the redress which he sought in a petition under Article 226.

26. it is apparent even from the arguments of Mr. Singhavi and Mr. Dhanuka that they are not in a position to support the extreme proposition of

law that the moment other remedy is found to have been provided by or under the relevant law the jurisdiction of the High Court to entertain a

petition is barred. It is obvious that it was in order to wriggle out of the rigour which may follow a literal construction of the words in Clause (3)

that the argument that remedy must be a real remedy or that it must not be an illusory remedy was advanced. Such an argument runs clearly

contrary to the plain terms of Clause (3) which if read literally leaves no scope for the concept of a ""real remedy"". On the other hand, the concept

of a ""real remedy"" or ""the remedy not being an illusory remedy"" even in a case where there is a specific remedy provided against a particular act or

order of an authority ultimately lends support to the concept of the adequacy or the efficaciousness of the remedy. By way of an illustration it was

stated that if a person is required to deposit a large amount of money, which he is plainly not in a position to deposit, before be can avail himself of

an alternative remedy provided by the statute under which the authority concerned is taking action, then in such a case, even, according to the

learned Counsel for the respondents, the bar of Article 226(3) would not be attracted. Another illustration given was that where an authority

threatened to take some action but if that action is to be challenged, a notice of prescribed number of days is to be given before a suit can be riled,

the urgency of the matter may be such that the aggrieved person would be entitled to approach the High Court under Article 226 notwithstanding

the fact that an alternative remedy is provided by or under the relevant law. These illustrations themselves show that the learned Counsel for the

State Government and the Union of India did not seriously canvass for a literal construction of Article 226(3). The obvious reason why, according

to the learned Counsel, the bar of Article 226(3) did not operate in the illustrations given by them was that the other remedy was not adequate.

Strictly speaking, if Article 226(3) has to be literally construed, then whether there is another remedy available to a litigant or not must be

determined solely with reference to the relevant legal provision providing for such a remedy enabling a party to challenge an impugned action in a

forum which is provided by that law or with reference to the right to file a suit in a civil Court to challenge the impugned action if a suit is not

barred. But once such a remedy and a forum is made available by or under the relevant law, the fact that on account of certain circumstances the

forum becomes unavailable by virtue of circumstances peculiar to the litigant himself does not make the forum or the remedy non-existent if the

words of Article 226(3) are given a literal construction. The argument of even the learned Counsel for the State Government and the Union of

India, therefore, ultimately comes to this that it will not be possible to construe Clause (3) strictly in the literal sense and there will be cases where

though the remedy is provided by law, that remedy will not be an adequate remedy in the circumstances of the case and in such cases, the petition

could be entertained. In our view also, this would be the correct approach to the construction of Article 226(3) and the other remedy referred to

therein must be an adequate remedy.

27. The concept of adequate and equally efficacious remedy as a part of the law with regard to the exercise of writ jurisdiction prior to the

amendment of Article 226 is now well defined. The public remedies in the form of writs have been engrafted in the Indian Constitution from the

English system of the Administration of Justice and the makers of the Constitution by conferring writ jurisdiction on the High Court wanted to

provide a quick and inexpensive remedy for the enforcement of fundamental rights and the power to issue writs, orders or directions ""for any other

purpose"" was included ""with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King''s

Bench in England"". See Election Commission, India Vs. Saka Venkata Subba Rao and, . The width of the power of the High Court to reach

injustice wherever it is found is explained by the Supreme Court in Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and

Another, in the following words (p. 84):

...This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is

found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority

against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is

widened by the use of the expression ''nature'', for the said expression does not equate the writs that can be issued in India with those in England,

but only draws an analogy from them. That apart High Courts can also issue directions, orders or writs other than the prerogative writs. It enables

the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the

power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the

unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast

country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the

High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article

through defined channels.

28. The nature of the writ jurisdiction to reach and remedy injustice propounded by the Supreme Court has not undergone any change even under

the new Article because the writs which the High Court was entitled to issue under the original Article 226 can also be issued even under the new

Article 226. All that has happened now is that certain restriction with regard to matters in respect of which the writ jurisdiction can be exercised

have been put in the different parts of the new Article.

29. One such restriction is to be found in Clause (3). In order to ascertain the exact scope of that newly added provision it is necessary first to

notice the legal position in the matter of an alternative remedy which was in the nature of a self-limitation on the power of the High Court in the

exercise of its writ jurisdiction. Under the original Article 226 the rule of exhaustion of alternative remedy was merely a rule of self-limitation, a rule

of policy, convenience and discretion. In U.P. State v. Mohd. Nooh air[1958] S.C. 86, dealing with the concept of the alternative efficacious

remedy, the Supreme Court in para. 10 has observed as follows (p. 93):

In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is

no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has

been conferred by statute, Halsbury''s Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there. The fact that the aggrieved party has

another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise

of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court

will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory

remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where

a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In Rex v. Postmaster-General :

Carmichael, Ex parte [1928] 1 K.B. 291 , a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has

been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary

jurisdiction.... Likewise in Khushalchand Bhagchand Vs. Trimbak Ramchandra and Others, it was held that the High Court would not refuse to

issue a writ of certiorari merely because there was a right of appeal. It was recognized that ordinarily the High Court would require the petitioner to

have recourse to his ordinary remedies, but if it found that there had been a breach of fundamental principles of justice, the High Court would

certainly not hesitate to issue the writ of certiorari.

(Italics ours.)

The observations of Harries C.J., in Assistant Collector of Customs for appraisement and Another Vs. Soorajmull Nagarmull and Another, were

quoted with approval. These observations are as follows (p. 665):

There can I think be no doubt that a court can refuse to issue a certiorari if the petitioner has other remedies equally convenient and effective. But it

appears to me that there can be cases where the court can and should issue a certiorari even where such alternative remedies are available. Where

a court or tribunal which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justice and arrives at a decision

contrary to all accepted principles of justice then it appears to me that the court can and must interfere.

(Italics ours.)

30. That the existence of an alternative and equally efficacious remedy to a litigant did not affect the jurisdiction of the High Court to grant an

appropriate relief was reiterated by the Supreme Court in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad,

Muzaffarnagar, The Supreme Court in that case observed as follows (p. 558):

It is a well-established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to

pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory

remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed Vs. The Municipal

Board, Kairana, , "...the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs...and where

such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it

should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy,

and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the

fact that the statutory remedies have not been exhausted.

(Italics ours.)

31. Thus the position under the old Article 226 was that the existence of an adequate and efficacious remedy was to be taken into consideration

while deciding whether the Court should exercise its discretionary jurisdiction under Article 226 or not. The rule of exhaustion of alternative

remedies was a rule of self-limitation, which merely controlled the exercise of discretion. For obvious reasons, in cases of the kind referred to by

the Supreme Court in Mohd. Nooh''s case, in spite of the fact that an adequate alternative remedy existed, the Court in the interests of justice

interferred in favour of the litigant. The question is whether what was a rule of self-limitation in the matter of the exercise of the discretion by the

High Court under Article 226 was intended to be codified as a rule of law or whether it was intended to deprive the High Court of its jurisdiction

on the mere existence of an alternative remedy being established. In the passage relied upon by Mr. Singhavi appearing on behalf of the

respondents in some cases from Legal Control of Government by Bernard Schwartz and H.W.R. Wade it is observed by the learned authors (p.

278):

Closely connected with the doctrine of primary administrative jurisdiction is the rule that available administrative remedies must be exhausted

before resort may be had to the courts. The affected individual is expected to take advantage of all remedies within the administrative process

before he can seek any judicial relief. Hence, if there is an administrative appeals procedure provided by statute or regulation, it must be resorted

to, and it is only after he has gone through such appellate procedure that the individual concerned can, seek judicial review on the usual grounds,

for example that the findings are not supported by substantial evidence.

At page 279 the learned authors have pointed out:

The exhaustion of administrative remedies is thus required even where it is claimed that the agency has no jurisdiction in the particular case: ''an

agency possessing authority over the general subject matter is entitled to proceed to a conclusion without judicial interference, If in the end it has

mistaken its authority or jurisdiction, correction must come by way of judicial review''.

32. The above view of the learned authors is based on, the decision of the American Supreme Court in Myers v. Bethlehem Shipped Corporation

(1938) 303 U.S. 41 and it is clearly inconsistent with the law declared by the Supreme Court of India from time to time regarding the scope and

powers of the High Court under Article 226 of the Constitution. Even though the theory of exhaustion of alternative remedies was being

propounded in the United States, as it appears from the passages relied upon, the Supreme Court has expressly held in a catena of decisions that

in certain cases of the kind referred to in Mohd. Nooh''s case, the Court should and must interfere even in spite of an existence of an alternative

adequate remedy, especially in a case where the decision bears a mark of illegality or want of jurisdiction on the face of it.

33. Indeed it must be noticed that even under the new Article 226 the existence of an alternative remedy does not affect the jurisdiction of the High

Court in a case where the grievance is that a fundamental right has been violated. Clause (5) expressly refers only to cases in Sub-clause (b) and

(c) and not to cases which-fall in Sub-clause (a) of Article 226(). We may also point out that the extreme view relied upon by Mr. Singhavi

regarding the exhaustion remedies doctrine is not rigorously followed even, by the State Courts in the United States. At page 280 the learned

authors have observed as follows:

The state courts generally refuse to follow the extreme application of the exhaustion doctrine illustrated by Myers. See Jaffe, Judicial Control of

Administrative Action, 435. The leading case is Ward v. Keenan 70 A. 2d 77 where Chief Justice Vanderbilt expressly rejected the Supreme

Court''s rule. According to him,

When the jurisdiction of the statutory tribunal was questioned on persuasive grounds a writ of certiorari might be allowed the challenging party in

advance of the hearing before the statutory tribunal for the obvious reason that if the question of jurisdiction were resolved against the statutory

tribunal the parties would be spared the vexation of a useless hearing. (p. 82).

British law, in so far as it is comparable, entirely supports Chief Justice Vanderbilt''s reasoning.

This passage will, therefore, show that the rule of exhaustion of alternative remedies has not been accepted totally even in the United States. The

Myers case was again commented upon by the learned authors at page 285 in the following words:

Justice Brandeis''s reasoning the Myers case would seem open to serious criticism, which indeed it has duly received in Ward v. Keenan and

elsewhere. It fails to make the important distinction as to the nature of an appeal to an administrative authority and an appeal to the court. The

administrative appeal is concerned with the merits, expediency, policy of the action in question. Judicial review is concerned with its legality. No

decision on an administrative appeal can give the authorities more jurisdiction than they possess in law, and their jurisdiction can be determined

only by the court. If an issue of jurisdiction is raised at the outset, it needs decision at the outset. It is not a question of ''the orderly conduct of the

government''s business"", as an American judge has said. It is a question of the legality of the government''s conduct. Admittedly, futile disputes over

jurisdiction could be a serious impediment to the work of administration if they were frequent. But administrative usurpations could equally be a

serious threat to liberty. There is no absolute order of priority. But the rule of law should have the benefit of any reasonable doubt, and the court

can be trusted to deal faithfully with frivolous claims.

These observations are, in our view, more in keeping with the view which has been prevailing in this country on the question of exhaustion of

alternative remedies. It is, no doubt, as argued by Mr. Singhavi, that in the Notes on Clauses of the Bill it has been said that the petitioner has to

satisfy the Court that he has no other remedy. That, however, does not take the matter further because those are the very words which are found

to be in Clause (3) and the effect of which now falls for construction before us.

34. The question is whether it can be said that by insertion of Clause (3) in Article 226 the mere existence of another remedy for seeking redress

which the petitioner prays for in his petition, the jurisdiction of the High Court to grant relief is taken away. It is important to note that even in

respect of cases falling under Sub-clause (b) and (c) of Clause (1), the writs which the High Court is entitled to issue are the same which it cap

issue for the purposes of Sub-clause (a). One of the writs which can be issued even in a case which falls within Clauses (b) and (c) is a writ of

prohibition. In a case where proceedings are being taken against a person entirely without jurisdiction, can it be said that it was intended while

introducing Clause (3) in Article 226 that he must go through the entire proceeding when it is possible, for him to show on the face of the

proceeding at the threshold that it is entirely unauthorised and illegal. We are for the time being not dealing with the question whether a suit will be a

proper remedy or not but we are restricting our attention for the time being to the remedies in the nature of appeals, revisions or representations

before the hierarchy of authorities which may be provided by or under the relevant law, rules or regulation. It is common experience that superior

administrative tribunals are loath to interfere with proceedings going on before the original tribunals before the proceedings are completed. In such

a case, the only alternative for the aggrieved person is to ask for a writ of prohibition. If he awaits the completion of the proceeding, he has no

occasion to ask for a writ of prohibition, though the invalidity of the final decision may be open to challenge on the ground of want of or illegal

assumption of jurisdiction and a writ of certiorari can be asked for. We may with advantage recall some of the observations of the Supreme Court

in Mohd. Nooh''s case where it was pointed out that in a case where an inferior Court or a tribunal acts wholly without jurisdiction or conducts

itself in a manner which is contrary to all accepted rules of natural justice, the Court must interfere even if a remedy of an appeal was available but

was not availed of. Those observations in para. 11 of the judgment in Mohd. Nooh''s case are as follows (p. 94):

On the authorities referred to above it appears to us that there may conceivably be cases-and the instant case is in point-where the error,

irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent & loudly obtrusive

that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or

tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a

manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court''s sense of fair play

the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or

tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had

to it, it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and

the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy

without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior Court will ordinarily

decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above it has the power to do so and may and

should exercise it. We say no more than that.

In a case where the petitioner can show a patent want of jurisdiction, the redress which he seeks is that the tribunal must be prevented from

proceeding further with the matter. There can be little doubt that the very fact that a person is subjected to a proceeding before an administrative

tribunal which patently lacks jurisdiction would result in an injury of a substantial nature for the purposes of Clause (b). Clause (3), in our view,

therefore, must be so construed that merely because a remedy is provided against an action taken against a person, it does not prevent him from

approaching this Court in exercise of its jurisdiction under Article 226 if he can show on the face of the proceeding that the proceeding is entirely

without jurisdiction. It will be open to him to ask for a writ of prohibition if he approaches at the threshold of the proceeding taken against him or if

he has allowed the proceeding to go on he could still ask for a writ of certiorari if the order can be shown to be vitiated by want of jurisdiction or

on any of the grounds referred to in the observations in Mohd. Nooh''s case quoted above. Indeed such a case is expressly contemplated by

Clause (c). Clause (c) refers to an illegality in any proceedings. We have already held earlier that the operation of Clause (c) is not restricted

merely to the final order which is passed in a proceeding, but it will also cover the earlier stages of the proceedings which will lead to the finality or

conclusion of that proceeding. The several clauses of Article 226 and especially Clauses (1) and (3) have to be read harmoniously because Clause

(5) expressly deals with cases falling under Sub-clause (b) and (c) of Clause (1). Sub-clause (c) of Clause (7), in our view, itself contemplates an

illegality in a proceeding resulting in substantial failure of justice being challenged even at a stage prior to the termination of the proceeding and it

will be no answer in such a case that the petitioner should await the final conclusion of the proceedings. In the kind of cases above referred to it is

obvious that the remedies prescribed by the appropriate law will not be adequate or efficacious. The words ""other remedy"" or ""alternative remedy

in the context of the exercise of writ jurisdiction of the High Court had become terms of art and had acquired a definite connotation and had always

been understood to mean that the remedy should be adequate and equally efficacious so as to disable the petitioner from seeking relief in the nature

of a writ or other appropriate order or direction in his favour. The Parliament must be presumed to know this accepted connotation of the words

other remedy"" in the context of writ jurisdiction and, in our view, the same meaning must be given to those words which have been used in Article

226(3). Giving a literal meaning to the words in Article 226(3) would defeat the purpose of vesting the writ jurisdiction in the High Court the nature

of which has not changed even under the new Article 226.

35. The construction which we have placed on Clause (3) does not, in our view, render that provision nugatory at all, as was sought to be

contended on behalf of the respondents at one stage. It is well-known that under the provisions of the original Article 226, in spite of the fact that

there was an adequate alternative remedy, the Court exercised its discretion in favour of the petitioner if on the peculiar facts of a case interests of

justice so required. See Baburam''s case and Mohd. Nooh''s case cited supra. It is such a kind of case where the bar created by Clause (3) will

operate. In other words, the jurisdiction of the High Court to interfere in cases where there is alternative adequate, efficacious and convenient

remedy is now barred and it is in order to secure this end that the rule which was originally one of self-limitation has now been made a rule going to

the root of the jurisdiction under the new Article 226.

36. It is important to remember that the writ jurisdiction has always been exercised to further the ends of justice. Writs have been described as

speedy remedies provided by the Constitution. Referring a person to an alternative remedy which is inefficacious often results in harassment and

delaying of justice which could not have been the intention of the Parliament in enacting Article 226(3). The construction which we are placing on

Clause (3) furthers the object of the writ jurisdiction, namely, to provide for a speedy remedy. The question whether in a given case a remedy is an

adequate and efficacious remedy will depend on several circumstances and will have to be decided on the facts and circumstances of each case as

will appear from the instances which were quoted in the course of arguments and referred to earlier by Mr. Dhanuka and Mr. Singhavi. It will

depend on the nature of the injury; it will depend on the quality of the redress available by the alternative remedy; the time element involved; the

urgency for the relief; the ability or otherwise of the litigant to comply with conditions required to be satisfied before alternative remedy can be

resorted to and various other factors all of which it will not be possible nor feasible to enumerate. It will, therefore, be futile to attempt to lay down

any guidelines applicable in all cases as to when a remedy can be said to be adequate and efficacious. We are reluctant to place a literal

construction on the provisions of Clause (3) and we must reject the argument that wherever and whenever a remedy exists, the jurisdiction of the

High Court to entertain a petition under Article 226 in matters covered by Sub-clause (b) and (c) of Clause (1) is taken away.

37. It is not necessary to refer in detail to two unreported decisions of this Court relied upon by Mr. Singhavi. In Mahindra Owen Limited v. Shri

V.W. Pandit (1968) Special Civil Application No. 1720 of 1966 and in Maganlal D. Radia v. The Municipal Corporation of Greater Bombay

(1970) Special Civil Application No. 1255 of 1970, this Court declined to exercise its discretion under Article 226 of the Constitution of India

because it was found on facts that the petitioner had an alternative remedy. In the first case it was found that the petitioner could have availed of the

alternative remedy by way of an appeal u/s 60 of the Cantonment Act. In the second case where the petitioner had challenged a notice issued by

the Assessor and Collector of the Bombay Municipal Corporation calling upon the petitioner to pay an amount of Rs. 3,843 towards the theatre

tax in regard to the performance made at his Radia''s Flotilla Club near Chowpatty, this Court declined to interfere as it was found that there was

an appeal provided under the provisions of Section 217 of the Bombay Municipal Corporation Act and the decision of the appellate authority,

namely, the Chief Judge of the Small Cause Court was further liable to be challenged in an appeal to the High Court u/s 218D of the said Act.

38. These two decisions are merely illustrations of the application of the rule which has been described earlier as a rule of self-limitation and they

do not lay down a proposition of law that the jurisdiction of the High Court under Article 226 is barred when there is an alternative remedy.

39. As contended by Mr. Singhavi, that it cannot be laid down as an absolute proposition that in every case, the remedy should be assumed to be

onerous where any deposit is to be made as a pre-condition for invoking the remedy. We may, however, point out that in Sales Tax Officer,

Jodhpur and Another Vs. Shiv Ratan G. Mohatta, , though it was held by the Supreme Court that it is not the object of Article 226 to convert High

Courts into original or appellate assessing authorities, wherever an assessee chooses to attack an assessment order on the ground that the sale was

made in the course of import and, therefore, exempt from tax and the fact that the assessee has to deposit sales tax while filing an appeal does not

always mean that he can bypass the remedies provided by the Sales Tax Act, it was pointed out that to warrant the entertainment of a petition

under Article 226, there must be something more in a case, something going to the root of the jurisdiction of the Sales Tax officer, something which

would show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act. Therefore, even

in a tax matter the Supreme Court did take the view that there may be certain cases where asking the assessee to adopt the remedies provided by

the Act would amount to palpable injustice to the assessee and if there is something which goes to the root of the jurisdiction of the Taxing Officer,

the assessee will be entitled to invoke the jurisdiction of the High Court under Article 226 without taking recourse to the statutory remedies.

40. We must also notice an argument advanced by Mr. R.J. Joshi appearing in Miscellaneous Petition No. 529 of 1976 which is directed against a

notice u/s 148 of the Indian Income Tax Act, 1961. Mr. Joshi, who adopted the arguments of Mr. Singhavi, contended that in view of the

provisions of Article 226(3), in a case where an alternative adequate remedy is provided under the provisions of the; Income Tax Act, the writ

jurisdiction cannot be invoked to challenge the notice of the kind challenged by the petitioner in Miscellaneous Petition No. 529 of 1976. It is

contended that the question with regard to the validity of notice can be adequately raised by the assessee in appeals provided under the Income

Tax Act not only in first appeal before the Appellate Assistant Commissioner but even before the Income Tax Tribunal and in a given case, a

reference u/s 256 of the Income Tax Act, 1961 could also be made to the High Court on the question of validity of the notice. Thus, according to

Mr. Joshi, the petitioner had an adequate remedy and the petition should, therefore, be rejected.

41. It is settled law that the validity of a notice u/s 148 could be adjudicated upon by taking recourse to the remedies provided by the Income Tax

Act. In Commr. of Inc.-tax v. Ramsukh Motilal (1954) 27 ITR 54 , the question whether a notice issued u/s 34 of the Income Tax Act, 1922, was

valid in law was answered in favour of the assessee in a reference u/s 66(1) of the Income Tax Act, 1922. Similar questions were also considered

in Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar, and in The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers

Ltd., Now, we have already pointed out that the question whether the petitioner had an adequate alternative remedy has to be decided on the facts

of each case. We are not dealing with any individual case and it is open to the respondent to satisfy the Court, which will deal with Miscellaneous

Petition No. 529 of 1976, that the petitioner was not entitled to invoke the jurisdiction of this Court under Article 226 because there was an

alternative adequate remedy.

42. There was a long debate at the bar on the question as to whether a suit is an alternative remedy or not as contemplated by Article 226(3).

There is not much dispute about the construction of the words, ""by or under any other law for the time being in force"" in the context of the

alternative remedy. When a remedy is said to be provided by a law, it means the remedy is provided by a substantive law or enactment and when

it is said to be provided under the law, it means it is provided by some subordinate legislation. The meaning of the words ""by or under the Act"" was

considered by the Supreme Court in Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, . In para. 15 the Supreme Court observed as

follows (p. 281):

''By'' an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by

necessary implication therefrom. The words ''under the Act'' would, in that context signify what is not directly to be found in the statute itself but is

conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a Subordinate law-making authority which

is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by

rule-making authorities which are vested with powers in that behalf by the Act. Vide Hubli Electricity Co. Ld. v. Province of Bombay (1948) L.R.

76 I.A. 57 : 51 Bom. L.R. 551 and Narayanaswamy v. Krishnamurthi [1958] Mad. 513 : S.C. AIR [1958] Mad. 343.

There is thus no dispute that ""other law"" referred to in Article 226(3) includes a statutory enactment and a remedy provided by any statutory

enactment or by any subordinate legislation made in the exercise of the rule-making power or other statutory power under the parent enactment

would be a remedy provided by or under ""any other law"".

43. There is, however, serious dispute between the parties on the question whether the words ""any other remedy for such redress is provided by

or under any other law for the time being in force"" includes a suit.

44. Mr. Seervai contends that there are certain statutes which expressly bar the filing of suits in respect of action taken under certain enactments. In

such cases it is obvious that the suit can never be ""other remedy"" as contemplated by Clause (3) of Article 226, leave apart the question of an

adequate remedy.

45. But the further contention advanced by Mr. Seervai is that except where a suit is prescribed expressly as a remedy by any law, it cannot be

said to be a remedy provided for by or under any other law for the time being in force. In other words, it is contended that in cases other than

where a right of suit is expressly given by law, there cannot be said to be any express provision of law as contemplated by Article 226(3) which

gives a general right of suit to a litigant.

46. Mr. Dhanuka contends that a remedy in the form of a suit must be taken to be a normal ordinary legal remedy provided for redress of every

legal wrong. According to him, if a suitor has a valid cause of action, then if he satisfies all the conditions necessary for the exercise of jurisdiction

by the civil Court, the right to file a suit as a remedy is implicit in the provisions conferring jurisdiction on Courts and tribunals. He relies on the

provisions of Section 9 of the CPC and contends that the general remedy of his suit is now a statutory remedy and is no longer a common law

remedy.

47. Mr. Singhavi has contended that the suit has always been considered as a remedy at common law and the recognition of the right to file a suit is

to be found in Section 45 Clause (d) of the Specific Relief Act, 1877, and he has also referred to a decision of this Court in Dinbai Petit v. M.S.

Noronha AIR [1946] Bom. 407 . He has also contended on the authority of the decision in Builders Supply Corporation Vs. The Union of India

(UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, , that the words ""law in force"" within the meaning of Article

372(1) of the Constitution includes common law. Article 372(1) of the Constitution of India, which provides for continuance in force of existing

laws and their adaptation, states:

(I) 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.

In Builders Supply Corporation v. Union of India, the Supreme Court was concerned with the doctrine of priority of State debts, a doctrine which

flowed from the common law and the question was whether the common law can be said to be ""law in force immediately before the

commencement of the Constitution"" so as to enable the State to claim priority in respect of its debts over the debts of other persons. While

answering that question the Supreme Court in para. 16 has observed as follows (p. 1067):

...The question which arises is whether this doctrine of priority which is based on common law and which was recognised by our High Courts prior

to 1950, can be said to constitute "law in force" in the territory of India at the relevant time. In other words, is this doctrine of common law which

was introduced in this country and followed, law in force within the meaning of Article 372(1)? If it is, then by virtue of Article 372(1) itself, the

same law would continue to be in force until it is validly altered, repealed or amended.

After referring to the earlier decision of the Supreme Court in Director of Rationing and Distribution Vs. The Corporation of Calcutta and Others, ,

it was observed in para. 20 (p. 1068):

It is, however, clear that there was no difference of opinion on the question that common law was included within the expression "law in force"

used by Article 372(1). The majority judgment expressly states that the relevant expression "law in force" includes not only statutory law, but also

custom or usage having the force of law and as such, it must be interpreted as including the common law of England which was adopted as the law

of this country before the Constitution came into force.

(Italics ours.)

It has thus been held by the Supreme Court that the common law of England which was adopted as the law of this country before the Constitution

came into force would be law in force at the relevant time within the meaning of Article 372(1). Mr. Setalvad in his Hamlyn Lectures on ""The

Common Law in India"", 2nd edn., has dealt with the common law right to have access to Courts if a person can show a cause of action. Dealing

with the rise of common law Mr. Setalvad has observed at page 62 as follows:

VI. Indian Common Law

Common law consists, as we have seen, of customary rules of the realm recognised by the courts. In that sense every country can be said to have

its common law, rules of conduct which apply to citizens generally and the rights and privileges which they can enjoy. Some of these customary

rules prevailing in India have come to be known as the Indian common law.

The right to a public highway is recognised in India as in England as the common law right of the citizen.... The Indian courts have also recognised

as a common law right a right to have access to courts of law if a person can show a cause of action. Jagannatha v. Kathaperumal AIR[1927]

Mad. 1035.

The inherent right of a person to bring a suit of a civil nature unless the suit is expressly barred is recognised by the Supreme Court also in Smt.

Ganga Bai Vs. Vijay Kumar and Others, , where while pointing out the difference between a right of suit and a right of appeal it was observed as

follows (p. 1129):

...There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one''s peril, bring a

suit of one''s choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability

requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of

appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is

described as a creature of statute.

In Dinbai Petit v. M.S. Noronha, a suit was considered as an alternative remedy contemplated by Clause (d) of the proviso to Section 45, Specific

Relief Act, 1877. Chagla J., as he then was, while considering the requirement of Clause (d) of the proviso to Section 45 of the Specific Relief

Act, 1877, made the following observations (p. 422):

The other important and interesting question which arises in this appeal is whether the right of a suit is a specific remedy contemplated by Section

45, Sub-clause (d), Specific Relief Act. Mr. Munshi has strenuously contended that the specific remedy must be a remedy given by a statute and

not merely a remedy by way of a suit. I see no reason to restrict the meaning of the expression ''specific and adequate legal remedy'' to merely a

remedy given by a statute and not an ordinary right of suit. The question which the Court has to consider in every case is whether the alternative

remedy, whether it be a right of suit or a specific remedy given by a statute, is as convenient, as beneficial and as effectual as the remedy which the

Court can grant u/s 45, Specific Relief Act. I do not think it is possible to urge that the right of suit is not a specific and adequate legal remedy as

contemplated by Section 45, Specific Relief Act. In the three English decisions to which our attention has been drawn, The Queen v. Charity

Commissioners for England and Wales [1897] 1 Q.B. 407, Reg. v. Leicester Union [1899] 2 Q.B. 632 and Rex v. Dymock (Vicar and

Churchwardens) [1915] 1 K.B. 147 , the right of a suit was considered as an alternative remedy to the writ of mandamus. With respect to the

learned Judge of the Calcutta High Court, I do not think that the opinion given by Greaves J. in Manick Chand Mahata v. Corporation of Calcutta

AIR [1921] Cal. 159, that the mere right of suit is not the specific remedy contemplated by Sub-clause (d) of Section 45, Specific Relief Act, is

the correct view.

48. It is true that it is not possible to trace the general right to file a suit to any particular statutory provision, but having regard to the broad wording

of Article 226(3) and the construction which has been placed on the phrase ""law in force"" by the Supreme Court, it is difficult to accept the

argument that the right of suit must be found only in some statute in all cases. The jurisdiction to try all suits of a civil nature which are not either

expressly or impliedly barred is given to the civil Courts u/s 9 of the Code of Civil Procedure. The manner of invoking this jurisdiction is by filing a

suit. The fact that jurisdiction has been given to the civil Court to try suits of a civil nature which are not expressly or impliedly barred would itself

indicate that the right of suit has been recognised and the kind of cases in which that jurisdiction can be invoked is also made clear. The right of suit

is thus based on a fundamental principle of law that where there is a right, there is a remedy jus ibi remedium. Accordingly, a litigant having a

grievance of a civil nature has independently of any statute a right to institute a suit under the common law in some Court or the other unless its

cognizance is either expressly or impliedly barred.

49. Mr. Seervai has referred in his argument to the meaning of ""common law"" given in Jowitt"s Dictionary of English Law and it is contended that

since according to Jowitt, common law was unwritten law as opposed to enacted law and its origin was to be found in customary rules followed by

all the people in the realm as opposed to the custom peculiar to certain localities and, therefore, if the right to file an action was intended to be

included as a common law right, it was necessary to add in Article 226(3) the words ""or recognised by any custom or usage having the force of

law."" In contradistinction with the provisions of Article 226(3) it is pointed out that where it was intended that law should include custom or usage

having the force of law, a provision to that effect was made in Article 13(3)(a). Jowitt in his Dictionary while referring to common law has

observed as follows (p. 426):

It is sometimes used in contradistinction to statute law, and then denotes the unwritten law, whether legal or equitable in its origin, which does not

derive its authority from any express declaration of the will of the legislature.... It depends for its authority upon the recognition given by the courts

to principles, customs, and rules of conduct previously existing among the people.... The distinction between written and unwritten law is adopted

from the Romans, who borrowed it from the Greeks Inst. 1.1, t.2, Sections 3, 9 and 10. In thus distinguishing law into the lex scriptae or statute

law and jus non scriptae or common law we use the latter in a peculiar and restrained sense, signifying by it nothing more than that the original

institution and authority of the law are not set down in writing, as is the case with Acts of Parliament, but that it receives its binding power from long

and immemorial usage and universal reception throughout the realm. The authenticity of these customs, rules, and maxims rests entirely upon

reception and usage, as declared by the judges, who are the sworn depositaries and interpreters of the law.

50. We have already referred earlier to the passage from Mr. Setalvad''s lectures on the Common Law of India where it was pointed out that the

common law consists of customary rules recognised by Courts and the Courts in India have recognised the right to file a suit if a person has a

cause of action as a common law right. The words ""common law"" are also used in contradistinction to statute law but both statute law and common

law will be included in the phrase ""law for the time being in force"". The right to file a suit which had become a part of common law is expressly

saved by the Constitution by Article 372(1) and ""common law"" is included within the term ""law for the time being in force"" used in Article 226(3).

It was, therefore, not necessary to make any special reference to ""custom or usage having the force of law"" in Article 226(3) as contended by Mr.

Seervai.

51. It is also not possible to accept the contention that the words ""law for the time being in force"" must have reference merely to statute law or

constitutional provisions or law contained in subordinate legislation referred to in Clause (b) of Article 226(1). The words ""any other law for the

time being in force"" are words of the widest amplitude. The words ""any other law"" were used to indicate that reference was being made to law

other than Article 226 of the Constitution. If it was intended to restrict the operation of Article 226(3) only to a remedy to the provisions referred

to in Clauses (b) and (c) of Article 226(1), the words of the widest amplitude used in Article 226(3) would not have been so used.

52. It was argued that at the time of the institution of the suit Court-fees as prescribed by the Court-fees Act have to foe paid and remedy by way

of suit cannot be treated as an adequate remedy. As already pointed out, the question whether a remedy whether it be by way of a suit or a

remedy in any other form, is an adequate remedy or not has to be decided on the facts of each case. In many cases a suit has been considered to

be an adequate alternative remedy. See Seervai"s Constitutional Law of India, 2nd edn. vol. II, para. 16.116, footnote No. 56. So also, the

question whether the remedy is onerous, and therefore not adequate and equally efficacious will also have to be decided on the facts of each case.

53. Mr. Seervai then going back to Article 226(1) contended that an illegality contemplated by Article 226(1)(c) would cover an ultra vires action,

a mala fide action or an action in violation of the principle of natural justice and the duty to act fairly, for, according to him, in certain situations the

duty to act fairly applies also to administrative action. The illegality will also include, according to him, an error of law apparent on the face of the

record.

54. It cannot be disputed that an ultra vires action or a mala fide action is really no action in law at all and both are bound to result in substantial

failure of justice if they adversely affect the right of a person. Such an action will, therefore, fall within the scope of Article 226(1)(c) of the

Constitution.

55. It was then contended by Mr. Seervai that an action taken in violation of the principles of natural justice must be regarded as entirely void. The

argument before us was restricted only to a case where there is a breach of the principle of audi alteram partem and it was vehemently contended

that once an order is a nullity in the eye of law, it being void on the ground of violation of the principle of natural justice, it should not be necessary

for the aggrieved person to take recourse to the alternative remedy and he would be entitled to approach the High Court under Article 226 of the

Constitution without exhausting administrative or domestic appellate remedies. Heavy reliance was placed on the decision in Leary v. Nat. Union

of Vehicle Builders.35 Reference was also made to certain observations in Judicial Review of Administrative Action by Section A. de Smith, third

edn., where the learned author has observed as follows (p. 209):

EFFECTS OF BREACH OF THE RULE

Depending on the circumstances of the case, a decision reached or proceedings conducted in breach of the audi alteram partem rule will be review

able by means of certiorari, prohibition, mandamus, an injunction or a declaration. If a man is deprived of his liberty without the hearing to which he

was entitled, he will be able to secure his release on an application for habeas corpus.

Although breaches of natural justice used to be assignable as ''errors in fact,'' a ground of challenge presupposing that the impugned order was

merely voidable, there is a substantial body of recent judicial decisions to the effect that breach of the audi alteram partem rule goes to jurisdiction

(or is akin to a jurisdictional defect) and renders an order or determination void. That this is the better opinion is indicated by the following

propositions : formulae purporting to exclude judicial review are ineffective to oust review of determinations tainted by breach of the rule; a

determination thus tainted can be collaterally impeached by mandamus; recourse to administrative or domestic appellate procedures is not a

necessary preliminary to impugning the determination in the courts; prior recourse to such procedures is not to be construed as a waiver of the

breach; nor can an appeal in the strict sense cure the vice of the original determination, for one cannot appeal against a nullity and the appellate

proceedings should also be treated as void.

The other observations relied upon by Mr. Seervai are at p. 132 where the learned author has observed:

As has been, indicated, courts sometimes refuse to hear appeals against void decisions inasmuch as there is nothing to appeal against.

56. In Leary''s case, it was held by Megarry J. that the deficiency of natural justice in a trial body is not cured by any subsequent fair hearing by an

appellate body. It is on the basis of these observations that it is contended by Mr. Seervai that in a case where the principles of natural justice are

violated and the decision is a void decision, merely by taking recourse to the remedy provided by the relevant law, the deficiency of the natural

justice which vitiated the decision cannot be cured in the proceedings in the higher forum.

57. The difficulties which are created by the use of the term ''void'' and ''voidable'' are described by de Smith as ''''problems of excruciating

complexity''''. A void act or a decision is usually destitute of any legal effect and can be ignored with impunity and their validity can be attacked, if

necessary, in collateral (or indirect) proceedings, but these propositions are inapplicable to voidable acts and decisions. See Judicial Review of

Administrative Action, third edn., by S.A. de Smith, page 131. A voidable act is an act which until avoided has the legal effect which it is intended

to have.

58. In order to examine whether the proposition enunciated by Megarry J. in Leary''s case can be accepted, it is necessary to refer to the facts on

which the decision in Leary''s case turned. The plaintiff vas a member and one of the fifteen full time area organisers of the National Union of

Vehicle Builders in charge of Luton No. 10 branch of the defendant union. A meeting of Luton No. 10 branch of which Leary was unaware

purported to exclude him. This decision was confirmed by the branch committee of which also the plaintiff was unaware. He was excluded on the

ground that he was in arrears of contribution, Rule 26(2) providing that ""Members six months'' contributions in arrears shall be excluded at the

discretion of the branch committee."" The plaintiff was called to a meeting of the National Executive Committee when the question of arrears was

discussed and the decision of Luton No. 10 branch to exclude the plaintiff was endorsed. The plaintiff was present at the full hearing of his case by

the Appeals Council when the Council upheld the decision of Luton No. 10 branch. The National Executive Committee then decided that the

plaintiff''s services as area organiser should be terminated since he had been rendered ineligible to hold office. According to Leary, his exclusion

from membership of the union and from office as area organiser was ultra vires, null and void. The question which arose in the action was whether

the breach of natural justice by the branch committee was cured by complete rehearing of the plaintiff''s case by the Appeals Council and it was

held by Megarry J. that whilst a complete hearing by an original tribunal or by some other body competent to decide the issue which might satisfy

the requirement of natural justice, a plaintiff, where there was a right of appeal from an original decision, was entitled to natural justice both before

the original tribunal and the appellate tribunal. While so holding, the learned Judge made the following observations (p. 53):

...I therefore hold that the deficiency of natural justice in the trial body has not been cured by any subsequent fair hearing by an appellate body. The

decision of the branch committee was bad, and has not been cured, even if it was curable; nor has it been replaced by any decision of the NEC or

appeals council.

59. With respect, we find it difficult to accept the broad proposition enunciated in Megarry J.''s judgment that a subsequent fair hearing by an

appellate body does not cure the deficiency of natural justice in the trial body as being one of general application. The two rules of natural justice,

namely, that no man should be condemned unheard and that every Judge must be free from bias, as they are often put in the Latin maxim audi

alteram partem and nemo index in re sua have been treated as fundamental requirements not merely in the administration of justice in Courts in the

strict sense but even in the determination of a wider range of matters affecting rights of persons which are dealt with by administrative and domestic

tribunals. The rules of natural justice, however, are not embodied rules and the content of the rule audi alteram partem cannot be set down in any

definite formula.

60. In Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, it was clearly observed by the

Supreme Court that rules of natural justice vary with the varying constitution of statutory bodies and the rules prescribed by the Act under which

they function and the question whether or not any rules of natural justice had been contravened should be decided not under any preconceived

notions but in the light of statutory rules and provisions. These principles were reaffirmed in Gullapalli Nageswara Rao and Others Vs. Andhra

Pradesh State Road Transport Corporation and Another, In The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others, , the

Supreme Court again pointed out that the question whether the requirements of natural justice have been met by the procedure adopted in a given

case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the tribunal and the rules under which it

functions. In Hira Nath Mishra and Others Vs. The Principal, Rajendra Medical College, Ranchi and Another, the Supreme Court quoted with

approval the observations of Tucker L.J. in Russell v. Norfolk (Duke) [1949] 1 All E.R. 109, where Lord Justice Tucker observed (p. 118):

...There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements

of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-

matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been

from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of

presenting his case.

The Supreme Court also quoted with approval the observations of Harman J. in Byrne v. Kinematograph Renters Society [1958] 2 All E.R. 579,

where the learned Judge observed thus (p. 599):

What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the

accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good

faith.

Thus where a breach of the principles of natural justice is alleged, the question must firstly be judged in the light of the constitution of the statutory

body which has to function in accordance with the rules laid down by the Legislature. Secondly, when there are no such rules or the rules, if any,

are silent, there must be a minimum requirement which must be satisfied consisting of the person concerned being given an opportunity of making a

representation or statement in respect of the charge against him to allay the suspicions of the authority competent to take action and thirdly, the

person concerned must have a notice of the proceeding against him whether he chooses to appear or not. What is the nature of the hearing which

is required to be given will vary according to the relevant rules applicable in each case, It is true that natural justice requires that ""no man shall be

condemned unheard"", but in finding out whether a breach of this rule has been committed or not, the scope of the enquiry has always been only

whether the person concerned has been given a reasonable opportunity of being heard and whether nature of the opportunity given was sufficient

to meet the requirements of natural justice in each case. Can a person claim a right to an oral hearing or to cross-examine witnesses or to be legally

represented? Natural justice does not require that the hearing should be oral, but a statute itself may give a tribunal a discretion whether to hold an

oral hearing or not or in a given case a statute may negative a right of oral hearing. The right to a hearing or to an adequate notice may be of little

value if the individual does not know the evidence against him and it is things like these that will make it imperative that real and effective

opportunity must be afforded to a person to deal with or meet the case against him. See R. v. Architects'' Registration Tribunal [1945] 2 All. E.R.

131. In a given case, it may be a violation of the principles of natural justice to deny the right to legal representation in cases where it is not

expressly excluded and in a given case the cause of justice will be served by merely providing for adequate representation. Normally when

remedies are provided for challenging the decision of the trial tribunal, there are rules and regulations which control the scope of the powers and

authority of the appellate tribunals. In most cases the powers of the appellate tribunals are co-extensive with the power and jurisdiction of the trial

tribunal. If there is any defect in the proceeding of the trial tribunal arising out of violation or non-compliance with any of the principles of natural

justice, and the appellate tribunal is under the appropriate rules empowered to cure that defect, it will be difficult for the person concerned to

contend that the order of the trial tribunal should be totally ignored as a nullity on the ground that there has been a breach of the principles of

natural justice before the trial tribunal. In our view, if a decision which, it is contended, is vitiated by a violation of the principle of audi alteram

partem could be subjected to scrutiny by the appellate tribunal, it cannot be equated with a void decision as a decision without jurisdiction is. In

appellate proceedings even an inherent want or lack of jurisdiction of the trial tribunal is permissible as a ground of appeal on which the decision of

the trial tribunal or Court can always be asked to be set aside. We are not, therefore, inclined to hold that the statement of the law made by the

learned author Mr. S.A. de Smith reproduced by us earlier that ""courts sometimes refuse to hear appeals against void decisions inasmuch as there

is nothing to appeal against"" is applicable in this country. No decision has been shown to us where an appeal Court has declined to entertain an

appeal on the ground that the decision appealed against is a void decision. In a given case if the defect cannot be cured in the appellate tribunal, the

appellate tribunal can well set aside the decision and direct the trial tribunal to decide the matter afresh. The very fact that the appellate tribunal can

set aside the decision and have the matter dealt with again will mean that the decision could not be treated as a nullity. The concept that an

appellate decision is also void in a case where the trial decision is void will hold good, in our view, only where there is inherent lack of jurisdiction

in the trial tribunal which cannot be cured in appeal. It is not, therefore, possible for us to agree with the broad proposition made by Megarry J.

that the deficiency of natural justice in the trial body could not be cured by any subsequent fair hearing by the appellate body and that the decision

of the trial body should, therefore, be treated as void.

61. It is also not possible for us to agree with the view taken by Mr. De Smith that an appeal against an invalid administrative decision to a higher

administrative body will be regarded as a nullity in subsequent judicial proceedings. At page 132 the learned author has observed:

...But public policy does not require courts to decline jurisdiction, in such cases, and in fact several statutes provide for appeals to the High Court

or the Court of Appeal from inferior tribunals on jurisdictional grounds. However, an appeal against an invalid administrative decision to a higher

administrative body will be regarded as a nullity in subsequent judicial proceedings; such an appeal is not an affirmance of the original invalid

decision. Nor will a person aggrieved by an invalid decision be required first to exhaust administrative or domestic appellate remedies as a

condition precedent to impugning that decision in the courts.

The concluding observations in the above quoted paragraph were on the footing that the breach of natural justice goes to jurisdiction and makes a

decision void as will be clear by the observation of the learned author earlier at page 131 when he observes:

...For the present we shall act on the assumption that breach of natural justice goes to jurisdiction (or is closely akin to jurisdictional error) and

makes a decision void.

If a decision is without jurisdiction, the fact that the decision was challenged by way of an appeal will, no doubt, not estop the aggrieved person

from challenging the decision of the trial tribunal because the infirmity arising out of want of jurisdiction cannot be cured by filing an appeal nor can

want of jurisdiction be said to have been waived and filing of an appeal against an action without jurisdiction will not, as the learned author has put,

be an ""affirm ness of the original invalid decision"". As already pointed out by us, the analogy cannot be made applicable in the case of a decision by

an administrative tribunal which is challenged on the ground that there is a breach of audi alteram partem rule.

62. The learned author has himself referred to the view that in all cases the breach of the audi alteram partem rule will not make a decision void. At

page 211 the learned author has observed as follows:

...But on the whole the judges have declined, perhaps rightly, to commit themselves unequivocally to the proposition that they will hold decisions to

be void for breach of the audi alteram partemrule when they are satisfied that the party aggrieved could not have influenced the outcome at all had

he been accorded natural justice.

(Italics ours).

In support of this view the learned author has cited the decision in Ridge v. Baldwin [1964] A.C. 40 , Maradana Mosque Trustees v. Mahmud

[1967] 1 A.C. 13 and Malloch v. Aberdeen Corporation. Earlier on page 211 the learned author has observed that ""In some cases the Courts

have refused to interfere when satisfied that the outcome could not have been different had natural justice been fully observed."" Several illustrations

in support of this have been cited at footnote No. 25 including the decision of the Privy Council in Durayappah v. Fernando [1967] 2 A.C. 337 .

Though the learned author has found it difficult to reconcile this view with the view that breach of the audi alteram partem rule makes the decision

void, the use of the words ""perhaps rightly"" is significant and he has himself given a ground of reconciliation in footnote No. 30 as follows:

It can be so reconciled on the ground that absence of detriment does not affect the operation of the rule but is only a ground for refusing

discretionary relief.

This footnote becomes important and relevant so far as law with regard to the effect of a breach of natural justice prevails in this country in the

context of the exercise of jurisdiction under Article 226 of the Constitution of India. We are dealing with the scope of the writ jurisdiction and as

we shall show later, it is settled law in the country that unless prejudice is shown to have resulted from a breach of the audi alteram partem rule, the

Court will refuse to exercise its writ jurisdiction in favour of the person invoking it.

63. As pointed out by Mr. Bhabha, the concepts "void" and "voidable" are essentially concepts developed in the private law of contract and are

out of place in the field of public law. Mr. Bhabha has brought to our notice the observations of Lord Diplock in Hoffmann-La Roche v. Trade

Sec. [1975] A.C. 295. That was a case in which a statutory order made under the provisions of Monopolies and Mergers Act, 1965, regulating

the prices of certain drugs was challenged on the ground that the findings, conclusions and recommendations contained in a report of the

Monopolies Commission were invalid as the procedures adopted by the commission were unfair and contrary to the rules of natural justice. We

are not concerned with the merits of the case, but the observations of Lord Diplock at page 366 are, in our view, significant. These observations

under the heading ""The presumption of validity of the order"" are as follow:

My Lords, I think it leads to confusion to use such terms as "voidable," "voidable ab initio," "void" or "a nullity" as descriptive of the legal status of

subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent

jurisdiction. These are concepts developed in the private law of contract which are ill-adapted to the field of public law. All that can usefully be

said is that the presumption that subordinate legislation is intra vires prevails in the absence of rebuttal, and that it cannot be rebutted except by a

party to legal proceedings in a court of competent jurisdiction who has locus standi to challenge the validity of the subordinate legislation in

question.

64. It is, no doubt true, as Mr. Seervai contends, that the decision does not establish that ""an order ultra vires for violating natural justice could not

be directly challenged as ultra vires or if the prosecution was one of the remedies, it could not be challenged when the party who contends that the

law is ultra vires is prosecuted."" We have, however, referred to the above quoted observations of Lord Diplock to indicate that the concepts of

void and voidable are, as Lord Diplock put it, ""concepts developed in the field of private law of contract and did not fit well in the field of public

law,"" a view with which, with respect, we entirely agree.

65. The controversy with regard to void and voidable orders was noticed by the Supreme Court in Nawabkhan Abbaskhan Vs. The State of

Gujarat, . An externment order u/s 56 of the Bombay Police Act was passed against Nawabkhan who was prosecuted u/s 142 but was acquitted.

This order of acquittal was set aside by the High Court and it was held that the accused had re-entered the forbidden area during the currency of

the order. During the pendency of the criminal trial, the externment order was quashed by the High Court under Article 226 of the Constitution on

the ground of failure to give opportunity to be heard to the accused u/s 59 of the Bombay Police Act. In Nawabkhan''s appeal against the decision

of the High Court convicting him, it was held that the externment order never legally existed and the accused was entitled to acquittal. It was in this

context that the question as to whether a breach of the audi alteram partem rule goes to the root of jurisdiction was considered and it was

observed in para. 13 (p. 1477):

...Perhaps not all violations of natural justice knock down the order with nullity.

Krishna Iyer J., no doubt, made it clear that the judgment was dealing with the deprivation of a fundamental right when the duty to give a hearing

was not complied with, but in his judgment Krishna Iyer J. has expressly referred to ""the test of ex facie illegality or bad on its face"" as being

unworkable and it was laid down as a proposition of law that in cases where constitutionally guaranteed right is not involved, an order in violation

of natural justice is void in the limited sense of being liable to he avoided. In para. 18 it has been observed (p. 1479):

The test of ex facie illegality or bad on its face or in Lord Radcliffe''s words ''it bears no brand of invalidity on its forehead'', is also unworkable in

the work-a-day world of law. Error of jurisdiction and error within jurisdiction, have been suggested as a means to cut the Gordian Knot. Many

great writers have dealt with the subject but few have offered a fair answer to the question, is a determination, a determination at all when made

without a statutory bearing and when is it void and to what extent? Decisions are legion where the conditions for the exercise of power have been

contravened and the order treated as void. And when there is excess or error of jurisdiction the end product is a semblance, not an actual order,

although where the error is within jurisdiction it is good, particularly when a finality clause exists. The order becomes ''infallible in error'' a peculiar

legal phenomenon like the hybrid beast of voidable voidness for which, according to a learned author, Lord Denning is largely responsible. The

legal chaos on this branch of jurisprudence should be avoided by evolving simpler concepts which work in practice in Indian conditions.

Legislation, rather than judicial law-making will meet the needs more adequately. The only safe course, until simple and sure light is shed from a

legislative source, is to treat as void and ineffectual to bind parties from the beginning any order made without hearing the party affected if the injury

is to a constitutionally guaranteed right. In other cases, the order in violation of natural justice is void in the limited sense of being liable to be

avoided by court with retroactive force.

(Italics ours.)

66. The observations underlined above are binding on us and, in our view, they clearly lay down that in cases where fundamental rights are not

concerned, an order in violation of natural justice cannot be treated as void ab initio but that it is liable to be avoided in an appropriate proceeding.

67. Mr. Seervai, no doubt, contended that the decision of the Supreme Court in Nawabkhan''s case cannot be taken to be an authority in respect

of cases dealing with rights other than fundamental rights. As we have already pointed out above, the observations that orders passed in violation

of natural justice would be void only where a fundamental right is violated and in other cases, the order must be treated as voidable are not capable

of any such dissection and must be read as a pronouncement of the law by the Supreme Court and binding on us.

68. It must be remembered that in Ridge v. Baldwin [1963] 2 All E.R. 66, though Lord Reid and Lord Hodson held that the order impugned was

rendered void on account of a breach of natural justice, Lord Evershed and Lord Devlin use the word ''voidable'', which view was supported by

the judgment of Lord Morris when he observed (p. 110):

...The word ''voidable'' is, therefore, apposite in the sense that it became necessary for the appellant to take his stand : he was obliged to take

action for unless he did the view of the watch committee, who were in authority, would prevail. In that sense the decision of the watch committee

could be said to be voidable.

69. It is not possible to accept the argument of Mr. Seervai that the decision in State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, , where it

was observed that if essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity and the decision in Dr.

Bool Chand Vs. The Chancellor, Kurukshetra University, , where those observations were quoted with approval, lay down that in all cases where

a principle of natural justice is violated, the order is a nullity.

70. Mr. Bhabha had referred to decision of the Supreme Court of Canada in King v. University of Saskatchewan [1969] S.C.R. 678, in which

Spence J. held that if there is an absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the

Senate Appeal Committee. The view taken by Spence J. in this case did not appeal to Megarry J. in Leary''s case and he declined to follow it.

71. With respect, we agree with the reasoning of Spence J. which turned upon the construction of the provisions of the University Act having

regard to which he took the view that if there were any absence of natural justice in the inferior tribunals, it was cured by the presence of such

natural justice before the appeal committee because, as we have already pointed out, whether the breach complained of could be remedied in

appeal was a matter which must be determined in the light of the relevant provisions or regulations dealing with the remedies and their scope open

to a person who is affected by the decision complained of.

72. Mr. Singhavi has drawn our attention to at least three decisions of the Supreme Court where the test of prejudice was applied when a

complaint was made that the principles of natural justice were violated.

73. In The Keshav Mills Co. Ltd. and Another Vs. Union of India (UOI) and Others, the Government of India passed an order appointing a

committee for investigating into the affairs of the Kesava Mills Co. u/s 15 of the Industries Development and Regulation Act, 1951. The

investigating committee completed its enquiry and the Government of India passed an order u/s 18A of the Act authorising Gujarat State Textile

Corporation to take over the management of the whole of the company for a period of five years. This action was challenged before the Delhi High

Court inter alia on the ground that though the investigating committee had submitted a report to the Government of India in January 1970, the

Government did not furnish the management of the company with the contents of the report and Government should not only have supplied a copy

of the report to the company before finally deciding upon taking over the company''s undertaking but the company should also have been given a

hearing. The petition was, however, dismissed by the Delhi High Court. While disposing of the appeal filed by the company in the Supreme Court,

referring to the contention with regard to the violation of natural justice and the principles to be applied, it was observed by the Supreme Court in

para. 8 as follows (p. 393):

The second question, however, as to what are the principles of natural justice that should regulate an administrative act or order is a much more

difficult one to answer. We do not think it either feasible or even desirable to lay down any fixed or rigorous yard-stick in this manner. The concept

of natural justice cannot be put into a straitjacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions

and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person

concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially

and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. See, for instance, the

observations of Lord Parker in H.K. (An Infant), In re [1967] 2 Q.B. 617. It only means that such measure of natural justice should be applied as

was described by Lord Reid in Ridge v. Baldwin[1964] A.C. 40 as ''insusceptible of exact definition but what a reasonable man would regard as a

fair procedure in particular circumstances''. However, even the application of the concept of fair play requires real flexibility. Everything will depend

on the actual facts and circumstances of a case. As Tucker L.J. observed in Russell v. Norfolk(Duke):

...The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is

acting, the subject-matter that is being dealt with, and so forth.

(Italics ours).

On facts the Supreme Court found that the Mills had received a fair treatment and all reasonable opportunities to make out their own case before

Government and ""they cannot be allowed to make any grievance of the fact that they were not given a formal notice calling upon them to show

cause why their undertaking should not be taken over or that they had not been furnished with a copy of the report."""" In conclusion it was

observed by the Supreme Court in para. 21 (p. 399):

...We have no doubt that in the instant case non-disclosure of the report of the Investigating Committee has not caused any prejudice whatsoever

to the appellants.

(Italics ours.)

The Supreme Court thus took the view that no definite standard applicable to all cases in the matter of observance of principles of natural justice

could be laid down and it was laid down that while passing an administrative order, all that is essential is that the person concerned should have a

reasonable opportunity of presenting his case and the administrative authority should act fairly, impartially and reasonably. The Supreme Court thus

applied the test of prejudice in a case where a grievance of a violation of natural justice was made. It is true, as Mr. Seervai contended, that on

facts it was found that there was no prejudice because the Government was found to have given the Mills ample opportunity to reopen and run the

Mills and they just did not have the necessary resources to do so. That, however, does not detract from the proposition that the test of prejudice

was applied and the decision shows that one of the circumstances taken into account to find out whether there was prejudice or not was that the

Mills did not have the resources to run the concern.

74. We also find that the test of prejudice was applied by the Supreme Court in Suresh Koshy George Vs. University of Kerala and Others, and

Tata Oil Mills Co. v. Its Workmen [1963] II L.L.J. 78 . In Jankinath Sarangi v. State of Orissa, (1969) 3 SCC 395 , it was observed by the

Supreme Court (p. 394):

...There is no doubt that if the principles of natural justice are violated and there is a gross case this Court would interfere by striking down the

order of dismissal; but there are cases and cases. We have to look to what actual prejudice has been caused to a person by the supposed denial to

him of a particular right.

The test of prejudice was also applied by this Court in Damodar v. S.E. Sukhtankar (1973) 75 Bom. L.R. 538 it was observed by the division

Bench:

As in the present case by reason of breach or violation of principles of natural justice grave prejudice is caused to the petitioner he is entitled to

have the order of dismissal declared null and void and to have it set aside or quashed.

In passing, we may also point out that an order passed by the Commissioner of Local Government, Colombo, dissolving and superseding the

Jaffna Municipal Council, which was challenged on the ground without giving any opportunity of expressing views to any member of the Council

was held by the Privy Council as voidable in Duryappah v. Fernando [1967] 2 All E.R. 152 . The following observations of the Privy Council are

worth noting:

Apart altogether from authority their lordships would be of opinion that this was a case where the Minister''s order was voidable and not a nullity.

Though the council should have been given the opportunity of being heard in its defence, if it deliberately chooses not to complain and takes no

step to protest against its dissolution, there seems no reason why any other person should have the right to interfere. To take a simple example to

which their lordships will have to advert in some detail presently, if in the case of Ridge v. Baldwin [1963] 2 All E.R. 66, the appellant Ridge, who

had been wrongly dismissed because he was not given the opportunity of presenting his defence, had preferred to abandon the point and accept

the view that he had been properly dismissed, their lordships can see no reason why any other person, such, for example, as a ratepayer of

Brighton should have any right to contend that Mr. Ridge was still the chief constable of Brighton. As a matter of ordinary common sense, with all

respect to other opinions that have been expressed, if a person in the position of Mr. Ridge had not felt sufficiently aggrieved to take any action by

reason of the failure to afford him his strict right to put forward a defence, the order of the watch committee should stand and no one else should

have any right to complain. The matter is not free of authority, for it was much discussed in that case. Lord Reid (at page 81) reached the

conclusion that the committee''s decision was void and not merely voidable, and he relied on the decision in Wood v. Word (1874) L.R. 9 Ex.

190. Their lordships deprecate the use of the word void in distinction to the word voidable in the field of law with which their lordships are

concerned because, as Lord Evershed pointed out in Ridge v. Baldwin [1963] 2 All E.R. 66 , letter I quoting from Sir Fredrick Pollock, Pollock

on Contract (13th Edn.) 48), the words void and voidable are imprecise and apt to mislead. These words have well understood meanings when

dealing with questions of proprietary or contractual rights. It is better, in the field where the subject matter of the discussion is whether some order

which has been made, or whether some step in some litigation or quasi-litigation, is effective or not, to employ the verbal distinction between

whether it is truly a ''nullity'', that is to all intents and purposes, of which any person having a legitimate interest in the matter can take advantage or

whether it is ''voidable'' only at the instance of the party affected. On the other hand the word ''nullity'' would be quite inappropriate in questions of

proprietary or contractual rights; such transactions may frequently be void, but the result can seldom be described as a nullity.

It was pointed out that the order of the Minister was voidable and not a nullity and being voidable it was voidable only at the instance, of the

person against whom the order was made, that is, the Council, but the Council had not complained. It may be stated that the grievance against the

order was made by the Mayor and it was found that he had not been able to show that he was representing the Council or suing on its behalf and

that since the Council was dissolved, the office of Mayor was dissolved with it and he had no independent right of complaint because he holds no

office that is independent of the Council. What is to be noted is that though the impugned order of the Minister was found to have been passed

without giving any hearing to any member of the Council, it was held to be only voidable in the sense that till it was challenged by the aggrieved

party, it was a valid and effective order. It appears, therefore, to be settled law that the validity of decision is dependent upon the existence of

jurisdiction and not on the irregularity in the exercise of jurisdiction. An irregularity in the exercise of jurisdiction does not, therefore, vitiate the

decision as long as it is made within jurisdiction. Such a decision can be set aside only in direct proceedings and could not be disregarded or

impeached collaterally as a decision without jurisdiction can be.

75. It is, therefore, difficult to hold that an order which the aggrieved person claims as being vitiated on account of violation of the principles of

natural justice should be considered to be void so as to enable the aggrieved person to approach this Court under Article 226 without taking

recourse to the alternative remedy. This is, of course, subject to the view which we have earlier taken that in case the petitioner so approaches the

Court, he will have to satisfy the Court that the other remedies are not adequate.

76. It is not necessary for us to deal separately with the argument which Mr. R.J. Joshi appearing for the Revenue advanced in support of the

proposition that so far as tax matters are concerned, an order passed in violation of natural justice should not be treated as void. We only briefly

notice the argument which was founded mainly on the provisions relating to the powers of the Appellate Assistant Commissioner u/s 251 of the

Income Tax Act, 1961, and provisions of Section 255(6) which deal with the powers of the Income Tax Appellate Tribunal. Mr. Joshi has drawn

our attention to some decisions of the Supreme Court on the authority of which it is contended that the powers of the Appellate Assistant

Commissioner of Income Tax are co-extensive with the powers of the Income Tax Officer and whatever orders an Income Tax Officer was

entitled to pass could also be passed by the appellate authorities under the Act. Reference was made to the decisions in Commissioner of Income

Tax, Andhra Pradesh Vs. Bhikaji Dadabhai and Co., and Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, We may

only observe that what we have said earlier about orders passed in violation of the audi alteram rule will apply equally to the orders passed under

the Income Tax Act.

77. We may now deal with the judgment in Prabhakar''s case on which reliance was placed on behalf of the Union of India by Mr. Dhanuka in

support of the proposition that once an alternative remedy is found to exist, a further enquiry as to the efficacious nature or the adequacy of the

remedy is not permissible under the provisions of the newly inserted Article 226(3) of the Constitution of India. At the outset, we must mention the

fact that the judgment of the division Bench in Prabhakar''s case was a judgment dismissing the writ petition at the admission stage. The writ

petition arose out of a monetary claim made by the petitioner who was a detenu and he claimed a writ directing the State Government to pay the

subsistence allowance to which he claimed to be entitled and it was dismissed in limine on the ground that alternative remedy of a suit was available

to the petitioner. While, however, dismissing the petition summarily, the division Bench proceeded to construe the provisions of Article 226(3). We

are not very happy at the approach of the division Bench in the matter of construction of Article 226. The learned Judges have observed that ""there

is hardly any erosion effected of that judicial power by amendment."" It is impossible for us to appreciate these observations. It is well-known that

Article 226 was enacted with the avowed intention of restricting the power of the High Court. This intention is made clear even in the notes on

clauses. The scheme of the restriction of the power of the High Court runs through the whole of the new Article 226. Erosion of the jurisdiction of

the High Court is so apparent on the face of Clauses (1), (3), (4), (5) and (6) that these clauses have merely to be read to see the erosion. The

division Bench described the provisions of Article 226(3) as a ""negative statutory injunction"" what was ""originally a normative self-imposition"". The

division Bench held that once existence of a legal remedy is established, the consideration whether the remedy was equally efficacious or not was

not permissible. However, at one stage the division Bench took the view that (p. 276):

...The petitioner in a given set of facts may be able to satisfy the Court that a given remedy is not at all available to him.

It was then observed (p. 276):

...That would raise a different issue for determination. Such issues are not uncommon and have been the matters of decision when there are pre-

conceived or mala fide actions brought before the Court seeking relief of certiorari or mandamus, where referring the petitioner to the same said

authority would be a matter of mere formality or a matter of ritual.

The learned Judges of the division Bench seem to have taken the view that where ""preconceived or mala fide actions"" are brought before the

Court, the petitioner may be able to satisfy the Court that a given remedy is not available to him. These observations are, in our view, clearly

contrary to the earlier observations of the learned Judges where it was held that once the existence of a legal remedy is established, the

consideration whether the remedy was equally efficacious or not was not permissible. If the view of the division Bench was that once an alternative

remedy was provided by law the bar of Article 226(3) would automatically operate, it is difficult for us to appreciate why that bar would also not

operate irrespective of the fact that an action was challenged on the ground of mala fides. In the observations that in the case of mala fides a

remedy may be shown to be not available, thus bypassing the bar of Article 226(3), was implicit the concept of adequacy and efficaciousness of

the remedy. The learned Judges, therefore, have themselves conceded that there will be some area where the strict bar, which, according to the

learned Judges, was enacted in the form of a negative injunction, would not be attracted. The learned Judges have in their judgment referred to ""the

concept of real availability in law"" of any other legal forum which is sought by way of an exception to the general rule in Article 226(3). With

respect, in our view, such a concept will have no place if the construction placed on Article 226(3) by the division Bench is accepted as the

learned Judges have held that Article 226(3) must be read as a negative injunction which operates once a remedy is found to have been provided

by law or, as at one place the learned Judges have observed, ""the words "provided for" are used merely to indicate the stipulation of the law."" The

division Bench has not elaborated on what was described as ""real availability"" at one place and ""proper availability"" at another. See para. 18 of the

judgment. We may, however, point out that the consideration of real availability or proper availability of the remedy which would necessarily

require consideration of circumstances peculiar to each case would be clearly inconsistent with some observations made in the concluding part of

the judgment where it was re-emphasised that Article 226(3) worked as a clear prohibition going to the root of the jurisdiction of the High Court.

In para. 21 the division Bench has observed (p. 277):

...The language used being the sole guide to find out the intention of the Constitution, there is hardly any scope to suppose that Clause (3) was

enacted only as a guiding principle in exercise of the jurisdiction under Clause (1) and not as a prohibition for exercising jurisdiction in the matters

of hearing.

(Italics ours.)

Indeed at one stage, the division Bench has gone on to observe (p. 277):

What appears to us in consequence underlying Clause (3) of Article 226 of the Constitution is a constitutional fetter upon entertainment of petitions

which under Clause (1), as stated in Sub-clauses (b) and (c) thereof, would otherwise be entertain-able by the High Court.

Now, while it may not be possible to disagree with the view that Clause (5) is a fetter on the jurisdiction of the High Court, we are not inclined to

accept the view of the division Bench, as already pointed out, that the mere existence of a remedy is sufficient to fasten the fetter of Clause (3) on

the jurisdiction of the High Court. If we may say so, even the division Bench to a certain extent was inclined to take the view that in some cases

depending upon ""the real availability"" or ""proper availability"" of the remedy, the bar of Clause (3) would not apply.

78. We would also like to point out that having regard to the nature of the claim, which was a monetary claim, pure and simple, it was really not

necessary for the division Bench to go into an elaborate discussion on the content of Article 226(3) as newly inserted because on the view taken

by the Bench, the petition could be disposed of on the short ground that the petitioner had an alternative adequate remedy. The provisions of

Article 226, as newly inserted, were going to have a substantial impact on several pending cases in this Court and if we may say so, with respect,

the division Bench could well have avoided an attempt to lay down the law with regard to the construction of Article 226 in a case where elaborate

arguments, as are normally available to the Court by way of assistance in a case where both sides are represented, were not possible.

79. That brings us to another question which relates to the construction of the provisions of Article 226 Clauses (4) to (6) which deal with the

jurisdiction of the High Court to make an interim order in a petition under Article 226 of the Constitution of India. Normally at the stage of

admission, if the Court took the view that a prima facie case for an ad interim order is made out by the petitioner, which may be in the form of

either an injunction or a stay order, an ad interim order safeguarding the interests of the parties was always made. This power has now been

controlled and conditions have been laid down which have to be satisfied before the Court makes an interim order.

80. Clause (4) expressly provides that an interim order, whether it is in the nature of an injunction or stay or of any other kind, shall not be made on

a petition or in proceedings relating thereto unless copies of such petition and of all documents in support of the plea for such interim order are

furnished to the party against whom such petition is filed or proposed to be filed and opportunity is given to such party to be heard in the matter. It

obviously appears to be the intention of this clause that no interim order should be made ex parte.

81. The concept of opportunity of being heard is now a well-known concept. The necessary material on which an interim order is sought must be

made available to the opposite side against whom the order is sought or who is going to be affected by the interim, order and sufficient opportunity

and time, as is permissible in the circumstances of the case, must be given to enable the opposite party to put forth its point of view, whether it is in

the form of a reply in writing, if so desired by the party concerned, or whether in the form of an oral submission, if it so desires, or both, before an

order is passed. That this procedure was consistently being observed by Courts after notice of the ad interim order was issued cannot be seriously

disputed. What is, however, now contemplated is that this procedure must be followed before making any order whatsoever in the form of an

interim order.

82. Clause (5) is in the nature of a proviso which permits an interim order to be passed without complying with the conditions provided for in

Clause (4). But when power is given to the High Court to dispense with the requirements of Sub-clause (a) and (b) of Clause (4), it is stated that

this power to make an interim order without furnishing copies of the petition and the relevant documents and giving opportunity to the other side to

be heard is to be exercised by way of an exceptional measure. The Court has to be satisfied that in a given case it is necessary to make an interim

order without complying with the provisions of Clause (4) and the Court has to record reasons showing that an interim order, as an exceptional

measure, is required to be passed for preventing any loss being caused to the petitioner which cannot be adequately compensated in money. In

other words, though provision is made for dispensing with the requirements of Clause (4), the power to dispense with the requirements of Clause

(4) can be exercised only where an interim order is required to be passed in order to prevent any loss being caused to the petitioner which cannot

be adequately compensated in money. The duration of operation of such an order passed as an exceptional measure is constitutionally fixed at a

maximum period of fourteen days from the date on which the order is made if it is not vacated earlier. Within this period of fourteen days, the

requirements of Sub-clause (a) and (b) of Clause (4) have to be complied with. The order will stand vacated if they are not complied with and

even if they are complied with the order will cease to have effect unless the High Court has continued the operation of the interim order. The words

used in Clause (5) are that ""such interim order shall, if not vacated earlier, cease to have effect."" These words are mandatory in nature and

statutorily the interim order ceases to have effect (i) if the requirements of Clauses (a) and (b) are not complied with and (ii) if the High Court has

not continued the operation of the interim order after the conditions are complied with. There is thus a two-fold requirement to be satisfied if the

order made as an exceptional measure under Clause (5) is not to automatically stand vacated; the two requirements being that within the period of

fourteen days from the date of the order, the requirements of Sub-clause (a) and (b) in Clause (4) have to be satisfied and there has to be a

positive order of the Court continuing the operation of the interim order.

83. Clause (6) is of a still drastic nature. In positive terms it provides that no interim order shall be made on or in any proceedings relating to a

petition under Clause (1) in a certain kind of cases. It is expressly provided that where an interim order shall have the effect of delaying an enquiry

into a matter of public importance or it will have the effect of delaying any investigation or enquiry into an offence punishable with imprisonment or

where it will have the effect of delaying any action for the execution of any work or project of public utility or the acquisition of any property for

such execution by the Government or any corporation owned or controlled by the Government, such an order shall not be made. No discretion is,

therefore, left to the High Court to make any interim order whatsoever if a case is covered by Clause (6).

84. Clauses (4), (5) and (6) have thus clearly curtailed the powers of the High Court when compared with the powers exercised by it under the

original Article 226. Indeed, there can hardly be any doubt that by the amending Article 226, the power of the High Court to make an interim

order was being seriously affected.

85. It was vehemently contended by Mr. Seervai in the context of the drastic restriction on the jurisdiction to grant an interim order that the

provisions of Clauses (4) to (6) must be so construed as not to apply to petitions under Article 226(1)(a). The argument is that such a construction

is likely to lead to absurd results. The first absurd result, according to the learned Counsel, is that no similar fetter having been put on the power of

the Supreme Court under Article 32 of the Constitution and Supreme Court''s power under Article 32 to make an interim order in a writ petition

for purposes of enforcement of fundamental rights being unaffected, a litigant will be forced to approach the Supreme Court where he needs an

interim order in a matter dealing with fundamental rights. The learned Counsel contended that it could not have been in the contemplation of the

Parliament that a litigant who is complaining of a violation of fundamental right, in case he needs an interim order by way of urgent relief must run to

the Supreme Court, especially when the necessity to approach the Supreme Court in a case where relief was sought against the Union of India was

obviated by introducing Article 226(1A) by amendment and the same position continued even under the amended Article 226 in view of the

provision in Article 226(2).

86. The second absurdity, according to the learned Counsel, would be that while writ jurisdiction was being conferred on the High Court for the

enforcement of fundamental rights under Article 226(1)(a), that jurisdiction would in fact be rendered nugatory in cases which are covered by

Clauses (4) to (6). What was, therefore, suggested was that an interpretation must be so placed on Clauses (4) and (6) that their operation must

be restricted only to cases covered by Clauses (b) and (c) of Article 226(1). According to the learned Counsel, the words ""petition under Clause

(1)"" found in Clause (4) should be construed as referring to a ""petition under Clause (1)(b) and (c)"". In support of this proposition reliance was

placed on four decisions, namely, Salmon v. Duncombe (1886) 11 A.C. 627, Rex v. Vasey & Lally [1905] 2 K.B. 748, Rex v. Ettridge [1909] 2

K.B. 24 , Seth Banarsi Das etc. Vs. Wealth Tax Officer, Special Circle Meerut, etc., and on the principle laid down in Maxwell on Interpretation

of Statutes, twelfth edn., at p. 228. Mr. Seervai has also referred to a statement made in the Notes on Clauses 38 and 58 in which it was stated

that the High Courts continued to enjoy their power to enforce fundamental rights. According to the learned Counsel, if this was the intention of the

Parliament, then, Article 226 must be so construed that the power to enforce fundamental right which was given to the High Court should not be in

any way affected.

87. Another argument in order to point out what, according to the learned Counsel, was a manifest absurdity was that while restrictions were

placed on the power of the High Court to issue an interim order and in some cases the power was totally taken away in a proceeding under Article

226, the powers of the civil Court are unrestricted and in a suit filed for the enforcement of a fundamental right a civil Court could validly issue an

interim order ex parte even in respect of matters enumerated in Clause (6). It was pointed out that even this Court on the Original Side dealing with

a suit could well grant such an order while the same Court dealing with a petition under Article 226 either on the Original Side or on the Appellate

Side could not exercise the same jurisdiction in view of Article 226(4) to (6).

88. Mr. Paranjape appearing on behalf of the Union of India contended that on a plain reading of Clauses (4), (5) and (6), they applied equally to

all petitions whether falling under Sub-clause (a), (b) or (c) of Clause (1) of Article 226.

89. Mr. Singhavi appearing on behalf of the Bombay Municipal Corporation and the State contended that even the powers of the Supreme Court

have been curtailed to a limited extent because the Supreme Court has been deprived of its jurisdiction under Article 32A in the matter of

considering the constitutional validity of any State law in any proceeding under Article 32 unless the constitutional validity of any Central law is also

in issue in such proceedings. Thus, according to Mr. Singhavi, the Supreme Court will not be competent to entertain a petition under Article 32

complaining of a violation of a fundamental right where a question of constitutional validity of any State law is raised. It is contended by Mr.

Singhavi that Clauses (4) and (6) must be read as they are and the words clearly manifest an intention that the jurisdiction of the High Court was

sought to be curtailed in respect of proceedings referred to in Clause (6). There is no absurdity, according to Mr. Singhavi because Clause (6)

does not operate in respect of all fundamental rights and it is only in a small area, which is carved out, that the restriction contained in Clause (6)

will operate.

90. Mr. Bhabha who appears for the Union of India has contended that the express and unambiguous provision made in the Constitution in Article

226(4) to (6) with regard to power to grant interim relief which will be applicable in all cases and not only to cases under Article 226(1)(b) and (c)

must be given effect to and he has referred us to the Report of the Law Commission, (fourteenth report) vol. II, p. 670, where among the

recommendations regarding the writ jurisdiction of the High Court under Article 226, the following are to be found at serial Nos. 7, 8 and 9:

(7) The courts should be circumspect in granting stays in writ petitions and normally stay should be ordered only after giving notice to the

respondent and hearing him.

(8) In emergent cases, when an ex parte stay is ordered, it should be operative only for a very short time within which the respondent should be

served with notice and heard.

According to Mr. Bhabha, these recommendations have been given effect in Article 226(4) and (5). He has also drawn our attention to a passage

in ""A Treatise on the Constitutional Limitations"" by Cooley at p. 65 and it is contended that difficulties are not to be imported into a Constitution

where none appear upon its face.

91. There is no dispute that the rules governing the constructions of statutes also apply to the construction of the provisions of the Constitution. It is

the primary rule of construction of statutes that the intention of the Legislature must be found from the words used by the Legislature and if the

words used by the Legislature are open only to one construction, then it is not open to the Courts to adopt any other hypothetical construction on

the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The primary rule of construction of

statutes requires that the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when the words are

capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. It is only where two

constructions are possible that a question of choosing the one which is in consonance with the intention of the Legislature can arise. When the

Legislature clearly declares its intent in the scheme and language of the statute, it is the duty of the Court to give full effect to the scheme without

scanning its wisdom or policy and without engrafting, adding or implying anything which is not congenial to or consistent with such express intention

of the Legislature. See The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur, .

92. In Craies on Statute Law, Seventh edn., at p. 64, it is observed:

...Strictly speaking, there is no place for interpretation or construction except where the words of the statute admit of two meanings. As Scott L.J.

said : "Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely

presumptions in cases of ambiguity in the statute."

While dealing with the object of rules of construction Craies has observed (p. 64):

Rules of construction have been laid down because of the obligation imposed on the courts of attaching an intelligible meaning to confused and

union tillable sentences.

Dealing with the subject of manifest absurdity, injustice, inconvenience, etc. to be avoided, the principles are put down by Craies at p. 86 as

follows:

It is clear that "if," as Jervis C.J. said in Abley v. Dale (1850) 20 L.J.C.P. 33, "the precise words used are plain and unambiguous, we are bound

to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where

their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words

used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." And 100 years later

Finnemore J. said: Holmes v. Bradfield Rural District Council [1949] 2 K.B. 1 . "The mere fact that the results of a statute may be unjust or absurd

does not entitle this Court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the court will adopt that

which is just, reasonable and sensible rather than that which is none of those things."

Thus, Courts are bound to give effect to the language used by the Legislature where the language is clear and explicit. Referring to the argument

based on inconvenience and hardship Craies has observed (p. 89):

The argument from inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is

obscure and there are alternative methods of construction.

It was later observed (p. 90):

Where the language is explicit, its consequences are for Parliament, and not for the courts, to consider. In such a case the suffering citizen must

appeal for relief to the lawgiver and not to the lawyer.

The principle relied upon by Mr. Seervai on the basis of which he wanted to persuade us to read the words ""(b) and (c)"" after ""Clause (1)"" in

Clauses (4) and (6) of Article 226 is noticed by Craies at p. 107 in the following words:

The question at times arises whether, admitting a statute to have a certain intention, it must, through defective drafting or faulty expression, Jail of its

intended effect or whether necessary alterations may be made by the court. The rule on this subject laid down in the Privy Council in Salmon v.

Buncombe, (cited supra), is as follows : ''It is, however, a very serious matter to hold that, where the intention of a statute is clear, it shall be

reduced to a nullity by the draftsman''s unskilful ness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion,

but their Lordships hold that nothing can justify it except necessity, or the absolute intractability of the language used.'' (p. 634).

Bearing these principles in mind, the first thing that we must consider is whether there is any ambiguity in the words used in Clauses (4) and (6).

When it is said that an ambiguity arises by giving the words their plain meaning, it means that the words, if they are construed in a particular

manner, will not give effect to the intention of the Parliament. Similarly, when it is said that absurdity will result from a rule of literal construction, the

absurdity has to be judged with reference to the intention of the Parliament in enacting a particular provision. There is no ambiguity whatsoever in

the provisions in Clauses (4) to (6). They admit only of one construction. On the terms of Clauses (4) and (6) if the words are literally construed,

the intention of the Parliament is unambiguously, unequivocally and clearly expressed therein that the provisions were to apply to all petitions under

Article 226(1). There is not even a remotest suggestion that a distinction was to be made between a petition for the enforcement of fundamental

rights and a petition for the enforcement of other legal rights contemplated by Sub-clause (b) and (c) of Article 226(1) for the purposes of Article

226(4) to (6). If this was the intention of the Parliament, the mere fact that in a given case, hardship would result or inconvenience to a particular

litigant would result, will not be a matter which will weigh with the Court and prevent it from giving effect to the plain words of the Constitution.

93. So far as Clauses (4) and (5) are concerned, they do not have as drastic an effect as is sought to be made out because in spite of the

limitations placed in Clause (4) on the power to grant an interim order, discretion is still left to the Court for reasons to be recorded in writing to

grant an ex parte interim order if in a given case the Court is satisfied that failure to make an ex parte interim order will put a person to such loss

that he cannot be adequately compensated in money.

94. Clause (6) also clearly uses the words ""a petition under Clause (1)"". These words also clearly manifest the intention of the Parliament that

whether the petition relates to fundamental rights or other legal rights, provisions of Clause (6) will be attracted. The proposition that the power

given to the High Court to enforce fundamental rights under Article 226(1) is being substantially taken away by making a provision in the matter of

interim order in Clause (4) and Clause (6), in our view, appears to be rather widely stated. The categories of cases referred to in Clause (6) do not

exhaust all fundamental rights. The provisions are to operate only within a limited, field as described in Clause (6). It is, no doubt, true that in a

given case, the provisions of Clause (6) are likely to work extreme hardship and inconvenience, but that cannot be a reason for not giving effect to

the plain words therein.

95. It must, however, be mentioned that the power to grant an interim order is taken away only if the interim order will have the effect of delaying

the processes referred to therein. In each case the Court will have to consider whether in the case of the first category of cases referred to in

Article 226(6) the matter is of public importance, in the third category of cases whether the work or project is of public utility and in the fourth

category of cases whether the acquisition of the property is for the execution of a work or project of public utility. It is obvious that it will be for the

respondent who seeks to invoke the bar created in Clause (6) to satisfy the Court when hearing is given as required by Article 226(4) that the facts

on which the bar is sought to be invoked exist.

96. There is one important circumstance which also negatives the argument of Mr. Seervai that the operation of Clause (6) must; be restricted only

to cases covered by Sub-clause (b) and (c) of Clause (1) of Article 226. The Amending Act has made provisions in Section 58 thereof which

deals with a pending petition. While the provisions of Article 226(6) will apply to petitions which are filed after February 1, 1977, what is to

happen to interim orders made in pending petitions is provided for in Section 58(4) of the Amending Act. We shall deal with the provisions of Sub-

sections (1) to (3) of Section 58 later, but if we read Sub-section (4) of Section 58, it will be noticed that the provisions of Section 58(4) of the

Amending Act and Article 226(6) are identically worded except that in Section 58(4) reference is made to an interim order made before the

appointed day. Sub-section (4) of Section 58 of the Amending Act reads as follows:

Notwithstanding anything contained in Sub-section (3), every interim order (whether by way of injunction or stay or in any other manner) which

was made before the appointed day, on, or in any proceedings relating to, a pending petition...and which is in force on that day, shall, if such order

has the effect of delaying any inquiry into a matter of public importance or any investigation or inquiry into an offence punishable with imprisonment

or any action for the execution of any work or project of public utility, or the acquisition of any property for such execution, by the Government or

any corporation owned or controlled by the Government, stand vacated.

The only difference between Section 58(4) of the Amending Act and Article 226(6) is that while Article 226(6) operates on petitions filed after

February 1, 1977, Section 58(4) of the Amending Act operates on pending petitions. What we, however, wish to point out is that even in case of

pending petitions, interim orders, if they have the effect contemplated by Clause (6), because the concluding words of Section 58(4) and Article

226(6) are identical, such orders stand vacated. u/s 58 it is provided that it is to operate on a petition which would have been admitted by the High

Court under the amended Article 226. The petition which could be admitted under Article 226 in its amended form would be one dealing not only

with other rights described in Article 226(1)(b) and (c) but also one dealing with fundamental rights as provided in Article 226(1)(a). Section 58(4)

operates in respect of all such petitions and it makes no distinction between a petition dealing with fundamental rights or a petition dealing with the

other rights referred to in Article 226(1)(b) and (c). It could not have been the intention of the Parliament to treat a pending petition in respect of

fundamental rights differently than a similar petition filed after the appointed day merely on the ground that it came to be filed after February 1,

1977. So far as interim orders in respect of matters which are identically described in Section 58(4) of the Amending Act and Article 226(6) are

concerned, the Parliament has provided for a uniform manner of dealing with them. It will, therefore, not be possible to accept the argument of Mr.

Seervai that the applicability of Clauses (4) to (6) should be restricted only to a petition which does not relate to fundamental rights.

97. The fact that the Supreme Court was capable of granting an interim order in a given case will not result in any absurdity if the positive intention

of the Parliament was to restrict the powers of the High Court.

98. The retention of the original Article 226(1A) in the form of Clause (2) is also of no assistance in construing the provisions of Clauses (4) to (6)

the words in which are clear and unambiguous in their meaning. The statement made in the Notes on Clauses that the power of the High Court to

enforce fundamental rights continues to be enjoyed by the High Courts will also not affect the meaning of the plain words of Clauses (4) to (6).

99. The authorities relied upon by Mr. Seervai are also not of much assistance to us. As already pointed out by us, the principle that a construction

which modifies the meaning of the words and even the structure of the sentence which follows from the decision in Salmon v. Duncombe, Rex v.

Vasey and Lally, and Rex v. Ettridge, can be availed of only where the language of a statute, in its ordinary meaning and grammatical construction,

leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity which can hardly have been

intended. See Maxwell on Interpretation of Statutes p. 228.

100. In our view, the provisions in Article 226(4), (5) and (6) clearly spell out the intention of the Parliament to restrict the jurisdiction of the High

Court in the matter of making interim orders and having regard to the clear intention of the Parliament, it is not possible to hold that any

inconvenience or absurdity necessitating the applicability of the above quoted rule results from the plain and grammatical construction of those

provisions. We do not, therefore, think it necessary to discuss the authorities relied upon by Mr. Seervai. Suffice it to say that in each of those

cases it was found that a plain construction would defeat intention of the Legislature and they are, therefore, distinguishable.

101. The view which we are taking is in accord with the principles laid down by the Supreme Court in G. Narayanaswami Vs. G. Pannerselvam

and Others, , where the following passage from Crawford''s Construction of Statutes, 1940 edition, page 270, was quoted with approval:

Where the statute''s meaning is clear and explicit, words cannot be interpolated. In the first place, in such a case, they are not needed. If they

should be interpolated, the statute would more than likely fail to express the legislative intent, as the thought intended to be conveyed might be

altered by the addition of new words. They should not be interpolated even though the remedy of the statute would thereby be advanced, or a

more desirable or just result would occur. Even where the meaning of the statute is clear and sensible, either with or without the omitted word,

interpolation is improper, since the primary source of the legislative intent is in the language of the statute.

We must, therefore, reject the contention that the operation of the provisions of Clauses (4), (5) and (6) must be restricted to petitions other than

those falling under fundamental rights as contended by the learned Counsel for the petitioner.

102. That brings us to the provisions of Section 58 of the Amending Act. It prescribes a procedure for dealing with petitions under Article 226 of

the Constitution which were pending on February 1, 1977. In terms, Section 58 provides that every petition under the original Article 226 of the

Constitution made before the appointed day, which is February 1, 1977, and pending before the High Court immediately before that day and any

interim order made in that petition shall be dealt with in accordance with the provisions of Article 226 as substituted by Section 38. Thus the

provisions of amended Article 226 have now fastened themselves on petitions which were pending on February 1, 1977 having been filed prior to

that date. Sub-section (2) further reiterates this position and it provides that only that petition will survive and be treated as a pending petition if it

would have been admitted under the provisions of Article 226. The section itself is worded in the negative form and it provides that a petition,

which would not have been admitted by the High Court under the provisions of Article 226 as substituted by Section 38 of the Amending Act. if

such petition had been made after the appointed day, shall abate. In the latter part of the section provision is made with respect to an interim order

made on or in any proceeding relating to such petition and it is provided that any interim order, whether by way of injunction or stay in any other

manner, in a petition which abates shall stand vacated. There is then a proviso to that section. The proviso provides that nothing in Sub-section (2)

of Section 58 shall affect the right of the petitioner to seek relief under any other law for the time being in force in respect of matters to which such

petition relates and in computing the period of limitation, if any, for seeking such relief, the period during which the proceedings relating to such

petition were pending in the High Court shall be excluded. The proviso is intended to make available to the litigant such remedy as was open to him

under any other law for the time being in. force in respect of the matters to which the petition relates because the petition stands abated under Sub-

section (2) if it could not have been admitted under the new provisions of Article 226. The provision is analogous to Section 14 of the Limitation

Act because in most cases, having regard to the duration of the pendency of the petition in the High Court, normal remedies under the relevant law

must have become barred by limitation. The provision under Sub-section (2) that the interim order shall stand vacated is obviously made by way of

abundant caution because normally an interim order stands exhausted when the main petition itself ceases to survive for any reason whatsoever.

103. There was some argument at the Bar as to the point of time when the abatement contemplated by Sub-section (2) occurs and as to at what

point of time the interim order stands vacated. Before we deal with that, we shall refer briefly to Sub-section (5) of Section 58.

104. The scheme of Section 58(1) and (2) is firstly to make the provisions of new Article 226 applicable to pending petitions, and secondly to

declare petitions which could not have been admitted under the provisions of new Article 226 to have abated. Then provision is made in Sub-

section (5) with regard to interim orders which were passed in petitions which still survive as they do not abate as contemplated by the provisions

of Section 58(2). Under Sub-section (3) it is provided that if an interim order which was made before February 1, 1977, that is, the appointed

day, on or in relation to a pending petition, which is now clarified as not being one which has abated under Sub-section (2), is in force on the

appointed day, unless before the appointed day copies of such pending petition and of documents in support of the plea for such interim order had

been furnished to the party against whom such interim order was made and an opportunity had been given to such party to be heard in the matter,

such interim order ceases to have effect on the expiry of the periods which are separately mentioned in Clauses (a) and (b). In simple language, the

effect of Sub-section (3) is that in a petition which does not abate u/s 58(2) if there is an operative interim order and if this interim order is made

without giving an opportunity to the opposite side to be heard and the copies of the petition and the documents in support of the plea for the interim

order were not given to the opposite side before February 1, 1977, such copies were required mandatorily to be given within a period of one

month, failure to do which will entail a statutory effect of the interim order ceasing to be operative. If, however, copies are supplied within a period

of one month, as referred to in Clause (a), but no opportunity has been given to the party concerned to be heard in the matter before the expiry of

the period of four months, then also, the interim order is to cease to have effect on the expiry of the period of four months from the appointed day.

In other words, Sub-section (3) firstly requires that the copies of the petition should be supplied to the opposite party within a period of one month

from the appointed day, if this has not already been done, and it further requires that within four months, the party concerned should be given an

opportunity of being heard. If there is non-compliance with any of these provisions, then, the interim order ceases to have effect on the expiry of

the prescribed period. These provisions will, however, not apply to a case where prior to February 1, 1977, the interim order made earlier has

been confirmed after hearing the opposite side or where opportunity to be heard in the matter of confirmation of or making of the interim order was

given to but was not availed of by the opposite side against whom the order operates.

105. We would like to highlight the difference between the provision of Sub-section (2) and Sub-section (3) in so far as the interim order is

concerned. While Sub-section (3) uses the phrase ""cease to have effect"", Sub-section (2) uses the words ""shall stand vacated"". Mr. Singhavi

contended that the petitions to which Sub-section (2) of Section 58 is attracted stand automatically abated with effect from February 1, 1977 and

the interim orders in such petitions also stood automatically acted with effect from February 1, 1977 as the words used in Section 58(2) are ""shall

stand vacated"", it is, however, contended on behalf of the petitioners that the vacating of the order contemplated by Sub-section (2) is a result of

the abatement of the petition, and unless an order is, passed by the Court that the petition has abated, abatement cannot be said to have taken

place and the abatement will become operative with effect from the date on which the order of abatement has been passed and the interim order

will also stand vacated from that date.

106. It is difficult for us to accept the contention of Mr. Singhavi that the abatement u/s 58(2) takes effect automatically with effect from February

1, 1977. Abatement of the petition provided by Sub-section (2) of Section 58 is, no doubt, a statutory effect contemplated by that section, but

before that effect occurs, there is something which is required to be adjudicated upon as contemplated by the earlier part of Sub-section (2) read

with the provisions in Sub-section (1). Only those petitions abate under Sub-section (2) of Section 58 which would not have been admitted by the

High Court under the provisions of new Article 226. It is difficult to accept the extreme argument advanced by Mr. Singhavi that it is for the litigant

to decide whether his petition would be admitted under the provisions of new Article 226. Admission of a petition is an act of the Court and it is

difficult to see how it is possible to read in Section 58(2) a duty cast on a litigant to decide for himself whether a petition would be admitted by the

Court exercising its jurisdiction under Article 226. If the event of abatement is dependent upon the decision of the question whether the petition

would have been admitted under the provisions of new Article 226 and if such decision in the matter of admission is a judicial act and a judicial

decision, then it is obvious to us that unless after the appointed day the matter is put up before the Court and the Court applies its mind to the

question whether the petition would have been admitted under the new Article 226, the abatement would occur only after the Court reaches a

decision that the petition would not have been admitted under the new Article 226. The words ""the petition shall abate"", in our view, merely

indicate the legal result which will follow under Sub-section (2) of Section 58. In our view, the Court will have to pass an order of abatement and

consequent upon this order of abatement, a further order that any interim order that was passed in the proceedings relating to the petition shall also

stand vacated has to be passed. That this is the only construction possible on the terms of Section 58(2) will be clear from the difference in

phraseology used in Section 58(2) and Section 58(3) of the Amending Act. We have already pointed out that with regard to an interim order in a

petition which survives the bar of Section 58(2), the interim order is stated to ""cease to have effect"" if the requirements of Section 58(3) are not

complied with within the specified period, as contrasted with the phraseology used in Sub-section (2). The construction that we have placed is also

supported by the terms of the proviso to Sub-section (2). As already pointed out, the proviso to Sub-section (2) is intended to give benefit to the

litigant in the matter of exclusion of the period during which the petition was pending in the High Court before it abated under the terms of Section

58(2). Computation of the period of limitation has to be made with reference to a point of time because a period is an interval of time between two

dates. The proviso does not contemplate that during the pendency of the petition and before it is decided whether it abates or not, the litigant

should take recourse to the other remedy that may be open to him, because while considering the question whether the petition would have been

admitted under the new Article 226, one of the questions to be considered is whether the petitioner had an adequate alternative remedy. If it was

intended that the abatement was to occur statutorily from February 1, 1977 and the petitioner was to be entitled to exclude the period of pendency

of the petition up to February 1, 1977 for the purposes of computing the limitation prescribed for availing of any other remedy, the proviso would

have clearly made a reference to the fact that the period up to the appointed day alone would be excluded. Where the Parliament wanted to

specify the period after which the interim order was automatically to become inoperative, it has expressly said so in Clauses (a) and (b) of Sub-

section (5). There the period of one month under Clause (a) and period of four months under Clause (b) has been expressly provided. Such period

is to commence from February 1, 1977 which is the appointed day. The absence of any such express provision either in Sub-section (2) of Section

58 or the proviso thereto also indicates that the use of the words ""stand vacated"" did not evince an intention on the part of the Parliament to

provide that the abatement was to take effect and the interim order was to stand vacated automatically with effect from the appointed day, that is,

February 1, 1977. If matters are pending in Courts and if for one reason or the other they cannot be put up for being dealt with u/s 58(2) read with

Article 226, it will be extremely unfair and unjust to a litigant to deprive him of the benefit of the proviso to Section 58(2) for no fault of his own

which will be the effect if the argument of Mr. Singhavi is accepted.

107. As a matter of fact the construction leading to automatic abatement of the petition and automatic vacating of the interim order was vehemently

opposed by Mr. Joshi appearing on behalf of the Revenue. Mr. Joshi contended that Section 153 of the Income Tax Act provides a time limit for

the completion of assessment and re-assessments. We are not concerned with the varying periods for different kinds of cases contemplated by

Section 153, but the only provision that is material for the present purpose is Clause (ii) of Explanation 1 in that section. The relevant clause reads

as follows:

Explanation 1.-In computing the period of limitation for the purposes of this section-

(i) ...

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court,...

shall be excluded.

It is urged that there are cases where assessment proceedings have been stayed by an order of this Court and if the authorities were to proceed to

complete the assessments without having the stay orders vacated, it is likely to lead to a difficult situation as the authorities would possibly be faced

with a charge of contempt of Court. It is also urged that the Revenue would suffer if the period after February 1, 1977 is not allowed to be

excluded for the purpose of Explanation 1 to Section 153 as the prescribed period for computing the assessments would be cut short because no

action has so far been taken on account of the fact that the stay orders have not been vacated so far. There is no doubt that while an interim order

staying assessment proceedings is in force, there would hardly be any justification for proceeding with the assessment proceedings. However, in

the view we have taken of Section 58(3), it is not necessary to consider further the submissions of Mr. Joshi.

108. That brings us to another question closely connected with the operation of Section 58 of the Amending Act. The question is whether Section

58(2) also operates in respect of appeals pending in this Court against orders passed in the original petition under Article 226 of the Constitution.

The questions which been referred to this Full Bench by the division Bench have already been extracted by us earlier. It is contended my Messrs.

Paranjape, Singhavi and Dhanuka that Section 58 which is described as ""Special provisions as to pending petitions under Article 226"" will also

apply to proceedings in appeal against an order passed under original Article 226 before February 1, 1977. The argument is that what is pending

in appeal is really the petition under Article 226 and, therefore, Section 58 will in terms be attracted to such an appeal. The foundation of this

argument is primarily the decision of the Supreme Court in Smt. Dayawati and Another Vs. Inderjit and Others, and the decision in Garikapatti

Veeraya Vs. N. Subbiah Choudhury, . Now, it cannot be seriously disputed that an appeal has been often described as a continuation of the suit

and re-hearing of the suit. But in cases where a change in law during the pendency of the appeal has been held to apply even to the matters in the

pending appeal, that is not on the principle that an appeal is a continuation of the suit or a re-hearing of the suit but on the principle that a particular

change of law was on account of express provisions or by necessary intendment held to affect vested rights of persons and that was why as a

matter of retrospective application of the law, the change in law was given effect to by the appellate Courts. That, however, does not mean that a

general proposition can be made that a suit includes an appeal from the decision in the suit, as will be clear from the decision in Hansraj Gupta v.

Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co. [1932] 60 I.A. 13 : 35 Bom. L.R. 319, in which the Privy Council held that the

word "suit" ordinarily means and apart from some context must be taken to mean a civil proceeding instituted by presentation of a plaint. Just as in

a suit the decision determines the rights of the parties resulting in vesting of rights, same result ensues as a result of a decision in a petition under

Article 226. Unless, therefore, there are clear words in the statute which make the provisions thereof applicable to a pending appeal expressly or

by necessary intendment, the principle that normally vested rights are not disturbed must be given effect to. It was not possible for the counsel for

the Union or for the State or for the Municipal Corporation to contend that Section 58 expressly deals with appeals or that it indicates an intention

to interfere with rights vested in parties when a petition under Article 226 was already decided prior to February 1, 1977. How the petition has

come to be decided before February 1, 1977, that is, whether it is summarily rejected or decided on merits is hardly relevant so far as the vesting

of rights is concerned. Section 58(2) refers to a petition under Article 226 pending before any High Court. The words ""a petition under Article

226"" have always been understood as meaning the original petition under Article 226 and not an appeal from an order in the original petition. They

must be given their natural meaning and Section 58 must, therefore, be held to apply only to the pending petitions. It is important to note that there

may be petitions which have been decided by the High Court before February 1, 1977 and appeals may be pending against orders in such petition

in the Supreme Court. If it was intended that Section 58 was to apply to an appeal pending from an order on a petition under Article 226, as

contended on behalf of some of the respondents, there could not be any valid reason for the Parliament to make the provisions of Section 58

applicable to appeals pending in the High Court and not in the Supreme Court. The correct approach, in our view, is not to find out whether ""a

petition"" will also include an appeal against an order deciding petition but to find out whether Section 58 contains words which manifest an intention

to affect rights which become vested in parties as a result of a decision of a petition under Article 226. We may refer to the decision of the

Supreme Court in Dewaji v. Ganpatlal [1969] M. L.J. 495 : 71 Bom. L.R. 693, where the question was whether a provision, requiring the civil

Court to refer a question whether a transaction between a landholder and a person claiming to be a lessee is a lease within the meaning of the

Berar Regulation of Agricultural Leases Act was applicable to pending appeals against the decision of the civil Court. Section 16A of the said Act

read as follows:

(1) Whenever any question as is referred to in Section 16 arises before a civil Court in any suit or proceeding, the Court shall, unless such question

has already been determined by a Revenue Officer, refer the question to the Revenue Officer for decision and shall stay the suit or proceeding so

far as it relates to the decision of such question.

(2) The civil Court shall accept the decision of the Revenue Officer on the question and decide the suit or proceeding before it accordingly.

A learned single Judge of this Court while dealing with a second appeal filed by the alleged lessee held that in view of the amendment in the Berar

Regulation of Agricultural Leases Act, the question whether the defendant was a lessee or not had to be decided by the Revenue Officer. By a

judgment in favour of the alleged lessee recorded by the Revenue authorities the decree for ejectment was set aside. In a Letters Patent appeal by

the landlord, the division Bench held that

taking the scheme of the Act into account and the fact that there is no section in the Act which makes the Act applicable to pending proceedings, it

is at once clear that it was not intended to affect pending proceedings. Pending proceedings must continue unaffected by the provision of the Act

and whatever questions arose in those proceedings must be decided by the Civil Court.

The defendant appealed to the Supreme Court and the Supreme Court while dismissing the appeal observed (p. 499):

...It is true that the word "whenever" is wide but Section 16A uses the words "suit or proceeding" and these words do not ordinarily indicate

appellate proceedings.

Thus, it was held that the intention of the Legislature was not to apply the amending Act to pending appeals.

109. There is intrinsic evidence in the Constitution itself where when the Parliament wanted to make a provision relating to a pending appeal, it has

expressly referred to such a pending appeal as will be clear from the provisions of Clause (5) of Article 329A. Article 329A was introduced in the

Constitution by the Constitution (Thirty-ninth Amendment) Act in which provision was made in Clause (4) making inapplicable a law relating to

election petitions and matters connected therewith made by the Parliament before the commencement of the Constitution (Thirty-ninth

Amendment) Act, 1975, in case of persons referred to in Article 329A(1) such as the Prime Minister and the Speaker of the House of the People.

Clause (5) reads as follows:

Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of

the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of Clause

(4).

It is true that Clause (4) has been held to be unconstitutional by the Supreme Court, but it is sufficient for our purpose to point out that where a

provision was required to be made dealing with a pending appeal, a reference to such pending appeal or cross appeal was expressly made in the

Constitution. It, therefore, appears to us that if the Parliament wanted to make provisions of Section 58 applicable in the case of pending appeals,

a clear and express reference to a pending appeal would have been made therein.

110. The decision in Dayawati''s case turned on the applicability of a provision relating to reopening of money-lending transactions which provided

that where the Court has reason to believe that the interest is excessive, the transactions shall be reopened and the Court shall take an account

between the parties and relieve the debtor of all liability in respect of any excessive interest. The decision really turned on the construction of

Section 3 which did not make any express reference by itself to a suit but referred: to the power of the Court though a provision was made in

Section 6 that the provisions of the Act shall apply to all suits pending on or instituted after the commencement of the Act. It is important to point

out that in para. 10, Hidayatullah J., as he then was, has observed as follows (p. 1426):

Now as a general proposition, it may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after

the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of

the suit. Even before the days of Coke, whose maxim-a new law ought to be prospective, not retrospective in its operation-is oft-quoted, Courts

have looked with disfavour upon laws which take away vested rights or affect pending cases.

The reason why Section 3 was held to be applicable even in appeal is firstly to be found in para. 9 and then in para. 10. In para. 9 it was observed

(p. 1426):

The amended Section of the Usurious Loans Act is plainly mandatory because it makes it obligatory for a Court to re-open a transaction if there is

reason to believe that the interest is excessive.

Then in para. 10 it was observed (p. 1426):

...If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court

of appeal must have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the

Court of first instance. The distinction between laws affecting procedure and those affecting vested rights dos not matter when the Court is invited

by law to take away from a successful plaintiff, what he has obtained under a judgment.

The decision will thus clearly show that it turned mainly on the mandatory wording of Section 3 of the Usurious Loans Act which was held to affect

vested rights. One of the reasons which weighed with the Supreme Court was that the appeal in that case did not have an independent existence

because the preliminary decree which would emerge from, the appeal will be the decree which could become a final decree. The intention of the

Legislature was found by the Supreme Court in these words (p. 1427):

...In the present Act the intention is to give relief in respect of excessive interest in a suit which is pending and a preliminary decree in a suit of this

kind does not terminate the suit. The appeal is a part of the cause because the preliminary decree which emerges from the appeal will be the

decree, which can become a final decree. Such an appeal cannot have an independent existence.

Thus on facts it was held that the suit really had not terminated and that decision cannot, therefore, be of any assistance for the construction of

Section 58.

111. The observations in Garikapati''s case on which Mr. Singhavi has placed reliance are contained in the first principle deduced in para. 23 of

the judgment where it was observed (p. 553):

...That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity

and are to be regarded as one legal proceeding.

These observations are also of hardly any assistance. Though the Supreme Court has observed that suit, appeal and second appeal are to be

regarded as one legal proceeding, the fact remains that a suit, appeal and second appeal are independent and well recognised stages of litigation

and that is why in each case the intention of the Legislature has to be ascertained to find out whether a change in the law affects pending

proceedings in the appellate Court. The question for decision before us is not whether the petition and the appeal against the final order in the

petition is one legal proceeding but whether there are words in Section 58 on which an intention to affect vested rights can be gathered.

112. In a division Bench decision of this Court in Velayudhan Kuttapan Nair Vs. S.K. Bedekar and Another, the question was whether an appeal

against an order dismissing the petition on the ground that one of the respondents who had passed an order in appeal had his office in New Delhi

could be entertained by the appeal Court having regard to the newly enacted provisions in Article 226(1A). It was held that the appeal was a re-

hearing of the petition and it was, therefore, open to the appeal Court to apply to the pending petition the procedural law as enacted in Article

226(1A) and the petition was, therefore, maintainable. This decision is also clearly distinguishable. It turned on the principle that a change in the

procedural law affects pending matters. Article 226(1A) was construed as procedural law. The appeal Court which was hearing the appeal against

the order of dismissal could have exercised the same powers as the original Court and if by virtue of Article 226(1A) the authority in New Delhi

could be reached by a writ, nothing prevented the appeal Court from dealing with the matter. That was not a case where vested rights were sought

to be taken away and that decision would, therefore, not be of much use to the respondents. The petitioner could well have filed a fresh petition

after Article 226(1A) was added, but this course was avoided by the division Bench by taking the view that Article 226(1A) was applicable at the

appeal stage.

113. We are, therefore, of the considered view that there is nothing in Section 58(2) which necessitates that the words ""petition made under Article

226 of the Constitution before the appointed day and pending before any High Court"" should be given an extended meaning so as to include an

appeal filed against an order either rejecting, or allowing a petition before the appointed day, that is, February 1, 1977. Such an appeal, in our

view, must, therefore, be disposed of in accordance with the original Article 226. The same view has been taken by a Full Bench of the Andhra

Pradesh High Court [1977] Writ Appeal No. 435 of 1976.

114. The only other important question which remains to be considered is whether Articles 131A and 226A read with the amended Article 226 of

the Constitution of India exclude the jurisdiction of the High Court to admit and entertain a writ petition which raises the sole question of the

constitutional validity of any Central law. Article 131A reserves exclusive jurisdiction to the Supreme Court to the exclusion of any other Court to

determine all questions relating to the constitutional validity of any Central law. Clause (2) of Article 131A reads as follows:

Where a High Court is satisfied-

(a) that a case pending before it or before a court subordinate to it involves questions as to the constitutional validity of any Central law or, as the

case may be, of both Central and State laws; and

(b) that the determination of such questions is necessary for the disposal of the case,

the High Court shall refer the questions for the decision of the Supreme Court.

Provision is, therefore, made requiring the High Court to refer questions as to the constitutional validity of any Central law or, as the case may be,

of both Central and State laws if the determination of such question is necessary for the disposal of the case. The questions required to be referred

can arise not only before the High Court but also before a Court subordinate to it. Power has been given to the High Court under Article 228 to

withdraw a case pending in a case subordinate to it if the High Court is satisfied that it involves a substantial question of law as to the interpretation

of the Constitution, the determination of which is necessary for the disposal of the case. Such a case which is withdrawn can, subject to the

provisions of Article 131A, be disposed of by the High Court itself or the High Court can determine the said question of law and return the case to

the Court from which the case has been so withdrawn together with a copy of its judgment on such question and the subordinate Court on receipt

of the judgment has to proceed to dispose of the case in conformity with such judgment. The powers under Article 228 are subject to the powers

under Article 131A. Therefore, even if the only question which is involved in a suit or other proceeding before the subordinate Court relates to the

constitutional validity of Central law, the High Court has to withdraw this case and since the jurisdiction to decide the constitutional validity of the

Central law is vested solely in the Supreme Court, it has to make a reference under Article 131A. Clause (3) of Article 131A provides for a

power enabling the Attorney General of India to apply to the Supreme Court for a direction to the High Court to refer questions relating to the

constitutional validity of any Central law or, as the case may be, of both Central and State laws if the determination of such questions is necessary

for the disposal of the case. Under Clause (4) it is provided that the High Courts shall stay all proceedings in respect of the case until the Supreme

Court decides the question so referred.

115. What is contended by Mr. Paranjape is that when Article 226A provides that notwithstanding anything in Article 226, the High Court shall

not consider the constitutional validity of any Central law in any proceedings under that Article, the use of the word ''consider'' indicates that the

High Court is prohibited from even applying its mind to the question as to whether really the question of constitutional validity of any Central law

arises or not. In other words, the argument is that if a petition is filed in the High Court in which the sole question is whether a Central law is

constitutionally valid or not, it cannot be entertained.

116. It is difficult for us to accept this argument. It is obvious that Article 226A is a provision consequential upon the enactment of Article 131 A.

When Article 226A uses the words ""shall not consider the constitutional validity"", it is obvious that those words have been used with a view to

provide that the High Court shall not decide on the validity of the Central law and not with a view to even bar the determination of the question

whether a reference is necessary to be made to the Supreme Court.

117. In Kuldeep Singh v. Union of India [1975] 1 S.L.R. 792, the concept of the word ''consider'' was stated by a division Bench as follows (p.

803):

...The word ''consider'' or the process of consideration has within its ambit an examination of circumstances with objectivity rather than a mere

subjective conclusion. Essentially, it implies the duty to act judicially. In the Black''s Law Dictionary, Fourth Edition, at page 378 consideration has

been assigned the following meaning:

A technical term indicating that a tribunal has heard and judicially determined matters submitted to it.

118. The word ''consider'' thus also connotes the process of judicial determination and having regard to the fact that the provision in Article 226A

is a provision consequential upon introduction of Article 131A, it appears to us that it was intended to bring about the same effect as was

contemplated by Article 131A. To accept the submission made by Mr. Paranjape that the High Court cannot even consider for the purpose of

making a reference whether in a petition the question solely relates to the constitutional validity of any Central law or not would be placing an

extremely narrow construction on Article 226A which is not warranted. We may also point out that if the same question is raised in a suit, that suit

can be transferred by the High Court to its own file under Article 228 and the matter referred to the Supreme Court. Thus if Mr. Paranjape''s

argument is accepted, the position will be that if a petition solely challenging a Central law is filed, it could not be entertained, but if the same

petitioner files a suit challenging the validity of the same Central law, the matter could be withdrawn by the High Court under Article 228. Such an

anomalous position can hardly be said to have been contemplated by the Parliament. If Articles 131A, 226A and 228 are harmoniously construed,

in our view, there does not seem to be any impediment to the High Court entertaining a petition under Article 226 where the sole question raised is

the constitutional validity of any Central law. There is also nothing in Article 226A which would prevent the High Court from exercising normal

powers which belong to it under Article 226 in the matter of making interim orders in such a petition because the petition will still continue to be a

petition in the High Court under Article 226 in which only certain questions are required to be referred to the Supreme Court under Article 131A.

119. There was some argument on the question as to whether the word ''authority'' in Article 226 included a Court. It is well established that the

writs of mandamus, prohibition and certiorari are used to control inferior Courts and other persons or bodies of persons having legal authority to

determine questions affecting rights of subjects and having duty to act judicially. Dealing with the writs of mandamus, prohibition and certiorari, it is

observed in Halsbury''s Laws of England, third edn., vol. 11, at p. 53 as follows:

109. Introductory. In modern practice the most important aspect of the three orders is their use as a means of controlling inferior courts and other

persons and bodies of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. The

importance of this aspect has been greatly increased by the tendency of modern legislation to submit the determination of such questions to

tribunals other than the ordinary courts of law, and to Ministers and other official persons and bodies. Where (as is frequently the case) no right of

appeal to the courts exists, the three orders here under consideration form the principal means by which the determinations of these tribunals and

other persons and bodies can be brought before the courts. The degree of control which can be exercised is limited : provided that the tribunal

keeps within its jurisdiction and obeys the rules of natural justice, and refrains from setting out in its record the reasons for its decision, the Court

cannot interfere.

A mandamus will issue to a Court if it has not properly exercised its jurisdiction and has not heard and determined according to law, but mandamus

does not lie for the purpose of reviewing the decision of the Court on merits. Halsbury''s Laws of England, fourth edn., vol. 1, para. 113 has put

the position thus (p. 127):

113. Where discretion has been given and exercised. In cases where application is made for the issue of an order of mandamus to tribunals of a

judicial character, the order will not issue for the purpose of dictating to them in what manner they are to decide, their duty being only to hear and

determine according to law.

Where, accordingly, a judge of the county court, or magistrates, or income tax ?commissioners, or any other tribunal of a judicial character have in

fact heard and determined any matter within their jurisdiction no mandamus will issue for the purpose of reviewing their decision on its merits. The

rule applies even though the decision is erroneous, not only as to facts, but also in point of law; but the court may interfere when the tribunal has not

properly exercised its jurisdiction and has not heard and determined according to law, because it has taken, into account extraneous matters and

allowed itself to be influenced by them or has failed to have regard to legally relevant factors.

120. In Syed Yakoob Vs. K.S. Radhakrishnan and Others, after pointing out that the true legal position about the limits of jurisdiction of the High

Court to issue a writ of certiorari was never in doubt, the Supreme Court observed (p. 479):

...A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals : these are cases where orders are

passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be

issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question

without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is

opposed to principles of natural justice.

In Dwarka Nath v. I-T. Officer, it was also pointed out that a writ of certiorari can be issued only to quash a judicial or a quasi-judicial act and that

it could be issued to quash a quasi-judicial act of an administrative tribunal or authority. It was observed by the Supreme Court in para. 5 as

follows (p. 85):

...It is well settled that a writ of certiorari can be issued only to quash a judicial or a quasi judicial act and not an administrative act. It is, therefore,

necessary to notice the distinction between the said two categories of acts. The relevant criteria have been laid down with clarity by Atkin, L.J., in

Rex v. Electricity Commissioners : London Electricity Joint Committee Co. (1920), Ex parte [1924] 1 K.B. 171 elaborated by Lord Justice

Scrutton in Rex v. The London County Council : The Entertainments Protection Association, Ex parte [1931] 2 K.B. 215 and authoritatively

restated in Province of Bombay Vs. Kusaldas S. Advani and Others, . The said decisions laid down the following conditions to be complied with :

(1) The body of persons must have legal authority; (2) the authority should be given to determine questions affecting the rights of subjects; and (3)

they should have a duty to act judicially. So far there is no dispute. But in decided cases, particularly in India, there is some mixing up of two

different concepts, viz., administrative tribunal and administrative act. The question whether an act is a judicial act or an administrative one arises

ordinarily in the context of the proceedings of an administrative tribunal or authority. Therefore, the fact that an order was issued or an act

emanated from an administrative tribunal would not make it anytheless a quasi judicial act if the aforesaid tests were satisfied. The concept of a

quasi judicial act has been conceived and developed by English Judges with a view to keep the administrative tribunals and authorities within

bounds.

In the context of writ jurisdiction in respect of tribunals having legal authority to determine questions affecting rights of subjects and having the duty

to act judicially, the following passage from Halsbury"s Laws of England, 3rd edn., vol. 11, at p. 55 was quoted with approval by the Supreme

Court:

...It is not necessary that it should be a court : an administrative body in ascertaining facts or law may be under a duty to act judicially

notwithstanding that its proceedings have none of the formalities of, and are not in accordance with the practice of, a court of law. It is enough if it

is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition. A body

may be under a duty, however, to act judicially (and subject to control by means of these orders) although there is no form of Us inter parties

before it; it is enough that it should have to determine a question solely on the facts of the particular case, solely on the evidence before it, apart

from questions of policy or any other extraneous considerations.

121. The legal position as adumbrated above remains unaffected by the amendment of the Constitution. The new Article 226 does not make any

change in respect of the persons or bodies of persons to whom the writs can be issued.

122. Having regard to the aforesaid discussion, the questions extracted by us earlier are answered by us as follows:

Question No. 1: In the affirmative.

Question No. 2: In the negative for the first part; the Court shall have power to make necessary interim orders.

Question No. 3: In the negative, but the jurisdiction is ousted in a case where the other remedy is adequate, efficacious, convenient and beneficial

having regard to the redress sought.

Question No. 4: In the affirmative if the suit falls within the description of ""other remedy"" as, in answer to question No. 3.

Question No. 5: Provisions of Article 226(4) to (6) apply to all petitions which fall in Article 226(7).

Question No. 1 in appeal: In the negative. Question No. 2 in appeal: Does not arise.

123. This petitions shall now be placed before the appropriate Benches for disposal according to law.

124. In the circumstances of the case, there will be no order as to costs.