



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

KOHIMA BENCH

WRIT APPEAL 3(K) OF 2020

1. Rukuvoto Ringa, Superintendent,
Special Home (SH) & Observation Home (OH),
Pherima,
Department of Social Welfare,
Govt. of Nagaland, Dimapur.
2. Venedulu Vero,
Research Officer,
Directorate of Social Welfare,
Govt. of Nagaland, Kohima.
3. Kelevinu Naleo,
Chief Instructor,
Anganwadi Workers' Training Centre,
Diphupar,
Department of Social Welfare,
Govt. of Nagaland, Dimapur.

.....Appellants.

- Versus -

1. Meyalemla, Sr. Supervisor,
CDPO Office, Dimapur.
2. Unice Sema, Sr. Supervisor,
CDPO Office, Dansiripar, Dimapur.
3. Reylvolu Kezo, Sr. Supervisor,
CDPO Tribal, Kohima.
4. Zubemo Jami, Sr. Supervisor,
DWO Office, Wokha.

5. Alongla Aonok, Superintendent,
Special Home & Observation Home,
Pherima, Dimapur.
6. Khonbeni Jami, Sr. Supervisor,
CDPO Office, Dimapur.
7. Limasangla, Sr. Supervisor,
AWTC, Diphupar, Dimapur.
8. Sunepwapang, Sr. Supervisor,
DWO Office, Mokokchung.
9. M. Lakiumong, Sr. Supervisor,
CDPO Office, Shamator.
10. R. Lanuakum Walling, Sr. Supervisor,
CDPO Office, Changtongya, Mokokchung.
11. Meyangangla Ponger, Sr. Supervisor,
CDPO Office, Chukitong, Wokha.
12. L. Nikuto Chishi, Sr. Supervisor,
CDPO Office, Dimapur.
13. Zachamo Ngullie, Sr. Supervisor,
CDPO Office, Jakhama, Kohima.
14. Amilo Yanthan, Sr. Supervisor,
CDPO Office, Sanis, Wokha.
15. Longshithung, Sr. Supervisor,
CDPO Office, Wozhuro.
16. Atsole Khalo, Sr. Supervisor,
CDPO Office, Ongpangking.
17. Erenbeni Kikon, Sr. Supervisor,
CDPO, Wokha.
18. Bendangtemsu, Sr. Supervisor,
CDPO Office, Wakching, Mon.
19. A. Nzanbemo Jami, Sr. Supervisor,

CDPO Office, Chukitong Wokha.

20. Vishiho Aye, Sr. Supervisor,
CDPO Office, Sataka, Zunheboto.
21. Emlitenzuk, Sr. Supervisor,
CDPO Office, Mangkolemba, Mokokchung.
22. Obed Magh, Sr. Supervisor,
CDPO Office, Tseminyu, Kohima.
23. Chubameren, Sr. Supervisor,
CDPO Office, Longchem.
24. State of Nagaland,
Represented by the Chief Secretary,
Government of Nagaland, Kohima.
25. The Secretary,
Department of Social Welfare,
Kohima, Nagaland.
26. The Director,
Directorate of Social Welfare,
Kohima, Nagaland.

For the appellants	::	Mr. R. Iralu, Sr. Advocate, Mr. L. Iralu, Advocate.
For the respondents	::	Ms. Z. Zhimomi, Advocate, Mr. N. Mozhui, State Counsel.
Date of hearing	::	21.05.2020
Date of judgment	::	26.06.2020

BEFORE

HON'BLE MR. JUSTICE N. KOTISWAR SINGH
HON'BLE MR. JUSTICE S. HUKATO SWU

JUDGMENT & ORDER

(N. Kotiswar Singh, J.)

Heard Mr. R. Iralu, Learned Senior counsel for the appellants assisted by Mr. L. Iralu, Learned Counsel. Heard also Ms. Z. Zhimomi, Learned Counsel for the private respondents/writ petitioners and also Mr. N. Mozhui, Learned Counsel for the State respondents.

2. The present appeal has been filed challenging the order dated 12.02.2020, passed in IA(Civil) No. 176/2019, by which the application filed by the present appellants for vacating the interim orders passed by this Court earlier on 19.08.2019 and 17.09.2019 in WP(C) No. 126/2019 was rejected.

3. According to the appellants the aforesaid application, I.A.(Civil) No. 176/2019, was filed on 13.12.2019 and was moved on 16.01.2020 on which date no one appeared for the respondents and 2 (two) weeks' notice was issued to the respondents in the said application.

According to the appellants, a copy of the application was served upon the respondents (writ petitioners) on 21.01.2020.

When the matter was listed again on 31.01.2020, this Court passed the following order:

"Heard Mr. R. Iralu, learned senior counsel assisted by Mr. L. Iralu for the applicant.

By filing this application, the applicants seek the vacation/modification/alteration of the interim Order dated

19.08.2019 and 17.09.2019 passed in the main writ petition i.e. WP(C) No. 126(K)/2019. Although 2 (two) weeks time was granted to the opposite parties to file their objection but it is submitted at the bar that the respondents have received their copy of the application only on 31.01.2020.

Considering the fact that interim order was passed way back in 19.08.2019, I am inclined to grant 10 (ten) days to the opposite parties to file their objection, if any.

List this case again on 12.02.2020.

The opposite party should file their objection before that date."

4. Accordingly, the matter came to be listed on 12.02.2020 on which date the impugned order was passed by the Learned Single Judge rejecting the application for vacating the interim orders, against which the present appeal has been preferred.

5. Learned Senior Counsel for the appellants has taken the following pleas, in challenging the impugned order dated 12.02.2020.

6. It has been submitted that the Learned Single Judge erred in appreciating the fact that a copy of the application for vacating of stay orders was served on the Learned Counsel for the respondents/writ petitioners on 21.01.2020 and as such, 2 weeks would have expired on 04.02.2020, and since the application was not disposed of within 04.02.2020, that is, within 2 weeks of furnishing of the application for vacating the stay orders, by virtue of the provision under Article 226(3), the said interim orders passed by the Court on 19.08.2019 and 17.09.2019 in WP(C) No. 126/2019 would stand automatically vacated.

7. Mr. R. Iralu, Learned Senior Counsel also has submitted that in fact, contrary to own admission of the Learned Counsel

for the respondents (writ petitioners) that she received the application on 21.01.2020, the Learned Single Judge took the view that it was furnished on 31.01.2020 by referring to the order passed by the Court on 31.01.2020, wherein it was mentioned that it has been submitted at the Bar that the respondents received their copy of application only on 31.01.2020.

8. It has been submitted by the Learned Senior Counsel for the appellants that the Learned Single Judge ought to have considered the recording in the order dated 31.01.2020 that the respondents received a copy of application only on 31.01.2020 was a clerical mistake and as such, the said date ought to have been ignored in the light of the admission made by the Learned Counsel for the respondents that she received a copy of the application on 21.01.2020 and rather ought to have corrected the error.

9. Accordingly, it has been submitted that the Learned Single Judge has erroneously given the finding that the Learned Counsel for the respondents (writ petitioners) received a copy of the application only on 31.01.2020 contrary to the factual position that it was indeed served on 21.01.2020.

10. Otherwise, also on merit, the petitioners cannot have any grievance against the present appellants/respondents in the writ petition as the regularization of the service and the subsequent upgradation order, challenged in the petition, were by virtue of a policy decision taken by the Cabinet after the appellants had approached this Court earlier for upgradation of their service by filing a writ petition. It has been submitted

that the said Cabinet decision was taken in terms of the judgment and order dated 07.06.2018 passed by this Court in a writ petition, being W.P.(C) No. 83(K)2017 filed by the appellants. Accordingly, it has been submitted that since the said upgradation was by virtue of a decision of the State Cabinet based on certain directions of this Court, the writ petitioners could not have challenged the said decision for upgradation by filing a writ petition rather than challenging the order of this Court before the appropriate Appellate Forum.

11. It has been also submitted that the writ petitioners themselves were initially appointed in Grade-III posts and subsequently upgraded to Grade-II posts and as such, they cannot have any grievance against the upgradation of the present appellants. In any event, the present appellants/respondents in the writ petition are yet to file their detail affidavit in defense of the order of upgradation.

12. It has been also submitted that the petitioner had to first establish the existence of 3 (three) cardinal principles for grant of stay, viz., existence of *prima facie* case, balance of convenience, irreparable loss and injury which may be caused if stay is not granted. However, the said principles were not considered by the Court, nor were satisfied by the writ petitioners before obtaining the interim order.

Accordingly, it has been submitted that the present appeal be allowed by setting aside the impugned order dated 12.02.2020 passed in IA (Civil) No. 176/2019 and vacate the interim orders passed by the Learned Single Judge on 19.08.2019 and 17.09.2019 in WP(C) No. 126/2019.

13. Ms. Z. Zhimomi, Learned Counsel appearing for the private respondents (writ petitioners), on the other hand, has submitted that there is no illegality in the order passed by the Learned Single Judge.

It has been submitted that the Learned Single Judge has given a finding that a copy of the application for vacating the interim order was furnished on 31.01.2020 on the basis of a judicial order passed on 31.01.2020 in which it was clearly mentioned that "it has been submitted at the Bar that the respondents have received their copy of the application only on 31.1.2020." As such till such judicial order is rectified or modified, the aforesaid issue relating to the fact pertaining to receipt of a copy of the application cannot be ignored. If that is so, 2 weeks will be counted from 31.01.2020 in which event, the said period will expire only on 14.02.2020 and there could not have been any automatic vacation of the interim order and there was no illegality in taking up the matter by the Court on 12.02.2020 within 2 weeks on which date the Court declined to vacate the interim order passed earlier.

14. It has been also submitted by Ms. Z. Zhimomi that the present appellants are backdoor entrants in service as can be seen from the service records. They were initially appointed on contractual basis, whose services were extended from time to time. Subsequently, without following the service rules, their services were regularized in Grade-II post in the respective posts which they were holding. It has been also submitted that in the seniority list published by the authorities in the Grade-II, the names of the present appellants appear in serial nos.

62, 63 and 64 whereas, the writ petitioners were shown to be senior to them by placing them from sl. no. 14 onwards.

15. It has been also submitted that the State authorities could not have taken such a policy decision to upgrade the appellants by ignoring the claim of the writ petitioners. In any event, since the appellants were backdoor entrants whose services were regularized and given further benefit of upgradation without following the rules, their regularization and upgradation are liable to be interfered with by this Court and as such passing of the interim orders by the Court cannot be said to suffer from any irregularity or illegality.

16. Mr. N. Mozhui, Learned Counsel for the State respondents submits that the State Government is yet to file the affidavit in opposition and it would be appropriate as directed by the Learned Single Judge that the matter be finally heard after filing of the affidavits.

17. On hearing the Learned Counsel for the parties, it appears that two main issues are involved in the present appeal.

18. The first relates to the actual date of furnishing of the copy of the application seeking vacation of interim orders, as to whether it was on 21.01.2020 or 31.01.2020.

19. If the date of furnishing of the copy of the application is to be treated as 21.01.2020, 2 weeks mentioned under Article 226(3) would lapse on 04.02.2020 and in that event, since the application for vacating the interim orders passed by the Court was not considered within the said 2 weeks, the issue of

automatic vacation of the interim order on expiry of 2 (two) weeks has to be considered.

On the other hand, if the date of furnishing of a copy of the application is to be treated as 31.01.2020, as held by the Learned Single Judge, 2 weeks would lapse on 14.02.2020, in which case, there would be no automatic vacation of the interim order and there would not be any irregularity in the order passed on 12.02.2020 challenged in this appeal.

20. The other issue relates to the merit of the case as to whether the writ petitioners were entitled to get the interim orders which has been opposed by appellants in the present appeal.

21. In this regard, we have noted the submission advanced by Mr. R. Iralu the Learned Senior Counsel for the appellants that the provisions of Article 226(3) cannot be diluted for considering the application by the Court. We have also perused the decision of the Full Bench of the Hon'ble Gujarat High Court and also the decision of the Manipur High Court rendered in ***District Development Officer Vs. Maniben Virabhai, MANU/GJ/0176/2000: AIR 2000 Guj 255*** and ***Khaipao Haokip & Anr. G. Suanchinpau & Ors. 2019(4) GLT 217***, respectively, relied upon by the appellants. The decision of the Hon'ble Manipur High Court was based on the decision of the Hon'ble Gujarat High Court.

22. On the other hand it is the case of the present respondents that in any event, the applicant appellants having themselves agreed on 31.01.2020 to have the application fixed on 12.02.2020, they cannot make a volte-face now and

take the plea that the interim order got automatically vacated on 04.02.2020. Further, since the Court granted 10 days' time to file objection by treating 31.01.2020 to be the date of furnishing a copy of the application, the aforesaid Clause (3) of Article 226 cannot be invoked.

23. The order dated 31.01.2020 quoted above has generated this controversy and it appears to be a very important issue to be considered in this appeal, which is that, when was a copy of the application for vacating the stay order served on the writ petitioners, as the answer to this question would have a direct bearing on the applicability of Clause (3) of Article 226. Was it on 21.01.2020 as contended by the appellants, or on 31.01.2020 as contended by the respondents and also held by the Learned Single Judge?

In examining this issue, the attending issue which would arise to be considered is the scope of Clause (3), as to whether it is mandatory or directory.

24. As we proceed to examine this issue, we would like to observe that as is evident, it is a pure question of fact. Normally, this Court sitting in appellate jurisdiction would not interfere with a finding of fact arrived by the Learned Single Judge unless there is error apparent on the face of the record or is manifestly unjust or illegal.

25. From the impugned order, it is evident that the Learned Single Judge did lay much emphasis on the judicial order passed on 31.01.2020 to the effect that, as submitted at the Bar the respondents had received their copy of application only on 31.01.2020, as quoted herein below.

".....Although 2 (two) weeks time was granted to the opposite parties to file their objection but it is submitted at the bar that the respondents have received their copy of the application only on 31.01.2020.....".

Based on the aforesaid judicial order, the Learned Single Judge proceeded to accept 31.01.2020 to be the correct date of furnishing a copy of the application. The Learned Single Judge, accordingly, made the observation in para 14 of the impugned order, assigning the reason as to why the Learned Single Judge was inclined to accept 31.01.2020 as the date when the copy of the application was furnished to the Learned Counsel for the respondents/writ petitioners. Para 14 is accordingly, reproduced as below:-

"14. But for the finding recorded by this Court in the order dated 31.01.2020, this Court could have accepted the date of receipt of copy of the I.A by the learned counsel for the opposite party/writ petitioners as 21.01.2020; as the presence of signature of the learned counsel for the writ petitioners in the office copy of the I.A of the writ petitioners; however, since the date of receipt of the I.A by the learned counsel for the petitioners have been recorded as 31.01.2020 in its order dated 31.01.2020 by this Court in the presence of the learned counsel for the applicants, I am inclined to accept 31.01.2020 as the date of receipt of the copy of the I.A by the learned counsel for the writ petitioners. If 31.01.2020 be the date of receipt of copy of the I.A by the learned counsel for the opposite party/writ petitioners, a period of two weeks there from have not yet expired."

26. Perusal of the aforesaid portion of the order makes it manifestly clear that though the Learned Single Judge could have accepted the contention of the appellant that the copy of the application was served upon the counsel for the petitioners on 21.01.2020, because of the judicial order passed on 31.01.2020, the Learned Single Judge opted to accept

31.01.2020 as the date of receipt of the application, instead of 21.01.2020.

27. We are also mindful of the fact that the Learned Counsel for the writ petitioners did not dispute the fact that the signature bearing dated 21.01.2020 on the office copy of the application of the applicants was her signature though she did not make any categorical submission in the Court about receipt of the application on 21.01.2020 and she was quite equivocal about the same. In this regard, para 9 of the impugned order is of relevance and accordingly, the same is reproduced:

"9. The learned counsel for the opposite party/writ petitioners, Ms. Zhimomi, on the other hand, although does not dispute that the signature dated 21.01.2020, which is present in the office copy of the I.A. of the learned counsel for the applicants is her signature, yet, she has not made any categorical submission with regard to the receipt of the copy of the I.A on 21.01.2020. Ms. Zhimomi, learned counsel, at times, submits that she did receive the copy of the I.A on 21.01.2020, yet at the same time she also submits that she is not sure whether the application received by her was the I.A filed by the applicants/respondents."

28. A careful perusal of para 9 quoted above clearly indicates that Learned Counsel for the respondents/writ petitioners did acknowledge that it was her signature bearing the date 21.01.2020 which was found on the application of the appellants. Yet, she did not take an unambiguous stand that she did not receive any copy of the application on 21.01.2020. She wavered on her stand as reflected in the order reproduced above. To that extent, if the Learned Counsel for the respondents did not really submit the correct factual position

regarding the date of receipt of the application, it is to be deprecated.

29. There is indication to the effect that the Learned Counsel for the respondents in the application/writ petitioners had received a copy of the application on 21.01.2020. However, the problem as encountered by the Learned Single Judge as also confronting us is the judicial order passed on 31.01.2020 wherein it has been clearly recorded that *"it is submitted at the Bar that the respondents have received their copy of the application only on 31.01.2020."*

30. We are also mindful of the fact that no application was filed for by the appellants for correction of the said date 31.01.2020 in the order. We are also mindful of the fact that ordinarily, a judicial order cannot be ignored unless the same is rectified by another judicial order by way of review or appeal.

We are also mindful of the submission made by the appellants that once a clerical error was pointed out, the Court had every jurisdiction to correct and rectify such an error.

We have also noted that the present appellants had taken a specific plea before the Learned Single Judge when the matter was heard on 12.02.2020 that the respondents received a copy of the application on 21.01.2020.

But a perusal of the impugned order dated 12.02.2020 does not clearly reflect as to whether the applicants/appellants really made any such prayer to make such a correction before the Learned Single Judge when the matter was under

consideration, though it has been argued to that effect before us.

However, the fact remains that the Learned Single Judge chose not to accept the plea of the appellants that a copy of the application was served on 21.01.2020.

31. We also note that when the matter was put up before the Learned Single Judge on 31.01.2020, it appears the applicants/appellants did not point out that the respondents were furnished a copy of the application on 21.01.2020, to the contrary, accepted before the Court that the respondents received their copy of the application only on 31.01.2020, thus prompting the Learned Single Judge to record that "it is submitted at the bar that the respondents have received their copy of the application only on 31.01.2020".

We, thus, do not find the submission of the Learned Senior Counsel for the appellants that the Learned Single Judge had erroneously recorded the date of receipt as 31.01.2020 in his order dated 31.01.2020 to be convincing, so as to warrant interference by us.

32. Thus, closer scrutiny of the order dated 31.01.2020 would reveal that, on the basis of the submission made at the Bar that respondents received a copy of the application on 31.01.2020, the Court was inclined to grant time to the respondents to file their objections but at the same time the Court was conscious that as the interim order was passed way back on 19.08.2019, the Court granted only ten days' time to file objection, perhaps keeping in mind the fact that any such application has to be disposed of within 2 weeks of the

furnishing of the copy of the application as can be seen from the order passed on 31.01.2020, relevant portion of which is quoted below again.

"Considering the fact that interim order was passed way back in 19.08.2019, I am inclined to grant 10 (ten) days time to the opposite parties to file their objections, if any."

This order was preceded by the observation made by the Learned Single Judge as follows:

"Although 2 (two) weeks time was granted to the opposite parties to file their objection but it is submitted at the bar that the respondents have received their copy of the application only on 31.01.2020."

Thereafter, it was directed to be listed on 12.02.2020 with the following order:

"List this case again on 12.02.2020."

"The opposite party should file their objection before that date".

33. From the above, the clear inference that can be drawn is that what was in the mind of the Learned Single Judge, when the order was passed on 31.01.2020 in fixing the next date for considering on 12.02.2020 was that, the respondents received the copy of the application only on 31.01.2020. This observation of the Learned Single Judge was made on the basis of submission made at the Bar, which means that it was an unanimous and undisputed submission made by both the contesting parties without any demur or objection from any side. It means that the applicant/appellants themselves had also submitted to the same effect.

34. The aforesaid order dated 31.01.2020 also clearly indicates the anxiety of the Court to consider the matter within 2 weeks by treating the date of receipt of the application to be 31.01.2020.

If indeed, the Learned Single Judge had wrongly recorded that "*it is submitted at the Bar that the respondents have received their copy of the application only on 31.01.2020*" instead of 21.01.2020 as contended by the appellants, perhaps the Court would not have fixed 12.02.2020 for hearing the application. If the Court had considered the date of receipt of the application as on 21.01.2020 (which according to the appellants was erroneously recorded as 31.01.2020), the Court might not have granted such a long time to file objection, that is, by 12.02.2020 but an earlier date. The Court fixed 12.02.2020 for considering the application by treating the date of receipt of the application as 31.01.2020, which was within 2 weeks as contemplated under Clause (3) of Article 226 by giving only 10 days time to file objection.

35. It is also to be noted that when the Court passed the order on 31.01.2020 fixing the next date for consideration, nothing is indicated in the order that the applicant appellants had objected to the grant of such 10 days' time, if the real date of receipt of application, according to the applicants, was 21.01.2020, 2 weeks would have lapsed on 04.02.2020. If the applicant/appellants ***really knew and understood*** that the actual date of furnishing of a copy of the application was on 21.01.2020 when the order was passed on 31.01.2020, in that case it can be said that the applicants knowingly and without

any objection to the petitioners acquiesced to fixing of the next date on 12.02.2020 by the Court. The appellants had never insisted before the Learned Single Judge on 31.01.2020 that the date of furnishing a copy of the application was 21.01.2020. In such an event also it can be said that the applicant/appellants had waived their rights and could not have protested on 12.02.2020 when the matter was taken up for consideration.

36. From the above, we are of the view that, even assuming that the date of receipt of a copy of the application by the respondents had not been correctly reflected in the order as contended by the appellants, the Court did consider 31.01.2020 as the date when the copy was served, as submitted at the Bar, because of which the Court fixed the next date for consideration of the application on 12.02.2020.

37. We are of the view that this is a situation, for which the appellants themselves also have to be blamed for the reason that they themselves had also submitted before the Court on 31.01.2020 that the copy of the application was served on 31.01.2020, though we are also of the considered opinion that the respondents' conduct is also much to be desired as it was also incumbent upon them to inform the Court of any factual position correctly.

38. Under the aforesaid peculiar circumstances, we would hold that even though there is material evidence indicating to the effect that the respondents were served with a copy of the application on 21.01.2020, for the reasons discussed above including that the appellants never seriously asserted that the copy of the application was served upon the respondents on

21.01.2020, it has to be deemed to have been served on 31.01.2020 and accordingly, the 2 weeks' period would lapse on 14.02.2020.

Accordingly, we are inclined to hold that the impugned decision of the Learned Single Judge that the copy of the application was served upon the respondents on 31.01.2020 cannot be said to be irrational or unjustified and does not warrant interference from us.

39. Accordingly, if the date of furnishing a copy of the application is to be treated as 31.01.2020, there is nothing much to discuss about, as the 2 weeks period would lapse on 14.02.2020 and the Court considered the application on 12.02.2020, i.e., within time.

40. On the other hand, even if it is assumed as claimed by the appellants that the date of furnishing a copy of the application was 21.01.2020, yet as they did not raise any objection when the matter was taken up on 31.01.2020, it can be said that they waived their right and the benefit conferred under Clause (3) of Article 226 and hence, they are estopped from insisting that the 2 weeks period had lapsed on 04.02.2020 when the matter was taken up by the Court on 12.02.2020.

41. It is in the aforesaid context, it has to be examined whether the right conferred under Clause (3) to the affected party could be waived which, in turn, leads to the consequential question as to whether this provision under Article 226(3) is mandatory or directory. For, if the said provision is mandatory and cannot be waived, the inevitable

consequence will be that if the application filed under Article 226(3) is not disposed of within 2 weeks, the interim order will stand vacated irrespective of any reason for not disposing of the application within 2 weeks.

42. This issue had come up for consideration before this High Court as well as other High Courts and the majority of the High Courts, including our own High Court have taken the view that it is mandatory in nature and the interim order will stand vacated, if not disposed of within 2 weeks as mentioned in Article 226(3) of the Constitution.

43. As we proceed to consider this issue, it may be apposite to refer to the law relating to Article 226(3) of the Constitution.

Clause (3) of Article 226 reads as follows:

"226. Power of High Courts to issue certain writs.—(1) Notwithstanding anything in Article 32, every High Court shall have power,

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority

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

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

(b) *giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed*

on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated."

44. One of the first reported case is ***Gheesa Lal v. State, AIR 1981 Raj 65*** in which the Rajasthan High Court held that it is obvious that the intention of keeping the provisions for automatic vacation of such order, where no order is passed, within two weeks, is that the party who obtains an *ex-parte* stay order should not be allowed to abuse or misuse the process of the Court by proceeding in a leisurely manner and the party must be vigilant to get it affirmed, after affording an opportunity to the other side of hearing and neglecting to do would be at his own peril.

The Rajasthan High Court held that the Court should also take prompt steps for listing this application and the Court should consider immediately, as, in view of the constitutional mandate, serious consequences would ensue as this constitutional mandate admits of no exceptions. The Rajasthan High Court also added that inspite of the stay being vacated in terms of Clause (3), the stay application can be considered on merits again.

45. Soon thereafter, our own High Court also took a similar view that this provision is mandatory in ***South East Bus Association and Ors. Vs. The State of Assam, MANU/GH/0094/1981, (1981) 1 GLR 305.***

In the aforesaid case, a Learned Single Judge of this Court observed that this Clause (3) of Article 226 imposes a peremptory duty on the High Court to dispose such an

application within the stipulated period and if not done, the interim order would stand vacated. Further, there cannot be estoppel against the law of the land and no one can take advantage of his own wrong, by seeking adjournment of the application. This Court also agreed with the view taken in **Gheesa Lal** (supra). It was thus observed as follows:

“11. On a plain reading of the Clause (3), there is no escape from the conclusion that the words “shall dispose of” imposes a peremptory duty on the High Court to dispose of such an application within the specified period and in case the High Court fails to dispose of it, ex parte interim order would stand vacated ipso facto. It is settled law that where there is no ambiguity in the words, there is no question of interpretation. It is a constitutional mandate that such an application shall be disposed of by the High Court within the specified. The Court has no power to extend time. It is also well settled that provision with respect of time is always obligatory.

12. A similar question came up for consideration before the Rajasthan High Court in **Gheesa Lal v. State of Rajasthan, AIR 1981 Raj 65**. The learned Single Judge held the view that in case the application filed by the party against whom ex parte order was passed is not disposed of within the specified period, the ex parte order should stand vacated automatically. I am in respectful agreement with views above that the party who obtained ex parte order behind the back of the other party should be vigilant to get it affirmed, after admitting an opportunity to the other side of hearing it. In case, after obtaining the ad-interim order the petitioner fails to discharge his duty and prolong prolongs ex parte interim order, he can do so at his own peril.

13. In the instant case, on 9.7.81 on the prayer of the learned Counsel of the both the parties, it was ordered that the stay matter be would be heard in the 1st week of August 1981. As already pointed about, the provision of Clause (3) in regard to the period within which such application is to be disposed of is mandatory, and it cannot be nullified either by the act of the parties or of the Court. The consent of the Respondent No. 4 to the prayer for adjournment for hearing

of the case after the lapse of the period fixed cannot operate as estoppel against it for the simple reason that there can be no estoppel against the law of the land. It appears that both the parties were acting under the common mistake of the period stipulated under Clause (3) of the Article 226 within which the application was to be disposed of. The ex parte ad interim order could operate only till 20.7.81. The petitioners wrongly obtained adjournment till 1st week of August, 1981. In such a case, the maxim "no one can take advantage of his own wrong" would apply."

46. The other notable decision was rendered by Calcutta High Court in **Krishan Kumar Agarwala vs Reserve Bank Of India And Others: AIR 1991 Cal 272, 94 CWN 919.**

In the said case of **Krishan Kumar Agarwala** (supra), the following pleas were taken in support of the contention that Clause 3 of Article 226 is directory, which were rejected by the Calcutta High Court as follows:

- (i) This clause is itself *ultra virus* the Constitution as it affects the power of judicial review, which is considered one of the basic features of the Constitution and Clause (3) has affected the power of judicial review.

This contention was negative by the Court holding that power of the Court to issue ex-parte interim orders in furtherance of the main relief prayed under Article 226 was nor is a creature of Article 226 or any other provisions of the Constitution and therefore, cannot be a "feature" far less a 'basic feature', of the Constitution, and hence, Clause (3) of Article 226 cannot be said to affect or alter any feature or the structure of the Constitution.

- (ii) The contention that by providing for such automatic vacation of interim orders, passed by the Court under the provisions of Clause (3), Parliament has clearly exercised a Judicial jurisdiction not vested in it under the Constitution was also rejected on the ground that the

Legislature can even provide for ouster of jurisdiction of Courts and that too, even with retrospective effect as in the case of Article 323A.

- (iii) It was contended that since an application for vacation may not be disposed of within the time specified in Article 226(3) for no fault of the Writ Petitioner in whose favour the order was made and may not be so disposed of due to inadvertence of the office of the Court in listing the application or due to the Court itself being pre-occupied with other matters or otherwise, the period specified or the provision providing for its automatic vacation on the expiry of the period specified must be held to be directory based on the principle, *actus curiae neminem gravabit*.

This contention was also not accepted on the ground that Clause (3) has not only affirmatively enjoined the Court to dispose of the application within the period specified, but has also negatively in categorical terms provided for the consequence of non-disposal within the period by clearly enjoining that "if the application is not so disposed of, the interim order shall stand vacated".

It was held that when a statutory provision not only directs a thing to be done in a specified manner or within a specified period, but at the same time provides for the inevitable consequence of non-compliance with the direction, the direction must be held to be obligatory and not merely directory.

- (iv) It was also held that in interpreting the provision of the Constitution, it must not be construed in a manner to render that provision almost meaningless when the consequence for non compliance is clear and unambiguous.

The learned Single Judge also referred to the provisions of Rule 3 A of Order 39 of the Code of Civil Procedure, inserted by the Amendment Act of 1976, where there is a provision that "where it is unable so to do, it shall record its reasons for such inability", which is absent in

Article 226(3), thus clearly indicating that the provisions of Article 226(3) are intended to be mandatory.

- (v) The Court also approvingly referred to the decision of the Rajasthan High Court in **Gheesa Lal** (supra).
- (vi) The plea of apprehension that if the provisions of Article 226(3) are held to be mandatory and strictly enforced, the major bulk of the ex parte interim orders in the Court, with its number of cases almost reaching a breaking-point, would stand automatically vacated and that too, very often, for no fault or laches on the part of the Writ Petitioner, by holding that nothing shall prevent the Court to grant an interim order afresh after hearing the parties, on the application for vacation or otherwise, if the Court finds sufficient grounds to make such fresh order.

47. The Kerala High Court also took a similar view in **P. Raghunandanan v. Regional Transport Authority, Palakkad, 1995 SCC OnLine Ker 101 : AIR 1996 Ker 115 : (1995) 2 KLT 21.**

The Kerala High Court agreeing with the decisions of the Rajasthan High Court in **Gheesa Lal** (supra) and **Krishan Kumar Agarwala** (supra) of the Calcutta High Court, observed that,

"3.

It is apparent that the said provision is a self-operating one which has been inserted in the Constitution by the Constitution (Forty-fourth Amendment) Act, 1978. If six conditions conjoin together, the sub-article operates itself and the by-product is erasure of the interim ex parte order. Those six are the following:

- (1) An interim order should have been made on a petition filed under Art. 226.

- (2) Such interim order was passed against a party without furnishing copy of such petition and all documents in support of the plea for such interim order.
- (3) Such interim order was passed against that party without giving him an opportunity of being heard.
- (4) That party should have made an application for vacating the interim order.
- (5) That party should have furnished a copy of such application to the other party (or his counsel) in whose favour the interim order was made.
- (6) The High Court should have failed to dispose of the application within two weeks from the date of receipt of the application (or the date of service of its copy, whichever is later).

4. On fulfilment of all the above conditions, the sub-article operates without anything more to be done.”

48. Another notable decision holding that this provision is mandatory, was rendered by the Full Bench of the Gujarat High Court in ***District Development Officer Vs. Maniben Virabhai***, MANU/GJ/0176/2000: AIR 2000 Guj 255.

It was held in ***District Development Officer*** (supra) as follows:

“10. In our considered opinion, where the language of constitutional provision is plain and unambiguous, the provision cannot be read down on consideration that if plain meaning is assigned the consequences would be inconvenient or unjust to a party. On the plain language of clause (3), we do not find that the provision stating that the ex parte order of stay or injunction would stand vacated after a specified period of fulfilment of specified formalities by the party aggrieved, has any unjust result against the party who had obtained the ex parte order. The object and intention of the Parliament behind the constitutional amendment has to be kept good in view in construing the provision. The Parliament has noticed large number of cases where ex parte orders of

stay or injunction are obtained by parties without furnishing copies of the petition and stay applications thus denying grant of opportunity to the opposite parties of hearing and such ex parte orders continue to remain in operation to the prejudice of the aggrieved party for an indefinite period of time as the stay matters do not receive consideration by the High Court within a reasonable period of time. To protect the interest of such aggrieved parties suffering under ex parte orders of stay or injunction, Art. 226 in the Constitution is amended to incorporate clause (3) providing for automatic vacation of ex parte order or stay, if the aggrieved party is not heard against the ex parte order within a specific period after it had approached the Court for the purpose in accordance with the laid down procedure.

11.

12.

13. In our considered opinion from clause (3) the intention of Parliament is very clear that an ex parte order of stay or injunction obtained in proceedings under Article 226 will have a maximum life of two weeks from the date the application is made by the opposite party and is received by the High Court or to the party obtaining such order. The specified period would not commence from the date it is actually placed before the Judge to whom the case is assigned on the judicial side. Maxwell in a book on "The Interpretation of Statutes" (12th Edition) has stated as under:—

"Enactments regulating the procedure in Courts are usually construed as imperative, even where the observance of the formalities in question is not a condition exacted from the party seeking the benefit of the statute, but a duty imposed on a Court or public officer when no general inconvenience or injustice seems to call for a different construction."

Craies on "Statute Law" (7th Edition) contains the following statement of law on the canon of construction of an Act of Parliament:

"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.”

14. We find that by putting a plain meaning to the language employed in clause (3), no unjust results or consequences flow which can be said as contrary to the intention contained in the Constitutional amendment.

15. As has been stated by Maxwell in his authoritative work on Interpretation of Statutes:—

“Convenience is not always a safe guide to construction. However, difficult it may be to believe that Parliament ever really intended the consequences of a literal interpretation, “we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however, unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.”

16. Similar view has been expressed by the Supreme Court in *Nyadar Singh v. Union of India*, AIR 1988 SC 1979:

“It is true that where statutory language should be given its most obvious meaning — ‘to accord with how a man in the street might answer the problems posed by the words’ — the statute must be taken, as one finds it. Considerations relevant to interpretation are not whether a differently conceived or worded statute would have yielded results more consonant with fairness and reasonableness. Consequences do not alter the statutory language, but may only help to fix its meaning.”

17. On the settled principles of interpretation of statutes and more so of the constitutional provision, we are, with utmost respect, of the considered opinion that the learned single Judge H.L. Gokhale, J. as he then was, was not correct in reading something into clause (3) which is not to be found in it. It is not possible to read that on the ‘making of an application’ by the aggrieved party for vacation of ex parte order or stay or injunction reckoning the prescribed period of two weeks would be from the date on which such application is

placed before the Judge, to which the matter is assigned. In our considered opinion the views expressed by *Calcutta and Rajasthan High Courts* (supra) place such interpretation on clause (3) which is in consonance with the settled canons of interpretation. We also do not find that clause (3) of Art. 226 lays down any time limit for making an application for vacating ex parte orders by the aggrieved party for statutory operation of automatic vacation of such ex parte order.”

Thus, the reasons for the Full Court of the Gujarat High Court in taking the aforesaid views may be summed up as follows:

- (a) As the language of the constitutional provision is plain and unambiguous, it cannot be read down on consideration that if plain meaning is assigned the consequences would be inconvenient or unjust to a party.
- (b) The object and intention of the Parliament behind the constitutional amendment has to be kept in view in construing the provision which is to prevent ex parte orders to be continued for long to the detriment of the affected party, who was not heard at the time of passing the ex-parte order.

In the aforesaid decision, reference was made to the decision of the ***Calcutta High Court in Krishan Kumar Agarwala*** (supra) agreeing with the view taken by the Calcutta High Court.

49. The Allahabad High Court also took a similar view in ***R.C. Choudhary vs. Vice Chancellor, Dr. Bhim Rao Ambedkar University, Agra, AIR 2004 All 95.***

The Allahabad High Court concurred with the view taken by the Calcutta High Court in ***Krishan Kumar Agarwala*** (supra) as well as of the Rajasthan High Court in ***Gheesa Lal***

(supra) and of the same Court in ***Ram Ashish Ram vs. Security Officer (1991) 18 All LJ 24.***

The Allahabad High Court examined the relevant law to determine whether a provision is mandatory or directory and observed that,

“9. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.”

10. A Constitution Bench of the Hon'ble Supreme Court, in *State of U.P. v. Babu Ram Upadhyaya*, AIR 1961 SC 751, considered the issue as to whether the provision involved in the said case was mandatory and held as under (Para 29):—

“For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.”

11. While deciding the said case, the Hon'ble Supreme Court also placed reliance upon Maxwell on *“Interpretation of Statutes”*, 10th Edn. p. 381, wherein it has been observed as under:—

“On the other hand, where the prescription of a statute relates to the performance of a public duty and where the invalidation of the act done in neglect of them would work serious general inconvenience or injustice to persons who have no control over who have been entrusted with the duty without

promoting the social aim of the legislation, such prescription seems to be generally understood as mere instruction for the guidance and governance of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal in deed, but it does not affect the validity of the act done in disregard of them."

12. In *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895; and *State of Mysore v. V.K. Kangan*, (1976) 2 SCC 895 : AIR 1975 SC 2190, whether a provision is mandatory or directory, would, in the ultimate analysis, depends upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provisions but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

Accordingly, it was concluded as follows,

"19. The law on this issue can be summarised that the real test to determine whether the provision is mandatory or directory if non-compliance with the provisions renders the proceeding invalid, it would be mandatory.

20. However, the intent of the Legislature is the most relevant factor to determine the issue and not the language used therein. In clause (3) of the Act 226, legislature in its wisdom has provided that if the application of vacation of stay order is not disposed of within two weeks of its filing, the interim order shall, on the expiry of that period stand vacated.

21. In view of the above, the provisions under consideration are mandatory in nature and strict adherence has to be observed to these provisions."

50. However, the Allahabad High Court added a note of caution for the applicant to be alert and prompt in pursuing the application to get the benefit under Clause (3) of Article 226, thus, laid emphasis on the responsibility of the applicant

to get the application listed for disposal within 2 weeks of filing of the application in the following words,

"22. But such a party is under obligation to approach the Court within reasonable time from the date of notice to it: if the stay vacation application is filed in a leisurely manner, the party cannot claim that interim order stands automatically vacated by operation of law as it would amount to giving such a party premium for its non-action within a reasonable period and the very purpose for which the provision has been enacted, would stand frustrated."

51. As mentioned above our High Court has also taken the view that Clause (3) of Article 226 is mandatory in nature as held in ***South East Bus Association*** (supra), which view was adopted in subsequent decisions of this Court, some of which may be noted as below.

(i) ***Jaintia Hills Autonomous District Council and Ors. Vs. State of Meghalaya and Ors.,***
MANU/GH/ 0460/2020, 2003(2)GLT624.

In the aforesaid case, it was observed that by virtue of the provisions of Article 226(3) of the Constitution of India, the stay order granted in favour of the Petitioners/Appellants having not been confirmed within 2 weeks from the date of the application moved under Article 226(3) of the Constitution of India stands vacated.

(ii) ***R. D. Srivastava vs. Suren Panging,***
MANU/GH/0692/2003, 2003 (1) GLT 346.

In the aforesaid case, a Division Bench of this Court observed as follows:

"(4) Under Article 226 (3) of the constitution any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made, without furnishing to

such party copies of such petition and all documents in support of the plea for such interim order and giving such party an opportunity of being heard, can move an application to the High Court for vacation of such order. When such an application is moved a copy of the same has to be served on the party who has obtained the order of stay or injunction or on the counsel of such party and that the matter has to be heard within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is earlier. When the steps are taken by moving an application under Article 226 (3) of the Constitution for vacating the stay order, if the application is not disposed of within two weeks, it is the mandate of law that the interim order so passed shall stand vacated automatically. The effect of vacation would be as if there is no order of stay in existence passed by the Court, after expiry of two weeks.”

- (iii) ***Axis Bank Ltd. And Ors. Vs. Anupam Acharjee and Ors.*, MANU/GH/0025/2010, AIR 2010 Gau 98, (2011) 2 GLR 377, 2010(3) GLT 127.**

A learned Single Judge of this Court relying on **South East Bus Association (supra)** and **Gheesa Lal (supra)** took a similar view.

- (iv) ***Thokchom Anita Devi & Ors. vs. Tayenjam Herojit & Ors.* 2012 STPL 21444 Gauhati.**

A Division Bench of this Court, relying on the decision of the Gujarat High court in ***District Development Officer*** (supra) held that Clause (3) is mandatory in nature.

The Division Bench repelled the contention based on *actus curiae nemmem gravabit* and held that the language of the Clause (3) is clear and unambiguous and the Court cannot carve out any exception under the guise of removing hardships suffered by a party.

As regards the contention that as the Court was not functioning during the period in question and the Court was unable to dispose of the applications within the period stipulated by the Constitution, for which the writ petitioners can hardly be blamed and should not be victimized/penalized for no fault of theirs and the provision of Article 226(3) should not be read literally or in a pedantic manner but must be construed in such a manner as to prevent gross injustice to the writ petitioners or, conversely, to subserve the interest of justice on the basis of *actus curiae neminem gravabit*, the Division Bench rejected such a plea by holding that the Court cannot re-write a statutory provision, not to speak of a constitutional provision and a constitutional provision shall have to be interpreted in accordance with the plain language of the provision and Court cannot carve out any exception under the guise of removing hardships suffered by a party.

It was accordingly, held as follows:

"2. Admittedly, both the interim orders dated 2-4-2012 and 30-3-2012 were passed by this Court ex-parte in so far as the applicants are concerned and, that too, without furnishing a copy of the writ petition and all documents in support of the plea for such interim order and without giving an opportunity of being heard to the private respondents of both the writ petitions. It is the contention of Mr. Rarry Mangsatabam, the learned counsel for the applicants/private respondents, that though the applicants have filed both the two miscellaneous application for vacating/modifying the ex-parte interim orders on 20-6-2012 and furnished copies of the two applications to learned counsel for the writ petitioners on the same day, this Court could not dispose of the their applications before the expiry of two weeks from

the date on which the applications were received and, as such, both the interim orders stood vacated and should be so declared to be so by this Court under Article 226(3) of the Constitution. On the other hand, Mr. HNK Singh, the learned senior counsel for the writ petitioners, submits that as this Court was not functioning during the period in question, this Court was unable to dispose of the applications within the period stipulated by the Constitution, for which the writ petitioners can hardly be blamed and should not be victimized/penalized for no fault of theirs. According to the learned senior counsel, the provision of Article 226(3) should not be read literally or in a pedantic manner and must be construed in such a manner as to prevent gross injustice to the writ petitioners or, conversely, to subserve the interest of justice *actus curiae neminem gravabit*. He, therefore, contends that applications for vacation of the interim orders are liable to be dismissed on this ground alone.

3. A number of decisions have been cited by the learned counsel for the applicants to fortify his submissions. Suffice it to refer to the Full Bench decision of the Gujarat High Court in *District Development Officer v. Maniben Virabhai*, 2000 AIR(Guj) 255, which, with due respect, in our opinion, has correctly laid down the legal position. This is what it said:

"18. On the discussion aforesaid, we have answered all the questions posed by the learned Single Judge M.R. Calia, J. formulated in his order. Our conclusion, therefore, is that on plain language of Clause (3) in Article 226, an ex-parte order of injunction or stay shall stand vacated automatically after two weeks, if the aggrieved party completes all the formalities of making an application to the High Court and furnishing copy of such application to the party in whose favour the order is made. The

period of limitation of two weeks specified under Clause (3) shall commence on the plain language of that Article from the date of application is received by the Registry of the Court or is furnished to the party for whose benefit it is passed whichever is later in accordance with the Rules and practice of the Court. In our opinion, action or inaction on the part of the parties or Registry shall have no consequence of undoing what the Constitution law contemplates of automatic vacation of the order after expiry of two weeks on the completion of required formalities of procedure and occurrence of eventualities mentioned in Clause (3) of the Article 226."

4. A constitutional provision shall have to be interpreted in accordance with the plain language of the provision. A court cannot carve out any exception under the guise of removing hardships suffered by a party. We have given our anxious consideration to the argument of hardship and inconvenience propounded by the learned senior counsel, but, we are afraid, we cannot come to his rescue: to do so would amount to re-writing a constitutional provision. Sometimes, some unforeseen events may intervene forcing a Court to close down or to prevent it from its normal functioning, for which neither the court nor any of the parties can be blamed. But that cannot be a ground for a Court to re-write a statutory provision, not to speak of a constitutional provision such as Clause (3) of Article 226 of the Constitution. This is usually attributed to systemic failure. Such systemic failure may be brought to the notice of the Parliament for early amendment of the Constitution to prevent future recurrence, but it is not within the province of this Court to undertake such an exercise. Confronted with this situation, another ingenious attempt is made by the writ petitioners to save themselves from this catastrophe. They did this by filing applications for

extension of the interim order which stood automatically vacated on the expiry of the stipulated two weeks. We cannot allow these applications at this belated stage for the simple reason that these applications were admittedly filed by them after the expiry of the stipulated period of two weeks: such applications for extension ought to have been filed by them before the expiry of the stipulated period of two weeks. After the expiry of the period stipulated by Clause (3) of Article 226 of the Constitution, it had died a natural death, and we cannot breathe new life to it. It shall, however, be open to the writ petitioners to apply for fresh interim order by filing an appropriate application, which shall, however, be considered by this Court on merit and after giving an opportunity of hearing to the parties. Till then, it is good bye to the interim orders dated 2-4-2012 and 30-3-2012."

52. However, a divergent view that Clause (3) of Article 226 is directory in nature is to be found in the decision of the Madras High Court in ***T. Gnanasambanthan (Dr.) v. Board of Governors*, 2014 SCC OnLine Mad 235 : (2014) 1 LW 612 : (2014) 2 CTC 549 : (2014) 3 Mad LJ 1 : 2014 Lab IC 3072.**

The Madras High Court referred to most of the decisions referred to above and distinguished these cases.

In coming to the aforesaid conclusion that the provision of Article 226(3) is directory, the Madras High Court held that no party should be prejudiced because of the act of the Court based on the principle *actus curiae neminem gravabit*.

It held that non listing of an application within the 2 weeks' time mentioned under Article 226(3), which is not due to the fault of the party but due to the fault of the Registry of

the Court, would fall under the category of “act of omission” and the party must not be made to suffer. In that context it also held that Clause (3) of Article 226 is directory and not mandatory.

It was thus held that if the condition imposed by the provision of law to do a certain thing within a time frame is upon an institution and the consequences of that institution in not complying with the condition is to fall upon someone else who have no control over the institution which is to perform the duty, then the provision of law cannot be construed as mandatory, but only directory.

It was held that what Article 226(3) imposes is an obligation upon the High Courts to dispose of the application for vacating the stay within two weeks and the failure of the High Court to comply with this Constitutional mandate, cannot result in an adverse consequence upon the party. On the other hand, if an obligation is cast upon one party and the consequences of failure to fulfil the obligation are to be suffered by another party, the provision prescribing such an obligation and consequence, cannot be treated as mandatory, but can be treated as directory.

53. The Madras High Court in the above referred case noted the observation made by the Division Bench of the Allahabad High Court, **R.C. Chaudhary** (supra), which sought to carve out an exception to the aforesaid mandatory provision by stating that if a stay vacation application is filed in a leisurely manner, such a party will not be entitled to avail the benefit of Clause (3) of Article 226. The Madras High Court also contemplated another situation wherein an application for

vacating the stay is taken up for hearing within two weeks of its presentation and the Court reserves orders. If orders were not pronounced on or before the expiry of the 14th day from the date of filing of the vacate stay application, could it be said that the party, who obtained an interim stay, should still suffer, despite ensuring that the application is heard within two weeks.

54. The Madras High Court in the aforesaid case of **T. Gnanasambanthan (Dr.)**, thus, held as follows:

65. But unfortunately, none of the High Courts, whose decisions are relied upon by the respondents, has considered the question from the pedestal of the most fundamental principle of law namely that no one shall be prejudiced by an act of court (actus curiae neminem gravabit). An act can either be an act of omission or be an act of commission. The non listing of an application for vacation of an interim order, if not due to the fault of any of the parties, but due to the fault of the Registry of the Court, would fall under the category of "act of omission". No law can be so absurd as to say that if the Court is at fault, the parties shall suffer. I do not think that any case law is required to support the proposition that an act of court shall not prejudice a party.

66. The question as to whether Clause (3) is directory or mandatory should have been approached by the Courts from the perspective as to whether a party can be prejudiced by an act of Court or not. All the Courts including the Division Bench of the Allahabad High Court came to the conclusion that Clause (3) is mandatory, only on the premise that the consequences of non compliance are also prescribed in the clause itself. But, such a view tantamounts to missing the tree for the wood.

67. In *Raza Buland Sugar Co. Ltd v. The Municipal Board* (AIR 1965 SC 895), a Constitution Bench of the Supreme Court held that the question whether a particular provision is mandatory or directory, cannot be resolved by laying down any general rule

and that it would depend upon the facts of each case. The Court has to consider the purpose for which the provision had been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting therefrom whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject as well as other considerations which may arise on the fact of a particular case, including the language of the provision. The said decision of the Constitution Bench was followed by the Supreme Court in *Salem Advocate Bar v. Union of India* ((2005) 6 SCC 344). While doing so, the Supreme Court pointed out therein that our laws on procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their backs, that proceedings that affect their lives and properties should not continue in their absence and that they should not be precluded from participating in them. Therefore, we have to interpret Article 226(3), consistent with the interpretation given by the Constitution Bench. If the interpretation given to clause (3) of Article 226 would result in putting one of the parties to grave injustice, without any opportunity of hearing, the provision cannot be taken to be mandatory but can be taken only as directory.

68. In *Sharif-Ud-Din v. Abdul Gani Lone* ((1980) 1 SCC 403 : AIR 1980 SC 303), the Supreme Court indicated that the question whether a provision of law is mandatory or not depends upon its language, the context in which it is enacted and its object. The Court made an important observation, which will resolve the problem for us and hence it is extracted as follows:—

“In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law

relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another, when such act is not done in that manner, the former has to be regarded as a mandatory one”.

69. Therefore, it is clear that if the condition imposed by the provision of law to do a certain thing within a time frame is upon an institution and the consequences of that institution not complying with the condition is to fall upon someone else who have no control over the institution which is to perform the duty, then the provision of law cannot be construed as mandatory, but only directory.

70. It is true that if a statutory provision contains a prescription and also stipulates the consequences of non compliance with the condition, it would normally be taken to be mandatory. But, the direction as well as the consequences of non compliance with the direction should both fall upon the same person, if such an interpretation is to be given.

71. In other words, the statutory provision should contain a direction to a party to the proceeding. It should also prescribe the consequences that would fall upon the party, on whom, the obligation to comply with the condition is imposed by the provision. Take for instance, the provisions of Order XXXIX Rules 3 and 3-A. If a person, in whose favour an interim order of injunction is granted ex parte, fails to comply with the obligation cast under Sub-Rule (a) of Rule 3 of Order XXXIX, the interim injunction granted can be vacated on the ground of failure to comply with the obligation. But, where a direction to do something is against one party, the consequences of that party

not complying with the direction, cannot be made to fall upon another party. Article 226(3) imposes an obligation upon the High Courts to dispose of the application for vacating the stay within two weeks. The failure of the High Court to comply with this Constitutional mandate, cannot result in an adverse consequence upon the party. If an obligation is cast upon one party and the consequences of failure to fulfill the obligation are to be suffered by another party, the provision prescribing such an obligation and consequence, cannot be treated as mandatory, but can be treated as directory.

72. As a matter of fact, the Division Bench of the Allahabad High Court appears to have realised this problem in the decision in *R.C. Chaudhary*. That is why in paragraph 22 of the report, the Division Bench of the Allahabad High Court held that if a vacate stay application is filed in a leisurely manner, such a party will not be entitled to avail the benefit of Clause (3) of Article 226.

73. In other words, the Division Bench of the Allahabad High Court has created an exception to the rule enunciated under Article 226(3). But, it must be pointed out that if a provision is mandatory, it is not permissible for a Court to carve out an exception not inbuilt in the statutory provision itself. Interpreting a statutory provision to be mandatory and at the same time, carving out an exception not found in the language of the provision, go contrary to each other. Therefore, the proper interpretation to be given to Clause (3) of Article 226 is to say that it is directory and not mandatory, so that no party is allowed to take advantage of the failure of the Court to dispose of an application for vacation of stay within 14 days.

74. As a matter of fact, the Division Bench of the Allahabad High Court took note of only one serious consequence namely that of a party approaching the Court with a vacate stay application in a leisurely manner and the Division Bench took such a situation out of the purview of Article 226(3). But, any number of such situations, which will prove to be disastrous, can be thought of. Take for instance a case, where an application for vacating the stay is taken up for hearing within two weeks of its

presentation and the Court reserves orders. If orders were not pronounced on or before the expiry of the 14th day from the date of filing of the vacate stay application, could it be said that the party, who obtained an interim stay, should still suffer, despite ensuring that the application is heard within two weeks. It is not within the control of any party to have his application or the opposite party's application listed for hearing. Even if a party succeeds in getting the application listed within two weeks, it is not in his control to ensure that the application is heard before the expiry of two weeks. Even if a party succeeds in making the Court hear the application for vacation of the interim order within two weeks, it is not in his control (especially these days) to ensure that it is disposed of within two weeks from the date of filing of the vacate stay application.

75. Therefore, an interpretation that would put a party, who is not at fault, to disastrous consequences, for the failure of an institution or for the happening of something that is beyond his control, is wholly unjustified. If a statutory provision imposes an obligation upon one party and makes the opposite party suffer for the consequences of non fulfillment of the obligation cast therein, such a provision cannot be said to be mandatory. Unfortunately, none of the High Courts, whose decisions are relied upon by the respondents, has taken note of this basic difference between the person, on whom, an obligation is cast and the person, on whom, the consequences are made to fall under Article 226(3). Hence, with great respect, I am unable to agree with the views expressed by the other High Courts."

55. From the above, it is clearly evident that there are two divergent views prevailing amongst different High Courts, most of the High Courts, viz., Gujarat High Court, Rajasthan High Court, Calcutta High Court, Allahabad High Court, Kerala High Court, Manipur High Court etc., including our High Court holding that Clause (3) of Article 226 is mandatory in nature and if the Court does not dispose of the application for

vacating the interim order within 2 weeks of the furnishing a copy of the application for vacation to the party in whose favour the earlier interim order was passed, the said interim order will stand vacated automatically.

The opposite view as held by Madras High Court is that it is not mandatory, but directory holding that even if the application could not be disposed of by the court within 2 weeks because of reasons attributable to the Court, no party should be made to suffer and hence there would not be an automatic vacation of the interim order.

56. Even though our own High Court also has taken the view that Clause (3) of Article 226 is mandatory in nature, because of the peculiar issue arising in this appeal and the stand taken by the respondent writ petitioners that the applicant appellants cannot blow hot and blow cold at the same time, and that they had waived their rights and are thus, estopped from raising this plea of mandatory application of Clause (3) of Article 226, as the applicants/appellants did not raise any issue when the Learned Single Judge on 31.01.2020 granted ten days' time to the respondents to file objection and fixing the next date on 12.02.2020, it has thus become necessary for us to examine as to what is the real purport of Clause (3) of Article 226.

57. We, however, on reconsideration of the facts and circumstances of the case, are of the considered opinion that perhaps this view that it is mandatory and admits of no exception may require a relook in the light of the elaborate judgment rendered by the Madras High Court and, in arriving at the contrary view that it is directory in nature and hence, will not entail automatic vacation of an interim order, if the

application for vacating the same filed under Article 226(3) is not disposed of by the High Court within 2 weeks as provided thereunder, as we find the view of the Madras High Court to be more reasonable.

58. We give our own reasons hereunder for leaning towards the view of Madras High Court and not being able to subscribe to the other view that it is mandatory in nature.

59. As discussed above, these are some of the reasons that persuaded majority of the High Courts to take the view that this provision is mandatory.

(i) The language of constitutional provision is plain and unambiguous, hence, it would be impermissible to read down the provision on consideration that if plain meaning is assigned, the consequences would be inconvenient or unjust to a party.

(ii) This provision does not lead to any unjust result against the party who had obtained the *ex parte* order.

(iii) The object and intention of the Parliament behind the constitutional amendment has to be kept in view in construing the provision as it was incorporated to deal with a large number of cases where *ex parte* orders of stay or injunction are obtained and such *ex parte* orders continue to remain in operation to the prejudice of the aggrieved party for a long period of time as the stay matters do not receive consideration by the High Court within a reasonable period of time.

(iv) This provision has been incorporated to protect the interest of such aggrieved parties suffering under *ex parte* stay orders.

(v) The object and purpose of the legislation would be defeated if it is held to be directory.

(v) Authorities that have been relied upon to take this view are, Maxwell on "The Interpretation of Statutes" (12th Edition), Craies on "Statute Law" (7th Edition), *Nyadar Singh v. Union of India*, AIR 1988 SC 1979, *State of U.P. v. Babu Ram Upadhyaya*, AIR 1961 SC 751, *Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur*, AIR 1965 SC 895; and *State of Mysore v. V.K. Kangan*, (1976) 2 SCC 895 : AIR 1975 SC 2190 etc.

60. The Madras High Court in its decision in **T. Gnanasambanthan** (supra) has elaborately dealt with these issues and given the reasons for departing from the views held by other High Courts referred to above, with which we also concur and as such it may not be necessary to repeat the reasoning assigned by the Madras High Court. However, we would like to add a few.

61. Apart from the situation where the Court is responsible for not disposing the application within 2 weeks as elaborately dealt with by the Madras High Court, what would be the position, if the party seeking vacation of the interim order acquiesces and consequently waives his right to have the application disposed of within 2 weeks?

In our opinion, if the applicant himself agrees to adjournment of the case sought by the other party, it will be deemed that he did not have any objection to the adjournment for consideration of the application for vacation of the stay order beyond 2 weeks, in which event, it would amount to acquiescence and waiver of the benefit extended under Article 226(3) and accordingly, this benefit may be denied to the applicant.

62. We hold so for the reason that, the Constitutional provision that an interim order shall stand vacated if the application filed for vacating the same is not disposed of by the High Court within 2 weeks subject to fulfilment of conditions mentioned under the provision, is essentially for the benefit **only** of such party to whom a copy of the petition with documents was not served and who did not get an opportunity of being heard and not all the opposite parties against whom the interim order was passed.

This beneficial result will come into operation **only when** the said Clause (3) is activated by such party, which also means that such a party himself cannot be responsible for non consideration by the Court of his application within 2 weeks, and not otherwise.

63. There are thus, certain conditions to be fulfilled before the aforesaid Clause (3) of Article 226 can be invoked. Thus, if the party against whom such an interim order or stay order had been passed does not make any application, the question of automatic vacation of the interim order does not arise.

Further, he himself must be as alert as the other party who had obtained the interim order.

64. It may be also noted that there is no limitation or specific time stipulated under the aforesaid Clause (3) for filing the application for vacation of the interim order by such an affected party. Thus, if the affected party does not file an application or does so nonchalantly and leisurely as observed by the Allahabad High Court in **R.C. Choudhary** (supra), the affected party through this provision based on technicality and

not based on merit, but by default, cannot get the benefit. It is for this reason that we would hold that if the party making the application for vacation himself agrees to extension of time for consideration of the application beyond 2 weeks, the benefit granted under Clause (3) cannot be availed of.

In other words, if the applicant who makes the application for vacation of the interim order/stay order waives his right before the Court for considering the application within 2 weeks, the rigour of law of automatic vacation of interim order as contemplated under Article 226(3) cannot be insisted upon.

65. It is not obligatory on the part of the affected party to invoke this Clause (3) of Article 226. There can be a normal application for vacation of any interim order, whether passed *ex-parte* or not. However, this is a special provision and right which is invokable only by the party who had not been furnished a copy of the petition nor given the opportunity to be heard when the stay order was passed.

Thus, though this provision has been held to have been incorporated with certain avowed public purpose of ensuring that *ex-parte* orders do not remain for long, it is to be noted that it is meant only for that particular party who did not have an opportunity of being heard and who was not furnished with a copy of the petition and documents when the interim order was passed. This policy is not targeted to stay orders generally *per se*, but only for the benefit of a particular category of party.

In a writ proceeding, typically the State Government and/or public authority are the main respondents/parties, and

at the time of filing of petitions, copies of the same are ordinarily given to them, who are generally represented by the respective counsel when petitions are taken up and interim orders passed. Thus, this provision is not ordinarily applicable for such official respondents/parties. If that is so, interim order, if passed will continue against them, till they seek vacation of such interim orders and they cannot take recourse to Article 226(3). However, by default, vacation of stay order under Article 226(3) invoked by another party, the State respondents will also reap the benefit, though they were heard and cannot invoke Clause (3) of Article 226.

66. Hence, though apparently this provision has been incorporated by the 44th Constitution Amendment Act, it is primarily for the benefit of a party other than the State/Authority. Of course, any legislation is essentially keeping in mind a public purpose, even if it is purely for the benefit of individuals. Accordingly, we are of the view that the element of public purpose in enacting the said Clause and inescapability of the consequence in not disposing of the application within 2 weeks may not be the determinative factors to ascertain whether it is mandatory or directory as it is mainly for the benefit of a particular class of adverse party referred to above.

67. In the present case, what we have noted is that, if the date of furnishing the copy of the application is to be treated as 21.01.2020 as contended by the appellants, the application was not disposed of on or before 04.02.2020 (within 2 weeks), not because of the act of the respondents only, but because of the order passed by the Court by fixing the matter beyond 2

weeks without any objection from the applicant/appellants. In such an event can the party be saddled with the disadvantageous position for a reason attributable to the Court and waiver by the applicants?

Certainly, it may be said that the party may be blamed for not being alert. Yet in the present case, the applicants themselves also contributed to the situation created by not raising any objection in not considering the matter within 2 weeks. Of course, it may be also argued that if this is allowed the party who had obtained the interim order may on one pretext or other seek adjournment and the very purpose of this constitutional provision will be frustrated. In this regard, it may be observed that the Court is not expected to play along with any party and is expected to ensure that this provision is not misused by any party and accordingly, any such prayer for adjournment must not be allowed, unless agreed by the party applying for vacating the interim order. The High Court should not ordinarily allow adjournment on the mere asking of any of the parties in view of the clear and unambiguous language of the provision and the Court has a duty and obligation to dispose of the application within 2 weeks, but there may be situations, though rare and appropriate, where the Court may have to defer consideration. But such power of the Court to defer beyond 2 weeks may be done very sparingly and only in rare and appropriate case, to borrow the expression used in ***Kartar Singh Vs. State of Punjab, (1994) 3 SCC 569***, as will be referred hereinafter.

68. In the present case, the peculiar feature is that the party seeking vacation of the interim order had not objected to the

adjournment sought by the opposite party. In such case, it can be presumed that such a party, has acquiesced to the prayer of the other party for adjournment beyond 2 weeks and thus waived his right or benefit conferred under Clause (3) of Article 226. In such an event, in our opinion, the rigour of Clause (3) cannot be enforced against the other party. On such happening, the application filed by the applicant under Article 226(3) would lose its sting and it would be considered to be a normal application for vacating the interim order. In fact, many a times applications are not filed for vacating interim orders even by parties who were not heard on the day of passing the interim order by invoking Article 226(3), which made the Kerala High Court to make the opening remark in **P. Raghunandanan** (supra) that *"Though this provision is explicit in the Constitution, it is seldom resorted to by parties aggrieved by interim ex-parte orders passed by this Court in writ petitions."*

69. While considering this issue, we have to deal with a plea which may be legitimately raised, that is, if Clause (3) of Article 226 is mandatory, can a party waive a mandatory provision?

In this context, as discussed above, it may be noted that any constitutional amendment can be said to be effected in public interest and as a public policy. Certainly, Clause (3) was added to ensure that *ex-parte* orders are not continued for long period and thus be limited in time and thus can be said to have a public purpose behind incorporation of the said clause. However, a closer examination of the clause would indicate that it is essentially for the benefit of the party who was not

given any opportunity of being heard and not all the opponent parties *per se*. It does not provide that the party against whom the *ex-parte* order was passed has to invoke this provision for getting the interim order vacated. For any reason, he may not opt to invoke this provision. Even if he does so, he may do so in leisurely manner as observed by the Allahabad High Court in **R.C. Choudhury** (supra) that, "*Such a party is under obligation to approach the Court within reasonable time from the date of notice to it: if the stay vacation application is filed in a leisurely manner, the party cannot claim that interim order stands vacated by operation of law as it would amount to giving such a party premium for its non-action within a reasonable period and the very purpose for which the provision has been enacted, would stand frustrated. [Para20]*", thus clearly indicating that if such a lackadaisical approach is adopted by an applicant, he may not get the benefit under Article 226(3). This made the Learned Single Judge of the Madras High Court to comment that the Division Bench of the Allahabad High Court has created an exception to the rule enunciated under Article 226(3) and observed that if the statutory provision is mandatory, carving out an exception would be contradictory to each other.

70. Even assuming that Article 226(3) is mandatory, it cannot be said that it cannot be waived. In this regard, one may refer to the decision in **Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, (1964) 6 SCR 1001 : AIR 1964 SC 1300**, in which it has been held that even a mandatory provision can be waived by the party for whose benefit the provision has been made.

"7.....

A waiver is an intentional relinquishment of a known right but obviously an objection to jurisdiction cannot be waived, for consent cannot give a court jurisdiction where there is none. Even if there is inherent jurisdiction, certain provisions cannot be waived. Maxwell in his book '*On the Interpretation of Statutes*', 11th Edn., at p. 375, describes the rule thus:

"Another maxim which sanctions the non observance of a statutory provision is that *cuilibet licet renuntiare juri pro se introducto*. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."

The same rule is restated in '*Craies on Statute Law*', 6th Edn., at p. 269, thus:

"As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court."

The Judicial Committee in *AL. AR. Vellayan Chettiar v. Government of Madras*⁶ pointed out that there was no inconsistency between the propositions that the provisions of Section 80 of the Code of Civil Procedure were mandatory and must be enforced by the court and that they might be waived by the authority for whose benefit they were provided. In that case the Judicial Committee held that Section 80 of the Code of Civil Procedure was explicit and mandatory; but still it held that it could be waived by the authority for whose benefit that was provided. This aspect of the law in the context of Section 35 of the Act was considered by a Division Bench of the Calcutta High Court in *Gaya Prosad v. Seth Dhanrupwal Bhandari*⁷. Dealing with this argument, P.N. Mookerjee, J., speaking for the court, observed:

"It is true that Section 35 of the Bengal Money-Lenders Act casts a duty upon the court but such duty is solely for the benefit the private benefit of the judgment-debtor. It is, therefore, open to him to waive this benefit, or, in other words, to waive his objection of non-observance of that statutory provision by the court . . .

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Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it. In the present case the executing court had inherent jurisdiction to sell the property. We have assumed that Section 35 of the Act is a mandatory provision. If so, the question is whether the said provision is conceived in the interests of the public or in the interests of the person affected by the non-observance of the provision. It is true that many provisions of the Act were conceived in the interests of the public, but the same cannot be said of Section 35 of the Act, which is really intended to protect the interests of a judgment-debtor and to see that a larger extent of his property than is necessary to discharge the debt is not solearned Many situations may be visualized when the judgment-debtor does not seek to take advantage of the benefit conferred on him under Section 35 of the Act; for instance, if the part of the property carved out by the court for sale is separated from the rest of his property, the value of the remaining property may be injuriously affected by the said carving out, in which case the judgment-debtor may prefer to have his entire property sold so that he may realize the real value of the property and pay part of the sale price towards the decretal amount. He cannot obviously be compelled to submit to the sale of a part of the property to his disadvantage. A provision intended for his benefit cannot be construed in such a way as to work to his detriment. But it is said that the proviso to Section 35 of the Act

indicates a contrary intention. Under that proviso, "if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree- holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest bid and the price so specified". This is only an option given to the decree-holder: he may exercise this option, if he does not like to go through the entire sale proceedings over again. In one contingency this proviso also works for the benefit of the judgment-debtor, for he will be relieved of part of his indebtedness. But anyhow this does not show that the main provision is not intended for the benefit of the judgment-debtor. We are, therefore, satisfied, on a true construction of Section 35 of the Act, that it is intended only for the benefit of the judgment-debtor and, therefore, he can waive the right conferred on him under Section 35 of the Act.

(underline supplied)

6. (1947) LR 74 IA 223, 228

7. (1953) 58 CWN 503, 508

71. It is well settled that the fundamental rights cannot be waived [See ***Basheshar Nath v. CIT, 1959 Supp (1) SCR 528 : AIR 1959 SC 149 : (1959) 35 ITR 190 ; State of Gujarat v. M.P. Shah Charitable Trust, (1994) 3 SCC 552***]. However, it is also to be remembered that this right given to an affected party is not a fundamental right, which cannot be waived.

72. Yet, there is a much more fundamental issue, which perhaps has not been dealt with by any of the High Courts in deep, though superficially by the Calcutta High Court.

This Clause (3) added to Article 226 certainly limits the power of the High Court in dealing with interim orders by laying down an inflexible rule (if held to be mandatory) that the High Court has to dispose of without fail within 2 weeks,

otherwise the *ex-parte* interim order will stand vacated. No discretion at all has been given to the High Court in exercising the power of the jurisdiction under Article 226 in matters of extension of *ex-parte* order beyond 2 weeks though jurisdiction to pass interim order has been conferred and not ousted.

In our opinion, this curtailment of the discretionary power of Court in exercise of jurisdiction under Article 226 is an anathema to the very core of the power and discretionary jurisdiction of the High Court under Article 226 which is also based on equity, since the jurisdiction to pass interim order has not been otherwise denied.

This power conferred upon the High Courts under Article 226 is an extraordinary jurisdiction circumscribed only by well settled legal principles and self-imposed restrictions.

73. The power and jurisdiction of the High Court under Article 226 has been explained by the Hon'ble Supreme Court in numerous decisions. Reference to some of the judgements may be made to indicate the wide scope of the power and jurisdiction of the High Court under Article 226.

This power is in fact wider than Article 32 of the Constitution and is couched in comprehensive phraseology and it *ex facie* confers a wide power on the High Court to reach injustice wherever it is found. This Article enables the High Courts to mould the reliefs to meet the peculiar and extraordinary circumstances of the case, as held in ***State of W.B. v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571 : (2010) 2 SCC (Cri) 401***, as follows:

"57. As regards the powers of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any Government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 of the Constitution that there is a marked difference in the nature and purpose of the right conferred by these two articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by **Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well i.e. for enforcement of any legal right conferred by a statute, etc.**

58.

59.*In Dwarka Nath case¹⁴ this Court had said that Article 226 of the Constitution is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. This article enables the High Courts to mould the reliefs to meet the peculiar and extraordinary circumstances of the case.* Therefore, what we have said above in regard to the exercise of jurisdiction by this Court under Article 32, must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226 of the Constitution.

(emphasis added)

14 AIR 1966 SC 81 : (1965) 3 SCR 536

74. Highlighting the same principle emphasising the scope of Article 226, it was held in **Secy., ONGC Ltd. v. V.U. Warriar, (2005) 5 SCC 245** that ,

"26. The matter can be considered from another angle also. It is well settled that the jurisdiction of the High Court under Article 226 of the Constitution is equitable and discretionary. The power under that article can be exercised by the High Court "to reach injustice wherever it is found". More than fifty years before, in *Veerappa Pillai v. Raman & Raman Ltd.*¹¹, the Constitution Bench

of this Court speaking through Chandrasekhara Aiyar, J., observed (at SCR p. 594) that the writs referred to in Article 226 of the Constitution are obviously intended to enable the High Court to issue them

“in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess **has resulted in manifest injustice**”.

(emphasis supplied)

27. Similarly, in the leading case of *Sangram Singh v. Election Tribunal, Kotah*¹² dealing with the ambit and scope of powers of High Courts under Article 226 of the Constitution, Bose, J. stated: (SCR p. 8)

“That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. **Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily;** and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, **though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be.** Therefore, writ petitions should not be lightly entertained in this class of case.”

(emphasis supplied)

The above principle has been reiterated and followed by this Court in several subsequent cases.”

11 1952 SCR 583 : AIR 1952 SC 192

12 (1955) 2 SCR 1 : AIR 1955 SC 425

75. Thus, if this wide discretionary power of the High Court to reach injustice wherever it is found, is curtailed by imposing an inflexible procedural provision under Article 226(3) that the High Court has to dispose of an application within 2 weeks, otherwise the interim order passed by it will automatically get vacated, it flies in the face of the wide discretionary power of the High Court to grant appropriate relief to reach injustice wherever it is found. It amounts to putting a procedural restriction on a wide discretionary power and thus negates the very essence of discretionary power given to the High Court.

76. It has been held that any attempt to introduce unnecessary procedural restrictions would defeat the purpose of the Article itself, though the said observation was made by the Hon’ble Supreme Court in the context of applicability of equity jurisdiction in England. Nevertheless, the Hon’ble Supreme Court was concerned that any attempt to place **procedural restrictions** would **not be permissible**, as held in **Dwarka Nath v. ITO, (1965) 3 SCR 536 : AIR 1966 SC 81 : (1965) 57 ITR 349**:

4.....

.....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. This interpretation has been accepted by this Court in *Basappa v. Nagappa*¹ and *Irani v. State of Madras*².

1 (1962) 2 SCR 169

2 (1955) 1 SCR 250

(emphasis added)

77. Thus, it is this weighty consideration we have taken into account in taking the view that Clause (3) of Article 226 cannot be mandatory for it abridges and curtails the wide discretionary power of judicial review of the High Court, which is also a basic structure of the Constitution, which even by constitutional amendment cannot be ousted or abridged, as held in ***Committee for Protection of Democratic Rights*** (supra) as follows,

"39. It is trite that in the constitutional scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. In fact, the importance of separation of powers in our system of governance was recognised in *Special Reference No. 1 of 1964*⁹, even before the basic structure doctrine came to be propounded in the celebrated case of *Kesavananda Bharati v. State of Kerala*¹⁷, wherein while finding certain basic features of

the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Later, similar view was echoed in *Indira Nehru Gandhi v. Raj Narain*¹⁸ and in a series of other cases on the point. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. ***Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a constitutional amendment.*** (See *L. Chandra Kumar v. Union of India*¹³.) Besides, judicial review is otherwise essential for resolving the disputes regarding the limits of constitutional power and entering the constitutional limitations as an ultimate interpreter of the Constitution.” (emphasis added).

9 AIR 1965 SC 745 : (1965) 1 SCR 413

13 (1997) 3 SCC 261 : 1997 SCC (L&S) 577

17 (1973) 4 SCC 225

18 1975 Supp SCC 1

78. If judicial review is a basic structure of the Constitution which cannot be abridged even by a constitutional amendment and if the said power is exercised by the High Court under Article 226 of the Constitution of India, the scope of Article 226 cannot be emasculated by curtailing the discretionary power by mandating the High Court to decide an application within a fixed time frame, without any flexibility or discretion to go beyond the stipulated 2 weeks. In fact, there may be various situations including the one encountered in the Madras High Court case, as also in the case of ***Thokchom Anita Devi*** (supra), because of which the application could not be considered within 2 weeks. In the Madras case, it was the inability of the High Court to dispose of the application within 2 weeks, not for the fault of the writ petitioner, in which context

it was held that no one shall be prejudiced by an act of court (*actus curiae neminem gravabit*).

79. There could be also other reasons for not being able to dispose of the application within 2 weeks. One can imagine and speculate a situation like the lockdown imposed because of pandemic like Covid-19 which restricted normal functioning of many institutions including the judiciary or there may be other natural calamities like tsunami or severe flood or earthquake which could throw normal life off course temporarily within which period the mandated 2 weeks period would expire. Since the view that this Clause (3) brooks no exception, being a mandatory provision, results in automatic vacation of the stay order on the lapse of the 2 weeks, it can certainly lead to great prejudice to the petitioner. Thus any party in a judicial proceeding including the party who obtained the *ex-parte* order ought not be made to suffer on account of inability or inaction on the part of an entity or situation not within the control of the party.

80. Of course, one may say that the language of the Clause (3) sufficiently protects any such eventuality by providing that “*or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open*”, so that in such eventuality, the High Court can consider on the opening of the Court. This view, then takes into account such possibility of the application not being disposed of within 2 weeks. Thus, once the Legislature itself acknowledges that such eventuality can take place, what would prevent the High Court to grant time on such other similar eventuality taking place? Under the circumstances, if

the provision is read to be directory in nature, this issue gets resolved.

81. One may also visualise a situation where, inspite of reopening of the Court, no Bench is available to deal with such an application as happened in the case of **Thokchom Anita Devi** (supra). In that case this Court inspite of acknowledging that the application could not be considered within 2 weeks due to lack of availability of Bench, nevertheless, invoked Clause (3) to vacate the interim order on the ground that constitutional provision cannot be rewritten, negating the principle of *actus curiae neminem gravabit*.

It may be noted that this issue, based on the principle *actus curiae neminem gravabit*, was also raised and considered in **Krishnan Kumar Agarwala** (supra) as well, but also rejected.

The Calcutta High Court held that even if the interim order is vacated, nothing prevents the High Court to grant an interim order afresh after hearing the parties. On the other hand, our High Court in **Thokchom Anita Devi** (supra) held that though it is a very unfortunate situation, but it cannot be avoided as the Court cannot rewrite the language of the provision.

82. We would, however, beg to differ from both the views held by the Calcutta High Court and our own High Court.

Even if a fresh interim order is passed after the automatic vacation under Article 226(3), by that time a serious injury may have been caused with the vacation of the interim order. There may be situations, where by virtue of

vacation of the interim order, the petition itself may be virtually rendered infructuous. Further, as observed in ***Asian Resurfacing of Road Agency (P) Ltd. v. CBI, (2018) 16 SCC 299*** continuation of the interim order may be necessary to secure justice or to prevent abuse of the process of the Court. All instances falling within this category of cases may not be visualised at this stage. Yet because of the default vacation of the interim order, cause of justice may be defeated, though the alleged “suffering” of the party against whom the *ex-parte* order was passed may get prolonged by a few more days. Nevertheless, it cannot be said to cause an irreparable injury if the consideration of the application get delayed by a few days.

83. As regards the view of our High Court in ***Thokchom Anita Devi*** (supra), we can only say that it is to take care of such situation as confronting the Court in the said case, that there is need to ensure that the interim order does not get vacated by default. The situation arising in the said case was that there was no Bench available in the Imphal Bench of the Gauhati High Court at the relevant time to consider the application within 2 weeks, for which the writ petitioners could hardly be blamed as availability of Bench does not depend on either of the contesting parties but on the institution, and should not be made to suffer for no fault of theirs. Thus, the provision of Article 226(3) should not be read literally or in a pedantic manner but must be construed in such a manner as to prevent gross injustice to the writ petitioners or to subserve the interest of justice on the principle, *actus curiae neminem gravabit*.

84. As regards the case before the Calcutta High Court, it was contended before the Calcutta High Court that Clause (3), inserted by way of substitution by the Forty-Fourth Amendment Act, 1978, is *ultra vires* the amending powers of Parliament under Article 368 of the Constitution, as by the provisions of Clause (3), one of the basic features of the Constitution has been affected which Parliament cannot do in view of the majority decisions in ***Kesavananda Bharati [(1973) 4 SCC 225]***. It was urged that the power of Judicial Review is one of the basic features of the Constitution as held in ***Indira Nehru Gandhi*** case **[AIR 1975 SC 1590]** and Clause (3) of Article 226 has affected that power of Judicial Review.

85. This plea, however, was rejected on the ground that the power of the High Court to issue *ex-parte* interim orders in furtherance of the main relief prayed for in a petition under Article 226 is not a creature of Article 226, nor any other provisions of the Constitution and therefore it cannot be a "feature" far less a 'basic feature' of the Constitution, and, therefore if there is no such feature, basic or otherwise of the Constitution, the provision of Clause (3) providing the automatic vacation of an interim order, if the application for its vacation remains undisposed of for certain period, cannot be said to affect or alter any feature or the structure of the Constitution.

86. With respect, we are not able to subscribe to the view taken by the Learned Single Judge of the Calcutta High Court for the reason that power to grant interim relief is very much an ancillary part of the ultimate power of the High Court to

grant appropriate relief under Article 226 and inseparable from the substantive power to grant the main relief. If the High Court is divested of the power to grant interim relief in aid of the main relief sought by any party, the very power of judicial review gets nullified. The power of the Court to grant interim relief is always an attending feature of the power of the Court to grant the ultimate relief and it cannot be seen as a separate power of the Court.

It is now well settled that "*an interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding*" [***State of Orissa v. Madan Gopal Rungta, 1952 SCR 28 : AIR 1952 SC 12 : (1951) 2 MLJ 645; Mediquip Systems (P) Ltd. v. Proxima Medical System GmbH, (2005) 7 SCC 42***].

Thus, power to grant interim relief is inherent in the High Court which has the jurisdiction and authority to finally determine the *lis* and rights of the parties and grant appropriate final order. This discretion to pass appropriate interim order for such period as the Court may deem fit is an inalienable part of the inherent power of the Court which in our opinion could not be curtailed by a processual provision. This provision, thus, hits at the very heart of the inherent and discretionary power of the Court to grant appropriate relief in exercise of judicial review, if this provision is to be considered to be mandatory in nature. However, if it is read to be directory in nature, this limitation on the power of the Court can be reconciled and harmonised.

87. As discussed above, the power of the High Court under Article 226 is plenary in nature and is invoked and used to reach injustice wherever found.

The importance and significance of this discretionary and inherent power of High Court as regards power to grant interim orders came up for consideration, albeit, in a slightly different context in ***Asian Resurfacing of Road Agency (P) Ltd. v. CBI, (2018) 16 SCC 299***. Though the said decision was rendered in the context of the power of the High Court to grant interim stay in proceedings under the Prevention of Corruption Act, 1988 in view of the specific bar under Section 19(3)(c) thereof, the principle underlying the said decision would be relevant in the present case to understand the real purport and scope of Article 226(3).

Section 19(3)(c) of the Act provides that,

“19. Previous sanction necessary for prosecution.—(1)
No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, save as otherwise provided in the Lokpal and Lokayuktas Act, 2013.....

(2)

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—

(a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3).....”

88. One of the issues which arose for consideration in ***Asian Resurfacing of Road Agency (P) Ltd.*** (supra) was, whether in view of the blanket prohibition under Section 19(3)(c) of the P.C. Act, it will be permissible for the High Court in exercise of the power under Section 482 Cr.P.C. or Article 227 to interfere with the order of framing charge and grant stay.

The Hon’ble Supreme Court in the aforesaid case held that,

“**28.** We have thus no hesitation in concluding that the High Court has jurisdiction in an appropriate case to consider the challenge against an order framing charge and also to grant stay but how such power is to be exercised and when stay ought to be granted needs to be considered further.”

In coming to the aforesaid conclusion, while emphasising the public policy to ensure that proceedings dealing with corruption charges are speedily concluded and not unnecessarily delayed by curtailing the power of the courts in granting interim stays at various stages of such trials, the Supreme Court reiterated the inherent power of the High Court, for securing the ends of justice or to check abuse of the process of the court. In this regard it would be apposite to refer to paragraph no. 19 of the judgment in ***Asian Resurfacing of Road Agency (P) Ltd.*** (supra) [SCC pp 314-315], which reads as follows:

“**19.** It is not necessary to refer to all the decisions cited at the Bar. Suffice it to say that a Bench of three Judges in *Madhu Limaye*¹⁰ held that the legislature has

sought to check delay in final disposal of proceedings in criminal cases by way of a bar to revisional jurisdiction against an interlocutory order under sub-section (2) of Section 397 CrPC. At the same time, inherent power of the High Court is not limited or affected by any other provision. It could not mean that limitation on exercise of revisional power is to be set at naught. Inherent power could be used for securing ends of justice or to check abuse of the process of the court. This power has to be exercised very sparingly against a proceeding initiated illegally or vexatiously or without jurisdiction. The label of the petition is immaterial. This Court modified the view taken in *Amar Nath v. State of Haryana*²⁷ and also deviated from the test for interlocutory order laid down in *S. Kuppuswami Rao*²⁵. We may quote the following observations in this regard: (*Madhu Limaye case*¹⁰, SCC pp. 554-56 & 558, paras 6, 10 & 13)

"6. The point which falls for determination in this appeal is squarely covered by a decision of this Court, to which one of us (Untwalia, J.) was a party in *Amar Nath v. State of Haryana*²⁷. But on a careful consideration of the matter and on hearing the learned counsel for the parties in this appeal we thought it advisable to enunciate and reiterate the view taken by two learned Judges of this Court in *Amar Nath case*²⁷ but in a somewhat modified and modulated form.

* * *

10. As pointed out in *Amar Nath case*²⁷ the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory

order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court". But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of *autrefois acquit*.

Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible."

(underline added)

- 10 (1977) 4 SCC 551 : 1978 SCC (Cri) 10
- 25 1947 SCC OnLine FC 13 : (1947) 9 FCR 180
- 27 (1977) 4 SCC 137 : 1977 SCC (Cri) 585

89. Reference was made to **Kartar Singh Vs. State of Punjab, (1994) 3 SCC 569** in the said judgment also in which the Hon'ble Supreme Court highlighted the scope of the power conferred on the High Court under Article 226 emphasising that this jurisdiction cannot be ousted, though it is to be used very sparingly and in rare and appropriate cases. It was held in **Kartar Singh** (supra) as follows,

359. Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions

are enacted in the Act with regard to the grant of bail and appeals arising from any judgment, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the Code...." clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. **But at the same time it cannot be said that the High Courts have no jurisdiction.** Therefore, we totally agree with the view taken by this Court in *Abdul Hamid Haji Mohammed*¹¹⁷ that if **the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in strait-jacket.** However, we would like to emphasise and re-emphasise that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution. (emphasis added)

117 (1994) 2 SCC 664

90. Accordingly, it was held in ***Asian Resurfacing of Road Agency (P) Ltd.*** (supra) as follows:

"37. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. **Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it**

under Sections 397 or 482 CrPC or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered.....”

(emphasis added)

91. In his concurring judgment in ***Asian Resurfacing of Road Agency (P) Ltd.*** (supra), Rohinton Fali Nariman, Hon’ble J, dealt with the scope of the inherent power of the High Court, in the following words,

“54. It is thus clear that the inherent power of a court set up by the Constitution is a power that inheres in such court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also found in Article 21 of the Constitution. This being the constitutional position, it is clear that Section 19(3)(c) cannot be read as a ban on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non obstante clause in Section 19(3) applying only to the Code of Criminal Procedure.”

(emphasis added)

In the aforesaid case of ***Asian Resurfacing of Road Agency (P) Ltd.*** (supra), reference was also made to the decision in ***Madhu Limaye vs. State of Maharashtra, (1977) 4 SCC 551.*** In ***Madhu Limaye*** (supra), it was held that,

“10. As pointed out in *Amar Nath case*²⁷ the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or

other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court", but, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. **But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court.** But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case

where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of *autrefois acquit*. **Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers.** The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.

(emphasis added)

27 (1977) 4 SCC 137 : 1977 SCC (Cri) 585

Thus, the Hon'ble Supreme Court took the view that the inherent power of the High Court could not have been ousted in spite of specific statutory bar in passing any stay order under Section 19(3)(c) of the P.C. Act, for securing the ends of justice and to prevent abuse of the process of the Court.

92. As regards the ouster of jurisdiction of the court and scope of judicial review, one may also refer to the decision in ***Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651.***

Para 7 of the Tenth Schedule to the Constitution incorporated by the 52nd Constitution Amendment Act, provides that notwithstanding anything in the Constitution, no

court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

In the light of the provisions of Para 7 of the Tenth Schedule which specifically barred the jurisdiction of the court, the majority in **Kihoto Hollohan** (supra) held that, judicial review will still be available, though the scope will be very limited and would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non compliance with rules of natural justice and perversity.

The Hon'ble Supreme Court further held that in view of the limited scope of judicial review, it cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a *quia timet* action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings, *however, with the exceptions where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.*

It was thus held in **Kihoto Hollohan** (supra) as follows:

"109. In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under Paragraph 6, the scope of judicial review under Articles 136, and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under Paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

110. In view of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a *quiatimet* action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.

111. In the result, we hold on contentions (E) and (F):

That the Tenth Schedule does not, in providing for an additional grant (*sic* ground) for disqualification and for adjudication of disputed disqualifications, seek to create a non-justiciable constitutional area. The power to resolve such disputes vested in the Speaker or Chairman is a judicial power.

That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the speakers/Chairmen is valid. But the concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution insofar as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.

That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood and explained in *Keshav Singh case*³² to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words 'be deemed to be proceedings in Parliament' or 'proceedings in the legislature of a State' confines the scope of the fiction accordingly.

The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule

act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no *quiatimet* actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence.

(emphasis added)

32 (1965) 1 SCR 413 : AIR 1965 SC 745

93. The Hon'ble Supreme Court in the recent decision in ***Keisham Meghachandra Singh Vs. Hon'ble Speaker Manipur Legislative Assembly and Others*** 2020 SCC OnLine SC 55, made the following observation as regards the power of judicial review in a proceeding for disqualification pending before the Speaker of the Legislative Assembly, which re-emphasised that power of judicial review can never be ousted, even if it is with limited scope in any proceeding which may be in the exclusive domain of a constitutional authority.

"29. A reading of the aforesaid decisions, therefore, shows that what was meant to be outside the pale of judicial review in paragraph 110 of *Kihoto Hollohan* (supra) are *quia timet* actions in the sense of injunctions to prevent the Speaker from making a decision on the ground of imminent apprehended danger which will be irreparable in the sense that if the Speaker proceeds to decide that the person be disqualified, he would incur the penalty of forfeiting his membership of the House for a long period. *Paragraphs 110 and 111 of Kihoto Hollohan (supra) do not, therefore, in any manner, interdict judicial review in aid of the Speaker arriving at a prompt decision as to disqualification under the provisions of the Tenth Schedule.* Indeed, the Speaker, in acting as a Tribunal under the Tenth Schedule is bound to

decide disqualification petitions within a reasonable period. What is reasonable will depend on the facts of each case, but absent exceptional circumstances for which there is good reason, a period of three months from the date on which the petition is filed is the outer limit within which disqualification petitions filed before the Speaker must be decided if the constitutional objective of disqualifying persons who have infringed the Tenth Schedule is to be adhered to. This period has been fixed keeping in mind the fact that ordinarily the life of the Lok Sabha and the Legislative Assembly of the States is 5 years and the fact that persons who have incurred such disqualification do not deserve to be MPs/MLAs even for a single day, as found in *Rajendra Singh Rana* (supra), if they have infringed the provisions of the Tenth Schedule.

(emphasis added)

94. If we keep the aforesaid principles in mind, in our considered opinion, Clause (3) to Article 226 should be read as directory. In other words, inspite of placing a time limit of 2 weeks to dispose of the application filed for vacating an *ex-parte* stay order, the High Court in exercise of the inherent power to secure the ends of justice and to prevent abuse of the process of the court may consider an application beyond 2 weeks. But keeping in mind the purpose of the constitutional amendment, which is to prevent any undue prolonging of *ex-parte* interim order, such consideration beyond 2 weeks must be done very sparingly and only in exceptional circumstances as has been dealt with in the Madras High Court case, as well as in the present case, because of waiver by the applicant. If Clause (3) to Article 226 is held to be mandatory and the 2 weeks period is held inflexible, this inherent power of the High Court to secure the ends of justice and to prevent abuse of the process of the court would be nullified, which can be avoided if this Clause (3) is considered directory.

95. We are, accordingly, of the view that even though the language used in the clause appears very clear and unambiguous which indicates it to be mandatory, since it is primarily in the interest of only a specific category of opposite party and not of all the respondents against whom the interim order has been passed, it is directory in nature. It is invokable by only such party who was not heard at the time of passing the ad interim order, and who may not also invoke the said Clause (3), and even if invoked, may not seriously pursue such an application or may waive his right to get it disposed within 2 weeks. Thus, it would be more appropriate to say that this clause is directory rather than mandatory.

96. We accordingly, hold that even though there are facets of law which support the view that Clause (3) of Article 226 of the Constitution of India is mandatory in nature, there are more overwhelming attributes as discussed above to show that this provision is directory in nature.

97. In the present case, as discussed above, we take the view that even if the date of furnishing the copy of the application is treated to be 21.01.2020, the applicant appellants having agreed to accept 31.01.2020 as the date of furnishing of a copy of the application instead of 21.01.2020, they have waived the right to have the application considered within 2 weeks of 21.01.2020. If the appellants really considered that a copy of the application was indeed served upon the counsel for the petitioners on 21.01.2020, in which event the 2 weeks would have lapsed on 04.02.2020 and when the matter was taken upon on 31.01.2020, they should not have submitted before the Court that the petitioners had

received a copy of the application on 31.01.2020, in which event the 2 weeks would lapse only on 14.02.2020. Under such circumstances, it has to be deemed that the applicant/appellants had waived their right to have the application considered before 04.02.2020 by the Court. It may be also noted that the intention of the Court as can be understood from the order dated 31.01.2020 was that the Court desired to fix the date of consideration on 12.02.2020 by treating it to be within 2 weeks of the service of application on 31.01.2020.

Thus, we hold that the appellants by their conduct had acquiesced to fixing the date on 12.02.2020 inspite of apparently knowing that it was served on 21.01.2020.

If that is so, as mentioned above, this right granted to the appellants under Article 226(3), not being a fundamental right and incorporated for the benefit of only such party, waived his right to get the application disposed of within 2 weeks. In such event he cannot get the benefit of the automatic vacation of the interim order.

98. We reiterate that even if Clause (3) is deemed to be mandatory as held by our High Court on earlier occasions such a provision can be waived as held in **Dhirendra Nath Gorai** (supra), as it is essentially for the benefit of a specific category of a contesting party and it is not obligatory on the part of such party that he has to mandatorily invoke Clause (3) of Article 226. The result will be that even if such an application is filed under Article 226(3), under the circumstances mentioned above and also as described in the decision in **T. Gnanasambanthan** of the Madras High Court case, the application will be treated as a normal application and interim

order may be vacated or continued in the usual manner, without invoking the provisions of Article 226(3) of the Constitution.

99. As regards the impugned order, as we have already held that the finding of the Learned Single Judge in the impugned order that the copy of the application was furnished on 31.01.2020 does not suffer from any illegality and hence, we also take that the copy of the application was furnished on 31.01.2020.

100. Accordingly, for the reasons discussed above, we hold that the impugned decision of the Learned Single Judge does not warrant interference on this ground.

However, the appellants have also raised another issue that the Learned Single Judge did not consider the three cardinal principles of granting stay/injunction of the existence of *prima facie* case, balance of convenience and irreparable loss injury which may be caused, while rejecting the application of the appellants.

101. On perusal of the impugned order, it is seen that Learned Single Judge did record the submissions advanced by the contesting parties on the merit of the case. However, no definitive determination was made based on the aforesaid three cardinal principles and the Learned Single Judge disposed of the matter by observing that neither the State respondents nor the private respondents have filed their counter affidavits. The Learned Single Judge, by observing that although the opposite parties/writ petitioners who are Class II officers in the Department may have challenged the

seniority positions assigned to the applicants/respondents in the cadre of Class-I officers in the Department by the impugned order dated 11.06.2019, yet, in view of the fact that the opposite parties/writ petitioners have also challenged the regularization of the services of the applicants/respondents, took the view that the entire writ petition itself be adjudicated on merit, once the counter affidavits are filed by the respondents in the writ petition and accordingly, dismissed the application filed by the appellants.

102. We would, accordingly, request the Learned Single Judge to hear the parties again about the desirability of continuing or discontinuing the interim order by applying the aforesaid three cardinal principles and dispose of the application on merit accordingly.

103. We would also like to observe that since we have taken the view that Clause (3) of Article 226(3) is directory in nature as opposed to the view taken earlier by our own High Court referred to above, we deem it appropriate that this issue may be referred to a larger Bench for which we direct the Registrar to place this matter before the Hon'ble Chief Justice with the request to constitute a larger Bench to decide as to whether the provisions of Clause (3) of Article 226 are mandatory or directory.

104. Though we have referred to a larger Bench to decide the issue referred to above, in view of our finding that the Learned Single Judge did not commit any illegality in holding that a copy of the application was served upon the respondents on 31.01.2020 and not 21.01.2020, there would not be vacation

of the interim order by default under Article 226(3) even by assuming it to be mandatory.

As regards the issue as to when the copy of the application was furnished to the respondents having been settled as having been served on 31.01.2020 for the reasons discussed above, it need not be reopened.

105. Since we have expressed our view that Learned Single Judge may reconsider the application for vacation or continuation of the interim orders passed earlier on the touchstone of the three cardinal principles as discussed above, the I.A. (C) No. 176(K)2019 be placed before the Learned Single Judge again for reconsideration on this aspect only.

106. The appeal is, accordingly, partly allowed.

Sd/-
JUDGE

Sd/-
JUDGE

Comparing Assistant