REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION [C] NO.231 OF 2018

MEDICAL COUNCIL OF INDIA ... PETITIONER

VERSUS

STATE OF KERALA & ORS. ... RESPONDENTS

WITH

WRIT PETITION [C] NO.178 OF 2018

J U D G M E N T

ARUN MISHRA, J.

1. The question involved in the writ petition/s is, whether the State of Kerala is competent to promulgate the Kerala Professional Colleges (Regularisation of Admission in Medical Colleges) Ordinance, 2017 (hereinafter referred to as "the Ordinance") notified on 20.10.2017, which is intended to nullify judgments and orders of this Court and encroaches upon the power of the judiciary.

2. The State of Kerala has promulgated the impugned Ordinance for regularising the admission of 180 students who were illegally admitted in the Kannur Medical College and Karuna Medical College

run by Prestige Educational Trust and Safe Development Alms Trust respectively. The students were admitted to the said medical colleges in the academic year 2016-17. After enquiry, it was found by the Admission Supervisory Committee of the professional colleges (in short "the ASC") that admissions were illegal. The decision was upheld by the High Court of Kerala and by this Court.

3. The background facts are that on 28.4.2016, this Court in *Sankalp Charitable Trust v. Union of India & Ors*. (2016) 7 SCC 487 directed that admissions to the MBBS/BDS courses shall be through the National Eligibility-cum-Entrance Test (NEET). The ASC vide order dated 4.8.2016 issued several directions to all the professional colleges in the State of Kerala to conduct the admission process in compliance of the directions laid down by this Court in *Sankalp Charitable Trust* (supra). On 9.8.2016, the Central Government directed all the States and Union Territories to conduct the combined/centralised counselling for the academic year 2016-17 for admission in MBBS course in the respective States/Union Territories, in line with the judgment passed by this Court in the case of *Modern Dental College & Research Centre & Anr. v. State of M.P. & Ors*. (2016) 7 SCC 353.

4. The Government of Kerala vide order dated 23.8.2016 directed all the medical colleges to admit only those students who were selected through common counselling. Writ Petition [Civil] No.28041

of 2016 was filed in the Kerala High Court challenging the order dated 23.8.2016. The High Court vide order dated 26.8.2016 issued interim directions that the admissions in the MBBS course for the academic year 2016-17 shall be conducted on the basis of the marks obtained in NEET, 2016 and all applications will be made online to facilitate transparency with regard to merit and identities of the applicants.

5. The ASC on 3.9.2016 after taking cognizance of the various complaints received by it, issued directions to the private medical colleges in Kerala to comply with the directions issued by it on 4.8.2016. It was also mentioned that any student whose admission was made in contravention of the directions issued by the ASC, will not be registered by Kerala University of Health Sciences (KUHS). On 6.9.2016 and 9.9.2016, the ASC passed the orders with regard to the prospectus submitted by Kannur and Karuna Medical Colleges approving the prospectus subject to the exception that reservation of seats under the management quota for the dependents of various trust associations was unsustainable in law and could not be applied while admitting the students. Questioning the same, said medical colleges filed W.P. No.30697/2016 and W.P. [C] No.30712/2016 in the Kerala High Court. The ASC vide order dated 10.9.2016 observed that the explanation submitted by the medical colleges was unsatisfactory and decided to revise the approval of the prospectus and issued a revised

admission schedule for the aforesaid medical colleges whereby the date for submitting online applications was revised and extended till 19.9.2016.

6. After conducting an enquiry, the ASC issued an order dated 15.9.2016 with respect to Kannur Medical College observing that the medical college had not called online applications as directed by the ASC by its order dated 10.9.2016 and directed that the admissions made, if any, shall stand cancelled.

7. The ASC passed another order after holding an enquiry on 15.9.2016 with respect to Karuna Medical College and held that the portal for online was closed on 6.9.2016 and there was a contravention of the directions passed by it in the order dated 10.9.2016 wherein the revised date for submitting online applications was up to 19.9.2016. On 17.9.2016 the ASC passed yet another order addressed to all the medical colleges situated in Kerala State, the directions issued by it were reiterated and it was also directed that the directions be placed on the website of the medical colleges forthwith. On 19.9.2016 the ASC further directed the colleges to conduct all admissions strictly in compliance with the directions which were issued by it from time to time.

8. The High Court of Kerala by its order dated 23.9.2016 passed in aforesaid writ petitions filed by the medical colleges approved the

decision taken by the ASC in respect of de-reservation of the management quota seats which were reserved for the dependants of various Trust associations, and issued various interim directions, keeping the writ petitions pending. The order dated 23.9.2016 was questioned in this Court in SLP [C] CC. Nos.19387-88/2016 – *State of Kerala v. Safe Development Alms Melamuri & Ors*. which were dismissed and this Court requested the High Court to decide the main writ petition as expeditiously as possible.

9. This Court vide order dated 28.9.2016 passed in C.A. No.9862/2016 – *Union of India v. Sree Narayana Institute of Medical Sciences & Ors*. set aside the interim direction passed by the Kerala High Court which allowed private medical colleges in the State of Kerala to conduct their own counselling and directed to conduct the centralised counselling for admissions in MBBS course for the academic year 2016-17. As the last date was closed, this Court on 30.9.2016 passed an order in CA No.9862/2016 – *Union of India v. Sree Narayana Institute of Medical Sciences & Ors*. (supra) and extended the last date for admissions in MBBS course from 30th September to 7th October 2016 so as to comply with the order.

10. On 2.10.2016 separate orders were passed by the ASC wherein it was observed that the respondent-medical colleges have deliberately flouted the directions issued vide its orders dated 4.8.2016, 3.9.2016,

4.9.2016, 10.9.2016, 17.9.2016 and 19.9.2016. The ASC cancelled all the admissions made by the respondent medical colleges in the MBBS course for the academic year 2016-17. Aggrieved by the order dated 2.10.2016 the respondent medical colleges filed W.P. Nos.32186/2016 and 32185/2016 in the Kerala High Court. The Kerala High Court vide its order dated 6.10.2016 was pleased to direct the respondent medical colleges to place all the relevant records pertaining to admission process before the Commissioner for Entrance Examination (CEE) for verification. It was further directed that after verification of the records the CEE shall finalise allotment of seats strictly on the basis of interse merit and complete it by 7.10.2016.

11. On 7.10.2016, Kannur Medical College made a statement before the Kerala High Court that no student turned up before the CEE seeking admission in their college. On 13.10.2016 the Commissioner for Entrance Examination (CEE) submitted its report concluding that the procedure followed by Karuna Medical College was flawed and there were material irregularities committed by it while admitting 30 students. So far as Kannur Medical College was concerned, the representative of the said college appeared before the CEE on 7.10.2016 at about 11.30 a.m. and left by 12.10 p.m. after furnishing the records. No explanation or clarification was furnished by the representatives of the medical college, and the conduct was noted by

the CEE. The person who claimed to be the representative of the college left immediately when he was asked to furnish the letter of authorisation from the college authorities.

12. The Kerala High Court vide judgment and final order dated 28.10.2016 cancelled as many as 150 admissions made by Kannur Medical College and 30 admissions made by Karuna Medical College through 'spot counselling'. The High Court of Kerala further directed the ASC to decide the rival claims made by students of both the medical colleges who had been admitted as well as the claims by other eligible students who were parties before the court.

13. The ASC passed a reasoned order dated 14.11.2016 whereby it quashed 150 admissions made in Kannur Medical College and ASC has observed that applications were not received online:

> "13. The ASC has scrutinized the 'online application' submitted by the Medical College. Even a cursory look of the application show that they are not actual 'online applications'. The forms do not show the name of the Medical College to which the applications were made. It doesn't carry photograph of the applicant. There is no signature of applicant, either digital or scanned. There is no application date. On the whole, the submitted applications only shows that they have been prepared for the purpose of submitting before the ASC as an attempt to claim online application system. Even the documents submitted before the CEE on 07.10.2016, as per the interim order of the Hon'ble High Court, these applications were not seen submitted for consideration, as reported by CEE…"

14. On 15.11.2016, aggrieved by the common judgment dated 28.10.2016 passed by the Kerala High Court in the case of respondent

medical colleges *i.e.* Karuna Medical College, as well as Kannur Medical College and the trusts – Safe Development Alms Trust and Prestige Educational Trust, filed SLP [C] Nos.32580-81/2016 and 35374-75/2016 before this Court. The MCI also filed SLP [C] Nos. 3882/2017 and 3952/2017. The students also petitioned this Court against the judgment and order passed by the Kerala High Court. In the matter which was filed by the colleges and the students, the order dated 14.11.2016 by the ASC was also questioned and this Court after hearing learned counsel for the parties for days together and after perusing the record which was adduced before it, did not find it appropriate to interfere with the order dated 14.11.2016. The colleges produced even those documents which they did not produce before the CEE/ASC and after examining all the documents, this Court declined to interfere in the matter vide order dated 22.3.2017. This Court further directed that the 30 students who were found eligible but were deprived of the admissions in Karuna Medical College, shall be adjusted in the next academic session i.e. 2017-18 and the corresponding number of seats shall be reduced for the said session for admissions. Review petitions were also filed which were dismissed by this Court on 2.5.2017.

15. After the aforesaid controversy was set at rest by the judgment of this Court, the State Government notified the impugned Ordinance on

20.10.2017 whereby admission of the students who were illegally admitted in the MBBS course in the year 2016-17 in the said medical colleges, were sought to be regularised. The Ordinance promulgated by the Government of Kerala is extracted hereunder:

> "**THE KERALA PROFESSIONAL COLLEGES (REGULARISATION OF ADMISSION IN MEDICAL COLLEGES) ORDINANCE, 2017)**
> Promulgated by the Governor of Kerala in the Sixty-eighth Year of the Republic of India
>
> *AN*
>
> *ORDINANCE*
>
> *to provide for regularisation of admission of students in certain medical colleges in the State during the academic year 2016-17*
>
> *Preamble*- WHEREAS, the admission of certain students in the discipline of medicine for the academic year 2016-17 was cancelled by the Admission Supervisory Committee of the State for non-compliance of its orders by certain managements;
>
> AND WHEREAS, no fault was found on the part of any student who got admission in such colleges;
>
> AND WHEREAS, the seats so cancelled are not allotted to any other students;
>
> AND WHEREAS, it is expedient to provide for regularisation of admission of students in such medical colleges in the State during the academic year 2016-17;
>
> AND WHEREAS, the Legislative Assembly of the State of Kerala is not in session and the Governor of Kerala is satisfied that circumstances exist which render it necessary for him to take immediate action;
>
> NOW, THEREFORE, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India, the Governor of Kerala is pleased to promulgate the following Ordinance: -

BE it enacted in the Sixty-eighth Year of the Republic of India as follows: -

I Short title and commencement-(1) This Ordinance may be called the Kerala Professional Colleges (Regularisation of Admission in Medical Colleges) Ordinance, 2017.
(2) It shall come into force at once.

2. *Regularisation of admission in medical colleges.*- Notwithstanding anything contained in the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-exploitative Fee and other measures to ensure equity and excellence in Professional Education) Act, 2006 (19 of 2006) or in any judgment, decree, order or any proceedings of any court or the Admission Supervisory Committee constituted under section 4 of the said Act or any other authority or in any agreement or instrument made under any law for the time being in force, it shall be lawful for the Government to regularise the admission of candidates who were qualified for admission in the discipline of medicine in any medical college in the State during the academic year 2016-17, but their admission was cancelled by any court or Admission Supervisory Committee, irrespective of the mode of submission of application and the non-production of any material before the Admission Supervisory Committee, subject to such terms and conditions as the Government may deem fit:

Provided that such admission shall not be regularised unless such candidate has duly attended the course during the said academic year.

3. *Procedure for regularisation.*- (1) The managements of the medical colleges who have admitted candidates as specified in section 2 to the discipline of medicine in any medical college and their admission was cancelled, may, within fifteen days from the date of commencement of this Ordinance, apply for regularisation of such admission.

(2) Every application for regularisation of admission under this Ordinance shall be submitted to the Government through the University concerned and the University shall, within seven days of receipt of such application, forward the same to the Government with a report containing its remarks on the following
matters, namely: -

(i) whether the student who got admission is qualified and is eligible as per the rank list prepared on the basis of the National

Eligibility cum Entrance Test, for admission in the discipline of medicine as per laws and orders in force applicable for the academic year 2016-17;

(ii) whether the students as mentioned in the application has duly attended the course during the academic year 2016-17;

(iii) whether the student is otherwise eligible to continue the course.

(3) An officer not below the rank of a Secretary to Government, as may be authorised by the Government by special order in this behalf, shall be the Competent Authority to consider an application under this Ordinance. The Competent Authority shall have the power to summon any person or to call for any document for the proper disposal of such application.

(4) On receipt of an application for regularisation under this section, the Government shall call for a report on it from the Director of Medical Education and after hearing the applicant and the respondents or any other person concerned, if necessary, consider the application and pass orders on it, including order for payment of the regularisation fee payable under this Ordinance.

(5) Where the application is sanctioned by the Government, a direction in this respect shall be issued to the University concerned and notwithstanding anything contained in any University Act or any statute or Ordinance made thereunder or in any other law for the time being in force, the University shall issue orders necessary for the enrolment of such students in the University and thereafter such students shall be considered as regular students of the discipline of medicine under the University with effect from the academic year 2016-17 till the completion of their course in the discipline.

Explanation. - For the purposes of this section, "University Act" means an Act establishing a University, passed by the State Legislature.

4. *Matters for consideration of the Competent Authority*. - While considering an application for regularisation received under Ordinance, the Competent Authority shall, -

(i) consider whether the student who got admission is qualified and is eligible as per the rank list prepared on the basis of the National Eligibility cum Entrance Test, for admission in the discipline of medicine as per laws and orders in force applicable for the academic year 2016-17;

(ii) confirm that no student is continuing in the college in violation of any other law for the time being in force;
(iii) not consider the mode of application submitted by the students;
(iv) not consider the non-production of any document or any material before the Admission Supervisory Committee;
(v)ensure that no capitation fee was collected by the management;
(vi) ensure that there was no profiteering by the management.

5. *Payment of regularisation fee*: - (1) Where the Government sanctions an application for regularisation of admission under this Ordinance, the management of such medical college shall be liable to pay a regularisation fee of three lakh rupees per student for such regularisation:

Provided that where any management collects such fee from any student, such management shall be liable to pay a fine of six lakh rupees per student.

(2) The competent authority under sub-section (3) of section 3 shall be competent to impose the fee as provided in sub-section (1) and it shall be specified in the order issued under sub-section (3) of section 3.

Date 20.10.2017 GOVERNOR"

16. Shri Vikas Singh, learned senior counsel appearing for the MCI, urged that the Ordinance is ultra vires of the powers of the State Government and is contrary to the various Constitution Bench decisions of this Court which he has relied upon. He has further submitted that the judgment has been nullified by the Ordinance. It is not that there was any lacunae or flaw in the laws which has been removed. There is an entrenchment by way of Ordinance upon the power of judicial review of the court. This Court has adjudicated upon

the legality of the order dated 14.11.2016 passed by the ASC which was questioned in this Court and the entire material was filed in the Court which was not even placed before the ASC/CEE. This Court granted hearing for several days and on being wholly unconvinced, dismissed the special leave petitions and clearly observed that no case for interference in the order dated 14.11.2016 passed by ASC was made out and further directed the admission of 30 students who were illegally deprived of their admission to be made in the next academic session. The State has no legislative power to nullify a judgment in view of the Constitution Bench judgments of this Court in *Janapada Sabha Chhindwara vs. The Central Provinces Syndicate Ltd. and Anr.* (1970) 1 SCC 509, *Belgaum Gardeners Cooperative Production Supply and Sale Society Ltd. v. State of Karnataka* (1993) Supp. 1 SCC 96, and *State of Tamil Nadu and Ors. v. State of Kerala and Ors.* (2014) 12 SCC 696.

17. A galaxy of learned senior counsel appearing on behalf of the respondents has emphasised that the impugned Ordinance intends on the admissions to be given on merits on the basis of performance in the NEET examination. Thus, it was permissible to enact Ordinance to make a scrutiny whether the candidates were eligible for admission on the basis of their merit in the NEET examination. It was also contended that the order of online applications passed by the Kerala

High Court was based upon the consent. Hence, it could not be termed to be an order passed by the court in judicial review. The decision did not have the effect of judicial precedent which could be said to be nullified by way of the Ordinance. It was also contended that ultimately it was not the fault of the students and if there was any procedural violation committed by the medical colleges in question, the students could not have been made a scapegoat or made to suffer for no fault of theirs. They were not heard by the ASC or CEE. This Court may exercise power under Article 142 of the Constitution of India and no interference is required to be made in the Ordinance as in the facts and circumstances, regularisation of the admissions was clearly permissible. It could not be said that the State Government has tried to usurp the power of judicial review.

18. A bare reading of the Ordinance makes it clear that the same aims at regularisation of admissions of students during the academic year 2016-17which were set aside by the ASC, the High Court and by this Court to benefit only two colleges and students in question. It is also stated in it that the Legislative Assembly of the State of Kerala is not in session and the Governor of Kerala is satisfied, the circumstances render it necessary for him to take immediate action. In exercise of the power conferred under clause (1) of Article 213 of the

Constitution of India, the Governor of Kerala is pleased to promulgate the impugned Ordinance.

19. It is provided in clause 2 of the Ordinance that notwithstanding anything contained in the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-exploitative Fee and other measures to ensure equity and excellence in Professional Education) Act, 2006 or in any judgment, decree, order or any proceeding of any court or the Admission Supervisory Committee or any other authority or in any agreement or instrument made under any law for the time being in force, it shall be lawful for the Government to regularise the admission of candidates who were qualified for admission in the discipline of medicine in any medical college in the State during the academic year in question, though their admissions had been cancelled by any court or ASC, and irrespective of the mode of submission of application and the non-production of any material before the ASC.

20. Clause 3 of the impugned Ordinance contains the procedure for regularisation. Under clause 3(1) the students can apply within 15 days from the commencement of the Ordinance for regularisation of such admission. Under clause 3(2), the application shall be submitted to the Government through the University with the remarks whether the student was qualified, eligible as per the rank list prepared on the

basis of the NEET for admission in the discipline of medicine as per the laws and orders in force for the academic year 2016-17; whether he has attended the course during the academic year 2016-17 and whether the student was otherwise eligible to continue the course. Clause 3(4) enables the Government to consider the application and pass orders on it including the order for payment of the regularisation fee payable under the Ordinance and clause 3(5) provides that where the application is sanctioned by the Government, the student shall be considered as regular student w.e.f. the academic session 2016-17 till the completion of their course in the discipline. Clause 3(4)(i) provides for consideration in case the candidate was eligible as per the rank list prepared on the basis of NEET, and no student was continuing in the college in violation of any other law for the time being in force. Clause 4(iii) further provided for regularisation notwithstanding the mode of submission of applications by the students. Regularisation fee of Rs.3 lakhs was to be paid per student for such regularisation.

21. What has been done by the impugned Ordinance by the State Government is clearly entrenching upon the field of judicial review and it was obviously misadventure resorted to. In our considered opinion, it was not at all permissible to the State Government to promulgate the Ordinance/legislate in the matter. Not only the judgment of the court is nullified and the arbitrariness committed in admissions was

glaring, and the decision of the High Court of Kerala which was affirmed by this Court with respect to applications to be entertained if they were online applications has been undone. It was clearly an act of nullifying judgment and is violative of judicial powers which vested in the judiciary. It was not open for the State Government to nullify the judgment/orders passed by the Kerala High Court or by this Court. It was not a case of removal of a defect in existing law. Various Constitution Bench decisions of this Court have settled the principles of law governing the field. It passes comprehension how the State Government has promulgated the Ordinance in question.

22. In *Janapada Sabha Chhindwara vs. The Central Provinces Syndicate Ltd. and Anr.* 1970 (1) SCC 509, a Constitution Bench of this Court has observed that it is not open to legislation to render a judgment ineffective. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the legislature to say that the interpretation of the law shall be otherwise than as declared by the Court. This Court has observed thus:

> "10. The nature of the amendment made in Act 4 of 1920 has not been indicated. Nor is there anything which enacts that the notifications issued without the sanction of the State Government must be deemed to have been issued validly under Section 51(2) without the sanction of the Local Government. On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of this Court. That, in our judgment, is not open to the Legislature to do under our

> Constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court."

23. *In the matter of Cauvery Water Disputes Tribunal* (1993) Supp. 1 SCC 96 (II), a Constitution Bench of this Court has observed that it is open to change the law in general by changing the basis but it is not open to set aside an individual decision inter-partes and thus affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power. This Court quashed the Ordinance and observed that by issuing the Ordinance the State of Karnataka has sought to take the law in its own hand and tried to be above the law. Such an act is an open invitation to lawlessness and anarchy. There cannot be defiance to the decision of the judicial authorities. This Court has observed thus:

> "76. The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.
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> 77. The effect of the provisions of Section 11 of the present Act, viz. the Inter-State Water Disputes Act read with Article 262 of the Constitution is that the entire judicial power of the State and, therefore of the courts including that of the

> Supreme Court to adjudicate upon original dispute or complaint with respect to the use, distribution or control of the water of, or in any inter-State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act. It is, therefore, not possible to accept the submission that the question of grant of interim relief falls outside the submission that the question of grant of interim relief falls outside the purview of the said provisions and can be agitated under Article 131 of the Constitution. Hence any executive order or a legislative enactment of a State which interferes with the adjudicatory process and adjudication by such Tribunal is an interference with the judicial power of the State. In view of the fact that the Ordinance in question seeks directly to nullify the order of the Tribunal passed on June 25, 1991, it impinges upon the judicial power of the State and is, therefore, ultra vires the Constitution.
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> 78. Further, admittedly, the effect of the Ordinance is to affect the flow of the waters of the river Cauvery into the territory of Tamil Nadu and Pondicherry which are the lower riparian States. The Ordinance has, therefore, an extra-territorial operation. Hence the Ordinance is on that account beyond the legislative competence of the State and is ultra vires the provisions of Article 245(1) of the Constitution.
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> 79. The Ordinance is also against the basic tenets of the rule of law inasmuch as the State of Karnataka by issuing the Ordinance has sought to take law in its own hand and to be above the law. Such an act is an invitation to lawlessness and anarchy, inasmuch as the Ordinance is a manifestation of a desire on the part of the State to be a judge in its own cause and to defy the decisions of the judicial authorities. The action forebodes evil consequences to the federal structure under the Constitution and open doors for each State to act in the way it desires disregarding not only the rights of the other States, the orders passed by instrumentalities constituted under an Act of Parliament but also the provisions of the Constitution. If the power of a State to issue such an Ordinance is upheld it will lead to the breakdown of the constitutional mechanism and affect the unity and integrity of the nation."

The Court has also observed in *Re: Cauvery Water Disputes Tribunal* (supra) that if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision

given against it, it would sound the death knell of the rule of law. The rule of law would be meaningless as it would be open to the State Government to defy the law and yet get away with it.

24. Yet again a Constitution Bench of this Court in *State of Tamil Nadu v. State of Kerala and Anr.* (2014) 12 SCC 696 has considered the question of separation of powers doctrine under the Indian Constitution and it observed:

> "126. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus:
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> 126.1 Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation, and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs- legislature, executive, and judiciary. In that sense, even in the absence of express provision for separation of powers, the separation of powers between legislature, executive and judiciary is not different from the Constitutions of the countries which contain express provision for separation of powers.
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> 126.2 Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.
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> 126.3 Separation of powers between three organs – the legislature, executive, and judiciary - is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of

breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.

126.4 The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State Legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

126.5 The doctrine of separation of powers applies to the final judgments of the courts. The legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

126.6 If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.

126.7 The law enacted by the legislature may apparently seem to be within its competence but yet in substance, if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are:

(i) Does the legislative prescription or legislative direction interfere with the judicial functions?

(ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided?

(iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality?

If the answer to Questions (i) and (ii) is in the affirmative and the consideration of aspects noted in Question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional."

This Court has observed that independence of the judiciary is fundamental to the rule of law. A legislation can be invalidated on the basis of breach of separation of judicial power since such breach is negation of equality under Article 14. Law can be declared void if it is found to have transgressed the constitutional limitations. The legislature cannot declare any decision of a court of law to be void or of no effect. It can remove the defects of the law pointed out by the court or on coming to know of it aliunde; otherwise, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in such altered circumstances. The legislature can make a validating law. Making validation as such, it removes the defect which the court finds in the existing law. There cannot be an attempt to interfere with the judicial process, and such law may be invalidated. The questions to be examined are: whether the legislation targeted at the decided case, what are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality? If law interferes with the judicial functions on the aforesaid tests laid down in para 126.7, the Court may declare the law as unconstitutional.

25. In *S.R. Bhagwat and Ors. vs. State of Mysore* (1995) 6 SCC 16, the provisions of Karnataka State Civil Services (Regulations of Promotion, Pay & Pension) Act, 1973 came up for consideration of this

Court. Provisions were made in section 11 nullifying the judgments and orders of this Court as had become final, and empowering the State to review such judgments and orders was held to be interference with the powers of the State legislature, and the Court struck down section 11(2) as ultra vires of the legislative powers of the State and sections 4(2), 4(3) and 4(8) were read down which sought to deprive the petitioners of the benefits of the judgment of the court which had become final. It was further observed that once the judgment has attained finality and was binding against the State, it cannot be overruled by any legislative measure. The Court observed that court's judgments cannot be nullified by the legislature:

> "15. We may note at the very outset that in the present case the High Court had not struck down any legislation which was sought to be re-enacted after removing any defect retrospectively by the impugned provisions. This is a case where on interpretation of existing law, the High Court had given certain benefits to the petitioners. That order of mandamus was sought to be nullified by the enactment of the impugned provisions in a new statute. This in our view would be clearly impermissible legislative exercise.
>
> 18. A mere look at sub-section (2) of Section 11 shows that the respondent State of Karnataka, which was a party to the decision of the Division Bench of the High Court against it had tried to get out of the binding effect of the decision by resorting to its legislative power. The judgments, decrees, and orders of any court or the competent authority which had become final against the State were sought to be done away with by enacting the impugned provisions of sub-section (2) of Section 11. Such an attempt cannot be said to be a permissible legislative exercise. Section 11(2), therefore, must be held to be an attempt on the part of the State Legislature to legislatively overrule binding decisions of competent courts against the State. It is no doubt true that if any decision was rendered against the State of

Karnataka which was pending in appeal and had not become final it could rely upon the relevant provisions of the Act which were given retrospective effect by sub-section (2) of Section 1 of the Act for whatever such reliance was worth. But when such a decision had become final as in the present case when the High Court clearly directed respondent-State to give to the petitioners concerned deemed dates of promotions if they were otherwise found fit and in that eventuality to give all benefits consequential thereon including financial benefits, the State could not invoke its legislative power to displace such a judgment. Once this decision had become final and the State of Karnataka had not thought it fit to challenge it before this Court presumably because in identical other matters this Court had upheld other decisions of the Karnataka High Court taking the same view, it passes one's comprehension how the legislative power can be pressed in service to undo the binding effects of such mandamus. It is also pertinent to note that not only sub-section (2) of Section 11 seeks to bypass and override the binding effect of the judgments but also seeks to empower the State to review such judgments and orders and pass fresh orders in accordance with provisions of the impugned Act. The respondent-State in the present case by enacting sub-section (2) of Section 11 of the impugned Act has clearly sought to nullify or abrogate the binding decision of the High Court and has encroached upon the judicial power entrusted to the various authorities functioning under the relevant statutes and the Constitution. Such an exercise of legislative power cannot be countenanced.

20. We, therefore, strike down Section 11 sub-section (2) as unconstitutional, illegal and void. So far as the underlined impugned portions of Section 4 sub-sections (2), (3) and (8) are concerned, they clearly conflict with the binding direction issued by the Division Bench of the High Court against the respondent-State and in favour of the petitioners. Once respondent-State had suffered the mandamus to give consequential financial benefits to the allottees like the petitioners on the basis of the deemed promotions such binding direction about payment of consequential monetary benefits cannot be nullified by the impugned provisions of Section 4. Therefore, the underlined portions of sub-sections (2), (3) and (8) of Section 4 will have to be read down in the light of orders of the court which have become final against the respondent-State and insofar as these provisions are inconsistent with these final orders containing such directions of judicial authorities and competent courts, these impugned provisions of Section 4 have to give way and to the extent of such inconsistency must be treated to be inoperative and ineffective. Accordingly the aforesaid provisions are read

> down by observing that the statutory provisions contained in sub-sections (2), (3) and (8) of Section 4 providing that such persons who have been given deemed promotions shall not be entitled to any arrears for the period prior to the date of their actual promotion, shall not apply in cases where directions to the contrary of competent courts against the respondent-State have become final."

26. On behalf of the respondents, certain decisions with respect to legislative competence have been referred. In *S.T. Sadiq vs. State of Kerala and Ors.* (2015) 4 SCC 400, this Court has laid down that the legislative function consists in "making" law and not in "declaring" what the law shall be. The legislature can make a law retrospectively which may alter the law as it stood when a decision was arrived at. It is in this limited sphere, the legislature may alter the very basis of an earlier decision given by the court. It cannot directly annul that final judgment by a subsequent legislation. If its purpose is to annul a final judgment, such act of legislature must be declared to be unconstitutional. The Court has observed:

> "13. It is settled law by a catena of decisions of this Court that the legislature cannot directly annul a judgment of a court. The legislative function consists in "making" law [see: Article 245 of the Constitution] and not in "declaring" what the law shall be [see: Article 141 of the Constitution]. If the legislature were at liberty to annul judgments of courts, the ghost of bills of attainder will revisit us to enable legislatures to pass legislative judgments on matters which are inter-parties. Interestingly, in England, the last such bill of attainder passing a legislative judgment against a man called Fenwick was passed as far back as in 1696. A century later, the US Constitution expressly outlawed bills of attainder [see: Article 1 Section 9].

> 14. It is for this reason that our Constitution permits a legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at. It is in this limited circumstance that a legislature may alter the very basis of a decision given by a court, and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then change the very basis of the earlier decision so that it would no longer hold good. However, if such is not the case then legislation which trenches upon the judicial power must necessarily be declared to be unconstitutional."

27. The decision in *Cheviti Venkanna Yadav v. State of Telangana & Ors.* (2017) 1 SCC 283, was relied on behalf of the respondents, wherein the Court considered the question of amendment with retrospective effect after a provision of the Act is struck down by the court. When does it not amount to the statutory overruling of a judgment by the legislature? This Court held that the legislature has the power to legislate including the power to retrospectively amend the laws and thereby removing causes of ineffectiveness or invalidity. Further, when such correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. The order of the High Court, inter alia, holding that the amended provisions did not usurp the judicial power was upheld and the court also opined that there was no violation of Article 14 of the Constitution. The Court observed:

“25. We shall deal first point first. The Reorganization Act came into force on 02.06.2014. Submission is, prior to the said date, the legislature that was not in existence as an entity could not have legislated relating to some aspect that covers the prior period. The aforesaid submission should not detain us long. In M/s. Rattan Lal and Co. and Anr. etc v. The Assessing Authority, Patiala, and Anr. AIR 1970 SC 1742 the Court was dealing with the competence of State of Haryana pertaining to a legislation enacted by the State of Haryana by way of an amendment prior to the reorganisation of the State. In that context the Court held:

> "12. …It is argued that the reorganisation of the State took place on November 1, 1966, and the amendment in some of its parts seeks to amend the original Act from a date anterior to this date. In other words, the legislature of one of the States seeks to amend a law passed by the composite State. This argument entirely misunderstands the position of the original Act after the reorganisation. That Act applied now as an independent Act to each of the areas and is subject to the legislative competence of the legislature in that area. The Act has been amended in the new States in relation to the area of that State and it is inconceivable that this could not be within the competence. If the argument were accepted then the Act would remain unamendable unless the composite State came into existence once more. The scheme of the States Reorganization Acts makes the laws applicable to the new areas until superseded, amended or altered by the appropriate legislature in the new States. This is what the legislature has done and there is nothing that can be said against such amendment."

The aforesaid passage makes it clear as crystal that after the legislature came into existence, it has the competence to enact any law retrospectively or prospectively within the constitutional parameters.

26. The second issue that emanates for consideration is whether the base of the earlier judgment has really been removed. Before stating the factual score, it is necessary to state how this Court has viewed the said principle. In Shri Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors. (1969) 2 SCC 283, the Constitution Bench while dealing with the legislation which intended to validate the tax declared by law to be illegal, opined that when a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be

removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind, for that tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Thereafter, the Court proceeded to state that validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. The legislature does it many a way. One of the methods it may adopt is to give its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. On such legislation being brought, it neutralizes the effect of the earlier decision as a consequence of which it becomes ineffective. The test of validity of a validating law depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.

27. In Bhubaneshwar Singh and Anr. v. Union of India and Ors. (1994) 6 SCC 77 in view of Section 3 of the Coking Coal Mines (Emergency Provisions) Act, 1971 which was promulgated in the year 1971 the Custodian being appointed by the Central Government took over the management of Coking Coal Mines and the said mines remained under the management of the Central Government through the custodian during the period from 17.10.1971 to 30.04.1972. The Coking Coal Mines (Nationalisation) Act, 1972 came into force w.e.f. 1.5.1972, and the right, title and interest of the owners in relation to Coking Coal Mines stood transferred to and vested absolutely in the Central Government free from all encumbrances. The provisions of the said Act were challenged before this Court in the case of Tara Prasad Singh and Ors. v. Union of India and Ors. (1980) 4 SCC 179 and the Constitution Bench upheld the validity of the said Act. The writ Petitioner before the High Court making a grievance that the Custodian had debited the expenses for raising the coal while the Coking Coal Mine was under the Management of the Custodian but had not credited the price for the quantity of

the coal raised, which was lying in stock on the date prior to the date the said Coal Mine vested under the Central Government. The High Court allowed the writ petition and a direction was issued that account be recast and payment be made to the Petitioner. The appeal before this Court by special leave was dismissed, as this Court was of the view that sale price of stock of extracted coal lying at the commencement of the appointed date had to be taken into account for determining the profit and loss during the period of management of the mine by the Custodian. After the appeal preferred by the Coal Fields was dismissed, Coal Mines Nationalisation Laws (Amendment) Ordinance, 1986 was promulgated and later on replaced by Coal Mines Nationalisation Laws (Amendment) Act, 1986 came into force. By Section 4 of the Amendment Act, Sub-section (2) was introduced in Section 10 of the Coking Coal Mines (Nationalisation) Act, 1972. The said provision declared that the amounts specified in the fifth column of the First Schedule against any coking coal mines or group of coking coal mine specified in the second column of the said Schedule are required to be given by the Central Government to its owner under Sub-section (1) shall be deemed to be included, and deemed always to have included, the amount required to be paid to such owner in respect of coal in stock or other assets referred to in Clause (j) of Section 3 on the date immediately before the appointed day and no other amount shall be paid to the owner in respect of such coal or other assets. Section 19 was the validating provision.

28. The writ petition was filed questioning the validity of the said ordinance primarily on the ground that it purported to nullify the judgment rendered in the case of Central Coal Fields Ltd. v. Bhubaneswar Singh and Ors. (1984) 4 SCC 429. The Court referred to the provisions and opined that:

> “13. ...if Sub-section (2) as introduced by the Coal Mines Nationalisation Laws (Amendment) Act, 1986 in Section 10 had existed since the very inception, there was no occasion for the High Court or this Court to issue a direction for taking into account the price which was payable for the stock of coke lying on the date before the appointed day. The authority to introduce Sub-section (2) in Section 10 of the aforesaid Act with retrospective effect cannot be questioned. Once the amendment has been introduced retrospectively, courts have to act on the basis that such provision was there since the beginning. The role of the deeming provision need not be emphasised in view of series of judgments of this Court. Hence reading Sub-

> section (2) of Section 10 along with Section 19, it has to be held that Respondents are not required to take into account the stock of coke lying on the date prior to the appointed day, for the purpose of accounting during the period when the mine in question was under the management of the Central Government, because it shall be deemed that the compensation awarded to the Petitioner included the price for such coal lying in stock on the date prior to the appointed day. Neither any compensation is to be paid for such stock of coal nor the price thereof is to be taken into account for the purpose of Sub-section (1) of Section 22 of the Coking Coal Mines (Nationalisation) Act, 1972."

Being of this view, the Court dismissed the writ petition.

29. In State of H.P. v. Narain Singh (2009) 13 SCC 165 while dealing with the validation of statute the Court ruled that:

> "26. It is therefore clear where there is a competent legislative provision which retrospectively removes the substratum of foundation of a judgment, the said exercise is a valid legislative exercise provided it does not transgress any other constitutional limitation."

To arrive at the said conclusion, the two-Judge Bench reproduced from the decision in Constitution Bench in State of T.N. v. Arooran Sugars Ltd. (1997) 1 SCC 326 which is to the following effect:

> "28. … '16. …It is open to the legislature to remove the defect pointed out by the court or to amend the definition or any other provision of the Act in question retrospectively. In this process, it cannot be said that there has been an encroachment by the legislature over the power of the judiciary. A court's directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect.'

30. From the aforesaid authorities, it is settled that there is a demarcation between legislative and judicial functions predicated on the theory of separation of powers. The legislature

> has the power to enact laws including the power to retrospectively amend laws and thereby remove causes of ineffectiveness or invalidity. When a law is enacted with retrospective effect, it is not considered as an encroachment upon judicial power when the legislature does not directly overrule or reverse a judicial dictum. The legislature cannot, by way of an enactment, declare a decision of the court as erroneous or a nullity, but can amend the statute or the provision so as to make it applicable to the past. The legislature has the power to rectify, through an amendment, a defect in law noticed in the enactment and even highlighted in the decision of the court. This plenary power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court can have a curative and neutralizing effect. When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. This does not amount to statutory overruling by the legislature. In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation. No doubt, the new legislation can be tested and challenged on its own merits and on the question whether the legislature possesses the competence to legislate on the subject matter in question, but not on the ground of over-reach or colourable legislation."

There is no dispute with the aforesaid proposition that the legislature has the power to retrospectively amend the laws and thereby remove the causes of ineffectiveness or invalidity on which judgment is based, and that would not be an encroachment upon judicial power when the legislature does not directly overrule or reverse a judicial dictum.

28. Reliance has also been placed by the respondents on *Goa Foundation & Anr. v. State of Goa & Anr.* (2016) 6 SCC 602 wherein the Court has discussed the matter thus:

“24. The principles on which first question would require to be answered are not in doubt. The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the Court. Even in such a situation, the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation [Madan Mohan Pathak and Anr. v. Union of India and Ors. (1978) 2 SCC 50. However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a Court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e. the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme, is guided by well-defined values which have found succinct manifestation in the views of this Court in Bhaktwar Trust and Ors. (supra).

26. If the above principles are to be applied to the present case what follows is that Section 41(6) to (9) introduced in the Principal Act by the Goa State Amendment renders ineffective Clause 4(viii) of the Agreement executed by the parties Under Section 41 of the Principal Act. With Clause 4(viii) being deleted the embargo on constructions on the acquired land is removed. It is the aforesaid Clause 4(viii) and its legal effect, in view of Section 42, that was the basis of the Court's decision dated 20th January 2009 holding the construction raised by the third Respondent on the acquired land to be illegal and contrary to the Principal Act. Once Clause 4(viii) is removed the basis of the earlier judgment stands extinguished. In fact, it may be possible to say that if Clause 4(viii) had not existed at all, the judgment of the Court dated 20th January 2009 would not have been forthcoming. It was therefore well within the domain of the legislature to bring about the Amendment Act with retrospective effect, the Legislative field also being in the Concurrent List, namely, Entry No. 42 of List III (Acquisition and Requisition of Property) of the Seventh Schedule to the Constitution.”

The Court has re-emphasised that a judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act. However, the legislature shall be competent to pass an amending or a validating Act, if deemed fit, with retrospective effect removing the basis of the decision of the Court by amending the law. Thus, once the provisions in clause 4(viii) were removed, the basis of the earlier judgment stood extinguished.

29. In *Goa Glass Fibre Ltd. v. State of Goa & Anr*. (2010) 6 SCC 499, a question arose whether under the Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002, sections 2, 3, 5 and 6 were unconstitutional. The contention was raised that the impugned Act nullifies the judgment of the Court. The Court has observed:

> "15. It is well settled that a Statute can be invalidated or held unconstitutional on limited grounds viz., on the ground of the incompetence of the Legislature which enacts it and, on the ground, that it breaches or violates any of the fundamental rights or other Constitutional Rights and on no other grounds. (See State of A.P. v. McDowell and Co. (1996) 3 SCC 709, Kuldip Nayar v. Union of India and Ors. (2006) 7 SCC 1.
>
> 16. The scheme of the Act appears to be simple. The Act imposes a Prohibition [under Section 2], requires recovery [under Section 3] and "extinguishes" all liabilities of the State that accrue or arise from the Notifications dated 15.05.1996 and 01.08.1996.
>
> 17. From the language of the Act, it becomes clear that the Act is not influenced by the outcome of the Judgment of the High Court in Manohar Parrikar's case. By the enactment, the Legislature has imposed prohibition of further payments under

> the Notifications, provides for recovery of rebate benefits from the beneficiaries and extinguishes the State's Liability under the Notifications mentioned supra. This exercise by the Legislature is independent of and dehors the results of the PIL of Manohar Parrikar and can be said to be uninfluenced by the said judgment. It was well within the Legislative power of the State to respond to the undisputed and disturbing facts which had enormous financial implication on the State's Finances to enact the Law with an object of remedying the unsatisfactory state of affairs which were known to the Legislature.
>
> 18. That the object of the Act is not to undo or reverse the judgments of either this Court or that of the High Court. On a reading of the Act as a whole, it does not appear that the Legislature seeks to undo any judgment or any directions contained therein. As observed earlier the Act imposes a Prohibition [under Section 2], requires recovery [under Section 3] and "extinguishes" all liabilities of the State that accrue or arise from the Notifications dated 15.05.1996 and 01.08.1996. Therefore, no exception can be taken to the constitutionality of the Act impugned, on the ground, that it seeks to undo or reverse any judgment. The Legislature in its competence has enacted the Act to achieve the purposes indicated therein and not to frustrate any judgment of any court including that of this Court. It is to be noted that State Legislature was competent to enact the Act in its present form even before the judgment of the High Court in the PIL and the fact that it has come after the judgment in PIL does not render it unconstitutional on the ground that it seeks to nullify the judgment of this Court in the earlier proceedings."

The liability of the State which accrued or arose from the notifications referred to therein was sought to be extinguished. It was held that it was not to undo the judgment. The legislature was held to be competent to remove the basis.

30. In *Tika Ram & Ors. v. State of Uttar Pradesh & Ors*. (2009) 10 SCC 689, this Court considered the provisions of Land Acquisition (U.P. Amendment & Validation Act, 1991, in particular sections 2 and

3 thereof adding proviso to section 17(4) of the Land Acquisition Act, 1894 and held the same to be constitutional. The contention that the U.P. Amendment Act merely sought to overrule judgments in *Kashmir Singh's* case AIR 1987 All. 113 or *State of U.P. v. Radhey Shyam Nigam* (1989) 1 SCC 591 and did not remove the basis or foundation thereof and was, therefore, ultra vires Articles 245 and 246 was rejected. The question arose regarding the constitutional validity of the Land Acquisition (Amending) Act. Notification under section 4 read with section 17(4) was issued on 4.12.1984 which was published in the Gazette on 8.12.1984. Declaration under section 6 was made on 4.12.1984 and published in the Gazette on 8.12.1984. It was found that simultaneous notifications under sections 4 and 6 could not be made and therefore the acquisitions were bad as held in *Kashmir Singh v. State of U.P.* AIR 1987 All. 113 which was upheld by this Court. Thereafter, the Ordinance was promulgated. The Statement of Objects and Reasons referred to the judgment in Kashmir Singh's case. It was decided to amend the Act for validating the proceedings in respect of the Notification under section 4 published on or after 24.9.1984 but before 11.1.1989. Following provision was inserted:

> "55. The amendment of Section 17 was brought on the legal anvil by way of a proviso to Sub-section (4) thereof which ran as under:
>
> > "Provided that where in case of any land notification under Section 4(1) has been published in the official Gazette on

> or after 24.09.1984 but before 11.1.1989 and the appropriate Government has under this Sub-section direction that proviso of Section 5A was not applied, a declaration under Section 6 in respect of the land may be made either simultaneously at a time after the publication in the Official Gazette of the notification under Section 4 sub-section (1)."

The Court in *Tika Ram* (supra) observed that the legislature had no power to overrule the judgment. However, it has the power to suitably amend the law to remove flaw pointed out by the Court. It was observed:

> "57. This argument is completely answered in Meerut Development Authority v. Satbir Singh reported in 1996 (11) SCC 462. This Court was considering this very proviso of Section 17(4) inserted by Land Acquisition [U.P. Amendment and Validation Act, 1991 [UP Act No. 5 of 1991] and relying upon the judgment reported as GDA v. Jan Kalyan Samiti, Sheopuri reported in 1996 (2) SCC 365, the Court took the view in paragraph 10 that when this Court had declared a particular statute to be invalid, the Legislature had no power to overrule the judgment. However, it has the power to suitably amend the law by use of proper phraseology removing the defects pointed out by the Court and by amending the law inconsistent with the law declared by the Court so that the defects which were pointed out were never on statute for enforcement of law. Such an exercise of power to amend a statute is not an incursion on the judicial power of the Court but as a statutory exercise on the constituent power to suitably amend the law and to validate the actions which have been declared to be invalid.
>
> 69. Reliance was also placed on the judgment in Bakhtawar Trust v. M.D. Narayan and Ors. reported in 2003 (5) SCC 298. Learned Counsel for the appellant relied on paragraphs 14 to 16. In our opinion, paragraph 14 was completely against the appellants wherein the State Legislature's power to make retrospective legislation and thereby validating the prior executive and legislative acts retrospectively is recognized. Of course, the same has to be done only after curing the defects that led to the invalidation. We respectfully agree with the propositions laid down in paragraphs 14, 15 and 16 thereof. In

> Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality reported in 1969 (2) SCC 283, which is referred to in paragraph 16 of the decision, it is stated that:
>
> > "the Legislature may follow any one method or all of them and while it does so, it may neutralize the effect of earlier decision of the Court which becomes ineffective after the change of the law."
>
> It is further stated therein that the validity of the validating law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject matter and whether in making the validation it removes the defect which the Courts had found in the existing law. The Amending Act has clearly passed these tests. All the relevant cases on this subject have been considered in this judgment."

The Court has observed that the State legislature has the power to make retrospective legislation, thereby validating the prior executive and legislative acts retrospectively, such power is recognised. Of course, the same has to be done only after curing the defects that led to the invalidation.

31. In the light of the exposition of the aforesaid principles of law in the various judgments when we revert back to the scenario in the instant matter, it is apparent that there was decision of the High Court of Kerala on 26.8.2016 regarding admission in MBBS/BDS courses in 2016-17 directing that all the colleges agree that the applications for admission are received only through "on-line" and that the said process provides transparency with regard to the merit as well as the identities of the applicants. Such applications shall be uploaded for scrutiny of the Admission Supervisory Committee also.

32. Against the said interim order which was of final nature, the Union of India had filed an SLP. This Court set aside only that part of condition No.1 wherein the respective colleges were allowed to conduct the counselling and admit the students without going into the merits. This Court has referred to the aforesaid order of the Kerala High Court in a decision dated 28.9.2016 in CA No.9862/2016. In C.A. No.3874/2018, (2018 (6) SCALE 174) – *Anitta Job & Ors. v. The State of Kerala & Ors*. decided on 20.4.2018, this Court observed:

> "14. We have already noticed above that Kerala High Court has passed interim order on 26.08.2016 under which the High Court issued certain directions regarding admission in MBBS/BDS Courses 2016-2017. Paragraph 9 of the judgment which is relevant in this context is as follows:
>
> > "9. Accordingly, there shall be an interim stay of operation and implementation of the impugned orders, G.O. (Rt) No. 2314/2016/H&FWD dated 20.08.2016 and G.O. (Rt) No. 2336/2016/H&FWD dated 23.08.2016, subject to the following conditions:
> >
> > (i) Admissions to the MBBS/BDS courses shall be only on the basis of the ranking of candidates in the rank list of NEET, 2016, on the basis of the inter-se merit among the candidates, who have applied to the respective colleges.
> >
> > (ii) All the colleges agree that the applications for admission are received only through online and that, the said process provides transparency with regard to the merit as well as the identities of the applicants. Such applications shall, therefore, be uploaded for the scrutiny of the Admission Supervisory Committee also immediately on the expiry of the last date for submission of applications.
> >
> > (iii) Since the counsel for the Admission Supervisory Committee has voiced a complaint that some of the

> colleges have not obtained approval of the Admission Supervisory Committee, for their Prospectus, the admission process shall be proceeded with only on the basis of a Prospectus, for which approval of the Admission Supervisory Committee has been obtained.
>
> (iv) The Admission Supervisory committee is directed to either approve or disapprove the Prospectus, submitted to them for approval, within three days of such submission."

15. It is relevant that against the interim order of the Kerala High Court dated 26.8.2016, Union of India has filed an SLP which was disposed of by this Court on 28.9.2016 in C.A.No.9862 of 2016. This Court set aside only that part of Condition No.1 wherein the respective Colleges are allowed to conduct the counselling and admit the students without going into the merits. This Court, however, specifically observed that this Court is not interfering with the admissions of students which have been done by the respective Colleges as those were done after reaching arrangement with the State Government. Last two paragraphs of this Court's order dated 28.9.2016 are as follows:

> "Having regard to the aforesaid facts as stated by the learned Solicitor General as well as the counsel for the respondents, we set aside that part of Condition No.1 wherein the respective colleges are allowed to conduct the counselling and admit the students without going into the merits.
>
> This issue shall be finally thrashed out and decided by the High Court in the writ petitions which are pending before it. However, we are not inclined to interfere with the admissions of students which have been done by the respective colleges as these are done after reaching arrangement with the State Government. In that behalf, the conditions which are mentioned in the impugned order shall continue to apply.
>
> The appeal stands disposed of in the aforesaid terms."

It is apparent from the order passed by this Court as well as by the High Court of Kerala that receiving online applications was mandatory and it was laid down in the judgment for ensuring the fair process of admissions, transparency as well as identities of the applicants. The condition was the outcome of the judgment on the power of judicial review passed by the Kerala High Court and affirmed by this Court also. Thus, the very same judgment is sought to be nullified by the impugned Ordinance by making a provision to the contrary. Admissions as per the Ordinance are to be regularised *dehors* the mode of submitting the applications. It is not removing the defect in any existing law. The Ordinance has clearly annulled a judgment of Court which was laid down in order to ensure fair procedure.

33. We have anxiously read the entire impugned Ordinance and a perusal thereof indicates that it is a blatant attempt of regularisation of admissions made which were declared to be invalid not only by the High Court of Kerala but by this Court after this Court had dealt with the order dated 14.11.2016 passed by the ASC after hearing the matter for several days and the Court had passed a reasoned order. While dismissing/disposing of the matters, this Court directed the 30 students who were illegally deprived of the admission, to be admitted in the next academic session 2017-18. It was clearly not a dismissal of

the case *in limine* but a reasoned order. In the writ petitions filed by the colleges and others, the validity and legality of the order dated 14.11.2016 was questioned. However, this Court has upheld the same. We also note that voluminous records were filed in this Court by both the medical colleges. The students were also heard when the decision was rendered. Thereafter also several petitions were filed which were dismissed by this Court. Thus, when this Court has upheld the order dated 14.11.2016 on the ground of illegality and irregularities and not following the due procedure, such admissions could not have been regularised at all. In case such a power of covering up illegal action is given to the State Government in individual cases of two colleges, the day is not far off when every judgment can be annulled. It is crystal clear in the instant case that the State Government has exceeded its powers and has entrenched upon the field reserved for the judiciary. It could not have nullified the judgment. The online procedure was laid down by the judgment. The provision of any existing law framed by legislation has not been changed by the State Government by the impugned Ordinance but illegalities found in the admissions were sought to be got rid of. What was laid down in the judgment for ensuring the fair procedure which was required to be followed was sought to be undone, it was nothing but the wholly impermissible act of the State Government of sitting

over the judgment and it could not have promulgated the Ordinance setting at naught the effect of the judgment.

34. It is also apparent that what the State Government has done by way of impugned Ordinance is not only impermissible and beyond legislative competence it also has the effect of perpetuating illegality and arbitrariness committed by the colleges in question by not following the mandate of law laid down by the High Court as affirmed by this Court. An effort has been made to cover up the arbitrariness and illegality in an illegal and impermissible manner for which the State Government had no competence. The provisions made in the Ordinance are otherwise also quite illegal and arbitrary besides in violation of the doctrine of separation of powers enshrined under Article 50 of the Constitution of India.

35. Reliance has been placed by the respondents on a decision of this Court in *Kunhayammed & Ors. v. State of Kerala & Anr*. (2000) 6 SCC 359 so as to contend that this Court has not dismissed the special leave petition by a speaking order. Thus, it cannot be treated to be a precedent. Reliance has been placed on the following observations made by the Court:

> "40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the Court, (iv) the question raised by the petitioner for

consideration by this Court being not fit for consideration or deserving being dealt with by the apex court of the country and so on. The expression often employed by this Court while disposing of such petitions are - "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. Maybe that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex-parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion, neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 of the C.P.C. or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 of the C.P.C. act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the

order of this Court. However, this would be so not by reference to the doctrine of merger.

44. To sum up our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can, therefore, be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any

> proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties,
>
> (vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.
>
> (vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by Sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

This Court has considered the expressions often employed by this Court while disposing of the special leave petition as "heard and dismissed", "dismissed", "dismissed as barred by time". Maybe that at the admission stage itself, the opposite party appears on caveat or on notice and offers a contest to the maintainability of the petition. Such an order may be passed even *ex parte* i.e. in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by this Court. This Court has ultimately concluded that if an order refusing to grant leave to appeal by a speaking order gives reasons for refusing the grant of leave, then the order has two implications; firstly the statement of law contained in the order is a declaration of law by this Court within the meaning of

Article 141 of the Constitution; secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by this Court which would bind the parties thereto and also the court, tribunal or authority.

36. When we read the order passed by this Court, all the parties have filed the pleadings while the order was passed by this Court. Counter affidavits, rejoinder and various other applications for taking on record the documents and plethora of documents were submitted before this Court and it was argued for several days at length. This Court has heard the matter and thereafter has expressed the opinion and recording finding as to the legality of the order dated 14.11.2016 for the first time as the order was not before High Court, vide the order passed on 22.3.2017 observing that:

> "Heard learned counsel for the parties.
>
> We do not find any ground to interfere in Order dated 14.11.2016.
>
> As 30 students have been found by ASC, in the case of Karuna Medical College, who have been illegally deprived of their admission in spite of being meritorious, we deem it proper to issue direction to the college and all other concerned authorities to admit them in the next academic session 2017-18 in Karuna Medical College and the corresponding number of seats, available to it, shall be reduced by 30 for the college in question for academic session 2017-18.
>
> The Special Leave Petitions are, accordingly, dismissed.
>
> Pending applications stand disposed of."

It is apparent from the aforesaid order passed by this Court that this Court did not find any ground to interfere with the order dated 14.11.2016. The SLPs. against the order passed by the High Court

were also dismissed and this Court had directed that 30 students be admitted in the next session. Independent directions were issued which were not ordered by the High Court. This Court directed that they are to be admitted to the academic session 2017-18. Thus, it does not lie in the mouth of the respondents to contend at all that it was not a decision on merits by this Court. Submission is startling and in the negation of stupendous effort made and time given by this Court while hearing the matters before deciding them by the aforesaid order.

37. It was also contended on behalf of the respondents that NEET merit is the fulcrum that has been adopted in the Ordinance; a student who could have obtained admission otherwise, had the procedure been followed, should not be deprived of admission in the course for no fault on his part. The submission, though attractive, is hollow and cannot be countenanced for assessment. Firstly the matter stands adjudicated finally and finally concluded up to this Court. Merit was the basis earlier too when the admissions were to be made through NEET and required "on-line" procedure was to be followed. It is not the change of the basis that has been made by merit criteria. Apart from that, when once the basic procedure laid down in the judgment for receiving online applications had not been followed, admissions that were cancelled on that ground, could not have been

validated at all. The colleges were unable to satisfy this Court as to the fairness of the procedure adopted by them. As such, this Court did not interfere with the judgment of the High Court as well as the order dated 14.11.2016 of the ASC. When merit was the basis earlier too, it cannot be said that the legislature has tried to introduce something new. It cannot be said that any defect has now been removed by the State legislature from the existing law. In fact, what was the judgment of the court, has been attempted to be nullified. It is nothing but an attempt to nullify the judgment which the legislature cannot do, as we have a well-defined field of separation of powers of the judiciary, legislature and the executive.

38. The decision in *Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors*. (1999) 7 SCC 120 has been referred to by the respondents in which the Court considered the question of the need for common entrance examination for admission to postgraduate medical courses in a State and observed that common entrance examination provides unique criteria for judging the merits of all candidates who come from different universities. The common entrance test alone will balance the competing equities of having competent students for specialised education. This Court has made the following observations:

> "28. This argument ignores the reasons underlying the need for a common entrance examination for post-graduate medical courses in a State. There may be several Universities in a State which conduct M.B.B.S. courses. The courses of study may not be

uniform. The quality of teaching may not be uniform. The standard of assessment at the M.B.B.S. examination also may not be uniform in the different universities. With the result that in some of the better universities which apply more strict tests for evaluating the performance of students, a higher standard of performance is required for getting the passing marks in the M.B.B.S. examination. Similarly, a higher standard of performance may be required for getting higher marks than in other universities. Some universities may assess the students liberally with the result that the candidates with lesser knowledge may be above to secure passing marks in the M.B.B.S. examination; while it may also be easier for candidates to secure marks at the higher level. A common entrance examination, therefore, provides a uniform criterion for judging the merit of all candidates who come from different universities. Obviously, as soon as one concedes that there can be differing standards of teaching and evaluation in different universities, one cannot rule out the possibility that the candidates who have passed the M.B.B.S. examination from a university which is liberal in evaluating its students, would not, necessarily, have passed, had they appeared in an examination where a more strict evaluation is made. Similarly, candidates who have obtained very high marks in the M.B.B.S. examination where evaluation is liberal would have got lesser marks had they appeared for the examination of a university where stricter standards were applied. Therefore, the purpose of such a common entrance examination is not merely to grade candidates for selection. The purposes is also to evaluate all candidates by a common yardstick. One must, therefore, also take into account the possibility that some of the candidates who may have passed the M.B.B.S. examination from more "generous" universities, may not qualify at the entrance examination where a better and uniform standard for judging all the candidates from different universities is applied. In the interest of selecting suitable candidates for specialised education, it is necessary that the common entrance examination is of a certain standard and qualifying marks are prescribed for passing that examination. This alone will balance the competing equities of having competent students for specialised education and the need to provide for some room for the backward even at the stage of specialised postgraduate education which is one step below the super specialities.”

The observations are of no help for the aforestated reasons. The State Government was not competent to promulgate the impugned Ordinance as already held. The question cannot be agitated afresh who could have obtained admission on the basis of the merit. There may be a large number of other students who might have been deprived of their right to obtain admission. Such kind of enquiry is impermissible to be made now in the wake of the decisions which have attained finality and are binding upon all concerned.

39. Reliance has been placed by the respondents on a decision of this Court in *Anitta Job & Ors. v. The State of Kerala* decided on 20.4.2018 (supra) so as to contend that this Court did not interfere with the admissions which were made without applying the mind as the students had appeared in the NEET examination and the college had admitted other similar students also. This Court has passed the order under Article 142. In the instant case in view of the previous verdicts, such a power cannot be exercised and apart from that when the judgments have attained finality, they are binding on all concerned including this Court. Power under Article 142 cannot be exercised to nullify its own judgment and to perpetuate illegality. The question involved in the case is the power of the State Government to promulgate the impugned Ordinance. It was not the question in the said decision of *Anitta Job* (supra). The decision is of no application to

the instant case. The power under Article 142 cannot at all be exercised by this Court in view of the previous decisions and also in view of the fact that it was not competent to enact the impugned Ordinance by the State Government so as to perpetuate an illegality in view of the pronouncements made earlier.

40. Resultantly, the writ petitions deserve to be allowed. The impugned Ordinance is declared to be *ultra vires* and entrenching upon the field earmarked for the judiciary as it sought to nullify the judgment and order passed by the High Court and by this Court.

.....J.
(Arun Mishra)

New Delhi;
September 12, 2018.

.....J.
(Indira Banerjee)