IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8597 OF 2001.

IN THE MATTER OF:

RAMJI SINGH AND OTHERS. .... APPELLANTS

VERSUS

STATE OF UTTAR PRADESH AND OTHERS ...RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANTS

1. **It is submitted that no case for reference to a larger bench of 9 judges is made out for the following reasons:**

Decisions of larger benches binding on smaller benches

2. The doctrine of Stare Decisis applies to the facts of this case and the bench of 5 judges were bound by the ruling of the Bench of 7 judges of this Hon'ble Court in **Bangalore Water Supply & Sewerage Board v. A. Rajappa and Others, (1978) 2 SCC 213**, (hereinafter referred to as the "**Bangalore Water Supply case'**'). While it is true that the bench of 5 judges that made the reference in **U.P. v. Jai Bir Singh, (2005) 5 SCC 1** (hereinafter referred to as the "**Jai Bir Singh case**") may have had an opinion on the issue decided in **Bangalore Water Supply case,** which was different from the ratio of the case, that by itself is not a ground for making a reference. The said bench of 5 judges was equally bound by the ruling of the bench of 7 judges in

the Bangalore Water Supply case. A judgment of 7 judges wherein 5 judges concurred and two partly dissented is nevertheless a judgment of 7 judges and hence the judgment of the Bangalore Water Supply case is binding on the bench of 5 judges that made the reference as has been spelt out by this Hon'ble Court in **Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673.** The relevant extract is as follows:

> ***12.*** *Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:*
> *(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*
> *(2) [**Ed.**: Para 12(2) corrected vide Official Corrigendum No. F.3/Ed.B.J./21/2005 dated 3-3-2005.] A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.*
> *(3) [**Ed.**: Para 12(3) corrected vide Official Corrigendum No. F.3/Ed.B.J./7/2005 dated 17-1-2005.] The above rules are subject to two exceptions: (i) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a*

Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh [(1989) 2 SCC 754] and Hansoli Devi [(2002) 7 SCC 273].

[Emphasis Supplied]

Bangalore Water Supply case is a judgment

3. The Bangalore Water Supply case judgment was delivered by the 7 judges on the same day i.e. on 21.02.1978. It is stated that the mere fact that the judges did not have the opportunity to debate with each other is not a ground for holding that it is not a judgment. However, the fact is that all the 7 judges delivered their judgment on 21.02.1978 and there is nothing in law which mandates that the judges will deliberate with each other before coming to their reasons or giving judgments. There are innumerable cases of this Hon'ble Court where individual judgments are given by concurrent or dissenting judges and where there is no mention of fact that the judgment of other judges have been read by them. This would however, normally happen when judges dissent and that is where they mention that they have read the judgment of the majority and indicate that they are dissenting from the majority. There is no such requirement in law that before a judgment is delivered, all the judges would have discussed each and every aspect of the judgment. Hence, the mere fact that some judges gave their reasons after one of them had retired, does not make

the judgment when delivered. It has also been suggested that judgment in Bangalore Water Supply Case is not a judgment in the eye of law for the reasons one of the judges wrote his reasons after going through the judgment of the other judge who had retired. It is submitted that it is the operative order which is the judgment of the Court in the eye of law and the date of delivery is considered the date of judgment as was stated in this Hon'ble Court's judgment in **Surendra Singh and Ors. v. State of U.P., AIR 1954 SC 194.** The relevant extract from the same is as follows:

> ***11.*** *An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open court. But however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else uptil then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the "judgment".*
>
> *[Emphasis Supplied]*

No manifest error shown

4. It is well settled in law that there has to be manifest error in the Judgment being referred, before it can be a referred to a larger bench. In **Bengal Immunity Co. Ltd. v. State**

of Bihar, (1955) 2 SCR 603 (hereinafter referred to as the "**Bengal Immunity case**"), this Hon'ble Court stated that ordinarily the doctrine of Stare Decisis applies and judgment may be overruled only when a manifest error arises. In this judgment, the consideration of this Court for overruling its earlier judgment entailed an interpretation of Article 141 of the Constitution of India and it was held that the Constitution can be readily amended making it necessary to correct a judicial error by overruling, which is stated below:

> *"**15.** In considering the applicability of the principles laid down in the decisions hereinbefore mentioned, it should be borne in mind that the English decisions may well have been influenced by considerations which can no longer apply to the circumstances prevailing in India. The error, if any, of the Court of Appeal in England, may be corrected by the House of Lords or eventually by Parliament by a simple majority. The mistakes, if any, made by the High Court of Australia, if not corrected by itself in a subsequent case, could be set right by the Privy Council when appeals were taken there or by the appropriate legislative authority. An error made by the House of Lords or the Privy Council can easily be rectified by Parliament by a simple majority by an amending statute. But in a country governed by a Federal Constitution, such as the United States of America and the Union of India are, it is by no means easy to amend the Constitution if an erroneous interpretation is put upon it by this Court. (See Article 368 of our Constitution). An erroneous interpretation of the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for a considerable time to the great detriment to public well-being. The considerations adverted to in the decisions of the Supreme Court of America quoted above are, therefore, apposite and apply in full force in determining whether a previous decision of this Court should or should not be disregarded or overruled. There is nothing in our Constitution which prevents us from departing from a*

previous decision if we are convinced of its error and its baneful effect on the general interests of the public. Article 141 which lays down that the law declared by this Court shall be binding on all courts within the territory of India quite obviously refers to courts other than this Court. The corresponding provision of the Government of India Act, 1935 also makes it clear that the courts contemplated are the subordinate courts.

20. *Reference is made to the doctrine of finality of judicial decisions and it is pressed upon us that we should not reverse our previous decision except in cases where a material provision of law has been overlooked or where the decision has proceeded upon the mistaken assumption of the continuance of a repealed or expired statute and that we should not differ from a previous decision merely because a contrary view appears to us to be preferable. It is needless for us to say that we should not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well-being in the light of the surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rigidly fixed limits as suggested before us. If on a re-examination of the question we come to the conclusion, as indeed we have, that the previous majority decision was plainly erroneous then it will be our duty to say so and not to perpetuate our mistake even when one learned Judge who was party to the previous decision considers it incorrect on further reflection. We should do so all the more readily as our decision is on a constitutional question and our erroneous decision has imposed illegal tax burden on the consuming public and has otherwise given rise to public inconvenience or hardship, for it is by no means easy to amend the Constitution. Sometimes frivolous attempts may be made to question our previous decisions but if the reasons on which our decisions are founded are sound they will by themselves be sufficient safeguard against such frivolous attempts. Further, the doctrine of stare decisis has hardly any application to an isolated and stray decision of the Court very recently made and not followed by a series of decisions based thereon. The problem before us does not involve overruling a series of decisions but only involves the question as to whether we should approve or disapprove, follow or overrule, a*

very recent previous decision as a precedent. In any case, the doctrine of stare decisis is not an inflexible rule of law and cannot be permitted to perpetuate our errors to the detriment to the general welfare of the public or a considerable section thereof.

[Emphasis Supplied]

The same principle is also affirmed in the cases of **Natural Resource Allocation, In re Special Reference No. 1 of 2012, (2012) 10 SCC1** and the **Supreme Court Advocates on record Association and anr. v. Union of India, (2016) 5 SCC 1.**

5. In **Waman Rao v. Union of India, (1981) 2 SCC 362** (hereinafter referred to as the "**Waman Rao case**"), the doctrine of Stare Decisis was applied and the judgment of this Hon'ble Court held that a judgment cannot be overruled by the bench of 9 judges merely because a different bench has a different opinion. Since the matter is not res-integra, a 5 judges bench can neither be referred for over ruling nor can it overrule a judgment of a larger bench of this Court. It must be shown that there was a manifest error in the judgment before an overruling can be considered. The relevant extract is as follows:

*"**33.** Thus, the constitutional validity of Article 31-A has been recognised in these four decisions, sometimes directly, sometimes indirectly and sometimes incidentally. We may mention in passing, though it has no relevance on the applicability of the rule of stare decisis that in none of the three earlier decisions was the validity of Article 31-A tested on the ground that it damaged or destroyed the basic structure of the Constitution. That theory was elaborated for the first time in Kesavananda Bharati [(1973) 4 SCC 225] and it was*

in the majority judgment delivered in that case that the doctrine found its first acceptance.

37. *The principle of stare decisis is also firmly rooted in American jurisprudence. It is regarded as a rule of policy which promotes predictability, certainty, uniformity and stability. The legal system, it is said, should furnish a clear guide for conduct so that people may plan their affairs with assurance against surprise. It is important to further fair and expeditious adjudication by eliminating the need to relitigate every proposition in every case. [See Harold J. Grilliot: Introduction to Law and the Legal System, 2nd Ed. (1979), p. 132] When the weight of the volume of the decisions on a point of general public importance is heavy enough, courts are inclined to abide by the rule of stare decisis, leaving it to the legislature to change longstanding precedents if it so thinks it expedient or necessary. In Burnet v. Coronado Oil and Gas Co. [285 US 393, 406] Justice Brandeis stated that "stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right".*

38. *While dealing with the subject of stare decisis, Shri H.M. Seervai in his book on Constitutional Law of India [2nd Ed (1975), Vol. I, pp. 59-61] has pointed out how important it is for judges to conform to a certain measure of discipline so that decisions of old standing are not overruled for the reason merely that another view of the matter could also be taken. The learned Author has cited an Australian case in which it was said that though the court has the power to reconsider its own decisions that should not be done upon a mere suggestion that some or all of the members of the later court may arrive at a different conclusion if the matter were res integra. [The Tramways case (No. 1), (1914) 18 CLR 54, per Griffith CJ at p. 58] The learned Author then refers to two cases of our Supreme Court in which the importance of adherence to precedents was stressed. Jagannadhadas, J. said in the Bengal Immunity case [Bengal Immunity Co. Ltd. v. State of Bihar, (AIR 1955 SC 661] that the finality of the decisions of the Supreme Court, which is the Court of last resort, will be greatly weakened and much mischief done if we treat our own judgments, even though recent, as open to reconsideration. B.P. Sinha, J. said in the same case that if the Supreme Court were to review its own previous*

decisions simply on the ground that another view was possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest Court of the land. In IT0 v. T.S.D. Nadar [AIR 1968 SC 623] Hegde, J. said in his dissenting judgment that the Supreme Court should not overrule its decisions except under compelling circumstances. It is only when the court is fully convinced that public interest of a substantial character would be jeopardised by a previous decision, that the court should overrule that decision. Reconsideration of the earlier decisions, according to the learned Judge, should be confined to questions of great public importance. Legal problems should not be treated as mere subjects for mental exercise. An earlier decision may therefore he overruled only if the court comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that if the matter were res integra, the members of the later court may arrive at a different conclusion.

***40.** It is also true to say that for the application of the rule of stare decisis, it is not necessary that the earlier decision or decisions of longstanding should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of precedent and it will be unnecessary to take resort to the principle of stare decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare decisis. Therefore, the reason why Article 31-A was upheld in the earlier decisions, if indeed it was, are not germane for the purpose of deciding whether this is a fit and proper case in which to apply that rule."*

Emphasis Supplied]

6. The above principles were summarised by this Hon'ble Court in **Supreme Court Advocates on record Association and anr. v. Union of India**, **(2016) 5 SCC 1**

(hereinafter referred to as the "**NJAC case**"). The principles on the basis of which a reference can be made to a larger bench are stated in this judgment as follows:-

> ***673.*** *There is absolutely no dispute or doubt that this Court can reconsider (and set aside) an earlier decision rendered by it. But what are the circumstances under which the reconsideration can be sought? This Court has debated and discussed the issue on several occasions as mentioned above and the broad principles that can be culled out from the various decisions suggest that:*
>
> ***673.1.*** *If the decision concerns an interpretation of the Constitution, perhaps the bar for reconsideration might be lowered a bit (as in Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (Thirteen-Judge Bench)). Although the remedy of amending the Constitution is available to Parliament, not all amendments are easy to carry out. Some amendments require following the procedure of ratification by the States. Nevertheless, where a constitutional issue is involved, the necessity of reconsideration should be shown beyond all reasonable doubt, the remedy of amending the Constitution always being available to Parliament.*
>
> ***673.2.*** *If the decision concerns the imposition of a tax, then too the bar might be lowered a bit since the tax burden would affect a large section of the public. However, the general principles for requiring reconsideration do not necessarily fall by the wayside.*
>
> ***673.3.*** *If the decision concerns the fundamental rights of the people, then too the bar might be lowered for obvious reasons. However again, the general principles for requiring reconsideration must be adhered to.*
>
> ***673.4.*** *In other cases, the Court must be convinced that the earlier decision is plainly erroneous and has a baneful effect on the public; that it is vague or inconsistent or manifestly wrong.*
>
> ***673.5.*** *If the decision only concerns two contending private parties or individuals, then perhaps it might not be advisable to reconsider it. Each and every error of law cannot obviously be corrected by this Court.*

673.6. *The power to reconsider is not unrestricted or unlimited, but is confined within narrow limits and must be exercised sparingly and under exceptional circumstances for clear and compelling reasons. Therefore, merely because a view different from or contrary to what has been expressed earlier is preferable is no reason to reconsider an earlier decision. The endeavour of this Court must always be to ensure that the law is definite and certain and continuity in the interpretation of the law is maintained. In this regard, Union of India v. Raghubir Singh, (1989) 2 SCC 754 (Five-Judge Bench)] presents an interesting picture. Section 23(2) of the Land Acquisition Act, 1894 (as amended in 1984) was interpreted by this Court on 14-2-1985 in K. Kamalajammanniavaru v. Land Acquisition Officer, (1985) 1 SCC 582. That decision was overruled six months later on 14-8-1985 in Bhag Singh v. UT of Chandigarh, (1985) 3 SCC 737]. That decision was in turn overruled on 16-5-1989 in Union of India v. Raghubir Singh, (1989) 2 SCC 754 (Five-Judge Bench)] and the law laid down in K. Kamalajammanniavaru v. Land Acquisition Officer, (1985) 1 SCC 582 was reiterated. It is this uncertainty and absence of continuity in the law that is required to be avoided.*

673.7. *An earlier decision may be reconsidered if a material provision of law is overlooked [How is this to be ascertained?] or a fundamental assumption is found to be erroneous or if there are valid and compulsive or compelling reasons or if the issue is of fundamental importance to national life. However, it might not be wise to overrule a decision if people have changed their position on the basis of the existing law. This is because it might upset the legitimate expectation of persons who have made arrangements based on the earlier decision and also because the consequences of such a decision might not be foreseeable.*

673.8. *Whether a decision has held the field for a long time or not is not of much consequence. In Bengal Immunity Co. Ltd. v. State of Bihar, (1955) 2 SCR 603: AIR 1955 SC 661 (Seven-Judge Bench)] a recent decision delivered by the Constitution Bench was overruled; in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111 (Seven-Judge Bench) a*

decision holding the field for a quarter of a century was overruled.

673.9. *Significantly, this Court has taken note of and approved the view that the changing times might require the interpretation of the law to be readjusted keeping in mind the 'infinite and variable human desires' and changed conditions due to 'development with the progress of years.' The interpretation of the law, valid for one generation may not necessarily be valid for subsequent generations. This is a reality that ought to be acknowledged as has been done by this Court in Maganlal Chhaganlal and by Chief Justice Dickson of the Canadian Supreme Court in The Queen v. Beauregard.[462] Similarly, the social context or 'contemporary social conditions or modern conceptions of public policy' cannot be overlooked. Oliver Wendell Holmes later a judge of the Supreme Court of the United States put it rather pithily when he said that:*

> *'But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.'*
>
> *Emphasis Supplied]*

7. A look at the reasons for making the present reference does not indicate any manifest error but merely shows a difference of opinion. The Ld. Counsel for the Petitioner, State of U.P. in the Civil Appeal No. 897 of 2002 titled as **State of U.P. v. Jai Bir Singh, (2005) 5 SCC 31**, summarised the reasons as follows:

(i) *Two of the opinions were delivered on 21.02.1978 and two on 7.4.1978. Some judges never had the opportunity of going through the opinions of the other judges. A judgment by the (multi-member) Bench handed down in the form of opinions authored and delivered by different judges on different dates is not a 'unanimous decision' of the Court and does not constitute 'an authoritative precedent'.*

(ii) *The judgment was only a 'workable solution' and only a 'tentative' and 'industry' in the Industrial Disputes Act*

('the Act') suggested by the different judges on the Bench themselves in their respective opinions and such amendment did come in 1982.

(iii) The subsequent legislative changes made by the Parliament by Act No. 46 of 1982 in the definition of 'industry' in the Act must be allowed to act as an aid for re-interpretation of that definition.

(iv) 'Sovereign' functions which have been held in the judgment to be exempt from the Act should include the constitutional duties and obligations of a Welfare State covered under Part IV – Directive Principles of the Constitution which should be treated to be excluded from the definition of 'industry' under the Act.

(v) The view in Safdarjung Hospital case applying the doctrine of noscitur a socits and holding that although 'profit –motive' is not relevant but the word 'undertaking' in the definition of 'industry' in the Act should be read and understood as 'analogous' to the accompanying words 'trade' and 'business' in the 'commercial sense' (i.e. not just in the sense of an enterprise being'. See also the view in Hospital Mazdoor Sabha case that a line should be drawn in a fair and just manner so as to exclude undertakings from the definition of 'industry' appears to be correct and the Court must reconsider where the line should be drawn and what limitations can and should be reasonably implied in interpreting the wide words used in Section 2(j).

(vi) The mere inclusion of a new 'public utility service' in the First Schedule read with S 2(n) of the Act would not make it 'industry' unless it actually answers the test of being an industry.

(vii) A worker-oriented approach is a one-sided approach; not only the interests of the employees but also the interests of the employers and the people at large in the form of 'private enterprise', 'public employment opportunities' and 'self-employment' are important and must form part of the judicial approach while interpreting the Act . In this regard, the observations relating to 'judicial experience' as recorded in the Coir Board v. Indira Devi are relevant.

(viii) The inhibition and difficulty which is being experienced by the legislature in making a 'better and more comprehensive' and the executive in bringing into force the amended definition of 'industry' is more due to the judicial interpretation of that in Bangalore Water case and the same needs to be removed.

8. In response, it is submitted as follows:

(i) **Reason No. 1**:

The judgment in the Bangalore Water Supply case delivered by 7 judges were unanimous even though given on separate dates. It is submitted that the dissenting judgment by two judges was only on the question of whether certain kinds of parties and professionals would be covered by the expression 'sovereign function'.

(ii) **Reason No. 2**:

The so-called "workable solution" in the Bangalore Water Supply case has stood the test of time for over 32 years now. Even assuming it has not, it is for the legislature to amend the Constitution and not for this Court to overrule its own decision.

(iii) **Reason No. 3**:

It is submitted that this Hon'ble Court cannot use the definition of 'industry' given in the amended Act of 1982 as an aid to or interpreting the definition of 'industry' and thereby be overruled by its own judgment. It has been held by this Hon'ble Court in **A.K. Roy and Anr v. Union of India, (1982) 1 SCC 271** that a statute or a section thereof which has not been brought into force, cannot be looked at for any reason whatsoever as it does not exist in the eye of law. Moreover, the court stated that a court of law cannot issue a writ of mandamus directing the

executive to enforce the provision if not enforced within a reasonable time or in case of delay. The relevant extract is as follows:

> ***51.*** *We may now take up for consideration the question which was put in the forefront by Dr Ghatate, namely, that since the Central Government has failed to exercise its power within a reasonable time, we should issue a mandamus calling upon it to discharge its duty without any further delay. Our decision on this question should not be construed as putting a seal of approval on the delay caused by the Central Government in bringing the provisions of Section 3 of the 44th Amendment Act into force. That Amendment received the assent of the President on April 30, 1979 and more than two and a half years have already gone by without the Central Government issuing a notification for bringing Section 3 of the Act into force. But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus. The court's power of judicial review in such cases has to be capable of being exercised both positively and negatively, if indeed it has that power: positively, by issuing a mandamus calling upon the government to act and negatively by inhibiting it from acting. If it were permissible to the court to compel the government by a mandamus to bring a constitutional amendment into force on the ground that the government has failed to do what it ought to have*

done, it would be equally permissible to the court to prevent the government from acting, on some such ground as that, the time was not yet ripe for issuing the notification for bringing the Amendment into force. We quite see that it is difficult to appreciate what practical difficulty can possibly prevent the government from bringing into force the provisions of Section 3 of the 44th Amendment, after the passage of two and a half years. But the remedy, according to us, is not the writ of mandamus. If the Parliament had laid down an objective standard or test governing the decision of the Central Government in the matter of enforcement of the Amendment, it may have been possible to assess the situation judicially by examining the causes of the inaction of the government in order to see how far they bear upon the standard or test prescribed by the Parliament. But, the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms. That makes it difficult for us to substitute our own judgment for that of the government on the question whether Section 3 of the Amendment Act should be brought into force. This is particularly so when, the failure of the Central Government to bring that section into force so far, can be no impediment in the way of the Parliament in enacting a provision in the National Security Act on the lines of that section. In fact, the Ordinance rightly adopted that section as a model and it is the Act which has wrongly discarded it. It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of Section 3 of the 44th Amendment into force. The question as to the impact of that section which, though a part of the 44th Amendment Act, is not yet a part of the Constitution, will be considered later when we will take up for examination the argument as regards the reasonableness of the procedure prescribed by the Act.

Emphasis Supplied]

(iv) **Reason No. 4**:

It is submitted that the said reason in "sum and substance" asked for overrule of the Bangalore Water

Supply case judgment to the extent that it decides what are 'sovereign functions'. It is submitted that the issue of what are 'sovereign functions' were discussed in **Corporation of the City of Nagpur v. Employees, 1960 AIR 675** which was decided long before the Bangalore Water Supply case.

> ***11.*** *Before considering the positive aspects of the definition, what is not an industry may be considered. However wide the definition of "industry" may be, it cannot include the regal or sovereign functions of State. This is the agreed basis of the arguments at the Bar, though the learned counsel differed on the ambit of such functions. While the learned counsel for the Corporation would like to enlarge the scope of these functions so as to comprehend all the welfare activities of a modern State, the learned counsel for the respondents would seek to confine them to what are aptly termed "the primary and inalienable functions of a constitutional Government". It is said that in a modern State the sovereign power extends to all the statutory functions of the State except to the business of trading and industrial transactions undertaken by it in its quasi-private personality. Sustenance for this contention is sought to be drawn from Holland's Jurisprudence, wherein the learned author divides the general heading "Public Law" into four sub-heads and under the sub-head "Administrative Law" he deals with a variety of topics including welfare and social activities of a State. The treatment of the subject "Public Law" by Holland and other authors, in our view, has no relevancy in appreciating the scope of the concept of regal powers which have acquired a. definite connotation. Lord Watson, in Richard Coomber v. Justices of the County of Berks [(1883-84) 9 AC 61, 74] describes the functions such as administration of justice, maintenance of order and repression of crime, as among the primary and inalienable functions of a constitutional Government. Isaacs, J., in his*

dissenting judgment in Federated State School Teachers' Association of Australia v. State of Victoria [(1924-29) 41 CLR 569] concisely states thus at p. 585:

> *"Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorised."*

These words clearly mark out the ambit of the regal functions as distinguished from the other powers of a State. It could not have been, therefore, in the contemplation of the legislature to bring in the regal functions of the State within the definition of industry and thus confer jurisdiction on Industrial Courts to decide disputes in respect thereof. We, therefore, exclude the regal functions of a State from the definition of industry.

Emphasis Supplied]

The same argument which is now sought to be made namely that activities carried on pursuant to Directive Principles of State Policy are 'sovereign functions' was dealt with and rejected. In any event it is absurd to suggest that welfare activities when carried on by the State are sovereign functions merely because the Directive Principles of State Policy is to guide the State in what kind of undertakings is in the interest of large public.

In countries who have liberalised and privatised economy, 'sovereign functions' which are ordinarily carried on by Governments are also now carried on

by the State. It has further been submitted that Justice Beg in his judgment in the Bangalore Water Supply case has held that the very expression 'sovereign functions' in a republican form of government is a misnomer since it is only the people who are sovereign. The relevant extract is as follows:

> ***163.*** *I would also like to make a few observations about the so-called "sovereign" functions which have been placed outside the field of industry. I do not feel happy about the use of the term "sovereign" here. I think that the term 'sovereign' should be reserved, technically and more correctly, for the sphere of ultimate decisions. Sovereignty operates on a sovereign plane of its own as I suggested in Keshavananda Bharati case [(1973) 4 SCC 225] supported by a quotation from Ernest Barker's Social and Political Theory. Again, the term "Regal", from which the term "sovereign" functions appears to be derived, seems to be a misfit in a Republic where the citizen shares the political sovereignty in which he has even a legal share, however small, inasmuch as he exercises the right to vote. What is meant by the use of the term "sovereign", in relation to the activities of the State, is more accurately brought out by using the term "governmental" functions although there are difficulties here also inasmuch as the Government has entered largely new fields of industry. Therefore, only those services which are governed by separate rules and constitutional provisions, such as Articles 310 and 311 should, strictly speaking, be excluded from the sphere of industry by necessary implication.*
>
> *[Emphasis Supplied]*

In sum, the petitioners are asking for overruling of the decision in Bangalore Water Supply case without pointing out any manifest error. It may be stated that mostly it is the State whether Central or State

Governments who are in the habit of challenging the Bangalore Water Supply case on this ground in almost all cases raising the plea and every department of the governemnt is performing a sovereign function only to get over their liability under labour laws.

(v) **Reason No. 5**:

The judgment in the **Safdarjung Hospital v. Kuldip Singh Sethi, (1970) 1 SCC 735** (hereinafter referred to as "Safdurjung case) was overruled by the Bangalore Water Supply case to the extent that the Bangalore Water Supply case holds that profit motive is not relevant to understand the "undertaking". No case is shown why this constitutes a manifest error. Nothing has been said to indicate that this ruling is erroneous let alone constituting a manifest error

(vi) **Reason No. 6**:

It is submitted that in the Bangalore Water Supply case, learned Judges pointed out that the very fact that public utilities services run by municipal corporations are by definition an 'industry' within the meaning of Section 2(9) of the Act, it follows that not all functions carried out by the State are 'sovereign functions'. No reason is shown to defer from this ratio much less any manifest error is pointed out.

(vii) **Reason No. 7**:

No reason is shown why a "worker oriented project" is erroneous while interpreting the Industrial Disputes Act. The said expression is only intended to convey that the Act is interpreted in the context of its object, as the object of the Act is to achieve industrial peace between the employer and the employees.

(viii) **Reason No. 8**:

No reason is shown why the inhibition of the Legislature in amending the law is on account of a judicial interpretation. On the contrary the Government in its Affidavit filed in **Union of India v. Sh. Gajanan Maharaj Sansthan, 2002 (5) SCC 44** has indicated that the reasons are lack of consensus in multiple bodies. An earlier attempt to refer the matter for a larger bench made in **Coir Board Ernakulam, Cochin v. Indira Devi P.S., (1998 (3) SCC 259)** was rejected in **Coir Board Ernakulam Kerala v. Indira Devai P.S., 2000 (1) SCC 224** and stated as follows:

> ***2.*** *The judgment delivered by seven learned Judges of this Court in Bangalore Water Supply case [(1978) 2 SCC 213] does not, in our opinion, require any reconsideration on a reference being made by a two-Judge Bench of this Court, which is bound by the judgment of the larger Bench.*

Alleged conflict

9. One of the primary reason for the reference is alleged conflict between **Chief Conservator of Forests v.**

Jagannath Maruti Kondhare, (1996) 2 SCC 293 (hereinafter referred to as the "**Chief Conservator of Forests case**") and **Gujarat v. Pratam singh Narsingh Parmar, 2001 (9) SCC 713** (hereinafter referred to as the "**Parmar case**"). It is submitted that there is no conflict between the two judgments. In the Chief Conservator of Forest case, it was held that in operating a particular scheme the Forest Department in the State of Maharashtra, the State was not performing a sovereign function. This was decision of three judges. The later judgment of the Parmar case is a judgment of two judges. Obviously, there could not be a conflict since the fact is that two judges in the Parmar case are bound by the decision of three judges in the Chief Conservator of Forests case. This Court in Parmar case held in the said judgment that the burden of proving that the functions being performed were not sovereign functions was on the workmen and that burden was not discharged. Hence, the reference to the industrial court was rejected. The said case turned purely on facts and did not hold that the Forest Department was performing sovereign functions. Their reference had failed purely on the basis of facts of that case. The said judgment is not an authority that the proposition that the various departments does not perform sovereign functions and hence there is no conflict exists between the said two judgments.

For all the reasons stated above, the reference ought to be rejected.