

“I.R. Coelho (dead) by L.Rs. Vs. State of Tamil Nadu & Others”

The Nine Judges' decision by Supreme Court
(The 9th Schedule Case)

'A Case Study'

Lecture delivered at the 'Advocates Association' on 9th Feb., 2007 at 4.15 pm:
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1. The nine judges' Bench presided by **Justice Y.K. Sabharwal, CJI** delivered a unanimous verdict on 11.1.2007 in **I.R. Coelho (dead) by L.Rs. Vs. State of Tamil Nadu and others**, upholding the '**Basic Structure Doctrine**', and the authority of the judiciary to review any such laws, which destroy or damage the basic structure as indicated in Art.21 read with Art.14, Art.19 and the principles underlying thereunder, even if they have been put in 9th Schedule after 14th April, 1973 (the date of the judgment in Kesavananda Bharti's case). The judgment upholds the right of judicial review and the supremacy of judiciary in interpreting the laws, which have been constantly under threat. The judgment reiterates and defines the exclusive right of the judiciary to interpret laws, in an ongoing struggle of supremacy between legislative and judiciary since 26th Nov. 1949, when the Constitution was dedicated to the people of India.

Legislative History: Right to Property

2. The philosophy underlying our Constitution goes back to the historic **Objective Resolution of Pt. Jawahar Lal Nehru** adopted by the Constituent Assembly on January 22, 1947, which inspired the shaping of the Constitution through all its subsequent stages: 'The guarantee and security to all the people of India, justice, social, economic and political; equality of status of opportunity, before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality was the objectives for drafting the Constitution.' The preamble embodied these objectives. The socialistic pattern of society was visible in the entire document. The word 'socialist' was, however, added to the preamble by 42nd Amendment Act in 1976. **The Prime Minister Smt.**

Indira Gandhi explained:- “We have always said that we have our own brand of socialism. We will nationalise the sectors, where we feel the necessity. Just nationalisation is not our type of socialism” (Statesman, 25.10.1976 P. 1 : 28.10.1976 P. 1).

3. The Constitution of 1949 had a threefold provision for safeguarding the right of private property. It not only guaranteed the right of private ownership but also right to enjoy and dispose of property free from restrictions other than reasonable restrictions. Firstly, Art. 19 (1) (f) guaranteed to every citizen the right to acquire any property by any lawful means such as inheritance, personal earnings or otherwise, and to hold it as his own and to dispose it freely, limited to such reasonable restrictions, which may not be in excess of the requirement of the interest of the general public. Secondly, Art.31 (1) guaranteed that no person shall be deprived of his property saved by the authority of law. Any property seized without proper legal authority was to be released at the intervention of the Court. A subject could not be deprived of his property by an executive order. Thirdly Art.31 (2) enjoined that if the State wants to acquire private property, it could do so by acquisition or requisition for public purpose and by payment to the owner by fixing the amount or specifying the principle upon it, it is to be determined.

4. The development of the socialist order by the then government led by Pt. Jawahar Lal Nehru was not possible without vast acquisition of land and for reorganisation of agricultural holding. The right to property was a serious threat to socialistic pattern of society. In **Kameshwar Vs. State of Bihar (1951) Patna High Court** held the Bihar Land Reforms Act unconstitutional. Allahabad and Nagpur upheld land reforms, against which appeals were pending in Supreme Court. The Constitution was amended.

5. The first constitutional amendment in 1951 exceptions were added to Art.31 (2) and Art.31-A – 31-C were inserted. The first amendment also added in 9th Schedule to the Constitution with reference to Art.31-B purportedly to save those legislations dealing with land reforms, which were struck down by the Court. The amended Art.31-A provided that notwithstanding anything contained in Art.13, no law providing for acquisition by the State of any estate or any rights, taking over of the management of any property by the State for a limited period either in public interest, or to secure proper management of the property, amalgamation of two corporations in public interest or to secure proper management of any of the corporations, the extinguishment or modification of any rights of

managing agents, secretaries and treasurers etc. and extinguishment or modification of any rights by virtue of any agreement, lease or license for searching, or winning, mineral or mineral oil or premature termination or cancellation of such agreement, lease or license, shall be deemed to be void on the ground that it is inconsistent with or takes away or approaches any of the rights conferred by Art.14 or Art.19 of the Constitution of India. The State law in this regard was to receive this status only after receiving assent of the President.

6. Article 31-B validated certain acts and regulations if without prejudice to the generality of the provision in Art.31-A they were put under 9th Schedule, and that the provisions thereof shall not be deemed to be void on the ground that they are inconsistent with, or take away or abridge any of the rights conferred by Part III of the Constitution. The amendment saved the conflict of such legislations with fundamental rights.

7. In **Shankari Prasad Singh Deo Vs. State of Bihar (1952)**, **Kochunni Vs. State of Madras (1960)** and **Sajjan Singh Vs. State of Rajasthan (1965)** the Supreme Court upheld the First Amendment and further held that the law, which seeks to deprive a person of his property must be a valid law, enacted by competent legislature and not inconsistent with any of the fundamental rights guaranteed by Part III of the Constitution. The Supreme Court, however, noted that if the effect of the amendment made in the Fundamental Rights on Art.226 is direct and not incidental, different considerations may perhaps arise. **Justice Mudholkar questioned, “it is also a matter of consideration whether making a change in basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect rewriting a part of the Constitution, and if the later, would it be within the purview of Art.368.”**

8. The brute majority of the Congress Government allowed it to amend the Constitution 41 times, till the promulgation of the emergency. The 4th, 5th and 25th and then 42nd amendment during the emergency in 1975 put the laws of acquisition of the State or other intermediate interest in land beyond scrutiny of fundamental rights, the directive principle of state policy or even basic structure of the Constitution. Though the legislature was, until the 4th amendment, under constitutional obligation to pay compensation the adequacy of which was not made questionable by the 4th amendment (1955) in Art.31 (2). In **State of West Bengal Vs. Bela Banerji (1954)**, the Supreme Court interpreted the word 'compensation' simpliciter as full compensation i.e. market value of the property on the date of acquisition.

The Government was not happy as it did not have adequate resources to pay compensation for all the property, which was to be nationalised.

9. In **R.C.Cooper Vs. Union of India (1970)** (the Bank Nationalisation Case) the Supreme Court held that the word 'compensation' implied full monetary equivalent of the property taken away from the owner i.e. market value on the date of acquisition.

10. In **I.C. Golak Nath and Ors. Vs. State of Punjab (1967)** a majority of 6:5 overruled Shankari Prasad and Sajjan Singh holding that constitutional amendment is law within the meaning of Art.30 and if it takes away or abridges any rights conferred by part III, it is void. The judgment was made prospective with effect from the date of decision (27th Feb. 1967).

11. I.C. Golak Nath resulted into 24th amendment (1971): adding Art.13 (4), that the article shall not apply to any amendment of the Constitution under Art.368 and also amended Art.368 (1) by adding the word "in exercise of its constituent powers"; 25th amendment (1971): amending Art.31 by which the amount fixed for acquisition could not be challenged on the ground of adequacy in Court and inserted Art.31 (c) declaring that law securing any of the principle in part 4 shall not be deemed to be void if it takes away the rights by Art.14 and Art.19, and no law containing such a declaration will be questioned in Court; 26th amendment (1971): omitting Art.291, (privy purses) and Art.362 (right and privileges of the rulers of the Indian states) and inserted Art.363-A ceasing the recognition of rulers and abolishing privy purses; and 29th amendment (1972): adding to Kerala Amendment Act in 9th Schedule.

12. The 24th amendment (1971) made an attempt to supersede Golaknath case putting the validity of constitutional amendment on the ground that it takes away or affects fundamental right beyond the pail of judicial scrutiny. This 24th amendment was challenged in **Kesavananda Bharti** case (1973) before 13 judges. The majority by 7:6 overruled the 24th amendment. The validity of Clause 4 of Art. 13 was upheld. In the result the fundamental rights could be amended under Art.368 and the validity cannot be questioned on the ground that the act invades or encroaches fundamental rights. The Supreme Court, however, by a judicial innovation structured a '**Basic Structure Doctrine**' and gave to itself power to review whether such an amendment would be ultra vires as it violates very structure of the Constitution. The Supreme Court without foreclosing the list of basic structure found following to be life and blood of the Constitution:-

“(a) Supremacy of the Constitution.
 (b) Rule of law.
 (c) The principle of Separation of Powers.
 (d) The objectives specified in the Preamble to the Constitution.
 (e) Judicial review; Arts.32 and 226.
 (f) Federalism.
 (g) Secularism.
 (h) The sovereign, democratic, republican structure.
 (i) Freedom and dignity of the individual.
 (j) Unity and integrity of the Nation.
 (k) The principle of equality, not every feature of equality, but the quintessence of equal justice.
 (l) The 'essence' of other Fundamental Rights in Part III.
 (m) The concept of social and economic justice-to build a welfare State; Part IV in toto.
 (n) The balance between Fundamental Rights and Directive Principles.
 (o) The Parliamentary system of government.
 (p) The principle of free and fair elections.
 (q) Limitations upon the amending power conferred by Art.368.
 (r) Independence of the Judiciary.
 (s) Effective access to justice.
 (t) Powers of the Supreme Court under Arts.32, 136, 141, 142.
 (u) Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act.”

13. Applying basic feature doctrine the majority in Kesavananda Bharti held that second part of Section 3 of the Constitution 25th Amendment Act, 1971 was invalid in Art.31-C, which provided that no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy.

14. The 25th Amendment 1971 substituted the word compensation in Art.31 (2) with the word 'amount' but again the majority of the Supreme Court reserved an area for judicial intervention in **Kesavananda Bharti Vs. State of Kerala (1973)** with the majority of 6:5 that the amount fixed by the legislature could not be arbitrary or illusory but must be determined by a principle, which is relevant to the acquisition of the property.

15. The Indira Gandhi Government reacted sharply by putting specified laws of acquisition of land beyond pail of Art.31 by engrafting exceptions in Art.31-A – 31-D, which excluded the obligation to pay any amount as compensation if such laws related to matters specified in the exceptional provisions namely, law for acquisition by the State of any estate or other intermediate interest in land to affect aggregarian reforms and to improve the agricultural wealth of the country as well as social control of the means of production. Art.31-A, except certain clauses of laws, Art. 31-B read with 9th

Schedule gave blanket cover to certain enactments, the number of which swelled from 13 to 284 by the year 2000. Art.31-C inserted by 25th amendment (1971) provided that any law, which seeks to implement the directive in Art. 39 (b) or 39 (c) with a view to plan the socialistic distribution of wealth and the means of production was not to be void for any inconsistency with Art.14 or 19. The decision in Keshavanand held that judicial review is one of the essential feature of the Indian constitution, which cannot be taken away by amendment under Art.368 and further held that the immunity to any particular law to implement the directive in Art. 39 (c) is unconstitutional.

16. The 42nd amendment (1976) was introduced during the emergency, amended as many as 56 Articles as well as 7th Schedule and changed the vital principles underlying the 1949 Constitution, including an attempt to overrule the judgment of this Court nullifying the election of Indira Gandhi enlarged the scope of Art.31-C by including within its protection laws to implement any of the directive principle in Part IV of the Constitution- not merely Art.39 (b) and (c).

17. The 44th amendment (1978) by the Janta Government, tried to do away with all the harm that was done to the Constitution by the 42nd amendment, but gave a death blow to the right of property guaranteed of the Constitution in 1948 in Art. 19 (1) (f) and 31. Art.19 (1) (f) was repealed and Art.31 was taken out of Part III and made Art.300-A. Right of property was no longer a fundamental right and was substituted as a constitutional right. An individual's property could be taken away by a public official without legal authority such a person would not be left with remedies under Art.32 as Art.300-A is not a fundamental right. A person complaining of any law taking away his right to property will have to look for his remedies under Art.226 or by an ordinary suit. The same amendment omitted clause 2 (A) (6), of Art.31 and Clause (2) of Art.31 and transferred its proviso to Art.30 as Clause (1) (A). The protection under Art.31 to the laws violating fundamental rights remained to operate as an exception to Art.14 and 19. Right to compensation to the actual tiller in Art.31 (A) (1), however, has been retained, even though Art.31 was omitted.

18. The 42nd amendment tried to overreach the implication of Kesavananda Bharti case and in order to uphold the sovereignty of Parliament (as constituent body) in Clause (5) of Art.386 declared that “there shall be no limitation” on the constituent power of the Parliament to amend and such amendment, shall not be called in any Court on any ground

(Clause 4). In **Minerva Mills (1980)** the Supreme Court by then armed with basic structure doctrine declared Clause (4) and (5) of Art.368 to be invalid on the ground that these clauses removed all limitations upon the power of the Parliament to amend the Constitution and to destroy the right of judicial review, which is “essential feature” or “basic structure” of the Constitution.

The order of reference

19. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act) vested certain land including forest land in the Janmam Estate in the State of Tamilnadu. The Act was struck down in **Balmadies Plantations Ltd. Vs. State of Tamilnadu, (1972) 2 SCC 133** because the acquisition of forest land was not found to be a measure of agrarian reforms under Art.31 (A) of the Constitution. Similarly Section 2 (c) of the West Bengal Land Holding Revenue Act, 1979 was struck down as arbitrary and unconstitutional. The Special Leave Petition by State of West Bengal was dismissed.

20. The 34th amendment and 66th amendment to the Constitution inserted these two acts in 9th Schedule in its entirety. These insertions were challenged before five judges Bench on the ground that portions, which were struck down could not be validly inserted in 9th Schedule. By an order passed on 14.9.1999 reported in (1999) 7 SCC 580 a Constitution Bench of Supreme Court referred the matter to the larger bench of nine judges observing that after 24th April, 1973 (the date when Kesavananda Bharti judgment was delivered) the inclusion of the acts, which were struck down by the Courts as violative of Part III of the Constitution of India in 9th Schedule is beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure. The judgment in **Waman Rao (1981)** in view of **Minerva Mills (1980)** and **Maha Rao Sahib Sri Bhim Singh Ji (1981)** was required to be reconsidered by the larger Bench.

21. The Supreme Court framed the broader question to be decided by nine judges:-

“The fundamental question is whether on and after 24th April 1973 when basic structure doctrine was propounded, it is permissible for the parliament under Art.31-B to immunise legislations from fundamental rights by inserting them to the 9th Schedule, and if so, what is the effect of the power of judicial review of the Court.”

22. The Supreme Court then traced the law from the first amendment (1951) inserting Art.31-A and 31-B and adding 9th Schedule to the Constitution upheld in **Shri Shankari Prasad Singh Deo Vs. Union of India, 1952 SCR 89** and **Sajjan Singh Vs. State of Rajasthan, (1965) 1 SCR 933** upholding 17th amendment (1964).

23. The majority of 13 judges in Kesavananda Bharti upheld 24th amendment, declared 25th amendment to the extent that it took away the power of judicial review, left 26th amendment to be determined by Constitution Bench of five judges and upheld 29th amendment. The doctrine of basic structure or framework was firmly established and that majority did not accept the unlimited power of the Parliament to amend the Constitution and held that Art.368 has implied limitations.

24. After promulgation of emergency in June 1975 the 39th Amendment tried to do away by Art.329-A the judgment of the High Court of Allahabad and added entries 87 to 124 in the 9th Schedule. Many of these were not connected with land reforms. In Indira Nehru Gandhi Vs. Raj Narain (1975) the amendments were struck down as violative of basic structure of Constitution. Internal emergency was proclaimed two weeks before the judgment and the fundamental rights were curtailed. 40th Amendment inserted entries 125 to 128 in 9th Schedule and the 42nd Amendment Act amended Art.368 and many other articles.

25. At the end of emergency 44th amendment (1978) tried to do away with most of the amendments but omitted Art.19 (1) (f) and Art.30 (1). The ADM Jabalpur was impliedly overruled by these amendments as MISA and Prevention of Publication of Objectionable Matters Act, 1976 placed in 9th Schedule were repealed.

26. In **Maneka Gandhi (1978)** a seven judges Bench overruled **A.K. Gopalan (1950)** after 28 years and held that procedure established under Art.21 has to be reasonable and not violative of Art.14.

27. In **Minerva Mills (1980)** the Supreme Court struck down Clause 4 and 5 of Art.368 as violative of basic structure of the Constitution and then came Waman Rao and Bhim Singh Ji challenging the validity of Urban Land (Ceiling and Regulation) Act, 1976, which was inserted in 9th Schedule. The Constitution Bench unanimously held Section 27 (1) prohibiting disposal of property as violative of Art.14 and 19 (1) (f), which was later omitted in 1978.

28. The 9th Schedule contains 284 acts added by 11 constitutional amendments from 1951 to 1995 and omissions of three acts.

The contentions

29. F.S. Nariman submitted that it is impermissible to immunise the 9th Schedule from judicial review as it is violative of basic structure. The basic structure test will include judicial review of 9th Schedule on the touchstone of fundamental rights. The constitutional validity has to be judged on the direct impact and effect test, which means the impact and not the form of amendment is relevant.

30. Per contra the respondents submitted that validity of 9th Schedule can only be tested on touchstone of basic structure doctrine and there was no question of judicial review of such legislations on the ground of violation of fundamental rights, which stand excluded by protective umbrella of Art.31-B and therefore, the challenge can be based only on the ground of basic structure doctrine and in addition (1) lack of legislation competence and (2) violation of other constitutional provisions. It was contended that issues covered by majority judgment in Keshvanand Bharati case.

The Reasoning

31. Relying upon Kesavananda Bharti's case the Court noticed Justice Khanna's opinion that fundamental rights could be amended, abrogated or abridged so long as the basic structure of the Constitution is not destroyed and at the same time upholding 29th amendment as valid, it was noticed that in Indira Gandhi's case Justice Khanna clarified his opinion, which tilted the balance in Kesavananda Bharti's case in which six learned judges were on either side in 13 judges Justice Khanna gave the casting opinion, the Supreme Court found that in Indira Gandhi Vs. Raj Narain Justice Khanna clarified his observations and said: "what has been laid down in the judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to fundamental right and is contained in Part III of the Constitution. The above observations clearly militate against the contentions that according to my judgment fundamental rights are not part of basic structure of the Constitution. I also dealt with the matter at length to show that the right to property was not a part of basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental right was a part of the basic structure of the Constitution."

32. The acts put in 9th Schedule do not become part of the Constitution by such inclusion as no State legislature has power to repeal or amend the Constitution.

33. In Waman Rao Justice Chandrachud and in Minerva Mills justice Bhagwati did not consider the binding effect of majority judgment in Kesavananda Bharti case. They only examined the effect, impact and working of the doctrine of basic structure in Kesavananda Bharti case. All these judgments show that violation in individual case has to be examined to find out whether violation of equality amounts to destruction of basic structure of the Constitution.

34. Justice Khanna did not elevate the right of property to the level and status of basic structure or basic framework of the Constitution. He has resolved the doubts in his opinion in Indira Gandhi case.

35. The amending power inserting laws into 9th schedule does not entail complete removal of fundamental right chapter. 9th Schedule is not controlled by any designed criteria or standards by which the exercise of power may be evaluated. There is no constitutional control on such nullification. If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be accepted that Part III of the constitution has key role to play in the application of the doctrine.

36. The responsibility to adjudge the constitutionality of all the laws is that of the judiciary. Art.32 is part of Part III. The inclusion of an act in 9th Schedule does not exclude the check of Part III including that of Art.32. The unchecked and rampant exercise of powers by including acts in 9th Schedule, the number of which has gone up from 13 to 284 shows that it is no longer a mere exception. The absence of guidelines for exercising such power means absence of constitutional control, which result in destruction of constitutional supremacy and creation of parliamentary hazimony.

37. The Parliament can amend the provisions of Part III subject to limitation of basic structure doctrine. Since full judicial review is also integral part of the constitutional scheme, the essence of the principles behind Art.14, 19 and 21 are also part of basic structure.

Once Art.32 is triggered, the legislation must answer a complete test of fundamental right. Every insertion into 9th Schedule does not restrict Part III review. For these reasons **every addition to 9th Schedule triggers Art.32, as part of basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.**

38. Equity, rule of law, judicial review and separation of powers form parts of basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before law.

39. In Waman Rao case the Court examined whether the device of Art.31-B could be used to immunise 9th Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in affirmative. It was said that such powers are likely to make controlled Constitution uncontrolled. It will render doctrine of basic structure redundant and will remove the golden triangle of Art.21 read with Art.14 and 19, in its entirety for examining the validity of 9th Schedule laws, as it makes the entire Part III inapplicable, at the will of the Parliament.

40. The 'essence of right test' is different from rights test. The argument that Part III is eliminated is incompatible with the implied limitation of power on Parliament.

41. **First the violation of rights of Part III is required to be determined, then its impact examined, and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow.** The golden triangle of Art.14, 19 and 21 is basic feature of the Constitution as it stands for equity and rule of law.

The Conclusion

42. The Supreme Court held:-

“A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

The majority judgment in Keshavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying

them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule."

43. **The Supreme Court held that if the validity of any 9th Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law is held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/ infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.**

44. The Supreme Court further held that the actions taken and transactions finalized as a result of the impugned Acts shall not be open to challenge, and directed that the petitions/ appeals be placed for hearing before a Three Judges Bench.

The Features

45. The nine judges deciding the issue of validity of laws put by constitutional amendment in 9th Schedule, has discussed many important cases in the judgment namely (1) Shri Shankari Prasad Singh Deo Vs. Union of India and State of Bihar (1952) SCR 89; (2) Sajjan Singh Vs. State of Rajasthan, (1965) 1 SCR 933; (3) I.C. Golak Nath Vs. State of Punjab, (1967) 2 SCR 762; (4) His Holiness Kesavananda Bharti Sri Pada Galvaru Vs. State of Kerala, (1973) 4 SCC 225; (5) Waman Rao Vs. Union of India, (1981) 2 SCC 362; (6) Minerva Mills Ltd. Vs. Union of India, (1980) 3 SCC 625; (7) Maha Rao Sahib Shri Bhim Singh Ji Vs. Union of India, (1981) 1 SCC 166; (8) Smt. Indira Nehru Gandhi Vs. Raj Narain, (1975) Supp. 1 SCC 1; and (9) L. Chandra Kumar Vs. Union of India, (1997) 3 SCC 261.

46. The Supreme Court relied upon Dr. Amartya Sen, Lord Steyn, and Granville Austin in holding primacy of fundamental rights not on the assumption that they are higher rights but that their protection is the best way to promote a just and tolerant society and the right of judiciary to protect constitutionalism and further to declare that Art.14, 19 and 21 represent the foundational values, which form the basis of rule of law. These are principles of constitutionality, which form the basis of judicial review apart from the rule of law and separation of powers. Anything that destroys the balance will ipso facto destroy the essential elements of the basic structure of the Constitution.

47. The Court also relied upon James Madison, Federalist 47, 48 and 51 in which he discusses Montesquieu's treatment of the separation of powers in the spirit of laws (Book XI, Ch.6) in which he writes that when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again there is no liberty, if judicial power be not separated from legislative and executive. Montesquieu finds tyranny pervades where there is no separation of powers and Supreme Court found that separation of powers is part of basic structure of the Constitution.

48. The judgment is not in the adversarial form in which the counsels raised arguments and the Court decided issues. It is rather a judgment of affirmation of the right of judicial review as the basic feature of the Constitution and to do away with the fictional immunity given by Art.31-B to the laws put in the well of the 9th Schedule. The judgment seeks to lay down the supremacy of the judicial review of the laws by Courts and none else and separation of powers and to guard the fundamental rights.

49. It may be argued that in 2007 there is no threat to the private property rights as the country has shifted its stand from socialism to neo capitalism and that the goals have shifted from equal distribution of wealth to accumulation of wealth by the nation through the individuals, organisations and corporations, for economic growth without compromising with socialistic pattern of society. With weak governments at the centre there is no real or apparent threat abrogating the fundamental rights by constitutional amendments. The judgment in fact comes by way of affirming of the judicial powers of review of all the laws on the touchstone of rights guaranteed in Part III and thereafter basic structured doctrine.

50. The unanimity of the judgment is a unique feature. So far all the cited judgments were delivered with divided opinions. It may be argued that

since the law is fairly settled, there was no cause for division of opinion. But for the scholars of law the unanimity of opinion amongst judges even to establish law, is an encouraging feature of the strength of judiciary.

References:-

- (1) Kameshwar Vs. State of Bihar, AIR 1951 Patna 91,
- (2) Shankari Prasad Singh Deo Vs. State of Bihar, 1952 SCR 89
- (3) Kochunni Vs. State of Madras, AIR 1960 SC 1080,
- (4) Sajjan Singh Vs. State of Rajasthan, (1965) 1 SCR 933,
- (5) I.C. Golak Nath & Ors. Vs. State of Punjab, (1967) 2 SCR 762,
- (6) Balmadies Plantations Ltd. & Anr. Vs. State of Tamil Nadu, (1972) 2 SCC 133,
- (7) His Holiness Kesavananda Bharati, Sripadagalvaru Vs. State of Kerala & Anr., (1973) 4 SCC 225,
- (8) Smt. Indira Nehru Gandhi Vs. Raj Narain, 1975 Supp. (1) SCC 1,
- (9) Menaka Gandhi Vs. Union of India, (1978) 1 SCC 248,
- (10) Minerva Mills Ltd. Vs. Union of India, (1980) 3 SCC 625,
- (11) Waman Rao & Ors. Vs. Union of India, (1981) 2 SCC 362,
- (12) Maharao Sahib Shri Bhim Singhji Vs. Union of India & Ors., (1981) 1 SCC 166,
- (13) L. Chandra Kumar Vs. Union of India, (1997) 3 SCC 261,
- (14) I.R. Coelho (Dead) by Lrs. Vs. State of Tamil Nadu & Ors., (1999) 7 SCC 580, and
- (15) M. Nagaraj & Ors. Vs. Union of India & Ors., (2006) 8 SCC 212.

References:-

- (1) Kameshwar Vs. State of Bihar, AIR 1951 Patna 91,
- (2) Shankari Prasad Singh Deo Vs. State of Bihar, 1952 SCR 89
- (3) Kochunni Vs. State of Madras, AIR 1960 SC 1080,
- (4) Sajjan Singh Vs. State of Rajasthan, (1965) 1 SCR 933,
- (5) I.C. Golak Nath & Ors. Vs. State of Punjab, (1967) 2 SCR 762,
- (6) Balmadies Plantations Ltd. & Anr. Vs. State of Tamil Nadu, (1972) 2 SCC 133,
- (7) His Holiness Kesavananda Bharati, Sripadagalvaru Vs. State of Kerala & Anr., (1973) 4 SCC 225,
- (8) Smt. Indira Nehru Gandhi Vs. Raj Narain, 1975 Supp. (1) SCC 1,
- (9) Menaka Gandhi Vs. Union of India, (1978) 1 SCC 248,
- (10) Waman Rao & Ors. Vs. Union of India, (1981) 2 SCC 362,
- (11) Minerva Mills Ltd. Vs. Union of India, (1980) 3 SCC 625,
- (12) Maharao Sahib Shri Bhim Singhji Vs. Union of India & Ors., (1981) 1 SCC 166,
- (13) L. Chandra Kumar Vs. Union of India, (1997) 3 SCC 261,
- (14) I.R. Coelho (Dead) by Lrs. Vs. State of Tamil Nadu & Ors., (1999) 7 SCC 580, and
- (15) M. Nagaraj & Ors. Vs. Union of India & Ors., (2006) 8 SCC 212.
