

(2016) 03 KL CK 0144

In the High Court Of Kerala

Case No : W.P. (C) No. 2640 of 2013 (D) and W.P.(C) Nos. 18030 and 31238 of 2014

Radhakrishna Kurup

APPELLANT

Vs

Nadakkal Service Co-Operative Bank Ltd. and Others

RESPONDENT

Date of Decision : 22-03-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 15, Article 15(1), Article 16, Article 16(2), Article 19, Article 19(1), Article 226, Article 246(1), Article 300-A, Article 31
Kerala Co-operative Societies Act, 1969 — Section 55, Section 56,

Citation : (2016) AIRCC 1524 : (2016) 4 KLT 82

Hon'ble Judges : Dama Seshadri Naidu, J.

Bench : Single Bench

Advocate : M. Tripten and G. Hariharan, Advocates, for the Appellant; P.C. Sasidharan and E.S. Ashraf, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Dama Seshadri Naidu, J.—Introduction:

1. The constitutional validity of Section 56A of the Kerala Co-operative Societies Act, 1969, falls for consideration in these writ petitions.
2. In W.P.(C) No. 18030/2014, the petitioners are the Co-operative Bank and one of its members; respondents 4 and 5 are the borrowers, the latter of whom mortgaged her property as security for the loans. Apart from being husband and wife, the fourth and fifth respondents are the petitioners in W.P.(C) No. 2640/2014 and W.P.(C) No. 18030/2014 respectively.
3. While the Bank has raised the issue of vires of Section 56A of the Kerala Co-operative Societies Act, the borrowers, on the other hand, seek the enforcement of Exhibits P7 and P8 orders passed by the authorities drawing their power from the impugned provision.
4. Since the writ petitions have similar issues involving the same parties, this

Court has proposed to dispose of the writ petitions through a common judgment. For ease of reference and convenience, the facts as pleaded and the parties as have been arrayed in W.P.(C) No. 18030/2014 are taken as the basis.

The Facts in Brief:

5. The fourth and fifth respondents, incidentally husband and wife, secured two business loans in 2001 for Rs. 10,00,000/- each by mortgaging, as security for both the loans, the property of the fifth respondent, the wife.

6. Later, when respondents 4 and 5 committed default in repaying the loan amounts, the Bank initiated recovery proceedings by filing A.R.C. Nos. 689/2002 and 691/2002 against them. Though the respondents initially entered their appearance, later they remained ex-parte; it has resulted in the Arbitration Court's passing a common award against the borrowers.

7. On the strength of the arbitration award, the Bank issued a demand notice calling upon respondents 4 and 5 to satisfy the award. Aggrieved, the fifth respondent filed W.P. (C) No. 34650/2005 before this Court and obtained an interim stay on the condition of her depositing Rs. 3,00,000/-. She did not, however, comply with the said direction. At any rate, this Court disposed of W.P. (C) No. 34650/2005 permitting the fifth respondent to clear the entire loan amount by 17.04.2006, failing which the Bank was free to proceed further.

8. But the fifth respondent, even within the extended time, has not availed herself of the indulgence shown by this Court in W.P.(C) No. 34650/2005. It compelled the Bank to issue a sale notice on 28.11.2008. The sale, in fact, took place on 14.01.2009. Among all the bidders present, the very Bank offered the highest and purchased the property for a consideration of Rs. 44,78,130/-.

9. As gathered from the record and the submissions of the learned counsel for the parties, the fourth respondent, in the meantime, filed W.P.(C) Nos. 12199/2007 and 1387/2009 assailing the sale notice. Though there was an interim direction in one of these writ petitions; this time, the fourth respondent failed to comply with it. Initially, W.P. (C) No. 12199/2007 was dismissed as it had been reported to have become infructuous. And later even W.P.(C) No. 1387/2009 was dismissed.

10. The issue had no quietus, though. This time, the fifth respondent filed W.P. (C) No. 4902/2009 in which, once again, she obtained an interim order staying the confirmation of sale subject to her depositing a part of the loan amount. In tune with the previous practice, rather failure, the fifth respondent, predictably, violated the direction, because of which, this Court dismissed W.P.(C) No. 4902/2009. At any rate, through Exhibits P1 and P1(a), on 24.03.2010, the petitioner had the sale confirmed in its favour; and on 27.03.2010, it took possession of the property.

11. The fourth respondent filed W.P.(C) No. 26638/2010 impugning the auction sale. But he withdrew the said writ petition on 10.03.2011. This time he

approached the Government challenging both the award and the auction sale. The Government, the first respondent, however, through Exhibit P3 order dated 28.07.2010, rejected the fourth respondents' claim. Next came the turn of the fifth respondent to submit a representation before the Government. The Government through Exhibit P4 directed the Bank to submit its explanation, which is Exhibit P5.

12. While the fifth respondent's representation was pending with the Government, the fourth respondent filed W.P.(C) No. 2640/2013. That apart, one Mr. Baiju, who is apparently unconnected with the borrowers, complained before the learned Lok Ayukta that the Bank is trying to sell away the property of a third party-evidently, that of the fifth respondent-without following the due procedure. The learned Lok Ayukta through Exhibit P6, though provided no relief, observed that if at all the Bank sold away the property, it should comply with the statutory mandate.

13. Ostensibly, in response to the fifth respondent's representation, after considering the Bank's objections in Exhibit P5, the second respondent issued Exhibit P7 order directing the Bank to take steps to re-convey the property to the fifth respondent after receiving the principal amount along with interest and the expenses. The third respondent issued Exhibit P8 consequential communication to the Bank to take further steps to comply with Exhibit P7 direction. Aggrieved, the Bank filed the writ petition.

W.P.(C) No. 2640/2013:

14. The fourth respondent, the husband, has filed the writ petition seeking these reliefs: (i) to set aside the sale conducted on 14.01.2009; (ii) to declare the sale void; (iii) to direct the Bank to comply with the directive of the Deputy Secretary, Co-operative Department; and (iv) to accept the demand drafts, i.e., the loan amount, expenses, etc., as has been directed by the Government.

W.P.(C) No. 31238/2014:

15. The fifth respondent, the wife, who is the other borrower, has filed the writ petition seeking the following relief: to direct the Bank to comply with the directive of the learned Lok Ayukta.

Summary of Submissions:

Petitioner's:

16. Sri. P.C. Sasidharan, the learned counsel for the Bank, has strenuously contended that Exhibit P7 and also consequential Exhibit P8 are ultra vires of the second and third respondents respectively. In elaboration of the said submission, the learned counsel has contended that respondents 4 and 5 repeatedly approached this Court and had all their writ petitions dismissed either for default or lack of merit. He has further submitted that on more than one occasion, the respondents themselves withdrew the writ petitions.

17. Laying specific emphasis on Exhibit P3 order in revision issued by the second respondent, the learned counsel contended that having exercised its revisional power in favour of the Bank, the second respondent for whatever reason cannot take a U-turn and issue Exhibit P7, which is nothing but, if at all, review of Exhibit P3 order.

18. According to the learned counsel, the second respondent has no power of review. He has taken me through the statutory provisions such as Sections 56A and 66A of the Kerala Co-operative Societies Act ("the Act") and also Rules 81 to 84 of the Kerala Co-operative Societies Rules ("the Rules").

19. Laying specific emphasis on Section 56A of the Act, the learned counsel has contended that though the Section reads to the effect that the society must dispose of the property within seven years, it has to be read down to save it from the vice of arbitrariness. According to him, there can be no statutory embargo against the Bank's holding the property.

20. In the alternative, the learned counsel has submitted that if at all the property must be sold, Section 56A does not mandate that it should be re-conveyed to the original owner of the property. According to him, in commercial terms, to secure the maximum benefit, the Bank can sell it on the open market. As regards Section 66A, the learned counsel would contend that the supervisory powers cannot be used to settle the individual disputes. And at best, it can be exercised for securing policy compliance.

21. Having referred to Rules 81 to 84 of the Rules, the learned counsel would contend that a lawful procedure is laid down under Rule 81 regarding the sale of the property. He has further submitted that, in terms of Rule 82, if there is any irregularity in the sale of the mortgaged property, the affected person shall file objections within thirty days. The claim of respondents 4 and 5, contends the learned counsel, is hopelessly barred by time, especially in terms of Rule 82 of the Rules.

22. The learned counsel has further drawn my attention to the interim order passed by this Court in W.P. (C) No. 18030/2014 on 06.04.2015. According to him, first, the interim direction is subject to the outcome of the writ petition. Second, the respondent has not complied with even that direction, as seen from the pleadings set out in I.A. No. 9002/2015.

23. In elaboration, the learned counsel has contended that though the total amount with 20% interest from the date of sale till the date of deposit will come to Rs. 89,56,260/-, the petitioner has paid only an amount of Rs. 35 lakhs.

24. Summing up his submissions, the learned counsel would contend that the claim of respondents 4 and 5 in W.P. (C) Nos. 2640/2013 and 31238/2014 is hopelessly barred by time and by the principles of res judicata. Further, he has contended that Exhibits P7 and P8 are ultra vires of respondents 2 and 3 and cannot be sustained.

Respondents":

25. Per contra, the learned counsel for the fourth respondent in W.P.(C) No. 18030/2014 and petitioner in W.P. (C) No. 2640/2013 has strenuously contested the Bank's claims. To begin with, the learned counsel has submitted that the fourth respondent has complied with the interim direction given by this Court on 06.04.2015. He has further drawn my attention to Exhibit P11 communication said to have been issued by the Bank.

26. In elaboration, the learned counsel has submitted that the Bank has only informed the respondents that they must pay still more amount in compliance with the interim order. According to him, the said communication reveals that the Bank is willing to accept the loan amounts along with interest.

27. The learned counsel has also submitted that this Court as well as the Government has, often, issued necessary directions to the co-operative societies to accept the loan amounts along with interest and re-convey the property. It is his specific contention that the second respondent has the power to issue Exhibit P7. And the power is traceable to, according to him, Section 66A of the Act.

28. Adverting to the merits, the learned counsel has submitted that there is an incurable defect in the sale proclamation. There ought to have been thirty days" time between the date of notice and that of sale. He has also submitted that the property, worth about Rs. 9 crore, has been knocked off for a meagre amount of about Rs. 45 lakhs.

29. The learned counsel contends that the fourth respondent withdrew W.P.(C) No. 26638/2010 only on the understanding and assurance given by the Bank that once the fourth respondent withdraws the writ petition, it would favourably consider the issue and re-convey the property after accepting the loan amount along with interest. To buttress his contention, the learned counsel has relied on Exhibit P4 series of demand drafts produced in W.P.(C) No. 2640/2013.

30. Stated succinctly, the learned counsel would contend that, all along, the fourth respondent had kept ready the demand drafts for the loan amounts and repeatedly approached the Bank to accept them. But the Bank under one pretext or another just dodged the issue.

31. Summing up his submissions, the learned counsel has urged this Court to dismiss W.P.(C) No. 18030/2014 filed by the Bank and allow the other two writ petitions thereby compelling the Bank to comply with Exhibits P7 and P8 orders of the Government.

32. The learned counsel for the fifth respondent in W.P.(C) No. 18030/2014 and petitioner in W.P.(C) No. 2640/2013 adopted the submissions of the learned counsel for the fourth respondent in all their material particulars.

Reply:

33. The learned counsel for the petitioners in W.P. (C) No. 18030/2014, based on

the amended pleadings, has frontally attacked the vires of Section 56A of the Act. He has contended that the provision is invidiously discriminatory and falls foul of Articles 14, 19 and 300-A of the Constitution. In elaboration, the learned counsel has contended that the legislature has resorted to an unreasonable classification of bracketing the Bank separately on the count of its retaining any property. Forcing the Bank to sell its non-banking property in seven years is without any rational object behind it.

34. Heard the learned counsel for the petitioners, the learned counsel for the respondents and the learned Government Pleader, apart from perusing the records.

Issues:

"I. Whether W.P.(C) Nos. 2640/2013 and 31238/2014 are barred by the principles of res judicata or hit by laches?

II. Whether the sale held on 14.01.2009 must be set aside?

III. Whether Section 56A of the Act is ultra vires of the Constitution?

IV. In the alternative, whether Section 56A of the Act is required to be read down so that it could be saved from the vice of unconstitutionality?

V. Whether Exhibits P7 and P8 communications from second and third respondents are ultra vires of those authorities?"

Issue Nos. I & II:

35. In W.P.(C) No. 2640/2013, the petitioner, the fourth respondent in the main writ petition, has sought the relief of setting aside the sale or declare it void. On both grounds, he had filed writ petitions earlier; those writ petitions were dismissed either on merits or as withdrawn. Thus, the contention of the learned counsel for the Bank has force. To the extent of those reliefs, the writ petition is barred by res judicata. Laches need not be gone into.

36. The other relief sought in the said writ petition is that the Bank should comply with the directive of the State in Exhibit P7 and accept the payment by the fourth respondent. This relief was not the subject matter of any of the previous writ petitions.

37. If we examine the pleas of the borrowers in more detail, it emerges that in W.P.(C) No. 31238/2014, one of the borrowers, i.e., the fifth respondent, seeks a direction to the Bank to comply with the directive of the learned Lok Ayukta. If we examine the order dated 18.12.2013 of the learned Lok Ayukta, it simply reads to the effect that the disposal of the property acquired by the Bank can only be as per Section 56A of the Act. Observing thus, it closed the complaint.

38. It needs little cogitation to hold that the order of the learned Lok Ayukta has reiterated, rightly so, the statutory obligation cast on the Bank and nothing beyond.

39. Thus, both the writ petitions-W.P.(C) Nos. 2640/2013 and 31238/2014-survive to the extent of the disposal of the property by the Bank. In other words, the outcome of those writ petitions is to be contingent upon the findings in W.P. (C) No. 18030/2014: the validity of Exhibits P7 and P8 and also the constitutional validity of Section 67A of the Act.

40. It may be trite to observe that the value of the property, its subsequent appreciation, or the inadequacy of the sale consideration in the auction sale cannot be grounds to interdict the sale. To set aside a sale that has already been confirmed, the Court needs more than the pleas referred to above. It is only fair to observe that the respondent borrowers have been given a long rope-opportunity at every turn to redeem the property-but they did not use it.

41. As to the withdrawal of W.P.(C) No. 26638/2010, the fourth respondent has contended that it was based on the assurance given by the Bank. Regrettably, no material has been brought on record to hammer home the said aspect. It is only a plea without any supporting material-an ipsi dixit.

Issue Nos. III & IV:

42. Much turns upon Section 56A of the Act. It is, therefore, essential to examine the said provision in the perspective of invalidation of legislation. Section 56A reads thus:

"56A. Disposal of non-banking assets: The immovable property acquired by a society through a sale by the sale officer or through any legal proceedings for realisation of loan amount shall be disposed of by the society within seven years from the acquisition with prior sanction of the General Body and the Registrar."

43. A plain reading of the above provision clarifies that if a society acquires any immovable property during its realising a loan amount, it shall dispose it of within seven years from then. The pre-condition is that the society shall have a prior sanction of both the General Body and the Registrar of Societies.

44. In this context, it is also pertinent to refer to the statutory scheme under Sections 55 and 56 of the Act. As per Section 55 of the Act, no part of the funds of the society other than the net profits shall be paid by way of bonus or dividend or otherwise disbursed among the members.

45. On the other hand, in terms of Section 56 of the Act, if a society has earned net profits, it shall transfer from the net profits fifteen per cent or above to the Reserve Fund; not less than five percent to the Co-operative Education Fund; and ten percent to the Co-operative Member Relief Fund. The balance of the net profits may be utilised for the purposes, such as payment of dividend and bonus. Section 57 of the Act, however, empowers the society to invest its funds.

46. Sections 66A of the Act empowers the Registrar to issue general directions and guidelines to any or all societies in furtherance of the Act or for implementing the Government policies for the benefit of the members and the

general public.

47. As regards the sale of the property in an auction, Rule 81 of the Rules prescribes the procedure to be followed in attaching and selling any immovable property. Rule 82 enables a person, either the owner or a person having interest in the property to have the sale set aside on his or her depositing the amount. Under Rule 83, a person interested can apply for setting aside the sale on the grounds of irregularity or fraud. Finally, Rule 84 of the Rules deals with delivery of possession.

48. The learned counsel for the Bank has referred to these provisions to emphasise the procedural constraints respondents 4 and 5 face to have the sale set aside. As a result of my answer to issue Nos. I and II, any discussion on the validity of sale or the consequential issue of setting it aside is obviated-the claim is barred by *res judicata*.

49. The property is 10.12 acres comprised in Re.Sy. Nos. 278/21 and 278/21/2 of Parippally Village, Kollam Taluk.

50. As gathered from the pleadings, it is the specific contention of the Bank-in the alternative, though-that Section 56A lays down only a procedure to be followed by the society for disposing of an immovable property acquired by it in an auction sale. It does not empower respondents 2 and 3 to direct the Bank to re-convey the property to the owner.

51. If the provision is interpreted as a mandatory one, it will denude the Society-indirectly, its members-of its right to hold immovable property beyond a period. Aggrieved, the Bank and one of its members have called into question the constitutional competence of the provision. The petitioners have maintained that the aforesaid interpretation conflicts with Sections 10 and 11 of the Transfer of Property Act, too.

52. To save the provision from the clutches of invalidation, according to the learned counsel for the Bank, the Court has to read it down, lest it should lead to an anomalous situation of affecting one's property rights. The provision offends Article 300-A of the Constitution, as well.

53. It can further be gathered from the pleadings of the Bank that Section 56A is enacted by virtue of the State's legislative power under Entry 6 of List III in the 7th schedule to the Constitution of India. Because of the lack of the Presidential assent, Section 56A is without legislative competence and consequently liable to be annulled by this Court. The Bank's assertion seems to be that Section 56A falling under List III cannot come in conflict with any central enactment, be it under List I or even List III of the Constitution, on the principle of repugnancy.

Repugnancy - Conflict with T.P. Act:

54. The learned counsel for the Bank has contended that Section 56A of the Act offends Sections 10 and 11 of the T.P. Act. First, the provisions of the Transfer of

Property Act mostly apply inter vivos, however. Second, the inapplicability of restrictions, I must say, is in the context of the conditions imposed in the conveyance or grant, but not by operation of law.

55. Section 10 of the T.P. Act mandates that where the property is transferred subject to a condition or limitation absolutely restraining the transferee, or any person claiming under him, from parting with or disposing of his interest in the property, the condition or limitation is void except in the case of a lease where the condition benefits the lessor or those claiming under him.

56. Section 56A of the Act, if anything, is on the obverse. Further, Section 11 of the T.P. Act declares that where, on a transfer of property, an interest is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. I do not see, regrettably, any application of Section 11 of the T.P. Act to the case at hand.

57. There is no gainsaying that the Kerala Co-operative Societies Act has received the Presidential assent. But, Section 56A of the Act, incorporated with effect from 30.04.2011, has received the assent of only the Governor. If any conflict occurs with any central legislation, the provision may suffer the consequence of invalidation. However, I see no provision in any central legislation coming in conflict with Section 56A of the Act—at least nothing has been brought to my notice, save Sections 10 and 11 of the T.P. Act. Their interplay or conflict with Section 56A stands already answered. It does not, however, deter us from examining the constitutional validity of Section 56A of the Act on a different plane.

Constitutional Conflict:

58. Entry 6 of List III of Schedule 7 of the Constitution governs transfer of property other than agricultural land, registration of deeds, and documents.

59. Section 56A of the Act was brought on to the statute book through Act 22 of 2013, which was published in Kerala Gazette Notification No. 4576/LegH2/2013/Law dated 25.04.2013. The amendment is deemed to have come into force on 30.04.2011. The learned counsel for the Bank has contended that Section 56A offends Article 300-A of the Constitution.

Article 300-A:

60. The right to property, once a fundamental right under Article 31, now survives in its attenuated form as a constitutional right. The right to property can be curtailed, abridged, or modified by the State only by exercising the Legislative power; it can be done only under law. It is, nevertheless, a fact that scholars like Prof. Tripathi P.K., and H.M. Seervai have opined that after the Forty-Fourth Amendment the right to property is better protected than before¹.

61. In *Jilubhai Nanbhai Khachar v. State of Gujarat*, 1995 Supp (1) SCC 596, the Hon'ble Supreme Court has held that deprivation connotes different concepts. Article 300-A gets attracted to an acquisition or taking possession of private property-by necessary implication, for public purpose- under the law made by the Parliament or a State Legislature, a rule, or a statutory order having force of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A of the Constitution.

62. On the question of the State's obligation to adequately compensate the owner of the property, differing with both Prof. Tripathi P.K., and H.M. Seervai, Durga Dasu Basu in his treatise *Commentary on the Constitution of India*² observed that after the 44th Amendment Act, 1978, nobody shall have any fundamental right to compensation under the Constitution unless the law which expropriates his property offers any compensation.

63. At any rate, in the light of the proposition of law in *Jilubhai* (supra), it can hardly be said that the mechanism introduced through Section 56A amounts to any acquisition or expropriation of property. Ipso facto, it cannot be said that the vires of Section 56A need be examined in the light of Article 300-A of the Constitution.

Reading Down:

64. It is, however, pertinent to observe that during submissions, the learned counsel for the Bank has, among other things, focussed on an alternative aspect: the provision is to be read down, lest it should fall foul of the constitutional scheme.

65. It pays to remember that reading down is an interpretative device to save a statute or a provision thereof from the vice of unconstitutionality. It has a limited application. It cannot be taken recourse to when the legislative intent is explicit and interpretative ambiguity is absent. It is not a deliberate device to mutilate the meaning of the provision lest it should perish. Interpretation is an intellectual rescue operation by the judiciary to extricate a trapped meaning from a rubble of words.

66. Bennion in his *Statutory Interpretation*³ Opines that the court seeks to avoid a construction that causes unjustifiable inconvenience to persons subjected to the enactment, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction where, for example, it appears that Parliament really intended it, or the literal meaning is too strong.

67. Treating the device of reading down as an aspect of strained construction, Bennion⁴ states that there are broadly four reasons which may justify (and sometimes positively require) the strained construction of an enactment:

(a) a repugnance between the words of the enactment and those of some other enactment [Constitutional provisions not ruled out];

(b) consequences of a literal construction so undesirable that Parliament cannot have intended them;

(c) an error in the text which plainly falsifies Parliament's intention; or

(d) the passage of time since the enactment was originally drafted."

68. A Constitution Bench of the Hon'ble Supreme Court in *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, 1991 Supp (1) SCC 600, has observed thus:

"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

69. Relying on the above exposition of law, recently, a Two-Judge of the Hon'ble Supreme Court in *Subramanian Swamy v. Raju*, (2014) 8 SCC 390 has held that the courts must read the legislation literally in the first instance. If on such reading and understanding, the vice of unconstitutionality is attracted; the courts must explore whether there has been an unintended legislative omission. If such an intendment, according to their Lordships, can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality.

70. In conclusion, going by the above judicial and academic deliberations, I am constrained to hold that Section 65A of the Act does not suffer from any inherent limitations, such as ambiguity, vagueness, as have been mentioned above, calling for adopting the interpretative device: the Rule of Reading Down. Yet, I may remind myself that we still must examine Section 56A on the touchstone of the fundamental rights.

Judicial Invalidation of Legislation:

Old and New Theories:

71. It is trite to observe that the judicial invalidation of any legislation can be only on two grounds: the vires of the Legislature and the conflict with the Fundamental Rights.

72. In his celebrated commentary, *Constitutional Law of India*⁵, the noted jurist H.M. Seervai, while beginning the discussion on Article 14, invokes Dr. Johnson⁶: What is obvious is not always known, and what is known is not always present.

73. Taking *E.P. Royappa v. State of T.N.*, AIR 1974 SC 555, as the springboard for his discussion, the learned author calls the proposition of law propounded on Article 14 before Royappa the "old doctrine" and the one propounded in Royappa and followed (seemingly) in other later judgments the "new doctrine".

74. At page 272 of the Commentary, the learned author observes that several judgments delivered after 1974 have claimed that the Supreme Court for the first time laid bare in Royappa's Case (decided in 1974) "a new dimension" of Article 14, which had somehow escaped all the Judges of an earlier day. In a concurring judgment, Bhagwati J., for himself, Chandrachud and Krishna Iyer JJ., dealt with the challenge to Article 14 and made the claim to have laid bare a new dimension of Article 14. That claim was repeated in *Maneka Gandhi's Case*, in the *Airport Case*, and in *Hasia's Case*-cases in which executive action was challenged as violating Article 14.

75. Referring to *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, Seervai opines: The claim made in these passages is that Royappa's Case pointed out for the first time that "Article 14 embodies a guarantee against arbitrariness... and (equality) cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits." According to him, it is an obvious reference to the doctrine of classification ("the old doctrine").

76. Seervai goes on to observe that the new doctrine is clearly wrong, and the old doctrine is clearly right. For, apart from the various infirmities of the new doctrine, it equates a part with the whole. No doubt arbitrary actions ordinarily violate equality; but it is simply not true that whatever violates equality must be arbitrary. He eventually concludes that a large number of decided cases, before and after Royappa's Case, make it obvious that many laws and executive actions have been struck down as violating equality without their being arbitrary. Further, in a liberal democratic Constitution like ours, it would be inappropriate to characterize laws as arbitrary.

Article 14 - Discrimination:

77. In *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123, a Seven-Judge Bench of the Apex Court, per Patanjali Sastri, C.J., has examined the concept of discrimination vis-?-vis Article 14. In paragraph 7 of the judgment, his

Lordship has held that all legislative differentiation is not necessarily discriminatory. The word "discrimination" does not occur in Article 14. Acknowledging that it occurs in Articles 15(1) and 16(2), his Lordship further holds that if such bias [semantically "discrimination" connotes bias] is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those Articles.

78. However, Fazl Ali, J. struck a slightly different note. According to his Lordship, a distinction should be drawn between "discrimination without reason" and "discrimination with reason". The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily govern another set of persons or objects. So the question of unequal treatment does not really arise as between persons governed by different conditions and different circumstances.

79. Further, M.C. Mahajan, J. (as his Lordship then was) in paragraph 32 observes that a legislature, as is well settled, to deal with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification. And it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the legislation, that necessity of judicial interference arises.

80. Proceeding further in the same vein, his Lordships invokes Frankfurter, J., who observed in *Tinger v. Texas* 310 US 141 at 147 that laws are not abstract propositions; they are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by specific remedies.

Rajbala - Reassertion:

81. In *Rajbala v. State of Haryana*, AIR 2016 SC 33, the Hon"ble Supreme Court has dealt with judicial invalidation of legislation on the grounds of it being arbitrary. In this singular, insightful judgment, the Hon"ble Supreme Court, per Chelameswar, J., has examined in depth the dichotomy of arbitrariness and unreasonable classification.

82. The questions Rajbala attempts to answer are these: Is the facet of arbitrariness judicially available for the invalidation of any legislation? Or is it, as has been suggested by H.M. Seervai, arbitrariness is only an adjunct or

appendage to the doctrine of classification, thereby being incapable of sustaining on its own?

83. Given the lucidity Rajbala's case displays in dealing with the issue on hand, I acknowledge that the following discussion draws heavily from the said judgment. To begin with, Rajbala analyses a host of precedents and holds that the judicial dictum on arbitrariness in those cases is either inessential to the determination of the issues on hand, or that it is only an alternative proposition after determining the issue on some other grounds.

84. In the process of its examining the conceptual confusion occasioned by the over reliance on the aspect of arbitrariness, Rajbala eventually homes in on State of Andhra Pradesh and Ors. v. McDowell & Co. , (1996) 3 SCC 709

85. In Mc Dowell, a Three-Judge Bench of the Apex Court holds, in a comparative perspective, that in India, the position is similar to the United States of America. The power of Parliament or, for that matter, the State Legislatures is restricted in two ways: A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone-viz. (1) lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. Mc Dowell, in fact, disapproves of the invalidation of legislation on the basis of procedural unreasonableness or substantive unreasonableness-the concepts inspired by the decisions of United States Supreme Court.

86. The conclusion in McDowell is that if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary⁷ or unreasonable. Some or other constitutional infirmity must be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified.

87. Rajbala emphatically enunciates that the courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is "arbitrary" since such an exercise implies a value judgment; the courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution.

88. Now, abandoning the amorphous judicial concept of arbitrariness, as has been suggested by Rajbala, we may examine Section 56A on the concrete, conceptually comprehensible principle of classification.

89. In State of Jammu & Kashmir v. Shri Triloki Nath Khosa , AIR 1974 SC 1, a Constitution Bench has held that discrimination is the essence of classification and does violence to the Constitutional guarantee of equality only if it rests on an

unreasonable basis. In paragraphs 31 and 32 of the judgement, it is held thus:

"31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints, or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."

32. Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the courts to substitute their own judgment for that of the legislature or the rule making authority on the need to classify or the desirability of achieving a particular object."

90. In *Deepak Sibal v. Punjab University*, (1989) 2 SCC 145, at 150, the Court holds that Article 14, now well settled, forbids class legislation, but does not forbid reasonable classification. Whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied: (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group, and (ii) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.

91. In *Union of India v. N.S. Rathnam*, (2015) 10 SCC 681, at 694, it is held that equal protection means the right to equal treatment under similar circumstances, both in the privileges conferred and in the liabilities imposed. Therefore, if two persons or two sets of persons are similarly situated/placed, they have to be treated equally. The legislature is competent to exercise its discretion and make classification. Every classification is in some degree likely to produce some inequality, but mere production of inequality is not enough. Article 14 would be treated as violated only when equal protection is denied even when the two persons belong to the same class/category.

92. A Seven-Judge Bench in *Special Courts Bill, 1978, In re*, (1979) 1 SCC 380, at 424, has summarised the propositions under Article 14 of the Constitution. Out of 13 enumerated enunciations, we may draw upon three, which read thus:

"(1) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means

segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(2) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(3) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality."

93. The real difficulty as often acknowledged by this Court, observes the Apex Court in *Amarendra Kumar Mohapatra v. State of Orissa*, (2014) 4 SCC 583 at 612, lies not in stating the principles applicable but in applying them to varying fact situations that come up for consideration. Now, I may undertake that difficult task of applying the principles to the facts.

94. The American Jurist Alexander Bickel in his *The Least Dangerous Branch* observes that judicial review is a counter-majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the Act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it. Quoting Bickel's observation with approval, the Supreme Court in *Govt. of A.P. v. P. Laxmi Devi*, (2008) 4 SCC 738, has observed thus:

"46. In our opinion, there is one and only one [comprehensive] ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must

make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope." (internal references omitted)

95. The Apex Court, after an exhaustive reference to various judicial pronouncements-both Indian and foreign- eventually concludes that the court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

The Scope and Ambit of Section 56A of the Act:

96. Applying the above judicial dicta, we may examine Section 56A of the Act.

97. To begin with, a Co-operative Bank cannot be equated with a commercial bank, which has its membership thrown open to the general public and which operates on a large scale with an objective of making profit. A Co-operative Society or Bank, on the other hand, caters to the needs of only its members; the membership can be restricted to a class of people based on the criterion adopted. Profit it may make, but it is not its sole or even principal objective.

98. The Co-operative Society has come into being primarily of its members by way of a collective effort. Whatever the net profit it has made, it shall be distributed among its members subject to the statutory stipulations, though. Wealth gets distributed evenly among its members. It is neither rapacious nor ravenous to earn profits. It does not, however, mean that it functions without heed to sound principles and practices of commerce if it is carrying on, say, banking.

99. A Society/Bank is, without cavil, an independent legal entity capable of, for example, holding property on its own, albeit for the benefit of its members. It is regulated, though not in an all pervasive manner, by the Government as per the Act. Given the guiding co-operative principles, its preamble, and the Constitutional mandate, especially, as reflected in the 97th Constitutional amendment, it is an organisation that stands on its own. It does not, nay cannot, suffer in comparison with a banking concern, at least in the limited sphere of lending.

100. Among other things, the Co-operative Bank lends money, usually, on the strength of security-say, mortgage of immovable property. It enters into the contracts most of which are commercial. If the borrower defaults, it enforces the contract by obtaining an award against the guarantors as well as the principal borrower. It lays execution and brings the mortgaged property for sale. Here lies the catch.

101. Once the mortgaged property is put to auction, any person can be a successful bidder. As an auction purchaser, the said person will have the sale confirmed and sale certificate issued in his favour on his depositing the sale consideration. As is the case with any other execution, for instance, under Order

21 of the Code of Civil Procedure, even the KCS Act provides for elaborate procedural safeguards for the judgment debtor and the mortgagor, too.

102. Let us examine the dichotomy mortgage displays: A third party, usually, bids the property and becomes its owner after following the due procedure-once the mortgagor fails to redeem the property. Sometimes lacking prospective bidders, the mortgagee bank itself may bid the property. As far as the realisation of the debts and sale of the mortgaged properties are concerned, the Co-operative Bank is treated on a par with any commercial bank or establishment that lends money.

103. However, the discrimination the Co-operative Bank suffers is this: If a third party bids the property, he or she retains the property as its absolute owner. So does any other banking concern, too. With the Co-operative Bank, Section 56A of the Act comes into operation. It is, therefore, necessary for us to examine the said provision, which reads thus:

"56A. Disposal of non-banking assets: The immovable property acquired by a society through a sale by the sale officer or through any legal proceedings for realisation of loan amount shall be disposed of by the society within seven years from the acquisition with prior sanction of the General Body and the Registrar."

104. First, the legislation treats the property a Cooperative Bank purchases in an auction as non-banking asset. The statute mandates that the Bank shall dispose of the property within seven years with the prior sanction of the General Body and the Registrar.

105. Section 56A of the Act, in one instance, fell for consideration before a learned Division Bench of this Court. In *Thampi Raj P.K. v. State Bank of Travancore*, 2012 (4) ILR (Kerala) 475 the facts in brief are these: Husband and wife borrowed Rs. 15,000/- from a public sector bank in late 70's or early 80's ("30 years ago" as per the judgment). On the borrowers' committing default, the bank obtained a decree in 1984 for an amount of Rs. 19,500/-. It took possession of the mortgaged property, a commercial building, and let it out.

106. The husband died pending the recovery proceedings before this Court. The wife, the co-borrower, has been parallelized because of Meningitis. Among their three children, one daughter is mentally retarded; another, a psychiatric patient. The family, it is observed, in these conditions could not prevent sale of the mortgaged property in execution proceedings.

107. Ad hominem the learned Division Bench may have adjudicated the issue. In that process, their Lordships have observed that the rent for a little over one year would have sufficiently recovered the decretal debt of less than Rs. 20,000/-. In the sale conducted by the Bank in execution proceedings, the Bank purchased the property for the decree amount; instead of selling the property, the Bank retained it and continued to collect rent of Rs. 1,41,600/- in a few years.

108. Perhaps, moving is the plight of the parties and that has weighed with the adjudication. The learned Division Bench, first, acknowledges that the legality is on the one side-in favour of the Bank. Their Lordships, however, proceed further to observe:

"[H]owever, what we feel is that a public sector institution at least should be fair in their dealings and should not exploit the weak and the vulnerable. Everyone in this country knows how obliging these Banks are to the powerful and the influential and how easily their debts in crores are written off allowing them to go scot free. We do not think the transaction is a fair deal expected from a public sector Bank... the Bank should have in the course of less than two years collected the rent and set off the debt amount with future interest and returned the property to the appellants, which may not be good business but magnanimity which if shown would have raised the prestige of the Bank above that of an ordinary money lender... We, therefore, hold that the whole transaction is an unfair deal at the hands of the Bank, which made a huge profit at the expense of thoroughly unfortunate people unable to handle their affairs.... We wish to remind the Bank that it is engaged only in money lending and should not take up real estate business with borrowers property. Excess over decree amount and interest if obtained on sale of defaulters" property should in fairness go to them and to them only. While the clever borrowers get all incentives at the hands of the Bank and invariably the Bank writes off huge debts, the sick and the weak are exploited by the Bank, which is not befitting for a public sector institution. We, therefore, feel in exercise of our extraordinary jurisdiction under Art. 226 of the Constitution, we should order refund of at least part of the profit made by the respondent Bank on sale of appellants" property."

109. I must admit with due respect that it does not lie within my province to pronounce on the correctness of the judgment of a learned Division Bench, much less the mechanics of adjudication. Suffice it to say that based on the above judgment, the respondent borrowers have obtained a directive from the Joint Registrar: The Bank should re-convey the property to the respondent-borrowers on their depositing the entire loan amount. Hence, the need to refer to the judgment in detail.

110. However, I further hasten to add that in the present instance, the vires of the provision are called in question. In *Thampi Raj* (supra), the adjudication proceeded without any challenge to the vires of the provision. As such, the principle of *stare decisis*, in my view, does not come in the way.

111. Before proceeding further, I may point out the fallacy of Exhibits P7 and P8 orders: If a borrower-mortgagor ensures that there are no bidders, it inevitably follows that the bank ends up as the borrower. All that the defaulter is to do is, wait seven years. The bank safeguards the property as the temporary owner, sells the property, and remits the excess amount back to the credit of the defaulter. With the real property rates galloping, who will have the windfall? Who will have the last laugh? The defaulter. Premium on dishonesty! May be.

112. Leaving aside the above hypothetical projection, I may focus on the vires of Section 56 A of the Act. Does it, as has already been observed, suffer from the vice of unreasonable classification. Based on the bedrock of presumption of constitutionality, we should acknowledge that the State has the power of determining who should be regarded as a class for purposes of legislation in relation to a particular subject. As far as the banking is concerned, especially vis-?-vis the borrowers, does a Co-operative Bank stand apart as a well-defined, distinct class? I am afraid, the answer is in the negative.

113. Granted that the co-operative spirit permeates the whole scheme of the legislation, still it is not discernible that at the cost of the welfare of all the members, a defaulter should be rewarded with the sale proceeds of the property just because that it is the Bank, rather than a third party, that has bid the property. Therefore, classification by way of segregation of the Co-operative Bank as a distinct entity to have a restriction imposed that it cannot own the so-called non-banking asset beyond a particular period is susceptible on the ground of unreasonable classification, with a taint of hostile discrimination, too.

114. Neither the Act, its preamble, objects and reasons, nor the co-operative principles or policy permeating the Act has brought out to bear on the issue by the respondent to sustain Section 56A of the Act. It is beyond the pale of controversy that legislative policy can be gathered from the Preamble, the Statement of Objects and Reasons, and the core provisions of the very statute (vide *Vasu Dev Singh v. Union of India* , (2006) 12 SCC 753, at 792). Equally salutary is the principle that once, however, the words used in the statute have a plain meaning, the courts should not busy themselves to find out the supposed intention or the policy underlying the statute (vide *Gurmej Singh v. Pratap Singh Kairon* , AIR 1960 SC 122).

115. Therefore, classifying the Co-operative Bank as a distinct banking entity for the purpose of denying it the right to set up the property cannot be said to be founded on an intelligible differentia. Much less has this differentia-an artificial, unsustainable one, at that-any rational relation to whatever object the legislation has sought to achieve. I must confess my inability to find any objective behind Section 56A to sustain the rational nexus with the differentia.

116. This Court, therefore, cannot but hold that Section 56A of the Act suffers, incurably, from the vice of unreasonable, irrational classification offending the principle of equality guaranteed under Article 14 of the Constitution.

117. There is, still, the unsettled controversy of non-application of the fundamental rights in relation to juristic persons. It need not, however, detain us any longer. For the petitioners include not only the Co-operative Bank but also one of the members, whose interests, too, are affected-not able to retain the property, as has been done by other banking, commercial establishments and persons.

118. Thus, in tune with the above discussion, this Court allows W.P.(C) No.

18030/2014 declaring that Section 56A of the Act is unconstitutional being violative of Article 14 of the Constitution. Consequently, the Court sets aside Exhibits P7 and P8. As a result, W.P.(C) Nos. 2640/2013 and 31238/2014 are dismissed. No order on costs.

1H.M. Seervai on Constitutional Law of India, 3rd Ed., Vol.II, pp.1088-89

28th Ed., Vol.8, p.9690

3Lexis Nexis (5th Ed) P.979

4Ibid, P.458

54th Ed. Vol.1

6Dr. Johnson's Preface to the Dictionary

7"Per Jeevan Reddy, J.: An expression used widely and rather indiscriminately - an expression of inherently imprecise import. The extensive use of this expression in India reminds one of what Frankfurter, J. said in *Tiller v. Atlantic Coast Line Railroad Co.*, , 1943 SCC OnLine US SC 36: , 87 L Ed 610 : , 318 US 54 (1943). "The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes contradictory ideas", said the learned Judge."