

(1957) 10 MP CK 0008

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 237 of 1956

Surajmal Arjundas Vaidya

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 09-10-1957

Acts Referred:

Constitution of India, 1950 — Article 141, 226
Mineral Concession Rules, 1949 — Rule 60

Citation : AIR 1958 MP 103 : (1957) ILR (MP) 507

Hon'ble Judges : M. Hidayatullah, C.J.; V.R. Sen, J; T.P. Naik, J; P.V. Dixit, J; B.K. Choudhuri, J

Bench : Full Bench

Advocate : R.S. Dabir, for the Appellant; M. Adhikari, R.K. Thakur, (for No. 3), B.S. Bakshi, (for No. 5) and M.W. Puranik, (for Nos. 7 and 8), for the Respondent

Judgement

M. Hidayatullah, C.J.—The following question has been referred for the opinion of the Full Bench :

"Can a writ of this High Court under Article 226 of the Constitution be issued to bind the Central Government in a case in which" under the Mineral Concession Rules, 1949 the Central Government has declined to review an order passed by the State Government?"

2. The reference came to be made under the following circumstances. The appellant Seth Surajmal applied for a mining lease in respect of 20.45 acres in village Botejhari, tahsil Waraseoni, district Balaghat. The application of Seth Surajmal was dismissed by the State Government and the State Government's decision was communicated to Seth Surajmal by the Deputy Commissioner, Balaghat, in memorandum No. 1381-7438-7-kh dated 27-12-1954 under endorsement No. K. Kh. Li. dated 19th January 1955. I reproduce the memorandum here:

"20. 45 acres. area thrown open vide notification in C. P Gazette part 3, page 8,

dated 7-1-55. Application to be received on and from 21-2-55. Shri Surajmal Vaidhya.

"The State Government has rejected the application of Srimati Lajwanti Jeewar and Surajmal Vaidhya for a mining lease in respect of an area of 22 94 acres in the village Botejhari. Tahsil Waraseoni. District Balaghat on the ground that the application is premature.

3. Under the Mineral Concession Rules Seth Surajmal applied to the Central Government for a "revision" of the order under Chapter VI of the Rules. The Central Government rejected the application, and the result was communicated to Seth Surajmal by memorandum No. 154(6)/55-M. II, New Delhi, dated 29th, July 1955. The memorandum was signed by Shri N. S. Gidwani, Deputy Secretary to the Government of India. It is necessary to reproduce that memorandum because I shall have to refer to its terms later. That memorandum is as follows :

"GOVERNMENT OF INDIA MINISTRY OF NATURAL RESOURCES AND SCIENTIFIC RESEARCH.

"Sir,

I am directed to refer to your application dated the 28th January, 1955 on the above subject and to say that after careful consideration of the facts stated therein, the Central Government have come to the conclusion that no case has been made out for revising the decision, of the Government of Madhya Pradesh rejecting your application for grant of a mining lease for manganese over an area of 20.45 acres in village Botejhari in Waraseoni tahsil in Bala-ghat district, Your application for revision is, therefore, rejected.

Yours faithfully, Sd/- N. S. Gidwani, Deputy Secretary to the Government of India."

4. When this memorandum was received "by Seth Surajmal, he moved a petition under Article 226 of the Constitution requesting that the two orders be quashed. The petition was heard in the presence of the State of Madhya Pradesh as well as the Union of India, and in describing the second respondent it was mentioned by the petitioner that the Union of India was "functioning under R. 57 of the Mineral Concession Rules as the Central Government through the Secretary, Ministry of Natural Resources and Scientific Research, New Delhi.

It appears that by the time the petition came to be made there were other applicants for the mining lease, and they are shown as respondents 3 to 9 in this appeal. The learned Single Judge who heard the petition dismissed it on two grounds : The first ground was that the High Court of Nagpur did not possess jurisdiction under Article 226 of the Constitution against the Central Government.

The second was that the order passed by the State Government and affirmed by the Central Government was correct and did not need to be set aside. The

present appeal was filed against that order, and during the course of the arguments the question was raised whether a writ could be issued from this Court against the State Government and/or the Central Government binding the Central Government acting under the Mineral Concession Rules. It was in these circumstances that the above mentioned question came to be referred to this Full Bench.

5. The larger question involved in this case is naturally whether this High Court has any jurisdiction, over the acts or omissions of the Central Government, or, in other words, whether this High Court can call the Central Government before it and bind it by its writs. The ancillary questions which arise need not be examined at this stage, because I shall consider them later in this opinion. At the present moment I confine myself to the larger question only but in relation to the facts of this case.

6. Article 226 of the Constitution was introduced in January 1950, and the first case to which I need refer is a decision of a Full Bench of the Allahabad High Court reported in *Maqbulunissa and Others Vs. Union of India (UOI)* and *Another*. That case undoubtedly supports the appellant and is strongly relied upon by him. In that case the Full Bench after examining the terms of Article 226 ruled that the High Courts, in whatever part of India, do possess jurisdiction over the Central Government and that they can compel obedience on the part of the Central Government by the issuance of writs against it.

It may be noted that the Allahabad decision was given before the leading pronouncements of the Supreme Court on the same subject and that, it, in effect, may be regarded as the first case to lay down the law in this context. The reasons given by the Allahabad High Court in reaching the above conclusion were that the Union of India can be said to be within the jurisdiction of the High Court of Uttar Pradesh, that Article 226 in terms mentions "any Government", which must necessarily include the Central Government, and that the test of action under Article 226 of the Constitution is that the applicants for the remedy reside within the territorial jurisdiction of the High Court and the effect of the order of the Central Government is within the State.

The learned Judges held that the Central Government is an all pervading body and cannot be said to be located only in New Delhi and outside the jurisdiction of the High Courts in India, and that it must be taken, therefore, to be amenable to writs issued from all the High Courts.

7. The leading case which probably influenced the learned Judges when they gave their decision was the well-known Privy Council case reported in *Ryots of Garabandho v. Zamindar of Parlakimedi*, AIR 1943 PC 16-4 (B). In that case their Lordships of the Privy Council had laid down that the subject-matter and the cause of action attract jurisdiction, and therefore the Full Bench held that if the effect of the order was upon people resident within the territories of Uttar Pradesh, the High Court of Uttar Pradesh had jurisdiction. The reference by the

learned Judges of the Allahabad High Court to the presence of the parties in Uttar Pradesh and the effect of the order upon them in relation to the act done by the Central Government clearly indicate that the test laid down by their Lordships of the Privy Council was the deciding factor.

8. The case of the Allahabad High Court, however, received a certain set-back when the first Supreme Court pronouncement came to be made. Their Lordships of the Supreme Court In Election Commission, India Vs. Saka Venkata Subba Rao and, on an interpretation of the terms of Article 226, discarded the test that cause of action attracts jurisdiction as laid down by the Privy Council. Their Lordships in dealing with that article observed as follows :

"These characteristics of the special form of remedy. (certiorari) render it necessary for its effective use that the persons or authorities to whom the Court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned Judge below that if a tribunal or authority "permanently located and normally carrying on its activities elsewhere" exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, such tribunal or authority must be regarded as functioning within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226."

" (Italicized (here into " ") by me.) Their Lordships further observed:

"The rule that cause of action attracts jurisdiction the suit is based on statutory enactment and cannot apply to writs issuable under Article 226 "which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority "within the territories" in relation to which the High Court exercises" jurisdiction. Nor is much assistance to be derived from the observations quoted above."

(Italicized (here into " ") by me.) Their Lordships still further observed :

"It will thus be seen that the decision is no authority for dispensing with the necessity of the presence or location, within the local limits of the Court's jurisdiction, of the persons or authority to whom the writ is to be issued, as the basis of its power to issue it."

9. The decision of their Lordships in Saka Venkata Subba Rao's case (C), led to a re-examination in India of the entire position of the High Courts vis a vis Article 226. Article 226 may now be quoted. It reads as follows ;

"(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

Their Lordships were apparently emphasizing the words occurring twice in the article referring to the territories in which the High Court; exercise their jurisdiction. They referred to the words "within those territories", and they stated that those words qualified "person or authority", and therefore the person or authority who was sought to be bound by a writ, order or direction under Article 226 must be permanently located and must normally carry on its activities within the territorial jurisdiction of the High Court.

No doubt, their Lordships did not refer to "Government" in this connection, and the question which has arisen is whether the same principle can be extended to Government in view of the words "any Government" occurring in Article 226. The learned counsel for the appellant argued that the Central Government must be taken to be residing all over India, that its normal location cannot be said to be only New Delhi, and that it normally carries on its activities everywhere in India.

He contended, therefore, that the words "within those territories" did not qualify Government at all. He also argued that if this meaning were not given to the words of the article", then no writ can ever issue to the Central Government except in the Punjab and the use of the word "any" in connexion with Government would have no meaning whatever.

10. The case of Saka Venkata Subba Rao, (C), was re-affirmed by their Lordships of the Supreme Court in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., It is necessary at this stage to see the facts of these two cases and how they proceeded. In the first case the Election Commission sat temporarily in Madras to deal with certain election matters. A learned Single Judge of the Madras High Court issued a writ of prohibition against the Election Commission: Saka Venkata Rao v. Election Commission 1 Ele LR 417 (E). The Supreme Court reversed that decision holding that the High Court of Madras had no jurisdiction to bind the hands of the Election Commission because the Election Commission was a statutory authority constituted by the President having its office permanently at New Delhi.

11. The second case arose under the Income Tax law, and the matter went before the High Court of Punjab, because under the Taxation on Income (Investigation Commission) Act, 1947, certain proceedings were taken against the appellants. The decision of their Lordships of the Supreme Court was that the presence of the Commissioner of Income Tax as well as of the assessee in Uttar Pradesh did not confer jurisdiction upon the Allahabad High Court to issue a writ against the Investigation Commission which had its permanent location at New Delhi, and that the Punjab High Court had jurisdiction. It may be mentioned that the Punjab High Court in Rashid Alimed v. Income Tax Investigation Commission ILR 1951 P&H 165: (AIR 1951 P&H 74) (F), had denied itself jurisdiction, and their Lordships of the Supreme Court stated that they were in error in saying so.

12. These two cases clearly indicate that at least with regard to a person, tribunal or authority as mentioned in Article 226 their Lordships of the Supreme

Court were clearly of the opinion that the person, tribunal or authority must be permanently located within the State and must normally carry on its activities there. The question, therefore, which I have mentioned above is whether the same test can be applied to the Central Government and whether there are any distinguishing features.

13. Before, however, I deal with this matter, I may refer to certain cases which arose immediately after the decision of their Lordships of the Supreme Court in these two cases. The first case to which I shall refer is a decision of a Division Bench of this Court reported in *Burhanpur National Textile Workers' Union v. Labour Appellate Tribunal India* ILR 1955 Nag 108: (AIR 1955 Nag 148) (G). That was a case, in which the Industrial Court situated at Nagpur had made an order which was taken in appeal before the Industrial Appellate Tribunal at Bombay.

The Industrial Appellate Tribunal dismissed the appeal, and the question then arose whether on a writ petition the High Court of Nag-pur could call before it the order of the Appellate Tribunal and quash it alongside that of the Industrial Court. The Division Bench consisting of Rao J. and myself held that the fact that the Industrial Appellate Tribunal was permanently located and was normally carrying on its activities in Bombay precluded the Nag-pur High Court from exercising jurisdiction over it under Article 226 of the Constitution, particularly as the order of the Appellate Tribunal was enforceable.

14. Next is a case reported in *Joginder Singh v. Director, Rural Rehabilitation* AIR 1955 Pep 91 (H). That case arose under the Administration of Evacuee Property Act. The orders of the subordinate officers appointed to administer evacuee property in Pepsu were taken by revision before the Assistant Custodian General in New Delhi, and the Assistant Custodian General dismissed the revision which had been filed. It was held by the Pepsu High Court that it had no jurisdiction to call before it the order of the Assistant Custodian General and deal with it because the office of the Assistant Custodian General was permanently located at New Delhi and therefore the Pepsu High Court had no seisin over his orders.

15. The third case is the decision of a Full Bench of the Allahabad High Court reported in *Azmat Ullah and Others Vs. The Custodian, Evacuee Property, U.P., Lucknow*, In that case the Custodian General had allowed the revision filed before him and had set aside the order of the Additional Custodian and restored that of the Deputy Custodian. The Allahabad High Court held that in view of the decisions of the Supreme Court in *Saka Venkata Subba Rao's* (C) and *Rashid's* (D) cases, the Allahabad High Court had no jurisdiction to bring before it the order of the Custodian General for the reasons which I have given in connexion with the two previous cases.

16. Their Lordships of the Supreme Court then decided one other case, and that is reported in *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, That case arose under the Travancore Taxation on Income (Investigation Commission) Act (Act 14 of 1124). Under that Act an officer was making an

inquiry into the income of the petitioner. The order appointing the officer and investing him with jurisdiction was passed by the Investigation Commission at New Delhi under the powers conferred on the Investigation Commission by the Taxation on Income (Investigation) Act, 1947 (Act 30 of 1947).

The action of the officer making the investigation was irregular, and therefore a writ was applied for against both the Investigation Commission at New Delhi and the officer concerned. Objections were raised before the Travancore-Cochin High Court by the Advocate-General of the State that no writ could issue against the second respondent, viz. the Investigation Commission, New Delhi. The High Court of Travancore-Cochin issued a writ only against the officer concerned.

An appeal was taken to the Supreme Court against that decision, and in order to sustain the objection that the High Court of Travancore Cochin had no jurisdiction in the matter reliance was placed upon the three cases which I have just now mentioned. Their Lordships of the Supreme Court dealt with the matter in a different way. They stated that the officer appointed to investigate into the affairs of the petitioner was an independent person acting with full liberty in so far as the Act permitted.

No doubt, that officer acted under the general supervision of the Investigation Commission, New Delhi, and he was answerable to the Investigation, but he was circumscribed in his actions by the Act which conferred powers on him, and he had to act in accordance with the principles of natural justice. Their Lordships said that even if he was treated as an agent, he could not save himself from responsibility by pleading the orders of his superior. The Travancore-Cochin High Court, according to their Lordships, was therefore correct in restraining him from acting either contrary to the Act under which he was constituted or to the principles of natural justice.

Their Lordships said that the Travancore-Cochin High Court had not issued a writ against the Investigation Commission, New Delhi, and that the High Court was perfectly at liberty to restrain the actions of the agent, who was acting beyond the powers conferred on him or against the principles of natural justice. Their Lordships in laying down the law stated that the agent was not a mere conduit pipe, though he was undoubtedly an arm of the Investigation Commission, New Delhi, but that, in so far as his acts were concerned he was a free agent, and if his acts were found to be contrary to law or otherwise unjust, the High Court could restrain him and paralyse him, and it was not the same thing as the issuance of a writ against the Investigation Commission, New Delhi,

17. The three cases to which I have referred were cited before their Lordships, and it was argued that to issue a writ against an agent would be in effect the issuance of a writ contrary to the principle and the dicta in those three cases that Courts do not do indirectly what they cannot do directly. Their Lordships observed that in those three cases there was a question of merger of the order of the inferior tribunal within the jurisdiction of the High Court in that of another

tribunal situated outside, and that the order of the inferior tribunal could not be effectively got out of the way without bringing before the High Court the order of the superior tribunal and quashing it as well.

Their Lordships observed that in so far as the three cases were concerned the High Courts must be taken to have correctly decided those cases. , I find it necessary to quote a passage at page 1213 from their Lordships' dictum because it reflects the opinion of their Lordships given on this point :

"As, therefore, no writ could be issued against that outside authority and as the orders against the authority within the territories would, in view of the" orders of the superior authority, have been infructuous, the High Court concerned had, "of necessity", to dismiss the petition. "Such, however, was not the position in the present petition before the High Court of Travancore-Cochin. There was here no question of merger of any judicial order of respondent 1 into the judicial order of respondent 2".

(Italicized (here into " ") by me.)

18. This case was used by the learned Advocate-General to show that the test of the location of the authority to be bound was still adhered to and that after there was a merger of the order of the inferior tribunal in that of the superior tribunal the order of the superior tribunal being extant that of the inferior tribunal could not be touched.

19. Shri Dabir, who appeared for the appellant, argued that these observations of their Lordships must be treated as obiter dicta and not binding upon the High Court. He argued that it was totally unnecessary for the learned Advocate-General to have referred to these cases because they were not in point and that, in any event, their Lordships' observations were not intended to lay down any law but were merely a reflection upon the argument which was advanced before them.

This raises a question as to how far obiter dicta of the Supreme Court are binding upon High Courts in India if the observations can be related to the facts in the case. The proposition that a case is an authority for what it decides and not what can be made to follow from the decision laid down in *Quinn v. Leatham* 1901 AC 495 (K), has undoubtedly been invoked from time to time but only to distinguish cases where the authority cited was considered inapplicable or unfortunate; but the approach to the problem of the binding nature of precedents has undergone a change.

That case was so decided because of the practice of English Courts. It is well known that the House of Lords does not overrule its own decisions, and barring one case there is no instance in which the House of Lords has departed from its earlier decisions. Indeed, in *Admiralty Commissioners v. S. S. Amerika* 1917 AC 38 (L), the House of Lords was invited to overrule its previous decision, but it declined to do so in spite of a very strong argument pressed upon it by Cave,

Solicitor-General (later Viscount Cave L. C.) assisted as he was by Professor Holdsworth who had prepared the brief for him; see also the second attempt in *Rose v. Ford* 1937 AC 826 (M). It is also well known that the Privy Council throughout its history had not departed from its decisions on more than two or three occasions. The reluctance of the superior Courts in England to vary their own decisions necessarily led to an examination of the conditions in which a previous decision could be held to bind the succeeding Courts. It was then found necessary to limit the operation of any decision to the facts of that case.

Of course, as has been pointed out by Professor A. L. Godhart in his article on "Ratio Decidendi of a Case (see "jurisprudence in Action", 1953 edition, p. 189), such facts have to be material facts. All facts which are not material and which can be held to be impliedly excluded cannot be taken into account to find out whether the decision is an authority in the succeeding case or not.

The difficulty of finding out what facts must be taken to be impliedly excluded was commented upon by subsequent writers and the result therefore is that if a decision is considered to be unfortunate it is limited to its own facts and not extended to facts analogous or similar, and *Quinn v. Leatham* (K), is used as an authority: see Stone, "The Province and Function of Law" pp. 155-100.

20. In the realm of the interpretation of Constitutions there is a different approach to the problem which I consider it necessary to state here because it has sometimes been overlooked in our country. An ordinary law passed to create ordinary civil jurisdictions in a State attempts to set the limits or the frontiers of its application very clearly, but the Constitution, on the other hand, lays down the ambit of jurisdiction in general words and often enough the frontiers of the jurisdiction have to be worked out by the Courts. In our Constitution, sometimes the limits of the jurisdiction have been indicated and sometimes they have not been so indicated.

Where they have been indicated, of course, the frontiers of the power of the Court are already well established. Where they are not so indicated, the question is how are the frontiers to be found. The same problem arose in America under the American Constitution, but there was never any desire in America to find out the ultimate frontiers of the law in the very first case. *Marbury v. Madison* 1803 1 Cra 137 (N) and *McCulloh v. Maryland*, 1819-4 Wheat 316 (O), are landmarks in the extension of the jurisdiction of the Supreme Court, but they never laid down the ultimate reaches of its power.

Even though judicial review was established by *Marbury v. Madison*, (N) (supra) it was only said that judicial review was open against the actions or orders of Government on the basis that the actions of Government have also to conform to the due process clause, but there was no attempt to indicate the absolute limit of interference which the Supreme Court would exercise. On the other hand, there was a progression by stage to indicate what came within the area of the jurisdiction and what did not.

We are invited in the present case -- as have been other High Courts from time to time -- to state categorically the ultimate limits of the operation of Article 226 of the Constitution. I say it with considerable regret that I do not think that it is ever necessary in any case to define categorically the frontiers open to High Courts under Article 226 for all kinds of cases. All that can be done is to examine the nature of the case to say whether that case comes within the four corners of the article or not. Unless we do so Article 226 will be all sail and no anchor.

21. We are not, of course, concerned only with Article 226 of the Constitution. We have to take into account the significance of cases that have interpreted the Constitution. Here I wish to voice a caution, which has been voiced on more than one occasion in the past, as to the use of precedents, I may say that the best way is to borrow the language of Griffith C. J. in *Fraser v. Victorian Railways Commissioners* 1909 8 C L R 54 at p. 58 (P), where the learned Chief Justice states as follows :

"It was for a long time a standing reproach to English law as administered in Courts of justice that it consisted in great part of a "wilderness of single instances" through which no clue of guiding principle was found. Occasionally some eminent lawyer pointed out that decided cases were only of value in so far as they declared or enunciated some principle of law. In comparatively late years an effort has been made by distinguished Judges to remove this reproach, and this Court from its establishment resolutely set its face in the same direction, and I had hoped that their efforts had met with some success. Latterly, however, I have observed an increasing --- or renewed --tendency in the profession to resort to the old method of research amongst the wilderness of instances, in which there is only too much danger that both counsel and the Court, if led by them, may lose their way."

22. A similar caution was expressed recently in *Smith v. Harris* 1939 3 All ER 960 at p. 965 (Q), by Scott L. J. He stated as follows :

"In truth, in the result, he was, in my opinion, submitting that we ought to decide the present case in the way he asked us to do because the facts of *Sharpe v. Avery & Kerwood* 1938 4 All ER 85 (R), were very similar, and we ought, therefore, to follow that decision. That is obviously a misuse of citations of other decisions for the purpose of an appeal. I know that counsel for the respondent will not think I am blaming him for calling our attention to that case, but I merely say that because it seems to me so important that issues of fact should be treated as issues of fact, and that the decisions upon them should not be cited in other cases, unless there is a real principle of law laid down, and it is the principle itself that is wanted for citation."

23. Again in *Mayor and Sherratt v. Cooperative Insurance Society, Ltd* 1939-2 KB 627 at p. 635 (S), Mackinnon L. J. observed as follows :

"Mr. Flint tried to assist us by citing separate expressions of opinion by various Lords in the House of Lords as to S. 43 in its various applications. I am bound to

confess that I have not followed all of them very intelligently, but I think that it is possible to collect, culled out of different judgments and dealing with different subject-matters, a great number of separate sentences which darken the meaning of this part of the Act and which in themselves are inconsistent with one another."

24. It would, therefore, appear that the use of citations has to be very limited, but in interpreting the law as laid down by a superior Court the question is whether we are entitled to overlook any part of the reasoning which the superior Court uses to establish its point. In the comity of Courts one Court of equal standing respects the decisions of another Court of equal standing, but the same may not be upheld. When we come to a superior Court, however, the test is what is the utility of the observation as enunciating a principle for the guidance of the inferior Court. Here I cannot be better than quote what Paton in his book entitled "A Text-Book of Jurisprudence", Second Edition, stated at p. 161, with regard to ratio decidendi and obiter dictum. In dealing with the case of *Donoghue v. Stevenson* 1932 AC 502 (T), as an illustration of his point, the learned author says as follows:

"Many decisions have been necessary to work out the real meaning of the doctrine. Professor Goodhart suggests that a fact is material unless it is expressly or impliedly held immaterial, but the difficulty is to discover what is implied. In truth we frequently cannot discover for what a case is authority unless we consider it in relation to prior and subsequent cases. One case, so to speak, plots a point on the graph of tort, but to draw the curve of the law we need a series of points. In many important cases there is a statement of principle much broader than is necessary if the material facts alone are considered. If the decision is felt to be wrong, the decision will be confined to cases raising precisely the same general facts : if it is thought correct, the merest obiter dictum may have very great weight."

25. This will show that where the law is laid down progressively one must not go by the strict rule of ratio decidendi and confine the decision only to the material facts in the case but must, if the decision is correct, use it even in spite of its broad statement of the law as a guide to future crises, and in dealing with a case which is to be utilized one must look not only to what was decided in the case but what was decided in previous and subsequent cases. See also per Lord Haldane in *Cornelius v. Phillips* 1918 AC 199 at p. 211 (U).

26. Our position under the Constitution is subordinate. We have under Article 141 of the Constitution to take the law from the Supreme Court. In doing so, we are not required to confine the decision of their Lordships to the material facts only if the obiter dictum given with the intention of distinguishing one kind of case from another can be made useful for our guidance.

It is in this sense that in *Mahendralal Choudhari v. Commissioner of Income Tax* ILR (1949) Nag 330 : (AIR 1952 Nag 205 at p 210) (V) it was stated that obiter

dicta of the Privy Council, if they can be made applicable to the facts of the case, can be used by the inferior Courts. A similar view was expressed by Gajendragadkar J. (as he then was) in *Narmadabai v. Hidayatalli* AIR 1949 Rom 115 (W). To the same effect is to be found an observation of their Lordships of the Privy Council in AIR 1925 272 (Privy Council) : see also *Ram Subhag Singh v. Emperor* AIR 1916 Cal 693 at p. 696 (Y), and *Atmaram v. Pandu* AIR 1926 Nag 154 (Z).

In other words, when an inferior Court is (taking the law from the superior Court) it cannot refuse to entertain or take into account a portion of the reasoning which was material for the decision of the case before the superior tribunal. Further, if two reasons are given to reach a conclusion, neither is obiter and both can be treated as the ratio. The following quotation from Devlin J. in *Behrens v. Bertram Mills Circus Ltd.* 1957 2 QB 1 at p 24 (Z-1), illustrates my meaning:

"It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observations obiter is also well established.

A Judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference".

26-a. It may be that the effect of the observation may itself be reduced to very little by the Superior Court; but if such is not the case and the reasoning is an integral step in laying down the law the reasoning must be given effect to. If we do not do this, we would be reduced to the position which Cardozo described in the *Nature of Judicial Process*, 15th edition, at pages 20-21:

". . . the work of deciding cases in accordance with precedents that plainly fit them, is a process similar in nature to that of deciding, cases in accordance with a statute. It is a process of search, comparison, and little more. Some Judges seldom get beyond that process in any case. Their notion of their duty is to match the colours of the case in hand against the colours of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.

But, of course, no system of living law can be evolved by such a process, and no judge of a High Court, worthy of his office views the function of his place so narrowly. If that were all to our calling, there would be little of intellectual interest about it. The man who had the best card index of cases would also be

the wisest Judge. It is when the colours do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the Judge begins".

27. The real purpose of enunciating a principle for the decision of a case is to gather the entirety of the law which has been laid down on that subject to see wherein the case in hand comes. In other words, after the inferior Court has found out the curve of the law -- to borrow the phrase of Paton -- it must try to find where exactly on that curve the case stands.

28. In dealing with the cases under Article 226 of the Constitution, which is a new jurisdiction, we are of necessity bound to take into account every expression of opinion given by their Lordships of the Supreme Court. After laying aside those statements of their Lordships which were not meant to lay down the law, we must attempt to establish, so to speak, the curve of the law with regard to the interpretation of that article and must attempt to find out where exactly the case which we have in hand falls. Unless we do so, we would be doing nothing more than taking cases which " were decided on different facts without their correlation to a proper scheme of interpretation, or we would be compelled to use stray sentences from their Lordships" judgment without being able to see how the development of the law has taken place.

29. Having made these observations as to the utility and the use of precedents of superior tribunals, I shall now pass on to examine how exactly the curve of the law with regard to Article 226 of the Constitution has been plotted by the decision of their Lordships.

30. I shall refer to one more case of the Supreme Court before dealing with the matter referred to just now. That case is reported in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, In that case the election tribunal having decided the petition and rejected it sent its orders to the Election Commission, which notified the order. Under the Representation of the People Act and the rules framed thereunder the re--cord of the tribunal was sent to the District Judge for custody. An objection was taken before the Supreme Court that the Tribunal having become functus officio no writ of certiorari could issue against the tribunal, which had ceased to exist. Their Lordships, relying upon two passages from Corpus Juris Secundum and Ferris on Extraordinary Legal Remedies held that certiorari was attracted, not necessarily against a Court or tribunal but against the record of a case. Their Lordships further held that the legal custody of the record being within the jurisdiction of the High Court, the High Court was competent to call up the record from that custody under Article 226 of the Constitution and to quash the order of the tribunal if it was found that the tribunal had acted contrary to law or the principles of natural justice.

31. From these cases it is easy to see what the opinion of their Lordships of the Supreme Court is as to the extent of the High Court's jurisdiction. To begin with, if an authority sought to be bound is permanently located or normally carries on

its activities else-where, the High Court cannot possess jurisdiction over it even though the parties to the case reside and the cause of action arises within the High Court's jurisdiction: (Saka Venkata Subba Rao's case (E)). On the contrary, if the cause of action arises elsewhere and the parties also reside outside the jurisdiction of the High Court, jurisdiction to bind the authority would be existing if the authority is permanently located or is normally carrying on its activities within the jurisdiction of the High Court : (Rashid's case (F)). The tribunal may not be existing; it may have -finished its work and may have become functus officio; even then, if the record is legally within the custody of someone within the jurisdiction of the High Court, the record can be called up and certiorari can issue against the record : (Hari Vishnu Kamath's case (Z2)).

If an authority employs an agent within the jurisdiction of the High Court and the agent acts independently under law, though under the general supervision of the outside authority, the action of the agent can be interfered with by the High Court if it is opposed to fundamental rights or is contrary to law or the course of natural justice : (Musaliar's case (J)).

If a special tribunal situated outside the jurisdiction of the State deals with an order of an inferior tribunal within the jurisdiction of the State and the order of the inferior tribunal can be said to merge in that of the superior tribunal the High Court cannot of necessity deal with the order of the inferior tribunal, if it cannot deal with the order of the superior tribunal : (Observations in Musaliar's case.)

32. I am therefore of opinion that interference in this case with the order of the Central Government may be open to this High Court (a) if it can be held that the Central Government is an authority located within the jurisdiction of this High Court, or (b) by certiorari against an order passed in a curial function of the Central Government if the record is by law in the custody of somebody within the jurisdiction of this Court and can be called forth from that custody, or (c) it has no effect upon the order of the State Government and the order of the State Government does not merge in that of the Central Government and the setting aside of the order of the State Government would afford full relief.

33. Examining the matter from this angle, I am clear that the words "person and authority are wide enough to include even Government. The mention of " "any Government" as being included in "person or authority" is not to introduce something which was not already there but is more by way of abundant caution, so that no question may arise that what was contemplated was not "Government" but, only a person or authority. An authority can only act through the agency of human beings and so also the authority of Government is exercised through the agency of persons. What "Government" means has been stated by Salmond on Jurisprudence, 10th edition, page 142, as follows :

"Political or civil power is the power vested in any person or body of persons of exercising any function of the State. It is the capacity of evoking and directing the activities of the body politic. It is the ability to make one's will effective in

any department of governmental action. The aggregate of all the persons or groups of persons who possess any share of this civil power constitutes the Government of the State. They are the agents through whom the State, as a corporate unity, acts and moves and fulfils its end."

34. This analysis of what is meant by "Government" shows that in the context of the Indian Constitution "Central Government" would, mean the President acting through the Council, of Ministers. It cannot be gainsaid that the Government of India as an authority is permanently located in and normally carries on its activities from New Delhi. In this sense this authority viz. the Central Government, is situated outside the jurisdiction of this Court. Thus, unless one of the other two conditions obtain in the case, relief to the appellant cannot be granted.

35. I now take up the second point whether the record of the Central Government can be made available to the High Court within the meaning of the ruling in Hari Vishnu Kamath's case (Z2). I have quoted above the memorandum which was issued by the Government of India. The learned counsel for the State Government could not say that the Government had received anything more than what was contained in the memorandum.

That memorandum on its face does not contain the order of the Central Government such as there must have been. It is merely a communication to the appellant of the gist of the order and the fact of rejection of the application for review. This is not the kind of order that their Lordships of the Supreme Court had in mind. The learned counsel for the appellant argued on the authority of a case referred to by the Supreme Court that it would be enough to deal with the communication and to quash it.

The case referred to is reported in R. v. Wormwood Scrubs Prison Governor 1948 1 All ER 438 (Z3). There a person who was taken in an emergency commission was discharged from the Army. After his discharge, he was taken over to Germany and was tried before 3, court-martial for not having continued his military service. He was convicted and sentenced and sent to a prison in England. A writ of habeas corpus having been asked for, their Lordships permitted to moving of an application for a writ of certiorari for calling up the conviction.

Their Lordships held that a court-martial could not try the detenu because he had ceased to be governed by the Army law and therefore the conviction was improper. The conviction was quashed, "and the man was ordered to be released. The learned counsel for the appellant contends that on the analogy of this case and the fact that in Hari Vishnu Kamath's case (Z2), their Lordships mentioned not only the record but also "other papers", the present case is covered by the latter. The passage referred to is a quotation from Ferris on Extraordinary Legal Remedies, which is to the following effect;

"The writ is directed to the body or officer whose determination is to be

reviewed, or to any other person having the custody of the record or other papers to be certified."

36. The learned counsel contends that interference by way of certiorari is available not only when the record can be called forth but even when other papers can be certified and examined. In my opinion, there must be made a distinction between a letter communicating the decision of the Central Government and an order of the Central Government. What their Lordships apparently mean is a pertinent or a material document which can be quashed, and the reasoning cannot be extended to cover mere communications to the party of the gist of the order.

In this sense I do not think that Hari Vishnu Kamath's case (Z2), can be made applicable to the present case and the quashing of the memorandum of a Secretary of the Central Government would not be tantamount to the quashing of the order of the Central Government. To quash the order, I must know the reasons on which that order proceeded and be able to examine them. There is no means at hand to compel the production of the Central Government's records. The State Government cannot be ordered to send for those records; nor can we, in view of what I have said earlier, order the production of the record before us. In my opinion, therefore, the ruling in Hari Vishnu Kaniath's case (Z2), cannot be made applicable to this case. It is therefore unnecessary to deal with this matter in this case at greater length, 1958 Matin. Pra. D.P./8

37. Now I take up the third point. The question is what is the nature or the order which the Central Government passes under the Mineral Concession Rules. Is it of an executive or curial nature? The chapter is headed "Revision", but in the body of the chapter the words review and revision have been used interchangeably. Whatever be the label under which the power goes, the main question really is what is the kind of action which the Central Government can take.

It is apparent on reading Chapter VI of the Mineral Concession Rules that the aggrieved party is given a right of redress against the State Government's decision. This right when analysed is equivalent to a right to examine the facts and the law pertinent to the case and to give a fresh decision which may amount to a complete annihilation of the decision of the State Government. This is a curial function and not an executive function.

38. In the present case, the Central Government has done nothing more than pass an order rejecting the application for review. It is contended that there would be no question of merger here because the orders of the State Government and of the Central Government are distinct, and that we can deal with the State Government's order and get it out of the way, which would have the effect of leaving nothing to be confirmed and making the order of the Central Government also ineffective.

The learned counsel for the appellant relied upon the observations of the Madras

High Court in *Collector of Customs v. A. H. A. Rahiman*, (S) ATR 1957 Mad 496 (Z4). In that case relying upon a decision of the English Courts reported in *Barnard v. National Dock Labour Board* 1953 1 All ER 1113 (Z5), Rajamannar, C. J., stated that it would be open to the High Court to quash the order of the inferior tribunal as a nullity and thus render the order of a superior tribunal also a nullity. The case relied upon was patently one of jurisdiction.

One Mr. Hogger, a port manager, acted as a tribunal which was constituted under the Dock Workers (Regulation of Employment) Order, 1947. It was found that the local board could not delegate their power to suspend any worker and that the act of Mr. Hogger was that of a mere intruder or equal to that of a usurper. An appeal was taken against Mr. Hogger's decision and the Appellate Tribunal affirmed his order. Their Lordships in dealing with the case did not quash the order of either Mr. Hogger or that of the Appellate Tribunal.

They granted a declaration of nullity in respect of Mr. Hogger's order and pointed out that the effect of declaring the order of Mr. Hogger a nullity was to render the order of the Appellate Tribunal also a nullity. Whether such an action can be taken in a case like the present is not before the Full Bench because under the terms of the reference I am not required to examine the issue whether the order of the State Government was a nullity or not. What we have to find out is whether by a writ we can bind the Central Government acting under the Mineral Concession Rules. In my opinion, the statement of law by the learned Chief Justice, even if it be correct, cannot be examined under the present question.

39. This leaves over the question of merger. I have indicated that the essence of the decision of their Lordships of the Supreme Court in *Musaliar's case* (J), when they dealt with the three cases to which I referred elsewhere was that if the order of the inferior tribunal merged in the order of the superior tribunal, then no action could be taken to quash the order of the inferior tribunal. Recently a Division Bench, of which two of us (Choudhuri, J. and myself) were members in *Premchand Lalchand Vs. State of Madhya Pradesh and Others*, held that under some statutes the order of an inferior tribunal merges even in an affirming order of a revisional tribunal. On that occasion the Division Bench referred to all the pertinent cases bearing upon this matter.

It was pointed out that once the order of an inferior tribunal merges in the order of a superior tribunal situated outside the jurisdiction of the High Court, the High Court cannot deal with the order of the interior tribunal which, so to speak, does not really exist for consideration. Under R. 60 of the Mineral Concession Rules finality has been granted to the State Government's order, subject only to the order of the Central Government which also is made final.

When the Central Government approves the order of the State Government, it, in effect, adopts the order of the State Government as its own and sets its own seal upon it. In this sense, the order extant is not the order of the State Government but the order of the Central Government and what we have to get rid of is the

order of the Central Government. In my opinion, under R. 60 of the Mineral Concession Rules, the order of the State Government merges in that of the Central Government and cannot be got rid of unless the order in which it merges can also be got rid of.

40. It remains only to refer to a catena of cases in which the same point has been traversed in the High Court in India. The solitary case reported in : Maqbulunissa and Others Vs. Union of India (UOI) and Another, has had an unfortunate history in its own Court. On many occasions, e.g., Kesar Sugar Works Ltd. Vs. The Union of India (UOI) and Another, ; Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others, ; Tej Bhan Madan Vs. Govt. of India, ; (S) Azmat Ullah and Others Vs. The Custodian, Evacuee Property, U.P., Lucknow, Ram Kirpal Chhakar and Another Vs. Union of India (UOI) and Another, and A.K. Moitra and Others Vs. Ministry of Defence, Union of India (UOI) and Others, it was not followed. The case of the Rajasthan High Court reported in Barkatali Vs. Custodian General of Evacuee Property of India, was not followed by Wanchoo C. J. himself because the learned Chief Justice was of the opinion that after the Supreme Court cases of Saka Venkata Rao (C) and Rashid (D) the earlier view expressed by him must be taken to be incorrect : Dungardas and Another Vs. Custodian Rajasthan and Another,

In the Pepsu case, which has been referred to earlier, and in three cases from Andhra the same law has been laid down. The Andhra cases are to be found in Venkayala Janaiah Vs. Board of Revenue (Andhra) and Another, , Vishakapatnam Co-operative Motor Transport Society Ltd. Vs. M. Subba Rao and Another, and V. Lakshmi Reddi Vs. Collector and Addl. Dist. Magistrate, Kurnool and Another, . In all the cases, an extreme position; arising under the decision of their Lordships of the Supreme Court is exemplified.

The Board of Revenue of the Andhra State was located at Madras and the question arose whether the Andhra High Court had the jurisdiction to quash an order of the Board of Revenue situated at Madras. The learned Judges held that regard being had to the opinion of the Supreme Court, the Madras High Court, and not the Andhra High Court, would have that power. They noted the anomaly that a Department of Andhra Government was outside the pale of the High Court's jurisdiction by its being located there. Of course, if the reason-mg had been that the Board of Revenue must be taken to be permanently located in Andhra and only temporarily at Madras, the view might have been different. In any case, the three; decisions of the Andhra High Court show the limit to which the decisions of the Supreme Court have been earned.

41. The same view was expressed in the Ajmer Judicial Commissioner's Court in Narain Singh v. Chief Commissioner, Ajmer, AIR 1955 RAJ 33 (Z17). I may here refer to the decision of a Single Judge of the Bombay High Court in P.N. Films Ltd. Vs. Union of India, I may refer also to K. B. Sipahimalani v. Fidahussein Vallibhoy 58 Bom LR 344 (Z19), where Chagla C. J. and Dixit J. had given contrary opinipns in relation to an order passed by the Custodian General. That

case has been dissented from by the Division Bench referred to in paragraph 39 and I find myself unable to agree with that decision. In this Court too the decisions have been uniform.

After Saka Venkata Subba Rao's case (C), 1 have referred to ILR (1955) Nag 108: (AIR 1955 Nag 148) (G). There are other cases, including the case of a Full Bench (which has not been reported) Menon v. The Union of India, M. P. No. 331 of 1953, D/- 3-10-1955 (Z20). There is a Single Bench decision to the contrary in Misc. Petn. No. 226 of 1955, D/- 10-11-1955 (Nag) (Z21), but that case has been overruled by the Division Bench decision I have referred to in paragraph 39 : See in this connection also Krishna Khandelwal and Another Vs. Director of Land Hiring and Disposal Eastern Command and Others, ; Manmull Jain Vs. N.C. Putatunda, ; Mohd. Hydar v. Custodian General of Evacuee Property ILR (1953) Hyd 616: (AIR 1954 Hyd 33) (Z24) and Rasheeduddin v. Accountant General ILR (1955) Hyd 780 : (AIR 1955 Hyd 269) (Z25).

42. For the reasons given above, I am of opinion that the Central Government cannot be deemed to be permanently located or normally carrying on its business within the jurisdiction of this Court, that the record of the case which the Central Government decided is not before this Court and cannot be made available from any legal custody within the State, that the order of the State Government must be deemed to have merged in that of the Central Government, and that that order of the State Government cannot be touched unless the order of the Central Government can be brought before this Court and quashed. I am, therefore, of opinion that regard being had to these circumstances the answer to the question which has been posed for the Full Bench must be in the negative.

Sen, J.

43. I agree.

Choudhuri, J.

44. I agree.

Naik, J.

45. I agree.

Dixit, J.

46. I agree.