CASE NO.:
Writ Petition (civil) 509 of 1997
Writ Petition (civil) 108 of 1999

PETITIONER:
RUPA ASHOK HURRA

Vs.

RESPONDENT:
ASHOK HURRA AND ANOTHER

DATE OF JUDGMENT: 10/04/2002

BENCH:
Umesh C. Banerjee

JUDGMENT:

With Writ Petition (C) No. 245/99, Writ Petition (C) No.338/2000, Writ Petition (C) No.325-326/2000, Writ Petition (C) No.663/2000, Writ Petition (C) No.680/2000, Writ Petition (C) No.374/2001

JUDGMENT

BANERJEE, J.

I have had the privilege of going through a very lucid expression of opinion by brother Quadri and while recording my concurrence therewith I wish to add a few paragraphs of my own. The issue involved presently though not a concept within the ambit of doctrine of stare decisis but akin thereto to the effect as to the scope or finality of the decision of this Court in the normal course of events. There cannot possibly be any manner of doubt that the matter once dealt with by this Court attains a state of finality and no further grievance can be had in regard thereto. The founding fathers of the Constitution decidedly provided that the decision of this Court as final, conclusive and binding final and conclusive inter-parties and binding on all. But the makers have also conferred a power of review of the Judgment of this Court and the perusal of the provisions of Articles 137 and 145 makes it abundantly clear. In the event, however, a party stands aggrieved by reason of a rejection of review, the question posed as to whether a litigant thereof to suffer the onslaught for all times to come and in perpetuity when on the face of the Order it appears to be wholly without jurisdiction or in violation of natural justice a further factum of there being a bias or gross or manifest injustice, which shocks the conscience of a reasonable man: needless to record that the facts, as noticed above, are not only unwarranted but possibly in the region of impossibility or more appropriately improbable Mr. K.K.Venugopal, the learned senior counsel appearing in support of one of the matters before this Bench, has been rather emphatic in his submissions as regards the apprehension of bias and it is his contention that a mere likelihood of bias should prompt this Court to allow a further consideration of the matter. Incidentally, be it noted that in all these matters, petitions under Article 32 of the Constitution have been filed with a prayer for issuance of the Writ of Certiorari. We called for the records in

some of the matters, which stand concluded by decisions of this Court and the principal issue thus arises as to the maintainability of a petition under Article 32 of the Constitution. There is no denial of the fact that the right exists to move this Court for enforcement of the rights conferred by Part III of the Constitution and stands conferred in terms of Article 32 and the language used therein is of widest possible amplitude but as regards the issuance of writs, the view seems to be rather well settled in the negative.
About four decades ago, in Naresh Shridhar Mirajkar and others vs. State of Maharashtra and another (1966) 3 SCR 744, a nine Judge Bench of this Court in no uncertain terms negatived the availability of writ jurisdiction under Article 32 and with utmost clarity and felicity of expression stated:

"We are, therefore, satisfied that so far as the jurisdiction of this Court to issue writ of certiorari is concerned, it is impossible to accept the argument of the petitioners that judicial orders passed by High Courts in or in relation to proceedings pending before them, are amenable to be corrected by exercise of the said jurisdiction. We have no doubt that it would be unreasonable to attempt to rationalise the assumption of jurisdiction by this Court under Art. 32 to correct such judicial orders on the fanciful hypothesis that High Courts may pass extravagant orders in or in relation to matters pending before them and that a remedy by way of a writ of certiorari should, therefore, be sought for and be deemed to be included within the scope of Art. 32. The words used in Art. 32 are no doubt wide; but having regard to the considerations which we have set out in the course of this judgment, we are satisfied that the impugned order cannot be brought within the scope of this Court's jurisdiction to issue a writ of certiorari under Art. 32; to hold otherwise would be repugnant to the well-recognised limitations within which the jurisdiction to issue writs of certiorari can be exercised and inconsistent with the uniform trend of this Court's decisions in relation to the said point."

Two decades later, this Court in A.R.Antulay vs. R.S. Nayak and another (1988) 2 SCC 602, relying upon the nine Judge Bench Judgment, came to a conclusion that in view of the decision in Mirajkar case, it must be taken as concluded that the judicial proceedings in this Court are not subject to the writ jurisdiction under Article 32 of the Constitution and that is so on account of the fact that Benches of this Court are not subordinate to larger Benches thereof and certiorari is not admissible thus for quashing of the Orders made on the judicial side of the court. In Smt. Triveniben vs. State of Gujarat (1989) 1 SCC 678, a Constitution Bench of this Court also in no uncertain terms laid down that it will not be open to this Court in exercise of its jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent Court. To complete the list, however, a very recent decision of this Court in Ajit Kumar Barat vs. Secretary, Indian Tea Association and others (2001) 5 SCC 42 one of us (Shivaraj V. Patil, J) upon consideration of Mirajkar (supra) and Antulay (supra) came to a conclusion that authority of an Order passed by this Court itself cannot be subjected to writ jurisdiction of this Court.

On the wake of the aforesaid, there is thus no manner of doubt that the plea of the availability of writ jurisdiction, as envisaged under Article 32 of the Constitution, cannot be sustained and the law seems to be well settled on this score and as such we need not delve into neither dilate any further thereon.

Having regard to the conclusion, as above, does it, however, mean and imply a closed door even if the Order of this Court depicts that the same stands in violation of natural justice adversely and seriously affecting the rights of the parties or the same depicts manifest injustice rendering the order a mockery of justice can it be said that the binding nature of an Order of this Court, cannot thus be ever be corrected even if it causes insurmountable difficulty and immense public injury the debate has a very large and wide ramification and thus will have to be dealt with in a manner with care and caution and with proper circumspection as regards its impact - the principal basis being the concept of justice and this is where the principle of ex debito justitiae comes to play. Can it be said that the justice delivery system of the country is such that in spite of noticing a breach of public interest with a corresponding social ramification, this Court would maintain a delightful silence with a blind eye and deaf ear to the cry of a society in general or even that of a litigant on the ground of finality of an Order as passed by this Court ? True the finality shall have to be maintained but is it the principal requirement, which the law envisages? Roscoe Pound stated that flexibility is the greatest virtue of law and thus its applicability should also be flexible rather than a rigid insistence on a strict format. Justice of the situation shall have to be considered with a fair perception of such a concept rather than with a blinking light attention ought to be focussed on a larger social perspective since law is meant for the society and if flexibility is its virtue, which law enjoys, its corresponding primary duty thus would be to change the legal horizon and perspective with the appropriate socio-economic change. The law must follow the society rather than abandon the society and carry on it strict track without any deviation or without being hindered of the social changes and thus resultantly face a social catastrophe.

Lord Denning’s exposition of the doctrine ’ex debito justitiae’ in A/s Cathrineholm vs. Norequipment Trading Ltd. (1972 (2) All ER 538) has been stated to be rather restrictive, but since basically the same stands out to be on the concept of justice, speaking for myself do not subscribe to such a criticism. The Master of the Rolls stated that if the Judgment is irregular that is, which ought not to have been signed at all then the defendant is entitled ex debito justitiae to have it set aside but in the event it is otherwise regular, question of setting aside of the Judgment would not arise. It is, thereafter, however, arises, the question as to the true effect of Regular and Irregular Judgments : Since the issue involves a much wider debate, we refrain ourselves to attribute meanings thereto or to dilate on the ramifications of the terminology having regard to further enunciation of the doctrine by both the English Courts and the Indian Supreme Court.
Adverting to the true purport of the maxim, therefore, it is no gainsaid that "the same relates to and arises from the concept of justice : In the event there appears to be infraction of the concept, question of there being a turn around and thereby maintaining a total silence by the law Courts would not arise. It is on this score, the learned Attorney General for India, appearing as Amicus Curiae, contended that Supreme Court has the jurisdiction to exercise this inherent power for the ends of justice or to prevent abuse of the process of the court. Though we are not inclined to ascribe an Order of this Court as an abuse of the process of the Court, but the factum of the availability of inherent power for the ends of justice cannot in any way be decried. The Constitution of India assigned a pivotal role on to the Supreme Court providing therein the supremacy of law with the rationale being justice is above all. The exercise of inherent power of this Court also stands recognised by Order XLVII Rule 6 of the Supreme Court Rules, 1966, which reads as below:

"6 Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The observations of this Court in A.R. Antulay (supra) lends concurrence to such an exercise of power by this Court ex debito justitiae. The Court can exercise its inherent power in the event of there being an error brought to the notice of this Court. Mukharji,J (as he then was) in paragraph 40 of the Judgment in A.R. Antulay (supra) very lucidly and with utmost precision stated:

"The question of validity, however, is important in that the want of jurisdiction can be established solely by a superior court and that, in practice, no decision can be impeached collaterally by any inferior court. But the superior court can always correct its own error brought to its notice either by way of petition or ex debito justitiae. See Rubinstein's Jurisdiction and Illegality)."

Incidentally a Seven Judge Bench of this Court in Synthetics and Chemicals Ltd. and others vs. State of U.P. and others (1990) 1 SCC 109 relied upon another Judgment of Lord Denning in Ostime (Inspector of Taxes) vs. Australian Mutual Provident Society (1959 (3) All ER 245 : 1960 AC 459) and the dissent noting by Justice Jackson in the case of Commonwealth of Massachusetts et al vs. USA (92 L ed 968), wherein in similar tone it has been stated that as soon as one finds a journey in the wrong direction, there should always be an attempt to turn to the right direction since law courts ought to proceed for all times in the right path rather than in the wrong. Adverting to the issue of inherent power, the observations of this Court in S. Nagaraj and others vs. State of Karnataka and another (1993 Supp. (4) SCC 595) seems to be rather apposite. This Court in paragraph 19 of the report, upon relying on the fundamental principles of jurisprudence that justice is above all, stated as below:

"Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage or justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai (AIR 1941 FC 1,2 : 1940 FCR 78 : (1941) 1 MLJ Supp 45) the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh [(1836) 1 Moo PC 117 : 2 MIA 181 : 1 Sar 175] that an order made by the Court was final and could not be altered:

". nevertheless, if by misprision in

embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in . The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

In one of its recent pronouncements [Supreme Court Bar Association vs. Union of India and another (1998 (4) SCC 409)] this Court has had the occasion to deal with the issue at some length relying upon Article 129 read with Article 142 of the Constitution. The plenary powers of the Supreme Court, as envisaged under Article 142, stand out to be complimentary to those powers to do complete justice between the parties and it is on this score in paragraphs 47 and 48 of the report, this Court

observed:

"47 The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or case under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely

dispute-settling. It is a "problem-solver in the nebulous areas" (see K. Veeraswami v. Union of India (1991) 3 SCC 655 : 1991 SCC (Cri) 734) but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

Incidentally, this Court stands out to be an avenue for redressal of grievance not only in its revisional jurisdiction as conferred by the Constitution but as a platform and forum for every grievance in the country and it is on this context Mr.Shanti Bhushan, appearing in support of the some of the petitioners, submitted that the Supreme Court in its journey for over 50 years has been able to obtain the confidence of the people of the country, whenever the same is required be it the atrocities of the police or a public grievance pertaining to a governmental action involving multitudes of problems. It is the Supreme Court, Mr. Shanti Bhushan contended, where the people feel confident that justice is above all and would be able to obtain justice in its true form and sphere and this is beyond all controversies. It has been contended that finality of the proceeding after an Order of the Supreme Court, there should be, but that does not preclude or said to preclude this Court from going into the factum of the petition for gross injustice caused by an Order of the Supreme Court itself under the inherent power being an authority to correct its errors any other view should not and ought not be allowed to be continued. Needless to record here, however, that review jurisdiction stand foisted upon this Court in terms of the provisions of the Constitution, as noticed hereinbefore and it is also well-settled that a second review petition cannot be said to maintainable. Reference maybe made in this context to a decision of this Court in the case of J.Ranga Swamy v. Govt. of A.P. & Ors. (AIR 1990 SC 535), wherein this Court in paragraph 3 stated as below :-

"We are clearly of the opinion that these applications are not maintainable. The petitioner, who appeared in person, referred to the judgment in Antulay's case (1988) 2 SCC 602 : (AIR 1988 SC 1531). We are, however, of the opinion that the principle of that case is not applicable here. All the points which the petitioner urged regarding the constitutionality of the Government orders in question as well as the appointment of respondent instead of petitioner to the post in question had been urged before the Bench, which heard the civil appeal and writ petitions originally. The petitioner himself stated that he was heard by the Bench at some length. It is, therefore, clear that the matters were disposed of after a consideration of all the points urged by the petitioner and the mere fact that the order does not discuss the contentions or give reasons cannot entitle the petitioner to have what is virtually a second review."

True, due regard shall have to have as regards opinion of the Court in Ranga Swamy (supra), but the situation presently centres round that in the event of there being any manifest injustice would the doctrine of ex debito justitiae be said to be having a role to play

in sheer passivity or to rise above the ordinary heights as it preaches that justice is above all. The second alternative seems to be in consonance with time and present phase of socio-economic conditions of the society. Manifest justice is curable in nature rather than incurable and this court would lose its sanctity and thus would belie the expectations of the founding fathers that justice is above all. There is no manner of doubt that procedural law/procedural justice cannot overreach the concept of justice and in the event an Order stands out to create manifest injustice, would the same be allowed to remain in silenco so as to affect the parties perpetually or the concept of justice ought to activate the Court to find a way out to resolve the erroneous approach to the problem. Mr.Attorney General, with all the emphasis in his command, though principally agreed that justice of the situation needs to be looked into and relief be granted if so required but on the same breath submitted that the Court ought to be careful enough to trade on the path, otherwise the same will open up Pandora's box and thus, if at all, in rarest of the rare cases the further scrutiny may be made. While it is true that law courts has overburdened itself with the litigation and delay in disposal of matters in the subcontinent is not unknown and in the event of any further appraisal of the matter by this Court, it would brook on further delay resulting in consequences which are not far to see but that would by itself not in my view deter this Court from further appraisal of the matter in the event the same, however, deserve such an additional appraisal The note of caution sounded by Mr. Attorney as regards opening up of pandora's box strictly speaking, however, though may be of very practical in nature but the same apparently does not seem to go well with the concept of justice as adumbrated in our constitution. True it is, that practicability of the situation needs a serious consideration more so when this Court could do without it for more than 50 years, which by no stretch of imagination can be said to be a period not so short. I feel it necessary, however, to add that it is not that we are not concerned with the consequences of reopening of the issue but the redeeming feature of our justice delivery system, as is prevalent in the country, is adherence to proper and effective administration of justice in stricto. In the event there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system technicality ought not to out-weigh the course of justice the same being the true effect of the doctrine of ex debito justitiae. The oft quoted statement of law of Lord Hewart, CJ in R v. Susssex Justices, ex p McCarthy (1924 (1) KB 256) that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seem to be done had this doctrine underlined and administered therein. In this context, the decision of the House of Lords in R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) seem to be an ipoc making decision, wherein public confidence on the judiciary is said to be the basic criteria of the justice delivery system any act or action even if it a passive one, if erodes or even likely to erode the ethics of judiciary, matter needs a further look. Brother Quadri has taken very great pains to formulate the steps to be taken and the methodology therefor, in the event of there being an infraction of the concept of justice, as such further dilation would be an unnecessary exercise which I wish to avoid since I have already recorded my concurrence therewith excepting, however, lastly that curative petitions ought to be treated as a rarity rather than regular and the appreciation of the Court shall have to be upon proper circumspection having regard to the three basic features of our justice delivery system to wit, the order being in contravention of the doctrine of natural justice or without jurisdiction or in the event of there is even a likelihood of public

confidence being shaken by reason of the association or closeness of a judge with the subject matter in dispute. In my view, it is now time that procedural justice system should give way to the conceptual justice system and efforts of the law Court ought to be so directed. Gone are the days where implementation of draconian system of law or interpretation thereof were insisted upon - Flexibility of the law Courts presently are its greatest virtue and as such justice oriented approach is the need of the day to strive and forge ahead in the 21st century. No costs.

..J
(Umesh C. Banerjee)

April 10, 2002