

**CHIEF JUSTICE'S COURT**  
HON'BLE THE CHIEF JUSTICE  
HON'BLE MR. JUSTICE HRISHIKESH ROY  
HON'BLE MRS. JUSTICE B.V. NAGARATHNA  
HON'BLE MR. JUSTICE SUDHANSHU DHULIA  
HON'BLE MR. JUSTICE J.B. PARDIWALA  
HON'BLE MR. JUSTICE MANOJ MISRA  
HON'BLE MR. JUSTICE RAJESH BINDAL  
HON'BLE MR. JUSTICE SATISH CHANDRA SHARMA  
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

**COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

**Civil Appeal No. 1012/2002**

**PROPERTY OWNERS ASSOCIATION & ORS**

**Petitioner(s)**

**VERSUS**

**STATE OF MAHARASHTRA & ORS**

**Respondent(s)**

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TRANSCRIPT OF HEARING

30-April-2024  
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1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

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3 **TUSHAR MEHTA:** My Lord, regarding that second Constitution Bench, yesterday My Lords  
4 indicated what we have taken instructions, the position is this. In 2020, other Hon'ble judges  
5 may not be aware. Yesterday the discussion regarding next Constitution Bench under the IDA,  
6 and I was to respond, what is the position. The position is, in 2020, there is an industrial code  
7 which is passed by the Parliament, but since the rules are in the process of being made, it is  
8 not yet notified. But there the definition of industry is in conformity with Bengal water supply.  
9 Oh sorry, *Bangalore Water Supply*. So, the suggestion subject to the approval of The  
10 Hon'ble Bench is, if it can go after the vacation, we can also take a call whether to amend the  
11 definition or what, what stand the government would like to take. Otherwise we are ready and  
12 we will...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Fine then, because anyway we have now, two  
15 days this week and three days next week.

16

17 **TUSHAR MEHTA:** My Lord, only one week, practically one week. Because yesterday...  
18 tomorrow Your Lordships have fixed some the judges matter also and this can't be over in a  
19 week. The Industrial dispute matter can't be over.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** You can keep it in July on the reopening. We will  
22 notify the date.

23

24 **TUSHAR MEHTA:** Yes, My Lord. My Lord Kindly come to Volume 2D, capital D, D for Delhi.  
25 My submissions on Article 39 but before that, I would wish Your Lordships to see Article 37,  
26 which is not My Lord... Of course, Your Lordships would be knowing about it, but it's not  
27 brought to Your Lordships notice in this matter. That would show, the sanctity which the  
28 Framers of the Constitution have attached to Directive Principles of State Policy. 37, My Lords.  
29 But last lines are in my respectful submission... Yes, My Lord, even lawmaking. Not just  
30 executive governance, even in lawmaking. 'Application of the principles contained in this part,  
31 the provisions contained in this part shall not be enforceable by any Court but the principles  
32 therein laid down are nevertheless fundamental in the governance of the country, and it shall  
33 be the duty of the State to apply these principles in making laws. There is a constitutional  
34 obligation, so to say, on the Legislature also, to apply these principles.'

35

1 Now, kindly come to my note, Volume 2D. The width of Article 39, because Your Lordships,  
2 obviously would bear in mind the question, which is being... for which we are assisting Your  
3 Lordship is, whether a private property would fall within 39 or not? In that context, My Lord,  
4 this is my perception of Article 39. 'The ownership and control of material resources of the  
5 community are so distributed as best to subserve the common good'. My Lord, each word in  
6 my respectful submission, is pregnant with meaning of making a Welfare State. If I have to,  
7 give one word for this entire Article, it is to create a Welfare State. Now, I would dissect why  
8 each word is used very carefully by the Framers of the Constitution. My Lord, it says  
9 'ownership and control of the material resources'. My Lord, if the Framers of the Constitution  
10 would have envisaged that the property owned by the Government to be used for the purposes  
11 which are mentioned, then there was no occasion for them to say that ownership and control  
12 would be used. 'Ownership and control' would necessarily mean that something which do not  
13 belong to the government, but in the larger interest of the common good, there can be a law  
14 passed.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** But these have to be resources of the community.

17

18 **TUSHAR MEHTA:** I'm coming to that. The word used is not material resources of either the  
19 State or the Government. It says 'resources of the community', which again, leads to an  
20 indication that it includes both Government property, and other than Government property.

21

22 **JUSTICE HRISHIKESH ROY:** Learned Solicitor, you must have... since we are on 39(b)...

23

24 **TUSHAR MEHTA:** My Lords.

25

26 **JUSTICE HRISHIKESH ROY:** ...and you are proposing to dissect the words there. Now,  
27 obviously, we are also going to look at... Now, when you say ownership, not with the  
28 Government. It is obviously in the private sector.

29

30 **TUSHAR MEHTA:** Both.

31

32 **JUSTICE HRISHIKESH ROY:** Right.

33

34 **TUSHAR MEHTA:** It can include both.

35

1 **JUSTICE HRISHIKESH ROY:** It can include both. So ownership and control of material  
2 resources, as the Hon'ble Chief Justice has pointed out, and what is to subserve the common  
3 good.

4

5 **TUSHAR MEHTA:** I'm coming to that.

6

7 **JUSTICE HRISHIKESH ROY:** Right. This common good element is very important  
8 because...

9

10 **TUSHAR MEHTA:** That's the, My Lord, keyword in the entire section.

11

12 **JUSTICE HRISHIKESH ROY:** That's right. So, whether common good... Of course, this is  
13 in the context of the provisions in the MHADA Act.

14

15 **TUSHAR MEHTA:** In general, we are.

16

17 **JUSTICE HRISHIKESH ROY:** Yeah, that's right. I mean, you are giving a broad  
18 interpretation...

19

20 **TUSHAR MEHTA:** Correct.

21

22 **JUSTICE HRISHIKESH ROY:** ...the discussion also has to relate to what is contained in  
23 the Maharashtra Act pertaining to the properties.

24

25 **TUSHAR MEHTA:** Yes, My Lord, but nobody touched MHADA Act from the point of view  
26 of its validity, et cetera. It was just by way of an example But I am a lot broadly, irrespective  
27 of, MHADA or any movable or removable property, any property. Property can be merely a  
28 private mine, for example. It is a material resource. It is a resource not belonging to the  
29 Government because it's a private mine. But therefore, the keywords are, it should be if any  
30 law is made under Article 39(b), it should be a) for distribution. b) it should be to subserve  
31 common good. Not good of any particular section of the society. Therefore, I say common good  
32 is the keyword My Lord, of this, that you take over some property for the purpose of, say, one  
33 section belonging to one race, one religion, one caste, one profession. That is not what is  
34 contemplated. It has to be a community property not belonging to the Government. It is  
35 required for being distributed and the ultimate goal has to be common good. And therefore,  
36 in one word, this, provides for an ideal definition of a Welfare State. This is not distributive  
37 justice.

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**JUSTICE B.V. NAGARATHNA:** No, the question is whether ownership of the community is also equivalent to ownership of an individual, or ownership of a community also encompasses individual ownership of property. That is the question.

**TUSHAR MEHTA:** That will have to be My Lord, so read. Otherwise...

**JUSTICE B.V. NAGARATHNA:** Whether a community means an individual.

**TUSHAR MEHTA:** I would answer that question. It will have to be so read, depending upon the facts and circumstances. For example, in my house, there is a rare mineral which is discovered. It's not a property of the community. It's a property of the individual, but then the keyword would be 'material resources'. If individual property has material resources which can be distributed and ultimately for common good of the citizens.

**CHIEF JUSTICE DY CHANDRACHUD:** Actually, your example is very apposite, because what your example shows is, that there may be instances where in respect of private property, there is a community interest. Now, this is clearly a case of that nature. Namely, though the property is of a private individual, underlying that property, you have, say, uranium or you have some very rare resource, which is really a resource of the community. And therefore, there can't be a very strict dichotomy between private and public. At the same time, it is a little too extreme. The formulation by Justice Krishna Iyer is a little too extreme. What that formulation says is, since the community consists of individuals and therefore, every individual is a part of the community, if the material resources of the community would therefore mean also resources of the individual. That may be a little extreme. I will tell you also...

**TUSHAR MEHTA:** It will be a little extreme. I...

**CHIEF JUSTICE DY CHANDRACHUD:** Also, we must now be cognizant of the fact that all these constitutional provisions are being, they have an evolution. We are now interpreting them not in the context of the India of 1950.

**TUSHAR MEHTA:** Nationalization to disinvestment, that's the transition.

**CHIEF JUSTICE DY CHANDRACHUD:** Therefore, we must therefore, adopt an interpretation which is in keeping with the changing nature of the times and the society which

1 we... At the same time, you must also have an enduring interpretation. So, it may well be that  
2 certain resources which are vested in private individuals, may still have some general bearing  
3 of public interest or community welfare, the welfare of the broader community, which requires  
4 regulation by the State.

5

6 **TUSHAR MEHTA:** Yes, My Lord, for example land... road, making of a road. Land is a  
7 material resource. When the function you are discharging is making of a road, some land is  
8 coming in between. It is for common good, for distribution, and it is a material resource, may  
9 be belonging to not the entire community, but an individual. Therefore, the law will be in tune  
10 with, if each and every word is existing simultaneously. And I would add one more thing.  
11 Ownership...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Also 39(b) postulates that there has to be a  
14 diversification of ownership and control. Why does it say ownership and control of the  
15 material resource to the community is distributed? So this is speaking about the need for  
16 diversification of ownership and control to protect the common good. That is, you don't want  
17 a concentration of economic resources in the hands of...

18

19 **TUSHAR MEHTA:** If they are material resources.

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21 **CHIEF JUSTICE DY CHANDRACHUD:** If they are material resources of the community.

22

23 **TUSHAR MEHTA:** it's not, for example rustic...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Dispersal. Dispersal would maybe... that's what  
26 distribution means.

27

28 **TUSHAR MEHTA:** Yes, because, for example, a rustic way of looking at it is, that you total  
29 up the wealth of the entire nation, divide it by the people whom you feel that needs to be  
30 distributed and whatever is the figure, distribute it. My Lord, that's not what 39 means. That  
31 would be a lack of understanding of governance as well as economics.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** We can't attribute to Article 39(b) and (c), at least  
34 in today's time, is sort of a definition which gives expression to an unbridled agenda of  
35 communism or socialism.

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37 **TUSHAR MEHTA:** Absolutely.

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**CHIEF JUSTICE DY CHANDRACHUD:** That is not our... that is not our Constitution today. We still protect private property. We still can protect the right to carry on business. We still want, as part of, say, a national agenda. I won't say the Government's agenda because this is across..

**TUSHAR MEHTA:** No, no, this is the agenda of the nation, whichever is the Government.

**CHIEF JUSTICE DY CHANDRACHUD:** ...is from 1990, and so it was irrespective of party lines and Government. We have now expressly adopted a policy of encouraging investment by the private sector, realizing that until then it is all right that the Government was involved in very high levels of investment in the industry. But now, truly, if we have to have a productive enterprise, you have to encourage private investment. And therefore, our interpretation must also be, you know nuanced to take care of what India is today and what India is moving towards tomorrow.

**TUSHAR MEHTA:** My Lord, investment in the private sector is now boosting common good than what was envisaged in '49, '47.

**CHIEF JUSTICE DY CHANDRACHUD:** For instance, in 1950, nobody envisaged that you would have electricity distribution by private companies on such a scale. Now you have that today.

**TUSHAR MEHTA:** Yes, My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** They couldn't have envisaged that, well the private sector will be building up infrastructure like roads, like ports.

**TUSHAR MEHTA:** My Lord, one of the judgments, very illuminating judgment. For example of airports, airports, some of the activities are privatized. Not the essential activities like customs, security, etc. But some of the activities are privatized.

**CHIEF JUSTICE DY CHANDRACHUD:** We may not have a very strict dichotomy that, well, something which is totally privately owned, can never be a material resource of the community. That would be a very extreme statement. But, it would be an equally extreme statement to postulate, that everything which is private is a material resource of the community, which the Attorney General argued. That, may not be...

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**JUSTICE SUDHANSHU DHULIA:** Your argument is actually going contrary to what the Attorney General said.

**TUSHAR MEHTA:** I, I'm going, in a little new nuance, My Lord. I would not argue contrary to him, but my nuance is different. Your Lordships, knows what I am trying to say and so far as the view expressed by Justice Krishna Iyer is concerned, it deserves respect. But with respect, I would personally and on behalf of the Government would not subscribe to that view, at this stage of the country's economic development.

**CHIEF JUSTICE DY CHANDRACHUD:** So, exactly. We will be sending a message across because what we write, will send a message of what India is and what India aspires to be.

**TUSHAR MEHTA:** Yes, My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** So, any interpretation which we... look, we don't want to dilute the constitutional social significance of 39(b) and (c). It's there for us. I mean, it's given to us. At the same time, we should not be sending a message by interpreting 39(b) in such a wide sense, that there is no protection of private rights in the society at all. How will we attract private investment if we say that there's no protection of [UNCLEAR].

**TUSHAR MEHTA:** It's counterproductive. That interpretation may not be in national interest, My Lord.

**CHIEF JUSTICE DY CHANDRACHUD:** But, we will not go as far as to say that, anything which is private can never be a material resource of the Government. That cannot be.

**TUSHAR MEHTA:** That's another extreme. That's another extreme. For example in MHADA, if we see, if the Government sees that there are, say, 500 people staying in 500 dwelling units, which are in a dilapidated condition, they may have their own justifications for staying, and there is a justification, because roof over the head is a justification. The owner, who is the landlord, he will not spend because he has a justification that I'm getting less money. The Government is not concerned with their ownership dispute or tenancy dispute. The Government would merely say, that we are concerned with your life. We provide for a mechanism under which we will evict you. Somebody would pay you the rent for the interregnum, till your houses are newly constructed. You fight and fight it out whether you are a tenant, you are a deemed tenant, you have to be evicted, etc. That's not the contractual



1 relationship we are concerned with. So, that would be material resources of the community,  
2 requires proper distribution for common good. So therefore, I say that each word is pregnant  
3 with meaning. And that is how My Lord, Your Lordships may consider taking a path which is  
4 neither on this extreme nor on this extreme.

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6 **CHIEF JUSTICE DY CHANDRACHUD:** A more balanced perspective on.

7

8 **JUSTICE B.V. NAGARATHNA:** See, for example, an individual owner, in this case, the  
9 owner of a building which is in a dilapidated condition [INAUDIBLE].

10

11 **TUSHAR MEHTA:** My Lord, That we will answer it separately. We will answer it separately.

12

13 **JUSTICE B.V. NAGARATHNA:** It all depends to what extent.

14

15 **TUSHAR MEHTA:** That MHADA Act and the validity of individual Acts, there are separate  
16 answers. There are separate answers to that. But the Government would not enter into that  
17 area of tenancy owner-tenant relationship. That's not the issue. Please for the time being... My  
18 Lord, that we have our justifications for the purpose of protecting the validity. That was just  
19 taken up as an example. Therefore, I am not going much into it. I am more on a wider canvas  
20 for the nation, for the national economy and the economic growth at which the nation is  
21 progressing at this stage, what should be the meaning of this.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** So, how would you formulate it? So, we can just  
24 take it down you know, to give some clarity to us.

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26 **TUSHAR MEHTA:** My formulation is this, My Lord.

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28 **CHIEF JUSTICE DY CHANDRACHUD:** You can reflect on it and tell us, how would you  
29 formulate this.

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31 **TUSHAR MEHTA:** 'The 39(b) is a measure for developing...'

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33 **CHIEF JUSTICE DY CHANDRACHUD:** A little slower.

34

35 **TUSHAR MEHTA:** '...a welfare state with the ultimate goal of common good.' I'm sorry.

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1 **CHIEF JUSTICE DY CHANDRACHUD:** Goal of predicting the common good, you would  
2 say?

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4 **TUSHAR MEHTA:** Common good. 'Ultimate goal of protecting the common good.'

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6 **CHIEF JUSTICE DY CHANDRACHUD:** Or achieving the common good.

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8 **TUSHAR MEHTA:** Or achieving, My Lord, I'm sorry. 'When material resources of the  
9 community needs legislative intervention of either taking over ownership', and this is my  
10 nuance My Lord, 'and/or control'. The Constitution says 'and', but I am saying it can be read  
11 even as 'or'. Sometimes, why I say 'or'? Suppose there is a private mine, the Government may  
12 not take over the ownership.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** But you have to complete the sentence. 'When  
15 material resources of the community need legislative intervention and/or taking over  
16 ownership or control...'

17

18 **TUSHAR MEHTA:** '...to achieve that common good of...'

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20 **CHIEF JUSTICE DY CHANDRACHUD:** I'll tell you how you began.

21

22 **TUSHAR MEHTA:** Control of the material resources, I'm sorry.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** 'Article 39(b) is a measure for developing a  
25 Welfare State with the ultimate goal of achieving the common good'. Then is it comma? 'When  
26 material resources of the community need legislative intervention of taking over ownership or  
27 control.'

28

29 **TUSHAR MEHTA:** 'Of ownership and/or control of material resources.'

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** '...legislative intervention of taking over of  
32 ownership or control...'

33

34 **TUSHAR MEHTA:** 'and/or'.

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36 **CHIEF JUSTICE DY CHANDRACHUD:** 'and/or'.

37

1 **TUSHAR MEHTA:** Because the Constitution says 'and'. 'Or' is my interpretation... 'of  
2 material resources of the community'.  
3

4 **JUSTICE B.V. NAGARATHNA:** ...for distribution.  
5

6 **CHIEF JUSTICE DY CHANDRACHUD:** ...for distribution.  
7

8 **TUSHAR MEHTA:** Yes.  
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10 **CHIEF JUSTICE DY CHANDRACHUD:** Just going back to this, can we...? And we're not  
11 putting you into a corner, I mean, it's just... it's thinking aloud. Can we say that you don't accept  
12 either of the two extreme positions? I mean, as a Government. One extreme position is that  
13 every element of private property is a material resources of the community. That's one. Just  
14 think over it. Second, that no private property can be a material resource of the community.  
15 There are two extreme positions.  
16

17 **TUSHAR MEHTA:** My Lord, I think, I respectfully agree.  
18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Isn't it? Because there are two extreme positions  
20 that no private property can be a material resource of the community.  
21

22 **TUSHAR MEHTA:** That is one extreme.  
23

24 **CHIEF JUSTICE DY CHANDRACHUD:** And second, that every private property is a  
25 material resource of the community. So, we don't... We assume both the...  
26

27 **TUSHAR MEHTA:** The test... the test...  
28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Can we take it down? Can we take it down?  
30 Because it will give us some clarity later on.  
31

32 **TUSHAR MEHTA:** Yes, the test if challenged...  
33

34 **JUSTICE SUDHANSHU DHULIA:** You'll have to formulate it.  
35

36 **TUSHAR MEHTA:** Yes, My Lord.  
37

1 **JUSTICE SUDHANSHU DHULIA:** Because then it will depend upon the context.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Exactly.

4

5 **JUSTICE SUDHANSHU DHULIA:** This is everything. This will be, maybe, the crux of the  
6 matter because then everything, perhaps, may depend upon the context, upon the situation.  
7 As the Chief rightly said, the interpretation of the 50s and 60s may not be relevant now.

8

9 **TUSHAR MEHTA:** Constitution, therefore, we say it is a deeming document. It changes its  
10 meaning.

11

12 **JUSTICE SUDHANSHU DHULIA:** In that way, you have to tell us. And you'll have to also  
13 tell us, what do you.... how should we understand community? That also you have to tell us.

14

15 **TUSHAR MEHTA:** May I do one thing, My Lord? Instead of Your Lordships being troubled  
16 with writing down, I'll prepare one paragraph and give it to you, that this is how my stand is.  
17 But I don't agree with so far whatever the Chief Justice has said, and Justice Dhulia has said,  
18 that it depends upon the context, depends upon what is community. Contextually, it can even  
19 be an individual, if the material resources are community based.

20

21 **JUSTICE SUDHANSHU DHULIA:** No, I'll give you an example. For example, let us say  
22 there is a community, a tribal community, right? They know where a particular herb or  
23 something is to be located. Now, that belongs not to an individual, maybe lying in an  
24 individual's farm or agriculture field, but it will belong to the entire community, right?

25

26 **TUSHAR MEHTA:** Correct.

27

28 **JUSTICE SUDHANSHU DHULIA:** But the community, will it be only that tribal  
29 community or people of that area or the entire country? That you will have to tell us. Because  
30 when 39(b) was being debated, one of the bill was to make it commu.... of instead of.... it should  
31 be citizens instead of...

32

33 **TUSHAR MEHTA:** K.T. Shah.

34

35 **JUSTICE SUDHANSHU DHULIA:** It was not done. So, deliberately this word 'community'  
36 was chosen.

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1 **TUSHAR MEHTA:** To make it wider.

2

3 **JUSTICE SUDHANSHU DHULIA:** But how wider? When wider and when narrower?

4

5 **TUSHAR MEHTA:** Instead of My Lord, my responding immediately. Can I, at the end of it,  
6 give my version of it? So far, I have completely bowed down and in agreement with what My  
7 Lord, the Chief Justice has formulated.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** As you were having this conversation, I was  
10 listening to brother Dhulia and you, and I made a note on the context. Now, in the context, we  
11 can identify three factors at least. I mean, this, I've just done it offhand.

12 1) What is the nature of the resource and its characteristics? Airwaves, very different from a  
13 private property of a different nature. So what is the nature... the spectrum, the nature of the  
14 resource and its characteristics?

15 2) The impact of the resource on the general well-being of the community or the common  
16 good.

17 3) The consequence of the concentration of ownership and control on the common good.

18

19 **TUSHAR MEHTA:** That may perhaps not be.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Some resources, you may not want to be... You  
22 may not want them to be...

23

24 **TUSHAR MEHTA:** Like uranium. I understand. I bow down that it cannot be with one  
25 individual.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** The scarcity of the resource.

28

29 **TUSHAR MEHTA:** Yes. If that My Lord is added, then scarcity or any peculiar significance  
30 of that resource is not left.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** These are by no means exhaustive factors. They  
33 again have to be evaluated from case to case, it's in context to context.

34

35 **TUSHAR MEHTA:** Yes, and the class should be identifiable class. The community doesn't  
36 mean the entire country, that whatever is there, you take it and distribute it. That's not a  
37 juvenile way in which the constitutional Framers have understood.

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**JUSTICE SUDHANSHU DHULIA:** Both the thrust of 38 and 39 is that wealth of the nation or the material resources, as they say, should not be concentrated in a few hands.

**TUSHAR MEHTA:** If it is required for making... for common good and not that it should not be. The Government is enabled through parliamentary legislation to intervene and take either ownership or control. There is no prohibition that it cannot be. But if other conditions are fulfilled, then the Legislature can intervene.

**JUSTICE SUDHANSHU DHULIA:** But the word is 'shall', both 39, 38. The State shall strive to do so.

**TUSHAR MEHTA:** Yes, while making the law. Yes, My Lord. Therefore, I am saying, Your Lordships are right. That enabling law... enabling provision is to make the law, where this will have to be borne in mind. My Lord, I will give one paragraph.

**CHIEF JUSTICE DY CHANDRACHUD:** Now, what next do you want to formulate?

**TUSHAR MEHTA:** No, not next, My Lord. I am skipping what is not relevant. I have given the definitions of control, ownership, etc. But just only one line. The Constitution says ownership and control. I would respectfully urge that the words are disjunctive. It can be 'or' also. For example... My Lord, why I say so.

**JUSTICE SUDHANSHU DHULIA:** Read ownership and control as ownership or control?

**TUSHAR MEHTA:** 'And' and 'or' both. I will give the example My Lords. For example, in a private mine, there is a huge tract of land belonging to me and there is some mineral discovered there. The Government may not be interested in taking over the ownership of the land. Ownership may retain with me. They will take control over the land. So, how much mineral will be excavated, what will be the royalty to be paid.

**CHIEF JUSTICE DY CHANDRACHUD:** Ownership, actually.

**TUSHAR MEHTA:** Therefore I'm saying, that depending upon the context, it can be ownership and control. It can also be ownership or control, depending upon the context. Your Lordships can skip the definitions. They are quoted only for the purpose of...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Solicitor, where are you on the note? Which  
2 page?

3

4 **TUSHAR MEHTA:** My Lord, up to page eight there are definitions quoted. This is only for  
5 ready reference. I am not going to read it. Please come to page nine, My Lord. Drafting history.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** That nine-page note. no?

8

9 **TUSHAR MEHTA:** No, My Lord. Volume 2D.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** 2D, okay. I thought you said 2B. Alright.

12

13 **TUSHAR MEHTA:** My Lord, I said D, D for Delhi at the beginning.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** I took it as B.

16

17 **TUSHAR MEHTA:** Yes. My Lord, kindly directly come to page 9, PDF 11.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** 2B was Solicitor's 16-page note. I said Solicitor  
20 has been uncharacteristic in this case. Now I realise, it's 74 pages.

21

22 **TUSHAR MEHTA:** My Lord, why I am little longer, there are two reasons; a) I quote the  
23 relevant para, so that Your Lordships may not have to shuffle through various volumes and  
24 second, My Lord the reason Winston Churchill gave that I'm writing you a long letter because  
25 I don't have time to write a short letter. Because you really need precise understanding of the  
26 subject to write something clear.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Was it Churchill or Shaw? Bernard Shaw  
29 actually. It was George Bernard Shaw.

30

31 **TUSHAR MEHTA:** Yes, My Lord.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Is it? That's from my recollection. I may be  
34 wrong.

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36 **TUSHAR MEHTA:** Many... My Lord, there are three, there are three individuals. There are  
37 three individuals.

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**JUSTICE HRISHIKESH ROY:** Brother Dhulia has made a comment. I think that is relevant.

**TUSHAR MEHTA:** If it is not a privilege....

**JUSTICE SUDHANSHU DHULIA:** No, since you are such a connoisseur of Urdu literature, somebody said that it's an art to write a very small letter, to be written. *Ek chhota sa khat likhna tha, issliye zyada time lag gaya. Ek chhota sa likhna tha.*

**TUSHAR MEHTA:** Yes, yes, yes. *Mukhtasar si baat hai.*

**JUSTICE SUDHANSHU DHULIA:** *Haan, mukhtasar ho jaayega.*

**TUSHAR MEHTA:** Yes, yes. There is a ghazal, *mukhtasar si baat hai, tumsey pyaar hai.* That's the short thing I want to say. I don't need an essay for that. *Mukhtasar* means short.

**JUSTICE B.V. NAGARATHNA:** It takes more effort to be precise.

**TUSHAR MEHTA:** That's exactly what Churchill or Bernard Shaw or whoever. My Lord, these are the three individuals to whom most of the things are attributed; Churchill, Bernard Shaw and Oscar Wilde. And Mark Twain. Yes, My Lord. Mark Twain. He is my favourite. And the same thing happens with Mirza Ghalib. Unfortunately, completely footpath level Shayari is attributed to him. Last *mein woh mareez likh deta hain... Ghalib likh dete hain.* My Lord, para 9. What was in the mind of the Framers of the Constitution? I'll not read the entire, but please see the first. This is the discussion by one Mr. S. Nagappa. 'Sir, this clause is the only clause where the poor man, the common man, can find some hope for the future. Clause 2 and 3 are identified for the benefit of poor men. No doubt, it would have been better if this clause had been drafted in more unequivocal terms, instead of in this ambiguous language. As a lay man, as a common man, I can see more ray of hope for the future in these clauses. It is the aim of the Hon'ble members who have assembled here, to socialize as early as possible. As long as these clauses stand, there is no possibility of capitalism thriving in India. I am very much thankful to the Drafting Committee and to the President of it, in particular, for having brought up... brought in these clauses. And my only grievance is that, they have not been drafted in more unequivocal language. Sir...', this is important, My Lord. This is now changed. 'Sir, the slogans today are municipalized utilities and nationalized industries and means of production. And unless and until these things are done, there is no hope for the common man'. My Lord,



1 now, the economic infrastructure and the concepts have changed from municipalization, that  
2 is, nationalization, to free trade, et cetera. Privatization, et cetera.

3

4 **JUSTICE B.V. NAGARATHNA:** Investment.

5

6 **TUSHAR MEHTA:** And that's what Dr. Ambedkar very prophetically said, that it is  
7 purposefully not made unequivocal, because there can be different ways of dealing with an  
8 economic scenario. Then, at the foot of that page, para 10. 'Further, Mr. K. T. Shah had  
9 proposed the following clauses to substitute Article 39(b) and (c). In that, the ownership,  
10 control and management of natural resources of the country in the shape of mines, mineral  
11 wealth, forest, rivers, flowing waters as well as in the shape of seas along the coast of the  
12 country, shall be vested in and belong to the country collectively, and shall be exploited and  
13 developed on behalf of the community by the State as represented by the Central or Provincial  
14 Governments'. 2 is relevant, 'that there shall be no private monopolies in any form of  
15 production of material wealth, social service, or public utilities, nor shall there be any  
16 concentration of means of production and distribution in private hands and States shall adopt  
17 every means to prevent such concentration or accumulation'. This was the theory or the  
18 thought in those days. Now please see, My Lord, Dr. Ambedkar's reply on 15th November '48.  
19 The second reason... this is, Dr. Ambedkar, and I quote. 'The second reason is that the  
20 amendment is purely superfluous. My Hon'ble friend, Professor Shah, does not seem to have  
21 taken into account the fact that apart from the Fundamental Rights which we have embodied  
22 in the Constitution, we have also introduced other sections which deal with Directive  
23 Principles of State policy. If my Hon'ble friend were to read the articles contained in Part IV,  
24 you will find that both the Legislature as well as the Executive have been placed by this  
25 Constitution under certain definitive obligations, as to form of their policy'. Now, to read only  
26 Article 31, that is Draft Article now 39. Your Lordships can on the side mark that, which deals  
27 with this matter, it says... Then, they have quoted the article, Draft Article, which is  
28 substantially on the same line. Then I again read Dr. Ambedkar.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

31

32 **TUSHAR MEHTA:** Your Lordships can now come to page 13, the highlighted part. 'The  
33 question is...', it starts with Dr. Ambedkar.... rest may not assist Your Lordships on the  
34 question being considered, therefore I am skipping. But I have put it there My Lord, for  
35 completion. 'The question is, have we got any fixed idea as to how we should bring about  
36 economic democracy? There are various ways in which people believe that economic  
37 democracy can be brought about. There are those who believe in individualism as the best

1 form of economic democracy. There are those, who believe in having a socialistic state as the  
2 best form of economic democracy. There are those, who believe in communistic idea as the  
3 most perfect form of economic democracy. Now, having regard to the fact that there are  
4 various ways by which economic democracy may be brought about, we have deliberately  
5 introduced in the language that we have used in the Directive Principle something which is  
6 not fixed or rigid', leaving it, My Lord for the next generations, as world economy develops, as  
7 Indian economic growth develops to take a call which economic model the country would  
8 choose. This is very foresight, and My Lord, almost prophetic. '... which is not fixed or rigid.  
9 We have left enough room for the people of different ways of thinking, with regard to the  
10 reaching of the ideal of economic democracy to strive in their own way to persuade the  
11 electorate, that it is the best way of reaching economic democracy. The fullest opportunity to  
12 act in the way in which they want to act. Sir, that is the reason why the language of Articles in  
13 Part IV is left in the manner in which the Drafting Committee thought it best to leave. It is no  
14 use giving a fixed, rigid form to something which is not rigid. Which is fundamentally changing  
15 and must, having regard to the circumstances and the times keep on changing. It is therefore,  
16 no use saying that the Directive Principles have no value. In my judgment, the Directive  
17 Principles have a great value, for they lay down that our ideal is economic democracy.'

18

19 Then, highlighted part. 'To lay down that our ideal is economic democracy, and also to  
20 prescribe that every Government, whatever it is in power, shall strive to bring about economic  
21 democracy, much of the misunderstanding under which most members are labouring, will  
22 disappear.' Then My Lord, Shibban Lal Saxena. 'This is a clause....' My Lord, he again deals  
23 with Draft Clause 31, the present 39. 'This is a clause which is a very fundamental... which is  
24 very fundamental in our Constitution. The character of the amendment suggested also show  
25 that it goes to the very root of the whole Constitution. My sympathies are undoubtedly with  
26 the amendments of Professor Shah, who has moved two amendments which really suggest  
27 that in his clause, we should lay down that the system of our State shall be socialist. In an  
28 amendment to the Preamble, I have suggested that the word "socialist" should be added before  
29 the word "Union". I personally feel that particular amendment, which he has moved, are very  
30 important, and I would urge my friend, Dr. Ambedkar, at least to incorporate the spirit of those  
31 amendments somewhere in the Constitution.' Part II of Article 31 says, 'ownership and control  
32 of the material resources', the same thing. Then he further adds, this is maybe important, assist  
33 Your Lordship. 'Now, this enunciation ownership and control of material resources of the  
34 community to be distributed so as to subserve the common good is a very wide enunciation of  
35 a most important principle. The enunciation is so general that any system of economy can be  
36 based upon it. Upon it can be based a system of socialist economy, where all resources of the  
37 country belong to the State and are to be used for the well-being of the community as a whole.

1 But a majority in the next Parliament can also come forward and say that the new deal evolved  
2 by Roosevelt is the best system and it should be adopted. This clause leave it open to any future  
3 Parliament to evolve the best plan of their choice.'

4

5 **JUSTICE B.V. NAGARATHNA:** So, what was good for the country in the 50s up to 1991,  
6 may not be good after 1991.

7

8 **TUSHAR MEHTA:** Exactly, they wanted to keep it open.

9

10 **JUSTICE B.V. NAGARATHNA:** So, it is an evolving concept and the clock comes back. We  
11 don't know when after some time, privatization becomes so stressful, that we go back to what  
12 was good in the 1950s, in the decades to come. We don't know.

13

14 **TUSHAR MEHTA:** Therefore, it is left to Parliament.

15

16 **JUSTICE B.V. NAGARATHNA:** It's all evolving.

17

18 **TUSHAR MEHTA:** Yes, and this new deal by Roosevelt, is that capitalist...

19

20 **JUSTICE B.V. NAGARATHNA:** Soon after independence, they said the new dams Hirakud  
21 Dam, Bhakra Nangal, they are the new temples of India.

22

23 **TUSHAR MEHTA:** Yes. Bhakra Nangal was the first.

24

25 **JUSTICE B.V. NAGARATHNA:** Because that is what was necessary.

26

27 **TUSHAR MEHTA:** Yes, absolutely.

28

29 **JUSTICE B.V. NAGARATHNA:** But now, after all that development, now the focus is on  
30 individual or private development. Country has developed to some extent. Now, the private  
31 development or the individual development. Therefore, liberalization, privatization,  
32 globalization, investment.

33

34 **TUSHAR MEHTA:** Keeping pace with the international economic development etc. My  
35 Lord, just subject to correction, out of interest, this new deal by Roosevelt.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** This is the World War II. Not World War II,  
2 sorry. '29 to '33, when there was the Great Depression.

3

4 **TUSHAR MEHTA:** Those were four horsemen and three musketeers. That's how the...  
5 Supreme Court used to be consisting of seven Hon'ble Judges and four Judges always in  
6 majority. They did not permit Roosevelt to carry out any of these.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Because you know, what happened was all the  
9 social welfare legislation, like minimum wages, maximum hours of work, they were struck  
10 down by the Supreme Court of the UK or the US on the ground, that they interfered with the  
11 private freedom of contract or therefore, the due process clause.

12

13 **TUSHAR MEHTA:** Yes.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** And the due process clause was applied in a  
16 substantive sense, so as to allow the Court to oversee what policy Parliament was... the  
17 Legislature... Congress was following, the Houses of Parliament were following. And the  
18 Justice Holmes was the dissenter. But the Constitution does not permit the Court to adopt a  
19 policy which a majority of the judges think is proper. Eventually, the New Deal legislation was  
20 upheld by one judge of the Supreme Court, there was a court packing agenda. They thought  
21 that they will alter the

22

23 **TUSHAR MEHTA:** That was the word used. Court packing.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** By introducing a few more judges there. But then  
26 what happened ultimately, was one judge switched his vote and that vote, which was switched  
27 is called in history, 'the switch in time that saved the nine'.

28

29 **TUSHAR MEHTA:** Saved the nine. There are some interesting material on that.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** And then they started upholding all the social  
32 welfare...

33

34 **TUSHAR MEHTA:** It was 3 versus 3. One judge was not clear. And it is written somewhere.  
35 They used to travel. They used to ensure that they travel in the same car and constructively  
36 being persuaded, and he remained with the four. Anyway, I will just go further. Now, please  
37 see the last word of Dr. Ambedkar at page... this can be skipped. The last concluding remarks

1 of Dr. Ambedkar at page 15. It starts at page 14, but highlighted part at page 15. 'I think the  
2 language that has been used in the draft, a much more extensive language which also includes  
3 the particular propositions which have been moved by Professor Shah and I therefore, do not  
4 see the necessity for substituting these limited particular clauses for the clauses which have  
5 been drafted in general language deliberately for a set of purpose.' My Lord, and the purpose  
6 is... this is the emphasis I would very respectfully give. The object and purpose was that it is  
7 open for each Legislature, depending upon the period of time they are making the economic  
8 policies, can have freedom to lay down economic legislations. My Lord, complete freedom in  
9 joints is given to the Parliament, that's the intention.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

12

13 **TUSHAR MEHTA:** Ultimately, it is left to the Parliament. Therefore, a little... not vague, but  
14 elastic, I would put it that way. Which can take into consideration the circumstances, factors,  
15 global factors, local factors, et cetera.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** All right.

18

19 **TUSHAR MEHTA:** Now, My Lord, I am on page 16. Your Lordships need not turn to. What  
20 I've said is this. The question My Lords are deciding, is whether a private property can be  
21 included under Article 39? What I said is, that when 39 was there, Right to Property was a  
22 fundamental right under Article 31. 19(1)(f), My Lord, I'm sorry.

23

24 **JUSTICE SUDHANSHU DHULIA:** Which page is this?

25

26 **TUSHAR MEHTA:** Page 16. PDF 16.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

29

30 **TUSHAR MEHTA:** So My Lord, 39(b) and Article 19(1)(f), that is, right to hold and dispose  
31 of property, co-existed. Meaning thereby 39 always intended even private property. And its  
32 deletion now as a fundamental right, and it going as Article 308, further strengthens that  
33 submission, that 39(b) encompasses not just Government property. Otherwise, for  
34 Constitution makers, there was no reason to say that all property owned and controlled by the  
35 Government shall be used for general good. Simple. Now, I have given the Statement of  
36 Objects and Reasons of 45th Constitution Amendment. I'll skip that, My Lord. That may not  
37 be relevant. While going through... for writing judgment, if Your Lordship needs, I have kept

1 everything so that Your Lordships have... can on one click, get it. Now, please come to, please  
2 come to... Please come to page 25. My Lord, I have given... again for Your Lordships assistance,  
3 I'm not going to read them. But if Your Lordships would wish to go through it or record it... in  
4 para 24 at page 25, there is one annexure, Annexure A, where I have analysed the provisions  
5 of other Constitutions on this aspect. And that is at Annexure A. There is no point reading  
6 them. Your Lordships can mark, it's PDF page 72. Please come to page 30. Para 39, if Your  
7 Lordships can... This is what... I have already paraphrased my submission, but this is another  
8 paraphrasing. 'India is a social democracy that aligns closely with the principles of a social  
9 welfare state. Social and economic justice is not to be understood in crude terms of distributive  
10 justice aimed at a wholesale allocation of the material resources of the community to the  
11 people at large in one go. On the contrary, a welfare state means a rationally tailored policy  
12 intervention...', that is legislative intervention, '.... in furtherance of common good, which may  
13 or may not involve compulsory acquisition, ownership, and/or control of private property. The  
14 effectuation of the same is to be carried out in a manner conducive to the common good,  
15 thereby achieving socio-economic justice.' My Lord, I have cited **D.S. Nakara** but Your  
16 Lordships may consider for the time being, not read that. Please come to page 35. Your  
17 Lordships are aware like, which, we assisted Your Lordships on the ground of another Article,  
18 where you have to give a declaration that this Act is enacted in pursuance to so and so. The  
19 same is with 39. The Act stipulates that we are exercising... The Parliament is exercising  
20 powers under 39(b) or (c), as the case may be. My Lord, I have just given a table of several  
21 legislatures... legislations where they have, the Parliament has used and mentioned 39(b). And  
22 please see the fourth column, material resource which is sought to be regulated or distributed  
23 under 39(b). I'm not reading it. I'll just read, what are the material resources for which...

24

25 I must add one thing. This declaration, the way in which Your Lordships have seen in other  
26 cases of alcohol industries, etc., is not mandatory in case of Article 39(b). Even if an enactment  
27 is not mentioning 39(b), the Government can defend it on the ground that I seek protection of  
28 39(b), and therefore, 31C. Just...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** It doesn't say industry is the control of which is  
31 declared by the Parliament.

32

33 **TUSHAR MEHTA:** Is declared by the..., because the Constitution requires a declaration.  
34 Here, the Constitution doesn't require the declaration. My Lord, liquefied petroleum gas,  
35 crude oil, railway wagons and other goods essential to the need of railways. Then, five  
36 components of rolling stock, like vacuum break equipments, ejectors, steam brake, valves, etc.,  
37 etc., some pharmaceuticals and chemicals, tractors, coke oven plants. Some of them are

1 repealed, some of them are enforced, but that's not relevant. I'm just giving an illustration,  
2 that these are the material resources for which the Parliament did take into account and  
3 mention 39(b). *Anglo-French Textiles Limited* employing a large labour force. My Lord,  
4 only one company was taken over, which is still in force, that is *Anglo-French Textiles*  
5 *Limited* acquisition and transfer of textile undertaking. Then Handloom and Weaving factory  
6 will...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** You read your material resources, *Anglo-*  
9 *French Textiles*. I wonder what is *Anglo-French Textiles*... Anyway...

10

11 **TUSHAR MEHTA:** It's a limited company.

12

13 **R. VENKATARAMANI:** If I can say something here?

14

15 **TUSHAR MEHTA:** Land, right to use water, Mysore palace.

16

17 **JUSTICE B.V. NAGARATHNA:** For example, a simple thing is the public distribution....  
18 where the farmers have to give levy sugar, the farmers have to part with some paddy to the  
19 State, so that, that is taken...

20

21 **TUSHAR MEHTA:** Distributed equally.

22

23 **JUSTICE B.V. NAGARATHNA:** Public distribution under...

24

25 **TUSHAR MEHTA:** Public distribution, PDF. Yes, My Lord.

26

27 **JUSTICE B.V. NAGARATHNA:** See, that is an example, clear stark example, so close to  
28 the people. Rationing of food grains.

29

30 **TUSHAR MEHTA:** I think Learned Attorney possibly wants to say something.

31

32 **R. VENKATARAMANI:** I was only trying to say about the *Anglo-French Textiles*.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** What is that?

35

36 **R. VENKATARAMANI:** I appeared in that matter, way back in 1984. And that was a textile  
37 which was lying closed in Pondicherry for about three years. After this Hon'ble Court

1 intervened, then the Government set up a Pondicherry Textile Corporation. That's how it was  
2 taken over and it was a private industry.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Oh, all right. Yes, Mr. Solicitor?

5

6 **TUSHAR MEHTA:** My Lord, then please come to... I've given 23 examples. This may not be  
7 exhaustive. We have tried our best to be as exhaustive as possible. There may be few some,  
8 probably, My Lord, legislations left, but public transport system, et cetera, et cetera. Now come  
9 to... kindly come to, My Lord, PDF 38, para 47, where this Hon'ble Bench, My Lord, permitted  
10 placing of reliance under 39(b) while defending a particular challenge to an enactment, that is  
11 *Bhim Singhji*, My Lord, our Ladyship mentioned.

12

13 **JUSTICE B.V. NAGARATHNA:** Other case where there is a change in the mindset. 1976  
14 Urban Land Ceiling Act case. And in 1999, it was repeat, that is, during the times of 1999, post  
15 liberalization.

16

17 **TUSHAR MEHTA:** Correct.

18

19 **JUSTICE B.V. NAGARATHNA:** So, 1976 and 1999, that is a stark example of how there is  
20 an evolving economic democracy in the country.

21

22 **TUSHAR MEHTA:** Yes. Depending upon several internal and external factors. And when I  
23 say, 'external', means global market. 'Internal factor' means the production decreasing or  
24 increasing... the demand being less or more, et cetera, et cetera.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** All Right.

27

28 **TUSHAR MEHTA:** My Lord, I'll just read the highlighted part of *Bhim Singhji*, where  
29 Urban Land Ceiling Laws were under challenge. The whole story, just above... just before the  
30 highlighted part... the whole story of the legislation. 'The long gestation of pre-legislative  
31 consideration, the brooding presence of Article 39(b) and (c), and the emphasis in Section  
32 23(4) on common good as the guiding factor for distribution point to public purpose, national  
33 development and social justice, as the cornerstone of the policy of distribution, it is not, and  
34 never can be compulsory taking from some private owners to favour by transfer other private  
35 owners.' Thereafter, My Lord, this is on the last line... last passage at Page 39 - 'I have already  
36 indicated that the postulate underlying the directive principles of Article 39(b) is that diffusion  
37 of ownership and control of material resources of the community is always in public interest



1 and therefore, the State is directed to ensure such distribution equitable thereof, as best to  
2 subserve the common good. But the priority is prescribed in Sub-Section 1 and 4 of Section 23,  
3 in regard to distribution of material resources, produce contrary results, as or results in the  
4 opposite direction, in as much as private purposes receive precedence over common good.' My  
5 Lord, that is more on the Act, My Lord. Then, My Lord, there is one, My Lord...This judgment  
6 is very... *Tinsukia Electricity*, where electricity under 39(b) was taken under the control of  
7 the Government. My Lord, there are other judgements where 39(b) is considered, for the  
8 purpose of testing the validity of a particular legislation. Now, Your Lordships can consider  
9 directly coming to 48. My Lord, I have given all those judgements where 39(b) is considered.  
10 But broadly, the view which Your Lordships have taken is this, My Lord. That ultimately it  
11 must evolve, it has to be left to the Parliament, because the Parliament is the best judge to  
12 decide under present circumstances, how the economic growth will take place, whether a  
13 particular mode or a particular format is a better suited format or not. Page 48, My Lord, Coal  
14 India. My Lord, it is judgement by three Hon'ble judges, authored by Justice KM Joseph, a  
15 very recent judgement of which Her Ladyship, Justice Nagarathna, was also a part of the  
16 bench, where Coal Mines Nationalization Act was considered. The issue was whether this Act  
17 would... the Competition Act would apply to Coal India or not, in view of Coal Mines  
18 Nationalization Act. Please see the underlined portion. This is per Justice Joseph.

19

20 **JUSTICE HRISHIKESH ROY:** Which para you are reading?

21

22 **TUSHAR MEHTA:** Para 97, page 48. Para 57 of my note.

23

24 **JUSTICE SUDHANSHU DHULIA:** 97 of the judgment?

25

26 **TUSHAR MEHTA:** 97 of the judgments.

27

28 **JUSTICE SUDHANSHU DHULIA:** Para 57.

29

30 **TUSHAR MEHTA:** Yes, My Lord. 'Recently', it starts with that. Your Lordship get it? Justice  
31 Roy get it?

32

33 **JUSTICE HRISHIKESH ROY:** Yes, Yes.

34

35 **TUSHAR MEHTA:** "Recently, a three-judge bench in *Coal India Limited versus CCI*,  
36 that is, competition Commission of India, in the context of applicability of Competition Act to  
37 Coal India, which was created under the Coal Mines Nationalization Act, it was held as under:

1 "The appellants are government companies. They were brought into being in the context of  
2 Section 3 and 5 of Nationalization Act. Undoubtedly, they were created to take the place of  
3 Central Government in the matter of supervising, control and managing the affairs of the  
4 mines. Still further, and more importantly, the Nationalization Act itself was intended to  
5 achieve the goals in Article 39(b) of the Constitution. This means, that the Nationalization Act  
6 contemplated coal to be a material resource, and it was to be distributed so as to subserve  
7 common good. The exclusive right in regard to the mines, as also the power to manage and  
8 supervise the mines, was vested with the first appellant company and its subsidiaries. The  
9 ambit of the power is unquestionably wide. We proceed on the basis that the appellants cannot  
10 be oblivious to its duty to bear in mind the sublime goal in Directive Principles, that is,  
11 distribution, so as to subserve the common good". Please come to My Lord, next page 49, para  
12 100 of the judgment. Does Your Lordship, am I wit Your Lordship? "The expression 'common  
13 good' in Article 39(b) is, a Benthamite sense involves achieving the highest good of the  
14 maximum number of people. The meaning of the words 'common good' may depend upon the  
15 times, the felt necessities, the direction that the nation wishes to take in future, the socio-  
16 economic condition of the different classes, the legal and fundamental rights, and also the  
17 Directive Principles themselves. As far as the time dictated content of 'common good' goes, it  
18 simply means that economics itself, not being bound in chains, but it is a dynamic concern".  
19 This evolution will be with the Parliament. Then, "The attainment of 'common good' would be  
20 dependent on the appreciation and understanding of a generation as to how economic  
21 common good is best achieved. The debate between advantages and disadvantages of pursuing  
22 the policy of the State intervention in economic policy which emasculates private enterprise  
23 and competition, has almost reached its end. The advantages of a fearlessly competitive  
24 economy have been realized by the nation. There is a backdrop to it. In the year 1991, as Your  
25 Ladyship was saying, "the nation was, in a manner of speaking, compelled to revisit its  
26 economic policy having regard to the precarious condition of its foreign exchange reserves.  
27 The Permit Raj, which involved acute regulation of economic activity by the State, with all its  
28 attendant evils, cried out for reforms. A slew of highly liberal reforms in '91 set the stage of the  
29 nation to make paradigm shift. As discussed in Raghavan Committee Report, things moved  
30 further in the direction of attaining faster economic growth. The Act is a measure which is  
31 intended to achieve the same. The role which was envisaged for the public sector company,  
32 could not permit them to outlive their utility or abuse their unique position. Disinvestment  
33 done in a proper manner was perceived as a solution. However, sans disinvestment, State  
34 monopoly's public sector companies and government companies were expected to imbibe the  
35 new economic philosophy. The novel idea which permeates the Act, would stand frustrated.  
36 In fact, if State monopolies, government companies and public sector units are left free to  
37 contravene the law", Your Lordships can skip. Kindly come to 120. 'We agree with the

1 appellants, and as held by this court in ***State of Karnataka versus Ranganatha Reddy***.  
2 The judgment which is placed, ***Ranganatha Reddy***, which is placed for Your Lordship's  
3 consideration, that distribution is a word of wide meaning and it is covered by Article 39(b) of  
4 the Constitution. It must be remembered that court had occasion to hold so, by way of dealing  
5 with the argument that nationalization did not have a nexus with the word 'distribution.' Now  
6 My Lord, may kindly come to page 51. The argument was, I will just paraphrase my  
7 submission. The argument of the other side was, that was more in the context of MHADA, that  
8 preservation of buildings or preservation of natural resources can never be a part of Article  
9 39(b), which I have dealt with saying...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

12

13 **TUSHAR MEHTA:** ...that intergenerational equity is a concept accepted by our  
14 jurisprudence. We preserve many things for the next generation. That is what we call  
15 intergenerational equity. Please see My Lord, page 51, para 59.

16

17 **JUSTICE SUDHANSHU DHULIA:** That phrase has been used in this judgment? What you  
18 are saying?

19

20 **TUSHAR MEHTA:** No, not in this judgment. But there are several judgments where  
21 'intergenerational equity' word, My Lord, I will place it for Your Lordship's consideration. But  
22 that's an accepted position under Indian jurisprudence, that this generation protects and  
23 preserves, as a trust, for the next generation. Forest, land, natural resources, minerals, etc.,  
24 etc. Also, intergenerational equity is used. I'll place those judgments, while highlighting that  
25 part.

26

27 60. 'The purpose behind Article 39(b)...' My Lord, I'm reading 60, '... is to secure the ownership  
28 and control of a resource in order to distribute it in a manner which results in common good.  
29 The argument of the Petitioner, therefore, is that preservation of a resource does not amount  
30 to common good. Apart from the fact that the said argument is unsustainable, owing to the  
31 natural wide meaning of the term common good, preservation of any resource is often required  
32 in order to further, the common good for the people at large and the nation as a whole. For  
33 example, the new entrenched principle of intergenerational equity propounded by this  
34 Hon'ble Court in the context of natural resources provides, that resources need to be judicially  
35 used in order to ensure that future generations are able to enjoy the fruits of the same.  
36 Intergenerational equity requires, in a welfare society and a society based on egalitarian  
37 principles, preserving resources even though, they are privately owned for the common good

1 of the future generations. The constitutional principle of egalitarianism, requires that  
2 intergenerational equity is adhered to, a balance is required to be struck.'

3

4 My Lords, then 63, 'intergenerational equity thus requires that present generation utilizes' --  
5 That's more repetition. I can skip that, My Lord. I have cited My Lord, two judgments on  
6 intergenerational equity. One is State of *Himachal Pradesh vs Ganesh Wood Products*  
7 and another as my learned friend Mr. Dwivedi, the younger one, the younger Dwivedi, pointed  
8 out My Lord, Eklavya. Para 65, *TN Godavarman*. Mr. Eklavya, he is also younger Dwivedi,  
9 My Lord. 'Then consistent precedents on the issue without any conflict.' My Lord, I will not  
10 read it. Your Lordships were taken through all the judgments, where the definition or the  
11 interpretation of 39(b), which we seek to give respectfully, has been accepted be it  
12 *Ranganatha Reddy* or *Abu Kavur Bai* etc., etc. My last point now.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

15

16 **TUSHAR MEHTA:** My Lord, I have already respectfully said that the views of Justice  
17 Krishna Iyer may perhaps not be relevant in the present context, I will put it that way. And I,  
18 very respectfully, while respecting the judgment and the view... My Lord, respectfully seek to  
19 disagree.

20

21 **JUSTICE SUDHANSHU DHULIA:** Few or some of it?

22

23 **TUSHAR MEHTA:** Some of it. No, not entirely.

24

25 **JUSTICE SUDHANSHU DHULIA:** Complete your argument.

26

27 **TUSHAR MEHTA:** I won't want to disagree with Justice Krishna Iyer in the entirety. It was  
28 otherwise also contextual. It was in the context of the private property involved in that case,  
29 but the discussion became very wide and over encompassing, My Lord, which may...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** ...said that we are not to be construed as having  
32 accepted this line of analysis,

33

34 **JUSTICE B.V. NAGARATHNA:** And that was in a concurring judgement... all that was  
35 said.

36

1 **TUSHAR MEHTA:** Yes. Page 62. My Lord, this is my last submission on 39(b). My Lord, my  
2 respectful submission is that *Mafatlal Industries* is not an obiter. And, My Lord, I raised  
3 that point very seriously. This is a judgement delivered by nine Hon'ble Judges. At page 62.  
4 PDF 62. And I have quoted the relevant paragraphs.

5  
6 **JUSTICE SUDHANSHU DHULIA:** *Mafatlal*, there's only mentioned in one paragraph.

7  
8 **CHIEF JUSTICE DY CHANDRACHUD:** One paragraph.

9  
10 **TUSHAR MEHTA:** 72.

11  
12 **JUSTICE SUDHANSHU DHULIA:** Yeah, that's it.

13  
14 **TUSHAR MEHTA:** My 72, My Lord.

15  
16 **JUSTICE SUDHANSHU DHULIA:** Your 72. In *Mafatlal* also it is in one paragraph.

17  
18 **TUSHAR MEHTA:** No. That's what is not pointed out. That's what I want to point out. And,  
19 My Lord, my respectful submission, at the cost of repetition is - It is not an orbiter. It is a *ratio*  
20 *decidendi*. I would urge, Your Lordships, to bear three factors in mind, when a judgement can  
21 be said to be obiter - 'a) Whether the question decided arose for consideration. b) Whether  
22 arguments were advanced by both the sides and c) Whether the court dealt with cursorily, as  
23 a passing remark or while dealing with a specific submission made by the Counsel.' My Lord,  
24 here, not only the lead judgement, even concurring and dissenting judgement is also  
25 answering this question. Something which is not brought to Your Lordship's notice. A specific  
26 argument was raised by Mr. Parasaran. And from the reading, Your Lordships, in my  
27 respectful submission, you will find that in fact, court wanted it to become a *ratio decidendi*.  
28 Your Lordships have page 62?

29  
30 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

31  
32 **TUSHAR MEHTA:** My para 72 and judgement para 84. My Lord, kindly allow me to read  
33 this one, because I want to show point was specifically raised - 'In this connection, Sri K.  
34 Parasaran has rightly emphasized the distinction between the constitutional values obtaining  
35 in countries like United States of America, Canada and Australia, or, for that matter, United  
36 Kingdom, and the values obtaining under our Constitution. This discussion, we may reiterate,  
37 is also relevant on the nature of the constitutional right to refund or restitution, as it is called.'

1 That was the question in **Mafatlal**. '...flowing from Article 265, referred to in para 71 to 73.  
2 Unlike the economically neutral, if not pro-capitalist, Constitutions governing those countries,  
3 the Indian Constitution has set before itself, the goal of justice, social, economic and political.  
4 A total restructuring of our society. The goal being, what is set out in Part IV of the  
5 Constitution, in particular in Article 38 and 39.  
6

7 Indeed, the aforesaid words in the Preamble constitute the motto of our Constitution, if we  
8 can call it one. Article 38 enjoins upon the State to strive to promote the welfare of the people  
9 by securing and protecting, as effectively as it may, a social order in which justice, social,  
10 economic and political shall inform, all the institutions of the national life. Article 39 lays down  
11 the principles of policy to be followed by the State. It says that, "the State shall, in particular,  
12 direct its policy towards securing (b) that the ownership and control of the material resources  
13 of the community are so distributed, as best to subserve the common good. And (c), that the  
14 operation of the economic system does not result in concentration of wealth and means of  
15 production to the common detriment. Refunding the duty paid by a manufacturer or assessee  
16 in situations where he himself has not suffered any loss or prejudice, is no economic justice. It  
17 is very negation of economic justice. By doing so, the State would be conferring an unearned  
18 and unjustifiable windfall upon the manufacturing community, thereby contributing to  
19 concentration of wealth in a small class of persons, which may not be consistent with the  
20 common good. The Preamble and the aforesaid Articles do demand that, where a duty cannot  
21 be refunded to the real person who have borne the burden for one or the other reason, it is,  
22 but appropriate, that the said amounts are retained by the State for being used for public good.  
23 Indeed, even in an economically neutral Constitution like the United States of America, such  
24 a course has been adopted by the State and upheld by the courts. It would be rather curious,  
25 ridiculous, if such a course were held to be bad under our Constitution, which speaks of  
26 economic and distributive justice, opposes concentration of wealth in few ends, and when a  
27 42nd Amendment describes our Republic as a Socialist Republic". Please come to My Lord at  
28 the foot, para 86. "That the material resources of the community". Now, kindly see they,  
29 discuss it specifically. 39(b) is discussed not as a passing remark. In the first para the learned  
30 judges say, this is relevant even for deciding the question of refund. Then they say in para 86,  
31 "... that the material resources of the community are not confined to public resources, but  
32 include all resources natural and manmade, public and privately owned, is repeatedly affirmed  
33 by this court, **Shri Ranganatha Reddy**, et cetera, et cetera, et cetera". Now, My Lords may  
34 kindly see para 73 Justice Paripoornan's conquering opinion. My Lord, an *obiter dicta*, in my  
35 respectful submission, would be in one judgment. If it is also discussed, a point is also  
36 discussed and deliberated and adjudicated upon even in the concurring judgment, My Lord, it  
37 can never be an *obiter dicta*. *Obiter dicta* is just something said in passing. The question never

1 arose, arguments not made, court never intended to decide that point, and as a passing said  
2 something. Here, after reading the majority, I am reading the concurring view of Justice  
3 Paripoornan. Please see at the foot of page 64. Just 5-7 lines from the underlined portion.  
4 “Shri. K. Parasaran...”, Your Lordship gets it? My Lord, Justice Paripoornan also is pleased to  
5 note the contention of Mr. Parasaran. “Shri. K. Parasaran brought to our notice the following  
6 portion of the Preamble and Article 39(b) and (c) of the Constitution to contend, that Article  
7 265 of the Constitution cannot be construed in a vacuum or isolation, but should be construed  
8 in light of the basic principles contained in other parts of the Constitution.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** We got the point. That you are saying that it was  
11 also dealt with by Justice Paripoornan. There what happened was, the question was whether,  
12 if a tax is struck down or if the levy has been held to be illegal, whether it should be a refund?  
13 The court said that, look, the manufacturers have not... they passed on the burden.

14

15 **TUSHAR MEHTA:** Yes.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** ... they have pertained... And therefore, it will  
18 result in unjust enrichment. And therefore, on the one hand, if you say that, well, the  
19 manufacturers would be entitled to a refund, all these resources will go into the hands of the  
20 manufacturers and promote a concentration of wealth. On the other hand, these resources  
21 could be used by the State for the purpose of the common good, and therefore they said Article  
22 39(b).

23

24 **TUSHAR MEHTA:** That material resources for the community, stressing it from 39(b). Now,  
25 My Lord, what is not quoted but I must bring to Your Lordship's notice, there is a minority  
26 view in *Mafatlal's* judgment. Please have a look at, My Lord, Volume...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Just give us that. We'll just make a note of it and  
29 take your word for it.

30

31 **TUSHAR MEHTA:** Volume 5.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Whose minority view is that?

34

35 **TUSHAR MEHTA:** Justice Sen, My Lord.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Volume 5. Page?

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**TUSHAR MEHTA:** Volume 5 relevant is at page 2914, paragraph 161.

**CHIEF JUSTICE DY CHANDRACHUD:** That's all right. We'll take it that...

**TUSHAR MEHTA:** There also contention noted and dealt with. So, my respectful submission is there is no need, My Lord, for the bench sitting in the combination of nine Hon'ble Judges to revisit that point, unless it is referred to a still larger bench. Last, now I will come to my... this is the submission on 39(b). Now, I would wish to assist Your Lordships on the question of 31C, according to them, that goes, it's a dead letter. Since that was raised subsequently my note is subsequent, My Lord, that is 2L.

**JUSTICE SUDHANSHU DHULIA:** 2 capital L.

**TUSHAR MEHTA:** L for London. Just for ease of reference.

**CHIEF JUSTICE DY CHANDRACHUD:** It's like the vacation is in your mind, Solicitor?

**TUSHAR MEHTA:** Why My Lords? Your Lordships are right, My Lord. I could have thought of some State in India.

**CHIEF JUSTICE DY CHANDRACHUD:** L for Lakshadweep.

**TUSHAR MEHTA:** Yes, My Lord... nothing in the contextually, where 'L' for Lakshadweep, not for London. For the ease of reference, I have taken the liberty of giving different colour to 31C. First part, which is blue in colour and second part, which is red in colour. Please see the red part, because this is what is...

**CHIEF JUSTICE DY CHANDRACHUD:** Red was struck down in *Kesavananda*.

**TUSHAR MEHTA:** In *Kesavananda*. That's all, My Lord. One more thing, I can place it on record, and I do wish to place it on record. So far as validity of 31C, except the red part is concerned in *Kesavananda Bharati*, all eight Hon'ble Judges unequivocally upholds it with separate reasons. And I would, My Lord, each para I would quote and place it for Your Lordship's consideration. The general discussion which happens, is not my argument, just my way of reference, that in *Kesavananda Bharati* judgment who decides what and what is



1 ultimately ratio for what proposition, is not a criticism or a discussion *qua* 31C. 31C, the bench  
2 is very clear. Eight Hon'ble Judges unequivocally, with reason uphold the validity.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

5

6 **TUSHAR MEHTA:** Now, Your Lordships may kindly see, it is My Lord, now amended para  
7 4, just My Lord, since few days have passed, just to refresh Your Lordship's memory. And there  
8 is a....

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** All or any principles enshrined in Part IV.

11

12 **TUSHAR MEHTA:** Yes, that is, para 4. But, I would like to again read para 4. 42nd  
13 Amendment, see this is Section 4 of the Constitution Amendment Act. Correct, My Lord?

14

15 **TUSHAR MEHTA:** Please bear that in mind. Because my submission is going to be that this  
16 amending section has gone. 31C was never under challenge. And if the view propounded by  
17 them is accepted by the court, what will be the devastating consequence? I have given  
18 illustrations. My Lord, for example tomorrow, one word from the Preamble is deleted by way  
19 of a Constitutional Amendment. That Constitutional Amendment is challenged. And Your  
20 Lordships set aside that amendment... that you could not have deleted, economic justice, for  
21 example. Would the entire Preamble go? That's the argument. It sounds absurd, but it is that  
22 absurd and I will show that.

23

24 **JUSTICE SUDHANSHU DHULIA:** Your argument language is now meaningless.

25

26 **TUSHAR MEHTA:** It becomes completely meaningless. And I have quoted that language,  
27 that now if they are right, how 31C would read.

28

29 **JUSTICE SUDHANSHU DHULIA:** Meaningless totally.

30

31 **TUSHAR MEHTA:** It becomes meaningless.

32

33 **JUSTICE B.V. NAGARATHNA:** No, no, Section 4, the amendment of... Constitutional  
34 Amendment Act, Section 4. That Section 4 is inserted into the main section, Article 31C. It is  
35 inserted.

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37 **TUSHAR MEHTA:** Substituted.

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**JUSTICE B.V. NAGARATHNA:** Yes. So, it becomes part of Article 31C. It does not have an independent existence.

**TUSHAR MEHTA:** Correct.

**JUSTICE B.V. NAGARATHNA:** Maybe by a Constitutional Amendment Act. But ultimately it goes into the main Article 31C.

**TUSHAR MEHTA:** Correct. So, now what was included, now no longer exists.

**JUSTICE B.V. NAGARATHNA:** Yes.

**TUSHAR MEHTA:** And what was there in law has to exist. That is my respectful submission. Now, My Lords, may kindly see... My Lord, this was challenged and My Lord, first...

**CHIEF JUSTICE DY CHANDRACHUD:** So, according to you, once, Section 4, the 42nd Amendment is struck down, that necessary results in the restoration of the position as it existed on the date of the adoption of that provision. That is your contention.

**TUSHAR MEHTA:** Yes. And one more thing, why, to buttress my submission, Justice... My Lord Justice Y. V. Chandrachud upheld the validity of 31C. My Lord, Justice Y.V. Chandrachud, authored the judgement of *Waman Rao* which challenged the original 31C. But simultaneously, the bench presided by My Lord, Justice Chandrachud, who also happened to be authoring judgement in *Minerva*, I'll show that, was considering post amendment 31C.

**JUSTICE B.V. NAGARATHNA:** Yes.

**TUSHAR MEHTA:** So, there were two matters simultaneously going on - '*Waman Rao*, 31C as upheld by the by *Kesavananda Bharati*. Second, *Minerva Mills*, 31C as amended by 42nd Amendment.' Both judgements delivered by, My Lord, Justice Y.V. Chandrachud and therefore, My Lord, I'll show - There is a clear intention of the Court. Court is conscious that, "This is what will be the effect of our judgement." That what was upheld by *Kesavananda Bharati*, now stands revived.

**JUSTICE B.V. NAGARATHNA:** Have they said so?

1 **TUSHAR MEHTA:** Pardon? Yes, My Lord. If Your Lordships are...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** You conclude it. Because this is your second  
4 point, no?

5

6 **TUSHAR MEHTA:** This is my second point.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** So, if you can just take us briefly through it. The  
9 other side Mr. Dwivedi will take.....

10

11 **TUSHAR MEHTA:** I'll just take, Your Lordships, through it without reading.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So according to you, *Waman Rao* was dealing  
14 with the unamended 31C.

15

16 **TUSHAR MEHTA:** Unamended 31C.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** There is no contention.

19

20 **TUSHAR MEHTA:** There is no dispute on that. *Minerva* was dealing with Section 4 of  
21 amended... Section 4, as amended by 42nd Amendment Act. Both, decided by same Learned,  
22 Hon'ble Chief Justice, who was the only factor common with *Kesavananda Bharati* also.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** But did *Waman Rao* deal with the unamended  
25 Section 31C in respect of a period after the striking down of the amended 31C?

26

27 **TUSHAR MEHTA:** Yes, yes, My Lord.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Or was it dealing with a period prior there to?

30

31 **TUSHAR MEHTA:** No, after. And therefore it says that, what will...

32

33 **JUSTICE B.V. NAGARATHNA:** Prior?

34

35 **TUSHAR MEHTA:** No, no. Kindly have a look at... kindly have a look at...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Anyway, just bear it in mind, but we don't want  
2 to... You can go in in your own way and then come back to...

3

4 **TUSHAR MEHTA:** The writ petition was '77. Please come to para 6, page 3.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** What is your formulation, Mr. Solicitor, on this?

7

8 **TUSHAR MEHTA:** My formulation is... Can I show and formulate?

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** Sure. That's right.

11

12 **TUSHAR MEHTA:** My Lord, para 6, page 3.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Page 6?

15

16 **TUSHAR MEHTA:** Para 6, My Lord. Page 3, para 6. Again, I'm sorry, but the same Learned  
17 Chief Justice Y.V. Chandrachud. Why, I, refer to the name, the purposes is, that His Lordship  
18 was aware that I have dealt with 31C challenge as a combination of 13 judges. **Waman Rao**  
19 is five judges old, unamended. And now, I have also heard **Minerva Mills**, which is post  
20 amendment. And therefore, My Lord, in that context, please read His Lordship's word, para  
21 4. "In these proceedings, the main challenge now is to the constitutionality of Article 31A, 31B,  
22 and unamended Article 31C of the Constitution". Now, My Lord, kindly see last line on page 3.  
23 "We are concerned with Article 31C, as it stood originally... as it stood originally, but, of course,  
24 without the concluding part struck down in **Kesavananda Bharati**". So, His Lordships  
25 were dealing with the first part, because second part was struck down in **Kesavananda**  
26 **Bharati**. Now My Lord, para 7. Again, My Lord, in **Waman Rao** the Learned Chief Justice  
27 says, 52. "That leaves for consideration the challenge to the Constitutional validity of  
28 unamended Article 31C. As we have stated at the beginning of this judgment, Article 31C was  
29 introduced by Constitution's 25th Amendment. Initially, it sought to give protection to those  
30 laws", Your Lordship can skip.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** This is again, **Waman Rao**, no? This...

33

34 **TUSHAR MEHTA:** This is **Waman Rao**. Then 53, "Mr. M.N. Phadke, who led the  
35 argument on behalf of the Petitioners, built a formidable attack against the *vires* of Article 31C.  
36 But with respect to the Learned Counsel, the effort is fruitless, because the question as regards  
37 the validity of Article 31C is no longer *res integra*. The opening clause of Article 31C...

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**CHIEF JUSTICE DY CHANDRACHUD:** What was the law in question in *Waman Rao*?  
That is a Maharashtra Agriculture Ceiling Act?

**TUSHAR MEHTA:** Maharashtra... Article 32 petitions, My Lord. It was The Maharashtra  
Agricultural Lands (Ceiling and Holdings) Act, 1961. But His Lordship decided...

**CHIEF JUSTICE DY CHANDRACHUD:** ... had to be decided on the basis of the  
unamended Article 31C.

**TUSHAR MEHTA:** Correct. Therefore...

**CHIEF JUSTICE DY CHANDRACHUD:** Because, on the date when that law was enacted,  
unamended Article 31... and what the bench did was, they tested the validity of the law with  
reference to unamended Article 31C. It was not a post *Minerva Mills* legislation.

**TUSHAR MEHTA:** It was not. It was pre-*Minerva Mills*.

**CHIEF JUSTICE DY CHANDRACHUD:** It had come to the same conclusion. But we must  
have conceptual clarity that *Waman Rao* was basically dealing with, and clearly an  
unamended Article 31C.

**TUSHAR MEHTA:** It says so.

**CHIEF JUSTICE DY CHANDRACHUD:** So, *Waman Rao* may not have a bearing on the  
residue of Article 31C, which remains post the decision in *Minerva*. *Waman Rao* may not  
really be conclusive. We will have to address it as a matter of first principle.

**TUSHAR MEHTA:** My Lord, it would have a bearing for the simple reason, that both  
*Waman Rao* and *Minerva Mills* were heard together and decided by the same Learned  
Judge.

**CHIEF JUSTICE DY CHANDRACHUD:** That militates against your submission, because  
it's very clear that in *Waman Rao*, they were not considering the impact of what will remain  
after 31C, as amended by the 42nd Amendment, is struck down. They were not considered  
with... considering that at all, as to whether there would be a revival, whether that would... As

1 a matter of first principle, we may still come to that conclusion. But **Waman Rao** does not  
2 give us a conclusive guidance on that.

3

4 **TUSHAR MEHTA:** Correct.

5

6 **JUSTICE B.V. NAGARATHNA:** It doesn't relate to that period.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** It doesn't relate to the period at all which we are  
9 now dealing with here.

10

11 **TUSHAR MEHTA:** But kindly come to the last part, para 54 because His Lordship also deals  
12 with 31C on a different ground and upholds it. I understand what is falling from Your Lordship.  
13 My Lord, the Chief Justice...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** I think the substantive answer, which you have  
16 to the argument of the other side should be something like this. The original provision of 31C  
17 which granted protection or immunity to laws against a challenge, so long as that law  
18 implements 39(b) and (c), that original provision was upheld in **Kesavananda Bharati**  
19 except for giving finality to the declaration.

20

21 **TUSHAR MEHTA:** Judicial review was...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Judicial review was saved. Now the widening of  
24 the ambit takes place in the 42nd Amendment. When Parliament widened the ambit, the idea  
25 was never to replace what is the original content of 31C with a completely new provision, but  
26 to expand the ambit to include 31, 39(b) and (c) plus all the other provisions. What is held to  
27 be objectionable in **Minerva Mills** was not the original ambit of 31C, but the extension,  
28 because they could not have said that the original 31C was invalid for the reason that they were  
29 bound by **Kesavananda Bharati**, which they also expressed. So, essentially, according to  
30 you, what was struck down was this unlimited power which was given, expansion of 31C to  
31 include not merely 39(b) and (c), but the entirety of Part IV of the Constitution because the  
32 court said then every law virtually will be, can be sustained on the ground that it implements  
33 some provision of the Directive Principles or the other.

34

35 **TUSHAR MEHTA:** Correct.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** So, when *Minerva Mills* strikes down Section  
2 4, you must read the intent of Parliament and the intent of the court. The intent of the court is  
3 not to strike down the entirety of 31C.

4

5 **TUSHAR MEHTA:** It was not under challenge. Only Section 4 was...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** But the intent was expansion. Now, therefore, it  
8 was to hold according to you, that look, even the original 31C is therefore, completely  
9 obliterated by virtue of the substitution by Section 4, would be in that sense a very formalistic  
10 reading of the Constitution.

11

12 **TUSHAR MEHTA:** Another point...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** We are dwelling... we are on.... Is there a more...  
15 other than saying it's a formalistic reading of the Constitution. Is there a constitutional concept  
16 which we can, is there at a conceptual level, can we now, can we not...

17

18 **TUSHAR MEHTA:** May I assist Your Lordships on that?

19

20 **JUSTICE B.V. NAGARATHNA:** The doctrine of revival. Doctrine of revival applies.

21

22 **TUSHAR MEHTA:** It would not be necessary. There would not be revival necessary at all.  
23 I'll tell Your Lordships why. Your Lordships are aware of the Blackstone Doctrine which is  
24 accepted in India by *Golaknath* downwards. Blackstone Doctrine says, that Your Lordships  
25 do not declare the law, Your Lordships merely validate or invalidate the law. Kindly give me a  
26 minute more to formulate my submission. Suppose today Parliament amends the law by  
27 Amending Act number so and so, Section 2 of the Amending Act amends the law or the  
28 Constitution, my principle governing both would be same. After two years, Your Lordships  
29 were to strike it down, that no, this is unconstitutional, right? I'll read My Lord that passage  
30 from *Golaknath* judgment, where Blackstone Doctrine is followed. What Your Lordships  
31 would be doing is, Your Lordships would be declaring it to be invalid from the date of its  
32 inception. It never was born. When Your Lordship says in *Minerva* that Section 4 of the  
33 Amending Act is unconstitutional, that substitution goes. Meaning thereby the original 31C  
34 was always there. That is your declaration, Your Lordship's declaration. That is Blackstone  
35 Doctrine and accepted in India. It would remain on the Statute Book.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** That's his argument, that what would remain on  
2 the Statute Book... Mr. Andhyarujina's argument is that what...

3

4 **TUSHAR MEHTA:** 31C, as it....

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** His argument is what remains on the Statute  
7 book is 31C, as amended, where it is held to be inoperable or unenforceable.

8

9 **TUSHAR MEHTA:** If Your Lordships see, My Lord, Blackstone...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** ...and if it remains on the Statute Book,  
12 according to him... According to him, if it remains in the Statute Book, but is thereby rendered  
13 unenforceable, then you cannot have another provision to the contrary on the Statute Book,  
14 which your argument would entail. That's the... that's the...

15

16 **TUSHAR MEHTA:** If Your Lordships, are My Lord, not going into this question, but there  
17 is one more point.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** The better way of, perhaps looking at it is this -  
20 'That what was the Parliamentary intent in its constituent capacity.' The Parliamentary intent  
21 was not to delete Article 39(b) and (c) from the ambit of the amended 31C. The object was to  
22 continue with 39(b) and (c)...

23

24 **TUSHAR MEHTA:** ...and then expand it.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** And then expand the ambit, right? The original  
27 provision was upheld in *Kesavananda Bharati*. Now, the purpose of Parliament in the  
28 42nd Amendment, not being to delete the reference to 39(b)and (c), but to expand the ambit  
29 of Article 31C. The declaration of unconstitutionality of Section 4 does not reach out to 39(b)  
30 and (c), but those principles of Part IV, other than 39(c).

31

32 **TUSHAR MEHTA:** 39(c), yes.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Right? And therefore, when Section 30... We may  
35 then be able to skirt this whole issue of revival and other things, by looking at this particular  
36 factual context... this particular constitutional context, because we have to look at that  
37 constitutional concept... that constitutional concept and perspective.



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**JUSTICE B.V. NAGARATHNA:** But when the..

**CHIEF JUSTICE DY CHANDRACHUD:** This isn't [INAUDIBLE] not capable of easy resolution. That's why we are nine of us looking at it here.

**TUSHAR MEHTA:** Yes.

**CHIEF JUSTICE DY CHANDRACHUD:** If it was so simple, we wouldn't be here, assembling in the...

**TUSHAR MEHTA:** There is, My Lord, a judgement...

**CHIEF JUSTICE DY CHANDRACHUD:** Solicitor, Mr. Andhyarujina's argument was that the power to repeal a provision, is a power which is exclusively entrusted to the Legislature. It is not a power which is conferred to the court. And the court cannot, therefore, will strike down the... do something which is really a power of the Legislature. The Legislature can always say, "All right, instead of all or any of the principle we have substituted with the word, 'Articles 39(b) and (c).' That's the power of the Legislature. You, as a court, don't have the power to do that. You can only declare that this is null and void. And therefore, of no enforceability whatsoever. That is the argument. How would you deal with that argument?

**TUSHAR MEHTA:** My Lord, would it apply? My Lord, I'm posing a question to myself.

**JUSTICE B.V. NAGARATHNA:** I think...

**CHIEF JUSTICE DY CHANDRACHUD:** ... formulate it. What is your point, so that then we'll wrap up? We would like to hear a little more submissions on this. We've got your point, but how would you then put it together in the end?

**TUSHAR MEHTA:** Before that, before I formulate, can I only show one paragraph in *Minerva*? Can I show one... I am sorry. In *Minerva Mills*...

**JUSTICE B.V. NAGARATHNA:** But, in *Waman Rao* also, they could...

**TUSHAR MEHTA:** In *Minerva Mills*, please see, My Lord, page 7 only red portion.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Of your note?

2

3 **TUSHAR MEHTA:** Of my note. Page 7. I will be as fast as I can. Only red portion, Your  
4 Lordship has?

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

7

8 **TUSHAR MEHTA:** While comparing the old and the amended, the same Learned Judge who  
9 decided all three, who was a part of all three and author of the two, “The question for  
10 consideration in light of this position is whether Section 4 of the 42nd Amendment has  
11 brought about a result which is basically and fundamentally different, from the one arising  
12 under the unamended Article. If the amendment does not bring about any such result, its  
13 validity shall have to be upheld for the same reasons for which the validity of unamended  
14 Article was upheld”. And thereafter, My Lord, the Learned Judge is pleased to say, that, no, it  
15 gives a different result. Therefore, my formulation is this. My Lord, the principles of  
16 interpretation in case of a statute and the Constitution, would be different. Second, the  
17 Parliament, while amending 39(b)... sorry 31C, never intended to delete or obliterate 39(b)  
18 and (c).

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

21

22 **TUSHAR MEHTA:** Therefore, when...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Third...

25

26 **TUSHAR MEHTA:** Third. It merely expanded, the protection under Article 39(b) and (c) to  
27 entire Part IV. What was found fault with, was the expansion, and not Article 39(b) and (c).

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Found fault with in *Minerva* ...

30

31 **TUSHAR MEHTA:** And therefore, the moment *Minerva* judgment comes, the expansion  
32 goes and not the original 31C. Sixth, My Lord, the Learned Judge My Lord, who decided  
33 *Waman Rao* and who, possibly My Lord, was also in the process of dictating or deciding  
34 *Minerva*, makes a positive declaration which is not under challenge.

35

36 **JUSTICE HRISHIKESH ROY:** I think in one part of your statement, you are wrong. What  
37 I understand is that those days the judges used to write by hand instead of giving dictation. In

1 fact, copious pages were written, so far as the judgments were prepared. So, a remarkable  
2 fortitude and effort that was taken.

3

4 **TUSHAR MEHTA:** Possibly, therefore, the judgments were also not very long. Please come  
5 to that declaration para 9.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** That we have seen at the end of *Minerva*.

8

9 **JUSTICE B.V. NAGARATHNA:** In other words, you're saying *Waman Rao*, which came  
10 later, has to be read alongside with *Minerva Mills*.

11

12 **TUSHAR MEHTA:** Because it happens to be decided by the same bench, only bench....

13

14 **JUSTICE B.V. NAGARATHNA:** There is a judicial, what you say, a statement made.

15

16 **TUSHAR MEHTA:** Declaration made. The declaration says in *Minerva Mills*, that 31C as  
17 upheld in *Kesavananda Bharati*, stands and only the amended part goes. It could not have  
18 been more elaborate or clear or unambiguous than this.

19

20 **JUSTICE SUDHANSHU DHULIA:** That's because it has been upheld in *Kesavananda*  
21 *Bharati*.

22

23 **TUSHAR MEHTA:** It could not have been, My Lord. Can never be. I'm obliged. That's going  
24 to be the submission. In a statute, there is a possibility of a void being created. But in  
25 Constitution, there cannot be any constitutional void, unless the court is dealing with validity  
26 of a constitutional provision which is declared unconstitutional. There is 31C is not under  
27 challenge in *Minerva*.

28

29 **TUSHAR MEHTA:** Well, let us be very clear. Only Section 4 of the Amending Act was  
30 challenged.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Right. That's it?

33

34 **TUSHAR MEHTA:** Only five minutes, My Lord. And, there is one judgement. I'll not read,  
35 My Lord.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Which one is that?

1  
2 **TUSHAR MEHTA:** That is on what happens when the... There are several legislative devices  
3 for the purpose of amendment. It can be by addition, deletion, substitution... what happens  
4 when the Legislature chooses the design of substitution. And the Supreme Court has said at  
5 page 10, para 23... This is our last statement. I'll cite - 'What happens to substitute...' I'll not  
6 want to read. Your Lordship, may, My Lord, read it. But it is very illustrative and it would assist  
7 you, Your Lordships, that if it is substituted, and substitution is held invalid, the original  
8 remains. Last five minutes. Give me last five minutes. Please come to page 14. My Lord, if Your  
9 Lordship takes the view with the other side, My Lord, who is arguing... page 14 - 'What will be  
10 the anomalous situation in a Constitution, which is the document of governance of the nation?'  
11 I have given some examples. For example, I have what we have done - the cases where  
12 Constitutional Amendment came by way of substitution... by way of substitution. Suppose that  
13 substitution is challenged, and that substitution is upheld. My Lord, What will be the... is, My  
14 Lord, sorry, struck down... What will be the anomalous situation? Please come to Page 14.  
15 Amendment in the Preamble, came by 42nd Amendment, by way of a substitution. Suppose  
16 that would have been struck down, the entire Preamble goes, by their logic... If their logic is  
17 true.

18  
19 **CHIEF JUSTICE DY CHANDRACHUD:** Substitute with 'Sovereign Democratic Republic'  
20 with 'Sovereign Social Secular Democratic.

21  
22 **JUSTICE SUDHANSHU DHULIA:** 'Substitute', they added.

23  
24 **TUSHAR MEHTA:** But, the Amending Act. No, My Lord, Amending Act says, "substituted".  
25 Same language as for Section 4. It is substituted.

26  
27 **CHIEF JUSTICE DY CHANDRACHUD:** Substituted. They didn't say, "Add Socialist,  
28 Secular, after Sovereign and before Democratic." They substituted.

29  
30 **TUSHAR MEHTA:** Page 3966. It's on record. Volume 4, 3966.

31  
32 **CHIEF JUSTICE DY CHANDRACHUD:** The footnote in Mr. Shankar Narayana's...

33  
34 **TUSHAR MEHTA:** Yes, My Lord. So, the entire Preamble goes by their logic. Now, My  
35 Lord...

36  
37 **JUSTICE B.V. NAGARATHNA:** That is not the import of their argument.

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**TUSHAR MEHTA:** No, but that line goes.

**JUSTICE SUDHANSHU DHULIA:** Everything goes in.

**TUSHAR MEHTA:** Then everything goes in. Your Lordships are right. Literally, everything goes, My Lord, if their argument is accepted. I am sorry, My Lord, for giving this illustration. My Lord, giving this illustration, the salaries of judges, are also by way of amendment, by substitution. There cannot be a constitutional vacuum. There can be a statutory vacuum. That's the contention.

**JUSTICE HRISHIKESH ROY:** In another way... I am sorry.

**JUSTICE SUDHANSHU DHULIA:** Earlier, it was 'Sovereign Democratic Republic'. Now, 'Socialist and Secular' are added between 'Sovereign and Democratic Republic'.

**TUSHAR MEHTA:** Substitute. The Amending Act uses.

**JUSTICE SUDHANSHU DHULIA:** But we are taking out this word and we are putting this... for the Second Amendment.

**TUSHAR MEHTA:** Correct My Lord. But I am on substitution, that if it is substituted, substituted part goes. Suppose Your Lordships, were to accept the challenge to those new additions, then only substituted part goes, the entire part doesn't go.

**CHIEF JUSTICE DY CHANDRACHUD:** ... the second part directly affects us because that deals with our salaries.

**TUSHAR MEHTA:** My Lord, therefore, I say, kindly pardon me for this example. But salaries are always amended by way of substitution. So, there would be a vacuum. My Lord, there can be a statutory vacuum, there cannot be a constitutional vacuum. That's the respectful submission.

**CHIEF JUSTICE DY CHANDRACHUD:** But, please rest assured, if you increase the salaries, we will not strike it down.

1 **JUSTICE B.V. NAGARATHNA:** And it cannot be decreased. And it cannot be decreased.  
2 This condition we'll push.

3

4 **TUSHAR MEHTA:** Section 4 and 2 are *pari materia*. And now, only last line para 20. Please  
5 see page 20, how Section 31C would look like or would exist, if their argument is right. We're  
6 at page 20. "Savings of laws", Your Lordship gets it?

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** All or any of the principles will go completely.

9

10 **TUSHAR MEHTA:** "Not vesting anything contained in so and so, no law giving effect to the  
11 policy of the State toward securing \_\_, \_\_, \_\_ shall be deemed to be void".

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** No, according to Mr. Andhyarujina, those words  
14 will still remain on the Statute Book, but they will be unenforceable. That's the argument.

15

16 **TUSHAR MEHTA:** How do we reconcile Preamble and large number of substitutions. There  
17 are some inclusions also. By way of amendment, something is included. But we have examined  
18 the substitutions. And please examine My Lord... if that... kindly, Your Lordships are aware,  
19 when privy purses were taken away. Privy purses were taken away by way of a Constitutional  
20 Amendment, because Constitution promised that we would be giving this privy purses. They  
21 failed. But suppose they would have succeeded? Kindly examine. This is about glaring... I'm  
22 sorry. This is my last example, but a glaring example, after My Lord...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** By and large, we got the...

25

26 **TUSHAR MEHTA:** Only last example, which I feel My Lord, is a glaring... This argument  
27 would put the court in a little helpless position, that's what I want to show. That's what I want  
28 to show. Therefore, this interpretation should be avoided. In original Constitution, there was  
29 an article which gave certain assurances to the princely states by way of princely purses. The  
30 government of the day decided that we should do away with princely purses... privy purses.  
31 That is section.. Article 36...whatever. My Lord, that deletion was challenged. Deletion was  
32 challenged. Ultimately, the challenge failed. But suppose the challenge would have been  
33 allowed by Your Lordships...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** By order it said that these rulers will be  
36 derecognized. That's why you said you can't do it, then Parliament [UNCLEAR] which is  
37 upheld.

1  
2 **TUSHAR MEHTA:** You can't do it in an Executive action, *Raghunathrao*. But thereafter,  
3 the court said first, that you can't do it by an Executive order, you have to have a Constitutional  
4 Amendment. Now please see My Lords, suppose that challenge would have been successful,  
5 the Article goes, Your Lordships cannot enact the law. That letter would remain that they  
6 would get privy purses. If somebody were to come before Your Lordships, Your Lordship will  
7 have to say if they are right. That sorry, we have a... struck down the deletion but we can't do  
8 anything, unless the Parliament re-enacts. But that cannot be the intention. Now, Mr. Salve  
9 wanted to say something because he appeared in both, *Waman Rao* and *Minerva*. If Your  
10 Lordships can?

11  
12 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Salve.

13  
14 **HARISH SALVE:** My Lord, I just want ten minutes and I'll finish at lunch.

15  
16 **R. VENKATARAMANI:** Before my learned friend starts, just one small interjection, If Your  
17 Lords would permit me.

18  
19 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Attorney. We'll come back to you after lunch  
20 because Mr. Salve only wants ten minutes.

21  
22 **R. VENKATARAMANI:** No, fair enough, I thought after lunch I may have some... I just want  
23 to say I've prepared a note. I'm not going to ask you all to read that note. That note is on first  
24 principle and entirely addressing this question of revival. So, I just want to say Your Lords,  
25 kindly read that, probably some light may be available in that note.

26  
27 **CHIEF JUSTICE DY CHANDRACHUD:** Just ask your junior to give us the volume  
28 number for your notes.

29  
30 **R. VENKATARAMANI:** I will do that.

31  
32 **TUSHAR MEHTA:** .... Line, My Lord. The judgment in *Minerva* and *Waman Rao* was  
33 delivered on the same day.

34  
35 **CHIEF JUSTICE DY CHANDRACHUD:** 9th May '18.

36  
37 **HARISH SALVE:** My Lord, I just wanted to add two things.

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**CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Salve?

**HARISH SALVE:** My Lord, the fallacy lies...

**CHIEF JUSTICE DY CHANDRACHUD:** Operative Order.

**JUSTICE B.V. NAGARATHNA:** Operative portion.

**CHIEF JUSTICE DY CHANDRACHUD:** Operative portion.

**HARISH SALVE:** Yes, yes. The fallacy lies in applying rules of statutory interpretation to reading judgments of the court, molding relief in constitutional matters. Article 368's construction that there is a limit on the power of Parliament to amend the Constitution is one of the most, perhaps dramatic developments of constitutional law jurisprudence in the world. How that power is exercised and what is the consequence of that power? Only Your Lordships can say. So, reading rules of substitution, interpretation, repeal, are My Lord, completely misplaced. And my respectful submission is, a declaration by the court doesn't repeal a law. A declaration by the court results in the law being still born. The declaration given in paragraphs 75 of *Minerva Mills* relates to Section 4, not Article 31. This is very important. And Section 4 said in Article 31C, for the following words, substitute the following words. *Minerva Mills* said, if we allow this substitution, then 31C which was upheld in *Kesavananda*, is radically changed. And the changed 31C, this change in 31C violates the basic structure because it dismantles the trilogy of rights 14, 19 and 21. And the words in paragraph 75, Your Lordships, has read it over and over again.

**HARISH SALVE:** Quoting the operative Declaratory Order, which had first been pronounced, was- 'Section 4 is beyond the amending power of Parliament and is void.' Let's stop there. The 'since' doesn't matter. If Section 4 is void, it is as though it was never enacted. Where is the question, My Lords, of saying, "Parts of Section 4". It doesn't say, "that part of Section 4". Your Lordships, declaration... Declaratory Declaration is - 'Section 4 of the Constitution Amendment Act is beyond amending power of Parliament and is void.' If 4 is void, and that's Your Lordship's declaration, then you scrub out 4 from the Statute Book. 4 was still born. It never breathed life. Where is the question of, 'Parts of 31C going away, and parts of 31C remaining?' The whole of 4 was void. That's the short answer to this, My Lord. And it is a nostalgic moment for me. It's a nostalgic moment for me. That's why when the Solicitor General asked me to assist, I was trying to hold fort, as Solicitor General for the State



1 of Maharashtra. When the redoubtable, Mr. Nariman argued this point first, before five  
2 judges, and we were first called upon to say, "Is there a 31C", then, My Lord, we argued 31C.  
3 Then he argued the main point about the challenge. And immediately. I was called upon. I  
4 said, "I rely on 31... 39(b) and (c)." If I remember correctly, sitting on the right side, Mr.  
5 Justice, M.B. Shah said, "Oh! But these resources means Government's resources, not private  
6 resources." So, I cited *Sanjeev Coke*. That's how it got... That issue got referred to seven.  
7 Before seven bench headed by Mr. Justice, Bharucha, I cited *Mafatlal*. That's how it got  
8 referred to nine. Issue was always about 39(b) and (c). If this point had to succeed, My Lord,  
9 the second issue didn't arise. If this point had succeeded, there was no question of reference.  
10 Five judges would have said, "There is no 39(b) and (c) on the Statute Book. We have already  
11 held, it violates Article 14. End of the road." So, My Lord, I submit, this point. It's a non-point,  
12 with great respect. What... One cannot superimpose rules you apply for statutory  
13 interpretation and working the General Clauses Act to Article 368 and the power of this Court,  
14 to determine the contours of 368. For what Your Lordships do is , when Your Lordships say,  
15 "It is beyond amending power". Suppose, My Lord, this Bill had been passed by Parliament  
16 ordinarily present in voting, what would have been the result? Your Lordship would have said,  
17 "Nothing has been done." If a State Assembly passed a law saying, "We repeal 39(b) and (c),  
18 would Your Lordship, take cognizance of it?" You won't. So, when Your Lordship says, "It  
19 violates 368", don't take cognizance of Section 4. Life goes on. That's the result, My Lord. I  
20 would submit as to be the approach in these matters.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Salve, thank you.

23

24 **HARISH SALVE:** Deeply obliged.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Salve. We'll come back after  
27 lunch and here, Mr. Dwivedi now....

28

29 **TUSHAR MEHTA:** Yes, My Lord.

30

31 **JUSTICE HRISHIKESH ROY:** And of course, this is in lighter way when you are giving  
32 voicing concern about substitution of the Preamble and whether Preamble, if the argument of  
33 the other side is to be accepted, whether the Preamble would exist in that case...we'll have a  
34 Constitution without the Preamble. Meaning thereby, a Constitution which will simply amble.

35

36 **TUSHAR MEHTA:** And if Preamble goes, My Lord, nothing remains, in fact, My Lord, as  
37 My Lord, Justice Dhulia said.

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**CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Dwivedi.

**RAKESH DWIVEDI:** I would like to deal with Article 39(b) first and noting the concern of the Court that the two extremes have to...

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**RAKESH DWIVEDI:** The question referred is whether private property is covered or not. The answer could have been simply that - Yes, it is covered. That question then arises is to what extent? Is it entirely within the ambit of 39(b)? If not, then what is the principle, what is the basis of drawing a line keeping out some kind of private property outside 39(b)? Or should it be left entirely to the Parliament to draw the line on an empirical basis because all economic policy is an exercise in empiricism. It's not permanent and it assumes different shapes and forms at different times. With march of history, many things which were unknown have become private property. Even ideas have become, once patented, they are properties. So, all kinds of goods and moveable, immoveable, all are falling within the domain of property. So, is it feasible for the Court to enter into this and draw a line? Something which was sought to be done in the Constituent Assembly, as has already been shown to Your Lordship that Mr. K.T. Shah...

**CHIEF JUSTICE DY CHANDRACHUD:** Yes.

**RAKESH DWIVEDI:** And Mr. Shibban Lal Saksena, they wanted in one sense, to confine it to natural resources, rivers, et cetera and to some monopolies, private monopolies. So, one thing is there from the debate history emerging that private property was never considered by anybody to be outside. The entire speech of Mr. K.T. Shah and Shibban Lal Saksena, who sought amendment is also directed at private monopolies. The private profit making and the response of Dr. Ambedkar was that everything which you want to do can be done within 39(b) as drafted, namely, as it exists today. And we have deliberately, consciously, used wide words, general words, so as not to limit. So, something which the framers, the Constituent Assembly did not think it appropriate to draw a line to limit and leave it flexible, should it be done today, My Lords? Because any line drawn cribs the power of the Parliament to deal with a particular situation which we do not know would or will not emerge in the future. Your Lordship's interpretation of Article 39(b) is not for today. If it is not limited by the past, it surely should not be limited by today. As My Lord Justice Nagarathna, was pleased to observe that supposing in future one finds, the Parliament finds that this privatization exercises which are being done

1 become stressful, harmful and obstructive, if I may go to this extent, to the further margin. So  
2 everything, My Lord, in economics, time comes when it becomes... time is when it is helping  
3 the further growth. A time comes when the very same thing becomes obstructive. Then you  
4 have to change courses. We may go back, you may go forward, further forward, all sorts of  
5 experimentation should be allowed to the Parliament, and the Court should then see, as and  
6 when the exercise is done by the Parliament, and then see what has been done, My Lord, is it  
7 going too far into the private domain? Surely no Parliament will be interested in taking away  
8 the spectacles and the watch of the individuals. That kind of private property is not a resource.  
9 I bought a spectacle and I don't earn from it. In Hindi, we call it *Samudayik Sansadhan*. So,  
10 it's the resource of the community. I must be able... If I have one house, a hutment so no  
11 Parliament is going after the hutment of that Dalit, My Lord, who's living in the village. First  
12 of all, there will be the democratic check. If they do that, surely they will don't want to last, but  
13 quite apart from that it doesn't mean to say that there should not be a judicial check, if possible.  
14 But that's not a resource of the community. It's not a resource at all. So there is a private  
15 property construct wherein will fall a large number of ownership of individuals, which is not  
16 actually a resource at all. It's for personal use. Somebody's cycle, somebody's scooter or  
17 motorcycle in today's modern world, they are all, or refrigerator, these are all modern needs  
18 of the person that doesn't result in any further source of income of profiteering to the  
19 individual. So what was being targeted was the private monopolies, the private profiteering,  
20 the concentration of wealth, as they say in 39(c). So, these are the guiding things. Some learned  
21 Counsels said on the other side that 38 is separate, 39(b) is separate, 39(c) is separate. It's not  
22 like that. Even the Preamble projects itself into the Directive Principles. 38 projects itself into  
23 39(b) and (c). They don't stand in isolated glory. They strengthen each other. The purpose is  
24 identical and same, and that is economic justice, as Dr. Ambedkar put it, justice social,  
25 economic and political. So this is surely not political. This is in the economic sphere. Economic  
26 justice, therefore, he spoke of in the context of 39(b).

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

29

30 **RAKESH DWIVEDI:** So idea is to equalize which means there are those people at that time  
31 in 1950s and even subsequently, there will be people who are owning a huge wealth and all we  
32 know and we read every day that inequality is growing. So with all this privatization and the  
33 growth of GDP, we have side by side, along with multi-storeys and big mansions, et cetera, we  
34 find the slums. So this is a product of privatization. Privatization is at the same time resulting,  
35 and we are watching it and the whole world today My Lord, wants the entire country, at least  
36 in India, looks forward for equalization. So, some method will have to be brought about, some  
37 policy will have to be evolved, maybe by taxations, by delivery of welfare goods, products. So

1 please construe 39(b) and (c) as broadly, as widely, as the framers of the Constitution  
2 envisaged. And my humble plea to Your Lordship is in this domain, since economic justice is  
3 a flexible phenomenon, please do not draw a line. Accept that line, which ineluctably,  
4 necessarily, compulsively flows from 39(b). With this, My Lord, if Your Lordship looks at, see  
5 how 38 to... how broad it is. Eliminate inequality in status, facilities, and opportunities. Some  
6 methodologies are prescribed, Article 14, 15, etc. There is a continuous conflict between  
7 equality, in fact, and equality, which is called formal equality. This conflict will go on. It's a  
8 continuous phenomenon. Unceasing, requiring constant, continuous attention at attenuating  
9 or eliminating it. That's the message of Preamble. That's the message of 38 and that's the  
10 message implicit in 39(b) and (c). So keeping this in mind My Lord, please construe 39(b).  
11 Let's look at it independently. There was one contention My Lord, that this talks of  
12 distribution, not acquisition. Acquisition stands, before you distribute, you have to acquire.  
13 One more aspect may be kept in view My Lord is, it is not that but for 39(b) and (c) or and 31C,  
14 acquisition is impossible. Acquisition under eminent domain with the Land Acquisition Act,  
15 et cetera, can be done for public purpose. Even private property if it... even the hut My Lord,  
16 which comes in the way of making the road can be acquired and compensated for. So, private  
17 property is not beyond acquisition at all, even in the General Law. All that this provision is  
18 now doing is, Your Lordships are scrutinizing is, whether Article... protection of Article 14, 19  
19 should be allowed to be taken away or not. Not that private property cannot be acquired. Once  
20 you declare 31C, it will not be there. So, once 31C declaration is there in the Act and it has  
21 nexus to 39(b) and (c), then 14, 19 becomes, is shut out. That's all that happens here. And it is  
22 this limited domain which we are scrutinizing. So, acquisition of private property is not  
23 sacrosanct, nor is it something which stands away from the domain of 39(b). Now 39(b), there  
24 cannot be a distribution to subserve common good unless acquisition happens. So, acquisition  
25 of private property, ownership and control. So, some private person's ownership has to be  
26 taken over in order to be distributed and that [NO AUDIO STARTS] is what has been  
27 happening when we abolish zamindari, when we abolish *Talukedaris* and so many other  
28 intermediaries. The lands were taken over and then distributed. So, you have to take it over.  
29 39(b) is certainly, I agree, to this extent is not a source of power per se, power will flow from  
30 Article 245, 246 with the Seventh Schedule so far as lawmaking is concerned. And 368, so far  
31 is Constitutional Amendment is concerned, it's also not a limitation it's a goal. It's a direction  
32 [NO AUDIO ENDS] in which the State, which means all the organs of the State, including  
33 Parliament and State Legislatures have to move. There was some debate that in Article 38, the  
34 word 'strive' should be deleted and substituted by some lighter word. Dr. Ambedkar said that  
35 this word has been deliberately brought in so to compel them to move in this direction. The  
36 most important goal for any Parliament or Legislature is to move towards equalization. It's  
37 unfortunate My Lord that inequality is still growing and that's something to be tackled. That's

1 the constitutional mandate. But 39(b) in the context of Article 31C involves a inclusion of  
2 declaration. So when 31C comes in, along with 39(b), then it's a source of power to make a  
3 declaration. Your Lordships are called upon to look at 39(b) in the context of 31C and 31C, if  
4 it has to be invoked...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** [NO AUDIO]not require a declaration that latter  
7 part brought in a declaration... if there is a declaration, you'll not review the...

8

9 **RAKESH DWIVEDI:** As my learned Solicitor General said that even if you don't have a  
10 declaration, still Court can see. But if the Legislature expressly says so, then Your Lordship  
11 will see the nexus. Once the nexus is established...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Then the conditions for 31C arrive.

14

15 **RAKESH DWIVEDI:** So, in order to bring in 31C, the legislation must speak, I may not call  
16 it declaration, it must speak expressly that because 14 and 19 are being shut out, so it must  
17 speak expressly or by necessary implication. So, this is a power which is emanating from 31C.  
18 So, when 31C comes into the picture, then this power and duty to speak about the invocation  
19 of 31C to shut out inquiry based on 14 and 19, for enforcing and implementing 39(b), assumes  
20 the shape of a power which, of course, would be connected with 245, 246. And in that context...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** 39(1)... 31C is not a power, it's a limitation on  
23 Legislative power. It is an immunity to legislation.

24

25 **RAKESH DWIVEDI:** But in as much as it is to be...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** It's an immunity to legislation. It's not a  
28 limitation, but in fact there's an immunity to challenge.

29

30 **RAKESH DWIVEDI:** The effect of invocation is immunity. The effect of invocation is  
31 immunity, but the power to invoke... but for 31C this can't be shut out. So, the Legislature must  
32 invoke 31C. 245, 246 by itself would not enable shutting out 14, 19. That is subject to 14 and  
33 19. It is 31C alone...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** But law giving effect to the policy of the State  
36 towards securing Article 39(b).

37

1 **RAKESH DWIVEDI:** That's right. State will have to speak expressly or by necessary  
2 implications that it is to secure, the law is being made to secure this, in which event, 14, 19  
3 then the Court will only examine nexus, the reasonable and direct nexus. So, therefore coming  
4 back, 39(b) when it says ownership and control, it was rightly submitted that the word 'and'  
5 as to be read as 'and/or'. And this is not unusual My Lord, the Chief Justice, and other learned  
6 Judges have in *Jindal Steel*, in the context of Article 301, read it in that manner. If Your  
7 Lordships have, I have two Volumes. Volume 2H and 2N. Paragraph 20 of 2H. Volume 2H.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** What page?

10

11 **RAKESH DWIVEDI:** Page 8.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Para 20?

14

15 **RAKESH DWIVEDI:** Yes. I have quoted for convenience, para 75 of Chief Justice Thakur's  
16 judgement, if Your Lordships will come down ten lines from the bottom of that paragraph -  
17 'The word 'and' can mean 'or' as well as 'and' depending upon the context in which the law  
18 enacted by the Legislature uses the same, suffice it to say that levy of taxes do not constitute a  
19 restriction...' then that goes. On different kindly have My Lord, the Chief Justice  
20 Chandrachud's judgment. - 'The word 'and' is normally...' at the bottom of the same page. 'The  
21 word 'and' is normally used in the conjunctive sense. However, this is not always the case,  
22 coupled with the use of the expression made. The expression 'and' in 304, should be construed  
23 to mean 'and/or'. In other words, the Legislature of a State may take recourse to both or either  
24 of them.' So I would say this happens when a power is conferred, then it's not essential that  
25 the entirety of the power be exercised. It is from this that this idea is flowing as My Lord, Chief  
26 Justice has put it very clearly. And then in the next paragraph, 653 - 'both 'and/or' are  
27 inherently ambiguous and is always conjunctive in the sense that it always signals and  
28 cumulative of the possibilities listed before and after the 'and'. However, 'and' is ambiguous in  
29 that it may be 'joint' or 'joint and several'. In the case of a joint 'and', every listed possibility  
30 must be included both A and B. All of A,B,C. In the case of a joint and several and, all the  
31 possibilities may be, but need not be included, A or B or both, A or B or C, or any two or all  
32 three. In other words, the joint and several 'and' is equivalent to 'and/or'.' The other learned  
33 Judges, I have mentioned the paragraph at the end. So, in fact, as the Solicitor General, the  
34 learned Solicitor General, said, submitted - 'and in this context of 39(b) ownership and control  
35 should be, both 'and/or'.' Leaving it to Parliament, either to take control, either to take,  
36 acquire, or to do both. So whichever subserves the good, that's the guiding star and for  
37 Parliament to do, take note of it. And it is not that acquisition has to be done first and then

1 something else. Step one, step two. It's all common there in 39(b). If they are together, every  
2 law of acquisition need not stand alone. Nowadays, all laws as Your Lordship, the Chief Justice,  
3 said in the earlier cases. Ragbag. You can have one law acquire and distribute. You don't have  
4 to have a separate enactment. And to separate it, acquisition from distribution in the context  
5 of 39(b) frustrates the whole purpose of 39(b). Because the idea is to equalize, take from some  
6 and distribute. The second expression is 'distributed'. How do we look at 'distributed'? And I  
7 would submit with respect that the word distributed should be construed as a part of the entire  
8 phrase in which it occurs. 'So distributed as best to subserve'. So, distribution will not mean in  
9 every case, distribute by bits and pieces, piece meal by metes and bounds. It may be in case of  
10 land where the Zamindari abolition you take the land and distribute it to a large number of  
11 people. But in another case, let's say of spectrum, which is undisputedly, property of the  
12 community, a resource of the community. Now, this spectrum is not to be distributed blood  
13 by bits and pieces to the people in the country. There would be an auction or a tender, and  
14 somebody will get a lease or a license, and then he will set up the whole structure based on  
15 which the community will then be benefited. So, that's another way of distribution of the  
16 benefit of the resource to the entirety of the community. So therefore, 'distributed' will not  
17 mean always distribution in bits and pieces. And that's why it is part of the phrase 'so  
18 distributed as best to subserve.'

19  
20 There can be a large pond. For in Bengal and we are standing there are non-agricultural  
21 property, which is one of them, is pond. And there are huge ponds. 500 acres of pond or even  
22 more. So now, water can't be distributed My Lord, we set by concrete, divide it and small  
23 portions given to a large number of people. So what can be done is that you take it over and  
24 give it to some cooperative society of a large number of people living around, and then they  
25 can utilize this pond. And there's another fear that the pond is, this... the private owner may  
26 feel that it's my property, so I'll fill up the pond and we'll have a huge skyscraper there and  
27 earn money out of it. So these are choices which are restricted, as Your Lordship said, that  
28 private property... the Chief Justice said that private property... there are certain private  
29 properties which inherently provide sustenance or they are in the interest of community is  
30 inbuilt in that private property. There are private forests, there are wetlands. Now this word  
31 'distributed' has been... fell for construction, Your Lordship may note para 92 of *Kavur Bai's*  
32 judgment, Volume 5, Page 2348 it begins and the relevant portion at page 2381. Para 92. 91  
33 and 92. Other dictionaries are also mentioned, earlier paragraphs. May I place para 92? Yes,  
34 1984 (1) SCC 515. May I place it? 'It is obvious, therefore, that in view of the vast range of  
35 transactions contemplated by the word 'distribution'. As mentioned in the dictionaries  
36 referred to above, it will not be correct to construe the word 'distribution' in a purely literal  
37 sense so as to mean only division of a particular kind or to particular persons. The words

1 apportionment, allotment, allocation, classification, clearly fall within the broad sweep of the  
2 word 'distribution'. So construed the word 'distribution' as used in 39(b) will include various  
3 assets, aspects, methods and terminology of a broad-based concept of distribution. In other  
4 words the word 'distribution' does not merely mean that property of one should be taken over  
5 and distributed to others like land reforms where the land from the big landlords are taken  
6 away and given to landless labourers or, for that matter, the various urban and rural ceiling  
7 Acts. That is only one of the modes of distribution, but not the only mode. In the instant case  
8 as we have already pointed out, distribution is undoubtedly there, though in a different shape.  
9 So far as the operators are concerned, they were mainly motivated by making huge profits and  
10 were most reluctant to go to villages or places where the passenger traffic is low or track is  
11 difficult. This naturally caused serious inconvenience to the poor members of the community  
12 who were denied the facility of visiting the towns or other areas in transport. By nationalizing  
13 the transport as also the units of the vehicle would be available to go to the farthest corner of  
14 the State and penetrate as deep as possible and would provide quicker and more efficacious  
15 facilities. This would undoubtedly be a distribution for the common good of the people and  
16 would be covered by 39(b).' So therefore, there will be various shapes in which this distribution  
17 can happen. Now, the third expression, the next expression, which in 39(b) is, 'material  
18 resources of the community'. So there are two parts. One, is to look at material resource and  
19 then material resource of the community. As Your Lordships have laid down in various  
20 judgments that one of the modes of construing is to dissect, breakup the components but not  
21 to stop there, but to reassemble them and then look at it as a whole. So dissect, separate,  
22 construe, then see how the meaning fits as a whole in the context. So, material resource, My  
23 Lord, resource, all resources which produce an income, they are our resources. As literally  
24 interpreted, contextually interpreted and the interpretation has to be wide, except that which  
25 is nonproductive of benefit, service, income and is essential for living. For one has to  
26 remember that Article 21 is not part of it; for we have to remember that Article 21 is not part  
27 of this protection. So, the Right to Shelter, Right to Livelihood has been held to be there in  
28 Article 21. So therefore, that private property, which is not productive, which is not a resource  
29 but is purely for personal benefit is not covered here. Otherwise, all other private property  
30 should be held to be within its ambit in its widest plenitude. And it should be left to Parliament  
31 to decide which one to touch or not to touch.

32

33 **JUSTICE SUDHANSHU DHULIA:** Whether it is tangible or intangible?

34

35 **RAKESH DWIVEDI:** Tangible, intangible, all kinds of property. We don't know what will  
36 be the scenario. That's the problem, My Lord, today. We cannot prognosticate what



1 technology... Artificial Intelligence is now coming in. Robotics is now coming in. So what all  
2 will Your Lordships visualize in laying down the line. We will be back in the Court again.

3

4 **JUSTICE SUDHANSHU DHULIA:** You mean we should not?

5

6 **RAKESH DWIVEDI:** I'm saying that Your Lordship should not. Leave it to the Parliament.  
7 This kind of private property, which I'm talking about, this property, no Parliament is going to  
8 touch.

9

10 **JUSTICE RAJESH BINDAL:** The others also, they can acquire the properties. We can  
11 acquire also the property for distribution.

12

13 **RAKESH DWIVEDI:** Yes, of course. The point is, in certain cases, the Parliament feels that  
14 Article 14... and why did 31A 31B, C come, My Lords? Because in the very beginning in 1951,  
15 the Constituent Assembly was acting as a Parliament, and it felt that 31A and B have to be  
16 brought in because the laws of this... Land Reform Laws were being struck down by courts on  
17 the angle of Article 14 and 19(1)(f) and so on. So they felt that on the one hand, we are  
18 compelled to have this measures to equalize, to uplift the downtrodden and on the other hand,  
19 My Lord, there is an interpretative exercise in the courts which is coming in the way. So,  
20 therefore they wanted to shut it out so, it happened right in the beginning 31A, 31B. And Your  
21 Lordships had said that in *Kesavananda* that 31C is nothing but an extension of 31A. So,  
22 yes, My Lords are absolutely right that acquisition can happen. That's how I started that  
23 acquisition of all kind of property can happen. Even the poor man's hut can be acquired if a  
24 road or a canal or dam or a metro is to pass, but there they have to pay compensation, market  
25 value, and all those concepts come in, and that was one of the basis for striking down of various  
26 laws that compensation are not being provided to the *Zamindars*. Therefore, the Parliament  
27 wanted to avoid it and they brought in the Constitutional Amendments to ensure that these  
28 questions do not become an obstacle and the country marches ahead. The prime, agrarian  
29 reform was an objective set before, in the freedom struggle itself and Article 51A says that - 'it  
30 is the duty of every citizen to cherish the noble ideas of freedom struggle.'

31

32 **JUSTICE SUDHANSHU DHULIA:** Lahore Resolution.

33

34 **RAKESH DWIVEDI:** Yes, Lahore Resolution 1929, as early as that, Jawaharlal Nehru...  
35 Pandit Jawaharlal Nehru was the President and he was the pioneer of the agrarian reform. So,  
36 agrarian reform... even before on the anvil, when we were on the anvil of Independence, it was  
37 put forward and coupled... Please see, I'm grateful to Justice Dhulia. 1929 is the Lahore

1 Resolution. 1931 is the Fundamental Rights Resolution of Karachi. So Fundamental Rights  
2 and the Directive Principles all were emerging simultaneously as a cherished, noble ideal.

3

4 **JUSTICE B.V. NAGARATHNA:** 1929 was Swaraj...

5

6 **RAKESH DWIVEDI:** That's the blend. That's the balance which Chief Justice Y.V.  
7 Chandrachud talked of in the *Minerva Mills*. They said - 'the two chariots... two wheels of  
8 the same chariot and balance is the basic structure.' That's the most important statement.  
9 Balance between the two is the basic structure. And sometimes this balance, in some  
10 situations, demands that some Fundamental Right be kept aside and not become an  
11 obstruction in the forward march, the further development or the upliftment of the  
12 Downtrodden, the Dalit. So, therefore...

13

14 **JUSTICE B.V. NAGARATHNA:** 31C is in the Fundamental Rights chapter.

15

16 **RAKESH DWIVEDI:** That's right. This is part of the same scheme. It's as fundamental now.  
17 Read 39(b), even in the context of 31C virtually takes the shape of a Fundamental Right. It is  
18 actually a Fundamental Right, because some people should not enjoy Fundamental Rights. By  
19 equalization, we take the Fundamental Rights and make them real for the poor people. So,  
20 that is to be realized. Everybody must enjoy the Fundamental Rights. So, education must go  
21 down, economics must ensure that the fruits are going to the people and to those who are  
22 labouring. So, I submit this, the only word now remains is 'community.'

23

24 **JUSTICE SUDHANSHU DHULIA:** No, about this 'material resources', so should we  
25 assume that you are not making any distinction between property and material resources. You  
26 think they are the same?

27

28 **RAKESH DWIVEDI:** All property. Yes, but everything is property today. The concept of  
29 property started emanating when John Locke started defining it in the context of occupation  
30 of America.

31

32 **JUSTICE SUDHANSHU DHULIA:** That means... that maybe... Suppose, somebody here  
33 discovers a cure for cancer tomorrow... today, right? That's his property, in a way.

34

35 **JUSTICE B.V. NAGARATHNA:** Yes.

36

37 **JUSTICE SUDHANSHU DHULIA:** That also becomes a material resource.

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**RAKESH DWIVEDI:** It is. Intellectual property, My Lord.

**JUSTICE SUDHANSHU DHULIA:** No, but with intellectual property there is a privacy attached to it. There is a whole lot of things. What we are saying is once you include tangible, intangible, everything in material resources, then that has to be decided, isn't it? Because this reference is for that only, this reference is for that only, that whether private property constitutes material resources or not.

**RAKESH DWIVEDI:** Yes.

**JUSTICE SUDHANSHU DHULIA:** So, a distinction has to be made or whatever, this has to be touched upon.

**RAKESH DWIVEDI:** Let me put it like this. When we talk of an idea becoming a patent and therefore the right of that individual, that idea itself is a generation of, is a social product. My idea taking shape in my mind is not sitting in a jungle that I have formed that idea. The society has contributed in my upbringing and growth and therefore, that idea... just bear My Lords. Maybe I'm completely off track, but just kindly...

**JUSTICE SUDHANSHU DHULIA:** No, we are with you on that.

**RAKESH DWIVEDI:** So now what happens? Now, an idea is, taking somebody gets a patent of a cancer treatment. Now, he says it's my property. I will... I'm not going to aid the society in cure or that I will set up a hospital, and then I will have such a high charge for it that people are not benefiting. Now, is the Parliament then incapable of saying that it may be your property, but the country needs it, people are dying? So we make a law, therefore. So, there can be a variety. All I'm saying is leave it to the Parliament. How will Your Lordship draw a line that this particular idea, this particular property should be out, this should be in? That's a very cumbersome exercise. An impossible exercise, I would say.

**JUSTICE SUDHANSHU DHULIA:** That's a good... I mean, I'm willing to accept that idea that, see, then there is no, nothing like an intellectual property, because before it becomes an intellectual property, it is in the nature; it is in the nature before it becomes your property.

**RAKESH DWIVEDI:** That is so.

1 **JUSTICE SUDHANSHU DHULIA:** If that is so, then that idea may not be acceptable to  
2 everyone, you see.

3

4 **RAKESH DWIVEDI:** If it's accepted to nine of Your Lordships I'm satisfied, My Lord. I'm  
5 not concerned with everyone standing outside the court. Surely, as My Lord the Chief Justice  
6 said - There are Gandhians, there are Marxists, there are socialists, there are Fabian socialists,  
7 and so on. So each looks at the development in its own way, My Lords. My Lords are absolutely  
8 right, many may not. But here we are concerned with this which the framers have made and  
9 Constitution is a document where every two persons will have a different view of it. That's the  
10 beauty of the interpretation exercise in the context of Constitution, there's no one... but which  
11 is more beneficial My Lord, where should... drawing a line, keeping out, how will you do it? It  
12 is entering into a boggy ground, My Lords.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** But assuming that material resources would  
15 include all kinds of property except those which are earmarked for personal use, as you said.  
16 What about the words 'of the community'?

17

18 **RAKESH DWIVEDI:** Yes.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Does that interpose some sort of limitation on  
21 what can be regarded as a part of that phrase?

22

23 **RAKESH DWIVEDI:** So My Lords, community... Yes, I was coming straight to that only,  
24 My Lords.

25

26 **JUSTICE SUDHANSHU DHULIA:** Community and what should we understand as  
27 community?

28

29 **RAKESH DWIVEDI:** Sorry, My Lord. Community?

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31 **JUSTICE SUDHANSHU DHULIA:** How do we understand community?

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33 **RAKESH DWIVEDI:** Material resource.

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35 **JUSTICE SUDHANSHU DHULIA:** Community also.

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37 **RAKESH DWIVEDI:** Community yeah.

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**CHIEF JUSTICE DY CHANDRACHUD:** Community does not necessarily mean the entirety of the population of the country or the state. Community would also be relative to the resource.

**RAKESH DWIVEDI:** Yes. So now, let's look at it this, My Lord. Community, literally speaking, means a combination of even two persons will be a community. In America there is a Community Property Act which deals with spousal property, which provides that all the property of the husband and wife together, whoever has whatever income, it will be shared equally. Its title is Community Property Act. So property earned by two persons will be a community, a firm, unless now, of course, we have a one-man company. So two persons in a firm, community.

**JUSTICE SUDHANSHU DHULIA:** In that sense... I'm sure you are aware of that. In U.P. there is a law that in the pond, the local villages, the fishing rights, the first charge is about the fishing community. So, the fishing community will be given those rights first. So in that sense, for the fishing, the community will be only fishing community to get those resources. But for a larger thing, the entire country may be the community.

**RAKESH DWIVEDI:** Maybe, My Lord.

**JUSTICE SUDHANSHU DHULIA:** Depends upon the context.

**RAKESH DWIVEDI:** Yeah, yeah, yes, of course. Maybe different spectrum... whole country owns the spectrum. Everybody must get the benefit of the spectrum, use of spectrum.

**JUSTICE SUDHANSHU DHULIA:** So the community has to be seen in the context, in the context.

**CHIEF JUSTICE DY CHANDRACHUD:** That's why it is relative it is. It is relative to the resource.

**JUSTICE SUDHANSHU DHULIA:** Yes, relative to the resource.

**RAKESH DWIVEDI:** How broad the section of community will be benefited will depend upon the particular resource.

1 **JUSTICE SUDHANSHU DHULIA:** Yes, that's it. What did you say just now?

2

3 **RAKESH DWIVEDI:** What resource it is.

4

5 **JUSTICE SUDHANSHU DHULIA:** What did you say just now? How? How?

6

7 **RAKESH DWIVEDI:** How broad a section of the country will get the benefit of a particular  
8 resource would depend upon the nature of the resource and where it is located. The very locale  
9 will restrict. If it is in Bengal, My Lord, surely the fishermen of other states would not be  
10 traveling there, can't be given the benefits. It has to be, and the resource is also limited, not  
11 the locale alone, but even the size of the resource. But ultimately, if we go strictly by private  
12 property concept, as my learned friends want, then the pond belongs to a private person. He  
13 will say - Why, it's my property.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Or say a mining lease, he'll say - It's my property.

16

17 **RAKESH DWIVEDI:** Mining is my property. My Lord, actually, nobody was born with land  
18 and ponds and rivers and sources. My Lord, ultimately this is the... private property is a  
19 concept of law and is a concept of material development of the society.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** And even if it is strictly private property, like say  
22 a lease. Lease creates an interest in land. Say a lease for mining purposes. Nonetheless, we've  
23 always accepted that there may be a regulation in the interest of the wider community. Because  
24 there is a community interest in regulating even private property. So, for instance, in the case  
25 of mining, that there should be sustainable mining. That you should not completely deplete  
26 the earth of its mineral resources. And therefore, the very notion of community interests  
27 postulates that there is, even in relation to property of a private nature and interest of the  
28 community in proper regulation. This is in the interest of proper distribution so as to subserve.  
29 The ownership and control subserves the common good.

30

31 **RAKESH DWIVEDI:** And it goes to the credit of Parliament in the last 75 years, how many  
32 times this has been invoked. Even the Mines and Mineral Act 1957, Your Lordships saw in that  
33 other matter, doesn't have this declaration, 31C.

34

35 **JUSTICE SUDHANSHU DHULIA:** No. That is because of first it was curtailed by  
36 *Kesavananda Bharati* and then by *Minerva Mills*.

37

1 **RAKESH DWIVEDI:** No, I'm not on that. I'm saying that we must give credit to the  
2 Parliament that it is not using 31C blindly right, left, centre, everywhere. Even in Mines and  
3 Minerals, since My Lord, the Chief Justice gave that example. Therefore, I'm pointing out that  
4 in the previous exercise. Yes.

5  
6 **JUSTICE HRISHIKESH ROY:** [NO AUDIO] distributed as best to subserve the common  
7 good. Now, when you subserve the common good in a given situation, you may be serving  
8 various common goods or benefiting various needs of the society.

9  
10 **RAKESH DWIVEDI:** Absolutely. For example, in the pond itself, fishing is one aspect. All  
11 the cattle of that part, they come to drink water in the pond. There's another interest. People  
12 come to the ponds to take bath there. So...

13  
14 **JUSTICE HRISHIKESH ROY:** You can't be forgetting the buffaloes who wallow in this  
15 water.

16  
17 **RAKESH DWIVEDI:** So, when they are wallowing in, there's little difference between the  
18 humans and the buffaloes. They all wallow together. In the villages, I've worked for 4 years  
19 with a downtrodden, so I've seen that phenomenon. They're on the one side, the buffaloes are  
20 in it, and the other side, the human beings are also... The ponds are very, very important for  
21 the village community. The only thing is that individual interest, up to a point, is to be  
22 protected, but there can be points raised where the society, the Parliament feels compelled  
23 that - No; we have to do something with it, and we don't want to get embroiled in this long-  
24 drawn litigation. So kindly see, after 20 years, these litigations are coming before your  
25 Lordships. [NO AUDIO] respectful submission means the people, they may also be individual  
26 people, they may be couple, they may be more than two. Communities cannot be limited to  
27 State. There is no colour of State ownership there. It cannot be that Air India, My Lord, when  
28 it was owned by the State. It was a material resource. The moment Tata takes over, it ceases to  
29 be material resources. Now that'll be... There's another reason.

30  
31 **CHIEF JUSTICE DY CHANDRACHUD:** Engagement between people, because people  
32 become a community when you're engaged with them.

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34 **RAKESH DWIVEDI:** So today there's so much.

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36 **CHIEF JUSTICE DY CHANDRACHUD:** Maybe it's an engagement on the social  
37 interaction, professional interaction, religious interaction.

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**RAKESH DWIVEDI:** Or even economic.

**CHIEF JUSTICE DY CHANDRACHUD:** Or economic interaction. Some engagement between human beings is implicit in the concept of community.

**RAKESH DWIVEDI:** Now, let's...

**CHIEF JUSTICE DY CHANDRACHUD:** There has to be some element of an interest of the community in order to make it a material resource of the community.

**RAKESH DWIVEDI:** No difficulty in all these things, My Lord. The only problem will be at what point of time the interest will emerge.

**CHIEF JUSTICE DY CHANDRACHUD:** That's a matter to be decided according to... You can't have an exhaustive definition.

**RAKESH DWIVEDI:** My Lords, you are right. My endeavour is limited to this, that it's very difficult in judicial review, today to draw a line. That line may be crossed very soon, such is the life. It will present another problem. Best is to entrust and then see where is it going, is it going so far as to touch somebody's personal belongings. In that sense, which is not a resource. Which can never be distributed for common good. So, nobody can take my spectacle and say - It can be distributed. Everybody can't wear it, everybody has a different eye sight problem. So it can't be distributed for common good or personal effects. Better way to put it is personal effects. So, community, in my view, is just people in their engagement, particularly economic engagements. And common good, of course, is again relevant, as I said. Thus the acquisition and distribution which is contemplated, is it serving the common good? But that will be sitting again in judgment, it can't be a subject matter of judicial review. All that is therefore covered by the word 'nexus.' Direct and reasonable nexus is for that purpose, which the Court will see in judicial review.

**JUSTICE SUDHANSHU DHULIA:** Now, to see that nexus. We'll have to see whether it is for the community, whether it is a material resource or not. That much has to be seen.

**RAKESH DWIVEDI:** If Your Lordship accepts my submission, that community is very wide, and therefore, then, of course, there is little to be determined. Now, one more aspect is there. Today, a question is whether private companies should be covered. What is a private



1 corporation today? Does even if every corporate promoter is today operating on the strength  
2 of deposit as money which, through the intermediary of banks, financial institution, is then  
3 given to them in loan and is utilized. A social interest, a community interest, is directly there.  
4 If the corporation doesn't pay back the loans in time, the depositor's interest gets directly  
5 affected immediately. Then no production can happen in this manufacturing of the  
6 corporation unless the labour power collaborates with the capital. And this is not Marxism. I  
7 am not afraid of Marxism. Our Constitution that Dr. Ambedkar said - 'We don't know which  
8 Government will come tomorrow. It may be inclined to socialism. It may not be done.' That's  
9 what Dr. Ambedkar said. Your Lordships read it. So, leave it to them. We cannot say today that  
10 if tomorrow a Government comes which is inclined towards socialism, then there will be an  
11 obstruction. You can't move towards that. That can't be the mandate from the Court. So, it's  
12 flexibility... Our Constitution makers have kept it pragmatic, flexible. It's up to the people to  
13 choose the kind of Government they want, the kind of growth they want. And therefore, it is  
14 neither Gandhian nor Marxist nor Fabian socialists, notwithstanding that the Preamble has  
15 been amended to include the word 'socialist'. There will be a great debate, if one goes, what is  
16 this socialist. There are n number of kinds of socialists in the world. All kinds of socialists.

17

18 **JUSTICE SUDHANSHU DHULIA:** But, it is there in Article 43A.

19

20 **RAKESH DWIVEDI:** Yes

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22 **JUSTICE SUDHANSHU DHULIA:** 43A is just what you're saying.

23

24 **RAKESH DWIVEDI:** Yes. 'The State shall take steps by suitable legislation to secure the  
25 participation of workers in the management. '

26

27 **JUSTICE SUDHANSHU DHULIA:** And read further.

28

29 **RAKESH DWIVEDI:** 'Of undertaking establishments or other organizations engaged in any  
30 industry.' So, every corporation engaged in rendering service, trade, commerce... it's a  
31 community. Not only this, the shareholders are there. The body of shareholders contribute.  
32 There are debenture holders, bondholders, there are private money lenders. So there's no way  
33 My Lord, that this private corporation today can claim to be private in the sense at one point  
34 of time we enclosed a piece of land and said that it is mine, excluding the other and closing the  
35 property and excluding others, which is the primeval form of private property. That doesn't  
36 exist. It is collaborative exercise today. Every private corporation, even if it is a one-man  
37 corporation, it will be borrowing money, it will be using labourers, and all those liabilities are

1 there. And to top it all, they produce and manufacture for the consumers, which is a continuous  
2 consume... exercise. Without the consumers, there will be no maximization of return, no  
3 profiting. They are seeking profits, and profits are coming from our pockets, My Lords.

4

5 **JUSTICE HRISHIKESH ROY:** From there, the taxes are going. That is used for social  
6 welfare only.

7

8 **RAKESH DWIVEDI:** And tax, Government takes the tax, and when these corporations are  
9 in crisis, they go to the government. And Government then supports them. So where is, just  
10 look at it, this whole phenomena of this industry and business today is a community exercise,  
11 nothing else.

12

13 **JUSTICE HRISHIKESH ROY:** OTS also?

14

15 **RAKESH DWIVEDI:** Sorry, My Lords.

16

17 **JUSTICE HRISHIKESH ROY:** OTS also in the banking field.

18

19 **RAKESH DWIVEDI:** Everything My Lords, nothing... That's why I'm saying, My Lord, that  
20 how do we define. So many imponderables are there, so much flexibilities are there. These  
21 words if Your Lordships feasibly impossible...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Now, this covers this part now.

24

25 **RAKESH DWIVEDI:** This completes this part of it, My Lord. Except that if Your Lordship  
26 may just note at para 26 at page 12 of the note. I have extracted some portions from Justice  
27 Khanna, Justice Y.V. Chandrachud as Your Lordship, then was.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** In *Kesavananda*, right?

30

31 **RAKESH DWIVEDI:** From *Kesavananda*, where they say that 31C is an extension of the  
32 principles of 31A. The relevant lines I have made it bold, but I have extracted the whole  
33 paragraph and the other learned judges I have given the paragraph at page 16. Paragraph 30,  
34 page 17.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** What else Mr....?

37

1 **RAKESH DWIVEDI:** Now leaving this topic, My Lords. The other note which we gave  
2 subsequently, because Your Lordships heard on the issue of survival of 31C.

3

4 **JUSTICE SUDHANSHU DHULIA:** You're on 31C now. How much of it survives and its  
5 effect?

6

7 **RAKESH DWIVEDI:** Unamended. My submission is, entirety of 31C survives, My Lords.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Your note is 2H?

10

11 **RAKESH DWIVEDI:** 2N.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** 2N.

14

15 **RAKESH DWIVEDI:** 2H was the one which I was reading.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

18

19 **RAKESH DWIVEDI:** This is 2N, which has something of 39(b) also.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Now on 31C, what is your point, Mr. Dwivedi?

22

23 **RAKESH DWIVEDI:** My Lord, the first point on 31....

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** We will be rising today at 3:30. I have to address  
26 a conference in Tajikistan, actually, as part of the Chief Justice of India's responsibilities.  
27 About 3:30 if we can rise. So in 20 minutes, will you be able to wrap up on 31C?

28

29 **RAKESH DWIVEDI:** It won't finish, My Lords.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** How long would you take on 31C roughly?

32

33 **RAKESH DWIVEDI:** I think My Lords, I'll take about an hour now on this.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** Then Mr. Sankaranarayanan?

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37 **GOPAL SANKARANARAYANAN:** I'll need [UNCLEAR]

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**CHIEF JUSTICE DY CHANDRACHUD:** And nobody else, right? Just Mr.....

**RAKESH DWIVEDI:** I think Mr. Shyam Devan is to... and Aishwarya.

**CHIEF JUSTICE DY CHANDRACHUD:** All right. So, tomorrow, of course, we'll go until 3:35 right now, but tomorrow, if we... if Mr. Dwivedi, can you wrap up say in about 45 minutes tomorrow by 11:50?

**RAKESH DWIVEDI:** I can, but if Your Lordships...

**CHIEF JUSTICE DY CHANDRACHUD:** Then what we can do is that we'll give the others. Mr. Sankaranarayanan, about 20 minutes. How long would you take?

**GOPAL SANKARANARAYANAN:** I think longer than that. I have eleven points to make. Those are the eleven points which are covered by my two notes. But it requires a little bit of reading. There are some aspects not been touched.

**CHIEF JUSTICE DY CHANDRACHUD:** So long as all of you can complete by, say, 12:00 tomorrow, and then we'll give them 1 hour for the rejoinder. One rejoinder, the 1 hour. Then we'll complete at 01:00 tomorrow. We'll finish with lunch. I think that's okay.

**GOPAL SANKARANARAYANAN:** Can I just indicate my...

**CHIEF JUSTICE DY CHANDRACHUD:** [NO AUDIO] them for rejoinder. So that, then we can have one rejoinder from them.

**GOPAL SANKARANARAYANAN:** Can I just indicate my Volume numbers are 2E and 2M, M for Minerva.

**CHIEF JUSTICE DY CHANDRACHUD:** All right.

**GOPAL SANKARANARAYANAN:** So, the initial pages that are in the Volume, My Lords. The note itself has links to the Annexure.

**CHIEF JUSTICE DY CHANDRACHUD:** Alright.

1 **GOPAL SANKARANARAYANAN:** So, the initial note is four pages. The second note is two  
2 pages. Almost everything in that.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** 31C. What happens to 31C post...

5

6 **RAKESH DWIVEDI:** The learned Solicitor has submitted that *Waman Rao...*

7

8 **GOPAL SANKARANARAYANAN:** There are two young men who also wanted to address  
9 for a few minutes each.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** No difficulty, but this side, we'll have to conclude  
12 by 12:00, so that by 01:00 we conclude tomorrow. So, between all of you, just talk to Mr.  
13 Dewan in the evening so that, between all of you, you lay down a schedule. 12:00pm sharp will  
14 conclude this side, so that 01:00 we can conclude. I think that will be fair for everyone.

15

16 **GOPAL SANKARANARAYANAN:** I'll be taking 15 minutes.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** No difficulty. 12:00 for this side and 01:00 for  
19 this side. All of you sit, all of you sit down together. One rejoinder. Any one person can make  
20 the rejoinder. We'll have one rejoinder because we follow in CBs, in Constitution Benches, we  
21 follow one rejoinder. Because... You want to make the rejoinder that we have no difficulty. Talk  
22 to... all of you settle who will make the rejoinder.

23

24 **JUSTICE SUDHANSHU DHULIA:** Article 25? Article, which Article?

25

26 **HARSHVIR PRATAP SHARMA:** *Minerva Mills*. If it remains as Article 25, what is the  
27 purpose...?

28

29 **JUSTICE SUDHANSHU DHULIA:** we are not dealing with Article 25.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** This is the first time we heard 25 in the last five  
32 days.

33

34 **HARSHVIR PRATAP SHARMA:** After 31C post *Minerva...*

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36 **CHIEF JUSTICE DY CHANDRACHUD:** Just a question of 60 differences. 6 and 3. 9,  
37 actually.

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**HARSHVIR PRATAP SHARMA:** [UNCLEAR]

**CHIEF JUSTICE DY CHANDRACHUD:** All right. Yes, Mr. Dwivedi.

**RAKESH DWIVEDI:** So far as, the interrelation between *Minerva Mills* and *Waman Rao*, the learned Solicitor General has made the submission which I stand by that note, and I'll drop that part of it, namely that the two orders were passed on the same day. Dissenting judgment is common.

**CHIEF JUSTICE DY CHANDRACHUD:** Two orders passed on the same day.

**RAKESH DWIVEDI:** Dissenting judgment is common and two learned judges, learned Chief Justice and Justice Bhagavati are common to the Bench. They take note of the observations made in the judgments. So both judgments have to be read together and in view of that, the unamended 31C should be considered as alive and operated. Now, let me assume My Lord, that in *Waman Rao's* case, since they were dealing with an enactment which is pre *Kesavananda Bharati* and therefore, they were not really alive to this question, I'm assuming that therefore, these two judgments don't conclude and we have to see then the effect of the declaration in *Minerva Mills*. I will not read para 75, where Lordships have seen what is declared null and void and beyond, Article 368 is Section 4. Which, for convenience, I've extracted at page 5 of this second note, 2N.

**CHIEF JUSTICE DY CHANDRACHUD:** N?

**RAKESH DWIVEDI:** N for Nagpur. My first submission is, please draw a distinction between a declaration which says that the amendment is void. That is, the substituted provision is void. And a declaration which says that the provision which is substituting is void. I hope I'm clear, My Lord. The substituted provision is void. And the other is that Section 4, which is trying to substitute itself, is void.

**JUSTICE B.V. NAGARATHNA:** Aren't they the same? The provision which is sought to be substituted, ultimately, it becomes the substituted provision.

**RAKESH DWIVEDI:** That's the effect of Section 4. But Section 4 as a whole has been declared to be void beyond Article 368.

1 **JUSTICE RAJESH BINDAL:** Examination was only to the amended provision?

2

3 **JUSTICE B.V. NAGARATHNA:** Amended, whether it has...

4

5 **RAKESH DWIVEDI:** Now look at the declaration.

6

7 **JUSTICE RAJESH BINDAL:** Final declaration, maybe. But examination was only to be  
8 amended provision...

9

10 **RAKESH DWIVEDI:** That it had to be because the Court was saying, that unamended was  
11 narrow, amended is very broad, virtually brings in all the laws which can be contemplated,  
12 barring some few, and therefore the expansion, the enlargement is void and beyond the scope.

13

14 **JUSTICE RAJESH BINDAL:** 31B also this Court says...

15

16 **RAKESH DWIVEDI:** But when? But, we have to give effect to the declaration. Reasoning to  
17 understand how they reached the conclusion. The reasoning will not decide the scope of or the  
18 effect of the declaration. For that we have to see just the declaration and the effect. Not how  
19 they reach that end. So, the endpoint is not that this expression, 'all the provisions of Part IV  
20 are struck down.' There can be two. The Court would have said...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Article 368 is really the amending power and  
23 Article 368 as interpreted contains limitations on the amending power. So the declaration,  
24 which our Court issued, was that the limitations on the amending power had been  
25 transgressed by bringing about Section 4, and therefore, it was null and void. So therefore, you  
26 are making a distinction between the substituted provision and the very process of  
27 substitution. The process of substitution was held to be *ultra vires* Article 368.

28

29 **RAKESH DWIVEDI:** The whole process has been found to be faulty beyond the constituent  
30 competence.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** So, if the process was found to be faulty, then the  
33 net consequences that it did not result in a valid exercise of constitutional power inserting it  
34 into the Constitution.

35

36 **RAKESH DWIVEDI:** I am grateful. That's precisely what I wanted to respectfully submit.  
37 That this doctrine of basic structure in *Kesavananda Bharati* was propounded as a

1 limitation on the constituent power in 368. And this limitation is unlike a limitation on the  
2 lawmaking power which is provided for in Part III or in some other Constitution provision of  
3 the Constitution. There are various provisions in the Constitution which in different contexts  
4 provide limitations. For example, 286 which was grappled in **Sundararamaiah** to which I  
5 will advert present reference. So, the consequences with regard to them is different. In 368 is  
6 a constituent power. If Your Lordships just see 368(1) itself. Your Lordships has seen that  
7 368(1) says - 'Notwithstanding anything in this Constitution, Parliament may in exercise of  
8 the constituent power amend by way of addition, variation or repeal, any provision of this  
9 Constitution in accordance with the procedure laid down in this article.' Now that procedure  
10 necessarily we have to read **Kesavananda Bharati's** dictum, which means you cannot  
11 amend the basic structure, accept the basic structure.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** It's not so much a matter of procedure as of  
14 substance also.

15

16 **RAKESH DWIVEDI:** Procedure is the special majority or ratification, in certain cases, in  
17 proviso. So this is, you cannot do this. There are certain parts of the Constitution which cannot  
18 be destroyed.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** But is there a distinction between an act being  
21 found unconstitutional? Say, it may be found unconstitutional on the ground that it is lacking  
22 in legislative competence. An Act may be found unconstitutional on the ground that it is  
23 contrary to a provision of the Fundamental Rights. Third, on the ground that it violates a  
24 substantive constitutional provision like Article 286. And fourth, that it is in violation of the  
25 constituent power. The 368 procedure is the recourse to the amending power, which has been  
26 held to be null and void here. Is there a distinction in this area that we are looking at depending  
27 on what is the ground for unconstitutional?

28

29 **RAKESH DWIVEDI:** Yes, I will advert to that My Lords. But before that, let me dwell a little  
30 more on 368. If a procedure is not followed, for example, My Lord, if it is not passed by two  
31 thirds in its project.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Or you don't have ratification, where there is  
34 ratification required.

35

36 **RAKESH DWIVEDI:** Or it requires ratification like... and you don't have the ratification,  
37 then it doesn't result in a Constitutional Amendment. It is as if it never happened, which means



1 the Constitution never stood amended. This last expression - 'thereupon the Constitution shall  
2 stand amended-.

3

4 **JUSTICE B. V. NAGARATHNA:** It says can be [UNCLEAR] time.

5

6 **RAKESH DWIVEDI:** A very crucial expression, the words...

7

8 **JUSTICE B. V. NAGARATHNA:** If it's first of all violating a constitutional provision, it  
9 cannot be brought back again.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** So, for instance, if you did not have a two-third  
12 majority and the Constitutional Amendment it fails for that reason. You can still bring in the  
13 same Constitutional Amendment.

14

15 **RAKESH DWIVEDI:** We can bring in. We can...

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17 **CHIEF JUSTICE DY CHANDRACHUD:** But if it is violative of Fundamental Right, you  
18 can't bring that again.

19

20 **RAKESH DWIVEDI:** That's the distinction between the two. But in one case it doesn't stand  
21 amended, equally in the other case it doesn't stand amended because basic structure cannot  
22 be amended. Please, therefore, this *Kesavananda's* dictum is very, very important. It has to  
23 be read into 368.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So where an amendment is found to be violative  
26 of the basic structure, is it your contention therefore, it is as if the amendment never entered  
27 into the Constitution?

28

29 **RAKESH DWIVEDI:** Never entered into the Constitution, that's what, My Lord.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So what happens if an amendment is found to be  
32 violative of Article 14 or 19? There does the amendment enter the Constitution? Or it enters  
33 the Constitution but is declared to be void?

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35 **RAKESH DWIVEDI:** No, I... just allow me to a little more breathing time to come to that.  
36 Fundamental Rights, there are cases which I'll... which my learned friends have also referred  
37 to completely out of context.

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**CHIEF JUSTICE DY CHANDRACHUD:** Justice Mathew. Nobody has cited *Ambica Mills*, Justice Mathew's judgment.

**RAKESH DWIVEDI:** I'll deal with all the cases. With great respect to my learned friend, My Lord, they don't say what he wants to say. They don't say what he wants to say. It doesn't... they were entirely, most of them are in different contexts of Article 13(1) *Balsara, Pesikaka*. All these are in 31. *Sundararamaiah* is breach of 286. They are not dealing with basic structure. It's very easy to attempt to transplant it from one soil to another soil, 368 context. But before that one has to draw a parity. All these cases, but one streak is common. All of them, without exception, say that if it is beyond the legislative competence, not 368, with respect to Seventh Schedule, they are null and void, *ab initio*, ineffective, to be ignored. To be ignored.

**JUSTICE B.V. NAGARATHNA:** Article 13(4) does not apply to a constitution amendment, where it defines law.

**RAKESH DWIVEDI:** Yes.

**JUSTICE B.V. NAGARATHNA:** It does not include the Constitution.

**RAKESH DWIVEDI:** Except since Your Lordships have in *Coelho* said that 14, 19, 21 forms the basic structure. So, it can be abridged, but not destroyed.

**CHIEF JUSTICE DY CHANDRACHUD:** Equating in other words, something which is lacking in legislative competence with something which is a violation of Article 368, the consequences were similar.

**RAKESH DWIVEDI:** I am saying...

**CHIEF JUSTICE DY CHANDRACHUD:** [UNCLEAR] never... there's no valid entry into the Constitution itself.

**RAKESH DWIVEDI:** It never entered. That's how it is to be treated. That's how the declaration in Para 75 has to be read, 'The Constitution did not stand amended in terms of the Bill.' The very Bill is knocked out. Just have a look at the procedure, My Lords, for a second.

1 **CHIEF JUSTICE DY CHANDRACHUD:** If it is violative of legislative competence, there  
2 can't be a validating act by that Legislature. If something is struck down as being lacking in  
3 legislative competence of the State Legislature, Parliament may pass a validating act, as it does  
4 in the case of tax. Maharashtra enacted a law, tax found to be unconstitutional, Parliament can  
5 enact a validating act. Can that be done in the case of a law which violates the basic structure?  
6 No. Likewise therefore, if it violates the basic structure, there's no question of a validation of  
7 the law, unless you cure the defect on the basic structure. Right?

8

9 **RAKESH DWIVEDI:** That's right.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** But therefore, both of these cases, according to  
12 you, result in nullity at that point of birth of the...

13

14 **RAKESH DWIVEDI:** Birth itself.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Or it's not born at all.

17

18 **RAKESH DWIVEDI:** Not born at all. It goes to the Bill. Please see...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** What happens if a law violates a Fundamental  
21 Right? Is that law born into the Constitution?

22

23 **RAKESH DWIVEDI:** There is a distinction between 13(1) and 13(2). In some cases and the  
24 great Jurist, eminent Jurist Mr. Seervai has tried to draw a distinction. He says that both are  
25 similar, the judgments are otherwise. He has criticized the judgments. But does the judgment  
26 stand? There is a distinction between 13(1) and (2). Because 13(1) deals with existing law.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

29

30 **JUSTICE B.V. NAGARATHNA:** Yes.

31

32 **RAKESH DWIVEDI:** So these laws, pre-Constitution laws they are made before. When  
33 made, they were valid. So they can't be knocked down from the inception. They continue by  
34 virtue of Article 372, subject to the provisions of Constitution.

35

36 **JUSTICE B.V. NAGARATHNA:** Otherwise, the Doctrine of Eclipse to a pre-Constitutional  
37 law.

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2 **RAKESH DWIVEDI:** Doctrine of Eclipse. That's right. And Mr. Seervai says - Why should  
3 not the Doctrine of Eclipse apply to 13(2) also. But that's a different debate, which this Court  
4 may have to resolve, if required. And I don't agree with the esteemed Jurist on that point. Take  
5 (2) for a second, My Lords. The procedure is somewhat different from the ordinary  
6 lawmaking- procedure.' An amendment of this Constitution may be initiated...' because Sub-  
7 Article (1) says - 'In accordance with the procedure laid down in this Article you have to amend.'  
8 The (2) says - 'An amendment of this Constitution may be initiated only by the introduction of  
9 a Bill for the purpose in either a House of the Parliament.' If I may pause here. No Bill violating  
10 Doctrine of Basic Structure can be presented at all. And when a Lordship declares it violative  
11 of basic structure, then the Bill itself goes. Where is the question of it turning into this act?  
12 There is no such thing as act procedure... As a matter of practice, it is said Constitutional  
13 Amendment Act so and so. It's actually the, and even... Let me read further. 'And when the Bill  
14 is passed in each House by majority of total Membership of that House and by a majority of  
15 not less than two-thirds of the Members of the House present in voting, it shall be presented  
16 to the President, who shall give his assent to the bill. And thereupon, the Constitution shall  
17 stand amended in accordance with the terms of the Bill.' So the terms of the Bill get  
18 incorporated. It is the Bill which is knocked out by the declaration in para 75.

19

20 **JUSTICE B.V. NAGARATHNA:** No, the Bill gets transformed into an Act after the  
21 President signs it.

22

23 **RAKESH DWIVEDI:** Your Lordships are absolutely right. But if Your Lordship declares that  
24 Bill to be violating the Doctrine of Basic Structure, then there was no Bill, which... That's right.  
25 So, to the extent Section 4 is knocked out, that part of the Bill goes.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dwivedi, may we rise today? There is some...  
28 We will continue tomorrow morning. We'll continue at 10:30 tomorrow morning. About 11:15,  
29 if you can wrap up Mr. Dwivedi, then the others can continue for another 45 minutes. If Mr.  
30 Dwivedi is taking longer, then the others can, in that sense, cut down their argument. So, that  
31 between all of you sit down. I'll be giving you one and a half hours. And then 1 hour... we take  
32 it that Mr. Andhyarujina, you'll be making the rejoinder now.

33

34 **ZAL ANDHYARUJINA:** I'll discuss it with my...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Alright.

37

1 **ZAL ANDHYARUJINA:** Obliged.

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***END OF DAY'S PROCEEDINGS***