REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO.18983/2023

BIHAR RAJYA DAFADAR CHAUKIDAR PANCHAYAT (MAGADH DIVISION) …PETITIONER

VERSUS

STATE OF BIHAR AND OTHERS …RESPONDENTS

O R D E R

1. The case run in the special leave petition[1] did not call for leave to prefer appeal being granted; hence, we had dismissed the special leave petition with a short order dated 19th March, 2025. However, immediately after such order was dictated, Mr. Gopal Sankarnarayanan, learned senior counsel who represented the petitioner had urged us to consider the desirability of penning a detailed opinion. Having regard to a couple of points raised by Mr. Sankarnarayanan, which indeed appeared to be important, we had the occasion to look into the SLP and his written notes of arguments during recess. Sometime later in the day, accepting Mr.

[1] SLP

Sankarnarayanan's request, we had informed him of our inclination to assign some reasons in support of the order of dismissal of the SLP. However, the short order having been uploaded on the same day, the detailed reasons are now provided in this opinion which is to be read with the order dated 19th March, 2025.

2. The challenge in the SLP is to a judgment and order dated 25th February, 2023 of a Division Bench of the High Court[2] dismissing an intra-court appeal[3] of the respondent no.7[4].

3. In the pre-constitutional set-up, the practice in Bihar was to appoint village chaukidars (village watchmen) for lifetime who used to work without any leave or retirement. During his illness or absence, any of his family members would assist him in performance of his duties; and when he died or became infirm, usually his family member nominated by him would take over the functions of a chaukidar, though the post was not strictly hereditary [see: ***Surendar Paswan v. State of Bihar***[5]].

4. The father of the respondent no.7, who was a chaukidar, had applied for appointment of his son, i.e., the respondent no.7, as a chaukidar in terms of the Bihar Chaukidari Cadre (Amendment) Rules, 2014[6]. However, such application was rejected since the father of the respondent no.7 had made the application after his retirement. This triggered a writ petition[7]

[2] High Court of Judicature at Patna
[3] LPA No. 508 of 2022
[4] Devmuni Paswan
[5] (2010) 6 SCC 680
[6] BCC (A) Rules
[7] CWJC No. 6471 of 2021

by the aggrieved respondent no.7, which was dismissed by the Single Judge of the High Court on 25th August, 2022. It is the said order that has been upheld by the Division Bench *vide* the impugned judgment and order.

5. The SLP is at the instance of a registered trade union. The petitioning union was not a party to the proceedings before the High Court, either before the Single Judge or the Division Bench. It claims to represent members who are in position to claim benefits flowing from the BCC (A) Rules. Proviso (a) to sub-rule (7) of Rule 5 of the BCC (A) Rules[8], introduced by way of an amendment in 2014, ordains that any person working in the cadre of chaukidar would be at liberty, a month prior to his retirement, to nominate his dependent kin for appointment in his place as chaukidar. The Division Bench proceeded to hold the offending proviso to be contrary to Articles 14 and 16 of the Constitution of India and, consequently, struck it down. As a sequitur, it was also held that the application of the respondent no.7's father for grant of benefit of employment to the respondent no.7 in accordance with Rule 5 of the BCC (A) Rules does not arise.

6. The primary contention of the petitioning union is that the offending proviso not being under challenge in the writ petition or in the appeal of the respondent no.7, the Division Bench clearly exceeded its jurisdiction in striking it down. It is the further contention of the petitioning union that the offending proviso is perfectly legal and valid; also that such an

[8] the offending proviso

order was made without even putting the members of the petitioning union on notice and, therefore, any order adversely affecting the chaukidars in service ought to be nullified being in breach of principles of natural justice. One other contention was also raised.

7. The brazen manner in which the respondent no.1[9] has derogated from Constitutional provisions to favour a handful of employees working as chaukidars, much to the detriment and prejudice of those patiently waiting for public employment, has engaged our due attention. As we proceed further, we would notice precedents declaring the law on the topic in no uncertain terms, which have been way-laid by the respondent no.1 with impunity.

8. Even as we celebrate 75 (seventy-five) years of our Constitution and take pride in governance of the country in terms thereof, still we find some of the States following archaic models of employment as if employment in public service is a hereditary right. It is for this reason that we propose to pen a few words in support of our conclusion that the Division Bench was perfectly justified in striking down the offending proviso although, admittedly, the same had not been subjected to any formal challenge.

9. The Division Bench referred to the decisions of this Court in ***Renu and Others v. District and Sessions Judge, Tis Hazari Courts, Delhi***[10], ***Bhawani Prasad Sonkar v. Union of India and others***[11], ***V.***

[9] State of Bihar
[10] (2014) 14 SCC 50
[11] (2011) 4 SCC 209

Sivamurthy v. State of Andhra Pradesh[12] and ***Ahmednagar Mahanagar Palika v. Ahmednagar Mahanagar Palika Kamgar***[13], to support its conclusion that the Constitution of India shuns appointment in public service by succession. In other words, employment should not flow as if it were heritable.

10. Two propositions in our Constitutional jurisprudence are no longer debatable. One is, there has to be equality of opportunity in matters of public employment and the other that, any law, which permits entry into public service without granting equal opportunity to all, would fall foul of Article 16 and is liable to be outlawed unless a reasonable classification, which is also valid, can be shown to exist.

11. Taking the discussion further, having read the decisions relied on by the Division Bench as well as the decisions referred to therein, law seems to have crystallised to the effect that apart from a scheme for employment on compassionate ground envisaging offer of appointment to an eligible dependant family member of an employee dying-in-harness or an employee suffering medical incapacitation, rendering him unfit to continue in service, or any scheme for public employment to a landowner, who relinquishes his right to receive compensation for acquisition of his land in lieu of an appointment, or any other scheme devised as a measure of protective discrimination, not breaching principles of reasonable classification, public employment has to be preceded by (i) an

[12] (2008) 13 SCC 730
[13] (2020) 7 SCC 171

appropriate advertisement inviting applications from eligible aspirants to offer their candidature or/and by requisitioning names of *prima facie* eligible candidates from the employment exchanges, (ii) screening the eligible aspirants by keeping aside the ineligible, (iii) conducting of a process of selection meeting the tests of fairness and transparency with a body of selectors constituted in accordance with the relevant law, (iv) making an impartial and bias-free selection upon due assessment of the *inter se* merits of the aspirants, (v) preparation of a merit list of candidates found suitable as per merit and arranging their names recognising such merit with due regard to rules of reservation, both vertical and horizontal, (vi) preparing a wait-list of candidates, if the governing rules so require and (vii) then proceeding to offer appointments from the merit list as well as from the waiting list, if the occasion to operate such waiting list does arise, giving due regard to merit - and merit alone.

12. This being the basic scheme preceding public employment in consonance with provisions which are non-discriminatory, it is incomprehensible as to how, and whatever be the reasons therefor, that the respondent no.1 could contemplate restricting appointment in a particular cadre to the descendants of only the chaukidars in service.

13. Even as we near 80 (eighty) years of independence, generating enough jobs in the public sector to absorb those eager to enter public service remains an elusive goal. While there is no dearth of eligible candidates in the country waiting in the queue, the quest for public employment is

thwarted by a lack of sufficient employment opportunities. To assume, as sought to be projected by learned counsel for the respondent no.1, that none would be interested in obtaining employment in a particular cadre (chaukidar) and that members of the general public are not interested in taking up employment as chaukidars in Naxal affected areas, is nothing but a surmise. Facts and figures have not been placed to demonstrate that prior to the introduction of the offending proviso, public advertisements were issued for appointment on vacant posts of chaukidars and what triggered the insertion of the offending proviso in the BCC(A) Rules was the inadequate number of applications received in response thereto.

14. We shall now be looking at some of the precedents having a bearing on the issue. The fairness of Mr. Sankarnarayanan in bringing to our notice two Constitution Bench decisions delivered in the second decade after the advent of the Constitution having a material bearing on the point in issue, apart from other decisions with which we had some degree of familiarity, is acknowledged.

15. In ***Gazula Dasaratha Rama Rao v. State of Andhra Pradesh***[14]*,* a Constitution Bench of this Court was urged in a petition under Article 32 of the Constitution of India to examine the validity of Section 6(1) of the Madras Hereditary Village Offices Act, 1895 which required the Collector to make appointments from amongst those whose families had previously held the office. The post in question was that of Village Munsif.

[14] AIR 1961 SC 564

The writ petition ultimately succeeded and the observations relevant for the present purpose are found in paragraphs 9, 10, 15 and 16 of the decision, which read as follows:

> "**9.** Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds — religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16, clause (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State; and clause (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. It would thus appear that Article 14 guarantees the *general* right of equality; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment to any office under the State. It is also worthy of note that Article 15 does not mention 'descent' as one of the prohibited grounds of discrimination, whereas Article 16 does. We do not see any reason why the full ambit of the fundamental right guaranteed by Article 16 in the matter of employment or appointment to any office under the State should be cut down by a reference to the provisions in Part XIV of the Constitution which relate to Services or to provisions in the earlier Constitution Acts relating to the same subject. These Service provisions do not enshrine any fundamental right of citizens; they relate to recruitment, conditions and tenure of service of persons, citizens or otherwise, appointed to a Civil Service or to posts in connection with the affairs of the Union or any State. The word 'State', be it noted, has a different connotation in Part III relating to Fundamental Rights : it includes the Government and Parliament of India, the Government and Legislature of each of the States and all local or other authorities within the territory of India, etc. Therefore, the scope and ambit of the Service provisions are to a large extent distinct and different from the scope and ambit of the fundamental right guaranteeing to all citizens an equality of opportunity in matters of public employment. The preamble to the Constitution states that one of its objects is to secure to all citizens equality of status and opportunity; Article 16 gives equality of opportunity in matters of public employment. We think that it would be wrong in principle to cut down the amplitude of a fundamental right by reference to provisions which have an altogether different scope and purpose. Article 13 of the Constitution lays down inter alia that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar

as they are inconsistent with fundamental rights, shall to the extent of the inconsistency be void. In that Article 'law' includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, that custom must yield to a fundamental right. Our attention has also been drawn to clause (4) of Article 16 which enables the State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The argument is that this clause refers to appointments or posts and further talks of inadequate representation in the services, and the learned Advocate-General has sought to restrict the scope of clauses (1) and (2) of Article 16 by reason of the provisions in clause (4). We are not concerned in this case with the true scope and effect of clause (4) and we express no opinion with regard to it. All that we say is that the expression 'office under the State' in clauses (1) and (2) of Article 16 must be given its natural meaning.

10. We are unable, therefore, to accept the argument of the learned Advocate-General that the expression 'office under the State' in Article 16 has a restricted connotation and does not include a village office like that of the Village Munsif. …

15. Finally, we must notice one other argument advanced by the learned Advocate-General on behalf of Respondents 1 to 3. The argument is based on the distinction between Articles 15 and 16. We have said earlier that Article 15 is, in one respect, more general than Article 16 because its operation is not restricted to public employment; it operates in the entire field of State discrimination. But in another sense, with regard to the grounds of discrimination, it is perhaps less wide than Article 16, because it does not include 'descent' amongst the grounds of discrimination. The argument before us is that the provision impugned in this case must be tested in the light of Article 15 and not Article 16. It is submitted by the learned Advocate-General that the larger variety of grounds mentioned in Article 16 should lead us to the conclusion that Article 16 does not apply to offices where the law recognises a right based on descent. We consider that such an argument assumes as correct the very point which is disputed. If we assume that Article 16 does not apply, then the question itself is decided. But why should we make that assumption? If the office in question is an office under the State, then Article 16 in terms applies; therefore, the question is whether the office of Village Munsif is an office under the State. We have held that it is. It is perhaps necessary to point out here that clause (5) of Article 16 shows that the Article does not bear the restricted meaning which the learned Advocate-General has canvassed for; because an incumbent of an office in connexion with

> the affairs of any religious or denominational institution need not necessarily be a member of the Civil Service.
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> **16**. For the reasons given above, we allow the petition. The orders of Respondents 1 to 3 in respect of the appointment to the post of Village Munsif of Peravalipalem in favour of Respondent 4 are set aside and we direct that the application of the petitioner for the said office be now considered on merits by the Revenue Authorities concerned on the footing that Section 6(1) of the Act insofar as it infringes the fundamental right of the citizens of India under Article 16 of the Constitution is void. The petitioner will be entitled to his costs of the hearing in this Court."

16. Close on the heels of the above decision followed the decision in ***B.R. Shankarnarayana v. State of Mysore***[15], where another Constitution Bench of this Court had the occasion to hear appeals arising out of Article 226 petitions, filed in the High Court of Mysore, certified as fit by such court. Upon introduction of the State Reorganization Act, 1956, the State of Mysore was formed as a new State. The legislature of the new State of Mysore enacted the Mysore Village Offices Abolition Act, 1961, which was made operative from 1st February, 1963. Immediately, after the Act was assented by the President, the Governor of Mysore, in exercise of powers vested in him under the proviso to Article 309 of the Constitution and other powers enabling him in that behalf, framed rules called the Mysore General Service (Revenue Subordinate Branch) Village Accountants (Cadre and Recruitment) Rules, 1961, in order to make recruitment to the posts of village accountants. The *vires* of the 1961 Act was unsuccessfully challenged before the Mysore High Court and the challenge carried to this Court also failed. Although, the 1961 Act was

[15] AIR 1966 SC 1571

challenged as a piece of colourable legislation, this Court on an examination of the material provisions of the impugned enactment gathered its object and intendment that the same was enacted to abolish all the hereditary village offices, viz. patels, shanbhogs, etc., which were held hereditarily before the commencement of the Constitution. Relying on ***Gazula Dasaratha Rama Rao*** (supra), it was held that it is open to the Court to scrutinize the law to ascertain whether the legislature by device, purports to make a law which, though in form appears to be within its sphere, in effect and substances reaches beyond it.

17. We may, at this stage, depart from the precedents of the sixties of the past century and move ahead to trace decisions rendered by this Court over a period of time thereafter.

18. In ***Yogender Pal Singh v. Union of India***[16]*,* this Court succinctly observed that rules whereby appointment was to be made from sons/near relatives of the persons already serving in the police force is violative of Article 16 of the Constitution. The relevant observation reads thus:

> "**18.** We are of opinion that the claim made by the appellants for the relaxation of the Rules in their cases only because they happen to be the wards or children or relatives of the police officers has got to be negatived since their claim is based on '*descent*' only, and others will thereby be discriminated against as they do not happen to be the sons of police officers. Any preference shown in the matter of public employment on the grounds of descent only has to be declared as unconstitutional. The appellants have not shown that they were otherwise eligible to be recruited as Constables in the absence of the order of relaxation on which they relied. Hence they cannot succeed."

[16] (1987) 1 SCC 631

19. Arising from Bihar, there is the decision in ***Surender Paswan*** (supra). The dispute there was between the appellants (who claimed themselves to be the hereditary nominees in terms of a circular dated 20th December, 1995 issued by the respondent no.1) and the private respondents (who were appointed on the post of Chaukidar pursuant to an advertisement dated 3rd October, 1994). The appointment of the private respondents was terminated by the respondent no.1 on 21st January, 1997. The High Court, *vide* order dated 07th April, 1997, quashed the order dated 21st January, 1997 as illegal and directed the Divisional Commissioner to ascertain whether there was any irregularity in the appointment of the private respondents and, if there were none, the claim of the appellants was to be considered on merits and not in accordance with the circular dated 20th December, 1995. It is imperative to note that the order of the High Court attained finality as it was never challenged. Thereafter, the Divisional Commissioner found irregularities in the appointment of the private respondents and directed the District Collector to consider the individual claim of the appellants. This order was set aside by the High Court on the ground that the earlier order of the High Court dated 07th April, 1997 was not followed in letter and spirit and directed the Divisional Commissioner to take steps and pass appropriate orders. The Divisional Commissioner relegated the matter to the Collector for making fresh appointments, who in turn, offered appointment to the appellants. Appellants' appointments were thereafter challenged by private respondents in a writ petition which was yet again disposed of with the

direction to decide the issue strictly in terms of the order of the High Court dated 07th April, 1997. Challenge to this order was unsuccessfully carried through a Letter Patents Appeal, which was impugned before this Court. This Court while deprecating hereditary appointments, did not feel the need to go into the question of constitutionality of the rules as the original order of the High Court dated 07th April, 1997 directing, *inter alia*, appointment strictly on the basis of merit, was never challenged. In view of the order dated 07th April, 1997 having attained finality, it was held that the appellants cannot claim any right to be appointed as legal heirs/nominees of the erstwhile chaukidars; therefore, the question of either examining the validity of the Circular dated 20th December, 1995 or considering whether the appointment of the appellants was in terms of the said circular, does not arise. Hence, this Court, directed fresh selection as per the Bihar Chowkidar Gradation (sic, Cadre) Rules, 2006.

20. ***Surender Paswan*** (supra) too, therefore, did not approve of appointments on the ground of descent.

21. We may now refer to the decision of the Punjab and Haryana High Court in ***Kala Singh v. Union of India***[17] and two decisions of this Court rendered in the recent past in ***Manjit v. Union of India***[18] and in ***Chief Personnel Officer, Southern Railways v. A. Nishanth George***[19] on an identical issue, which arose out of a scheme for employment introduced by the Indian Railways.

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[17] 2016 SCC OnLine P&H 19387
[18] (2021) 14 SCC 48
[19] (2022) 11 SCC 678

22. The Union Ministry of Railways introduced a scheme called the "Liberalised Active Retirement Scheme for Guaranteed Employment for Safety Staff"[20]. It allowed drivers and gangmen aged between 50 and 57 years to voluntarily retire after completing 33 years of service (later reduced to 20 years). After retirement, a "suitable ward" of the retired employee would be considered for employment.

23. The Division Bench in ***Kala Singh*** (supra) was seized of a writ petition concerning an employment dispute related to the LARSGESS but where the LARSGESS was not under challenge. Speaking for the Division Bench, Hon'ble Surya Kant, J. (as His Lordship then was) observed that the scheme, *prima facie*, does not stand to the test of Articles 14 and 16 of the Constitution and is a device evolved by the Railways to make back-door entries in public employment and brazenly militates against equality in public employment. While dismissing the writ petition and directing the Railways to stop making any appointment, the Division Bench also directed that the Railways should revisit the same keeping in view the principles of equal opportunity and elimination of monopoly in holding public employment. An application seeking recall of the order of the Division Bench was dismissed. The order of the Division Bench having been challenged before this Court, a coordinate Bench declined to interfere. In view of the observations made by the High Court, the Railway Board terminated the scheme.

[20] LARSGESS

24. In ***Manjit*** (supra), the jurisdiction of this Court under Article 32 of the Constitution of India was invoked by the petitioners therein seeking mandamus for their appointment in terms of the LARSGESS. Dismissing the writ petition, Hon'ble Dr. D.Y. Chandrachud J. (as His Lordship then was), speaking for a three-Judge Bench, observed:

> "**6**. The reliefs which have been sought in the present case, as already noted earlier, are for a writ of mandamus to the Union of India to appoint the petitioners in their respective cadres. A conscious decision has been taken by the Union of India to terminate the Scheme. This has been noticed in the order of this Court dated 6-3-2019 [Union of India v. Kala Singh, 2019 SCC OnLine SC 1965], which has been extracted above. While taking this decision on 5-3-2019, the Union of India had stated that where wards had completed all formalities prior to 27-10-2017 (the date of termination of the Scheme) and were found fit, since the matter was pending consideration before this Court, further instructions would be issued in accordance with the directions of this Court. Noticing the above decision, this Court, in its order dated 6-3-2019 [Union of India v. Kala Singh, 2019 SCC OnLine SC 1965], specifically observed that since the Scheme stands terminated and is no longer in existence, nothing further need be done in the matter.
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> **7.** The Scheme provided for an avenue of a back door entry into the service of the Railways. This would be fundamentally at odds with Article 16 of the Constitution. The Union Government has with justification discontinued the scheme. The petitioners can claim neither a vested right nor a legitimate expectation under such a Scheme. All claims based on the Scheme must now be closed.
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> **8.** In view of the above factual background, we are not inclined to entertain the petition under Article 32. The grant of reliefs to the petitioners would only enable them to seek a back door entry contrary to the orders of this Court. The Union of India has correctly terminated the Scheme and that decision continues to stand."
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> (emphasis supplied)

25. In ***A. Nishanth George***[21], the plea of the two respondents praying for benefit under the LARSGESS was rejected by the Railways; one of them

[21] (2022) 11 SCC 678

was found to be medically unfit, and in case of the other it was found that the application for benefit under the scheme was made by his father after he crossed the cut-off age. The respondents were unsuccessful before the Central Administrative Tribunal, but succeeded before the High Court of Judicature at Madras. This Court while setting aside the order under challenge and restoring that of the Tribunal took note of the decision in ***Manjit*** (supra) and ruled that the decision of the Union Government to discontinue LARSGESS was justified and, thus, the respondents were not entitled to any benefit.

26. It would, therefore, appear from the above that this Court has consistently deprecated the practice of appointment in public service as if public offices are heritable and has also upheld a law which abolished village officers being appointed on hereditary basis. Importantly, the observation made in ***B.R. Shankarnarayana*** (supra) regarding the extent of the powers of a court to put a law to scrutiny which, in form, appears to be within the power of the legislature but, in substance, exceeds its reach has to be borne in mind while deciding whether the Division Bench could have struck down the offending proviso.

27. It is indeed surprising that despite the aforesaid precedents of the sixties of the past century declaring the law authoritatively and the decision in ***Surender Paswan*** (supra), which emerged from Bihar, as late as in 2014, the respondent no.1 again sought to make appointment on the post of chaukidar a heritable right in favour of the dependent kin of the chaukidar in service. The offending proviso being in the teeth of the

precedents noted above, the same was rightly struck down by the Division Bench and the impugned judgment and order is unexceptionable on this score.

28. The next contention that the offending proviso was not under challenge in the writ petition and, therefore, the Division Bench ought not to have struck it down is liable to be rejected for the reason that follows.

29. Several decisions have been cited in support of the aforesaid contention. We need not refer to them individually.

30. Law is well settled that a law, be it a primary legislation or a subordinate legislation (rules, regulations or orders made under the authority of a primary legislation), cannot be struck down by a court unless there is a direct challenge to such legislation. It is also a well-established principle of Constitutional Law that constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case and where it is found necessary to decide them for a proper decision of the case.

31. However, the common thread that runs through all these precedents laying down such law is that the party aggrieved in each case, seeking relief from the court, omitted to lay a challenge to the law and the said omission impeded the grant of relief to such party.

32. The situation here is completely different. The respondent no.7 was seeking relief from the High Court relying on the offending proviso. In a case where the party aggrieved seeks enforcement of a provision of a rule, which is seemingly unconstitutional, would he raise the plea of its

unconstitutionality? It would be imprudent for him to do so and hence, the answer cannot but be in the negative. While considering the plea of the respondent no.7, the Division Bench found the offending proviso to be so obtrusively unconstitutional that notwithstanding absence of a specific challenge thereto, it proceeded to declare the same as void. Although the Division Bench had no occasion to refer to the decisions that we have referred to above, nothing much turns on it. The Division Bench must be presumed to be aware of the law on the subject that appointment cannot be claimed as a hereditary right and, thus, without even a challenge being laid to the offending proviso thought of striking it down. We do not see any illegality in such an approach.

33. However, a caution needs to be sounded. While not suggesting for a moment that the course of action which the Division Bench adopted in this case can routinely be adopted, we see no reason as to why the power to *suo motu* declare a subordinate legislation invalid, on the ground of its being manifestly contrary to a Fundamental Right read with binding precedents in terms of Article 141, should not be conceded to be within the vast reserve of powers of the Constitutional Courts. Though exercise of powers, *suo motu*, in an appropriate case in exercise of jurisdiction under Article 226 of the Constitution cannot be doubted, it is indubitable that such power has to be exercised sparingly and with due care, caution and circumspection. We are minded and do hold that, a writ court, when it finds its conscience to be pricked in a rare and very exceptional case by the patent unconstitutionality of a subordinate legislation connected

with the issue it is seized of, may, upon grant of full opportunity to the State to defend the subordinate legislation and after hearing it, grant a declaration as to unconstitutionality and/or invalidity of such legislation. After all, as the sentinel on the *qui vive*, it is not only the duty of the writ courts in the country to enforce Fundamental Rights of individuals, who approach them, but it is equally the duty of the writ courts to guard against breach of Fundamental Rights of others by the three organs of the State. This power is a plenary power resident in all the Constitutional Courts. Should, in a given case, it be found that there has been an egregious violation of a Fundamental Right as a result of operation of a subordinate legislation and the issue is concluded by a binding decision of this Court, we consider it the duty of the writ courts to deliver justice by declaring the subordinate legislation void to safeguard rights of others who might not still have been affected thereby. We reiterate, it can only be done rarely and in cases which stand out from the ordinary.

34. Consciously, we have deliberately kept primary legislation out of the sweep of such power firstly, in deference to legislative actions, which are presumed to be constitutional, secondly, because of the position it holds in the hierarchy of laws, and thirdly, because we know of no decision of this Court where a primary legislation was outlawed without a formal challenge being laid or a decision of a writ court striking down a primary legislation not under challenge being upheld.

35. It is not that a presumption of constitutionality is not to be drawn *qua* subordinate legislation; but, when a challenge to the constitutionality of

a subordinate legislation is examined, like a rule framed not in exercise of conferment of power by a statute but in terms of the proviso to Article 309 of the Constitution (as in the present case), it is open to the court to apply a more nuanced approach. After all, a subordinate legislation is seen as removed from the democratic process that is closely knit with primary legislation and hence, a more rigorous scrutiny in appropriate cases may not be inapt. The level of presumption may indeed vary, depending on factors such as (i) the nature of the subordinate legislation; (ii) the extent it is found to be in derogation either of the Constitution or the parent legislation which is its source; (iii) the exigencies and the manner in which the subordinate legislation is brought into force; and (iv) the potential impact on individual rights as well as public interest.

36. We are more than certain that should the State, in such a case of declaration of a subordinate legislation as void without a direct challenge being laid, consider itself aggrieved, it would surely approach the superior court to have such declaration annulled. Interestingly, in the present case, it is not the State but the beneficiaries of the offending proviso who seek annulment of the declaration made by the Division Bench, giving us good reason to believe that the respondent no. 1 is not aggrieved. In the absence of a challenge from the respondent no. 1 and its acceptance of the impugned judgment and order, the members of the petitioning union who are mere beneficiaries do not have a better claim.

37. Having given the said contention of Mr. Sankarnarayanan the consideration it deserves, we are of the view that the Division Bench after

hearing the learned counsel for the respondent no.1 as well as on consideration of the wealth of authorities that it relied on to strike down the offending proviso arrived at a correct conclusion that the same was void and its exercise of powers to quash it cannot be a subject of assail on the ground of it being beyond the jurisdiction of the High Court.

38. The other contention of Mr. Sankarnarayanan is that there was a different Bench which had been given the assignment to hear petitions challenging *vires* of any legislation and, therefore, the decision of the Division Bench is in the teeth of the decision of this Court in ***State of Rajasthan v. Prakash Chand***[22].

39. The contention, though attractive at first blush, makes no impression. The ratio of the decision in ***Prakash Chand*** (supra) will have no application in a case of the present nature. The Division Bench, which passed the impugned order, did have the authority to hear the intra-court appeal. The subject matter out of which the challenge emerged was covered by the roster set by the Chief Justice. It was not a case where the Division Bench heard a petition where the *vires* of a law was under challenge at the instance of a suitor. Instead, the Division Bench exercised its inherent powers upon *suo motu* taking up the point of *vires* for consideration and decision. As has been held in ***Indian Bank v. Satyam Fibres (India) (P) Ltd.***[23], which has been affirmed by a Bench of three Judges in ***State (NCT of Delhi) v. K.L. Rathi Steels Ltd.***[24],

[22] (1998) 1 SCC 1
[23] (1996) 5 SCC 550
[24] (2024) 7 SCC 315

inherent powers are powers which are resident in all courts, especially of superior jurisdiction and though these powers do not spring from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour, such power is necessary for the orderly administration of the justice delivery system by the courts. In addition, we hold that inherent power can also be exercised to do what is just keeping in mind what the justice of the case before the court demands.

40. Judged on the anvil of the said decisions, exercise of the inherent powers of a court in a given case over which it has jurisdiction cannot, therefore, be seen as limited by the roster set by the Chief Justice of the High Court.

41. The final contention of the members of the petitioning union being deprived of an opportunity of hearing before the High Court has also been urged to be rejected. Although, it is true that such members did not have any audience before the High Court, we have given the fullest opportunity to Mr. Sankarnarayanan to argue the case of the petitioning union.

42. While it is true that a dependent kin of an employee cannot be favoured with a public employment by his employer merely on the ground that the employee seeks to retire voluntarily before attaining the age of superannuation, it is equally true that the dependant kin, if he is otherwise eligible for appointment and on competing with other aspirants has achieved the requisite standard, figures high up in the merit list and

there are sufficient vacancies, he would seem to acquire a right to be considered for selection and consequent appointment; however, the fact that his father is/was an existing/a former employee of the same employer should make no difference while considering the candidature purely based on merit.

43. That is, however, not the case here. No right, far less any enforceable right of the members, has been infringed by reason of the impugned judgment and order. For reasons assigned above, since the offending proviso does not conform to Article 16 of the Constitution, the plinth of the petitioning union's attack to the impugned judgment and order crumbles. Therefore, even if the petitioning union did not have any audience before the High Court, it matters less since its members' grievance has duly been considered by us.

44. We are, thus, of the considered opinion that the impugned order of the Division Bench does not warrant any interference.

.....J.
(DIPANKAR DATTA)

.....J.
(MANMOHAN)

NEW DELHI.
APRIL 02, 2025.