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Table of cases cited

[The first page number refers to case in which cited
and the second page where cited]

A. G. Kazi v. C. V. Jethwani, AIR 1967 Bom 235, 240, <i>referred to</i>	..	..	248, 331
A. K. Gopalan v. State of Madras, 1950 SCR 88, <i>relied on</i>	..	..	248, 278
	<i>relied on</i>	..	248, 391
	<i>referred to</i>	..	248, 323
	<i>referred to</i>	..	248, 324
	<i>referred to</i>	..	248, 331
	<i>referred to</i>	..	248, 358
A. K. Kraipak v. Union of India, (1969) 2 SCC 262, <i>followed</i>	..	..	248, 287
	<i>followed</i>	..	405, 433
A. L. S. P. P. L. Subramaniam Chettiar v. Muttuswami Goundan, AIR 1941 FC 47, <i>referred to</i>	..	..	248, 377
Additional District Magistrate v. S. S. Shukla, (1976) 2 SCC 521, <i>referred to</i>	..	..	18, 20
	<i>explained</i>	..	248, 391
	<i>referred to</i>	..	248, 374
Ajantha Transports (P) Ltd. v. T. V. K. Transports, (1975) 1 SCC 55, <i>referred to</i>	..	..	171, 172
Ajit Kumar Patil v. State of W. B., 1963 Supp 1 SCR 953, 965-966, <i>followed</i>	..	..	173, 176
Alembic Chemical Works Co. Ltd. v. Workmen, (1961) 3 SCR 297, <i>relied on</i>	..	..	480, 482
Alisher v. State of U. P., (1974) 4 SCC 254, <i>followed</i>	..	..	588, 595
All India Banks Employees' Association v. National Industrial Tribunal, (1962) 3 SCR 269, <i>followed</i>	..	..	310, 327
	<i>referred to</i>	..	248, 343
———— Station Masters & Assitt. Station Masters' Association v. General Manager, Central Railways, (1960) 2 SCR 311, 316, <i>referred to</i>	..	..	37, 42
— Party Hill Leaders' Conference v. W. A. Sangma, (1977) 4 SCC 161, <i>referred to</i>	..	..	405, 434
Amar Chand Aggarwala v. Shanti Bose, (1973) 4 SCC 10, <i>relied on</i>	..	..	27, 36
American Federation of Labour v. American Suth & Door Co., 335 US 538 (1949), <i>referred to</i>	..	..	405, 447
Amolakchand Chhazed v. Bhagwandas Arya, (1977) 3 SCC 566, <i>followed</i>	..	..	504, 508
Andhra Sugar Limited v. State of A. P., (1968) 1 SCR 705, <i>referred to</i>	..	..	520, 535
	<i>followed</i>	..	520, 550
Anglo-India Jute Mills Co. v. Omademull, ILR 38 CAL 127, <i>referred to</i>	..	..	69, 77
	<i>referred to</i>	..	69, 82
	<i>referred to</i>	..	69, 89
Aptheker v. Secretary of State, 12 L Ed 2d 992, <i>referred to</i>	..	..	248, 308
	<i>relied on</i>	..	248, 327
	<i>relied on</i>	..	248, 331
	<i>relied on</i>	..	248, 336
	<i>referred to</i>	..	248, 378
Associated Cement Co. Ltd. v. P. N. Sharma, (1965) 2 SCR 366, <i>followed</i>	..	..	248, 287
Attorney General v. Edison Telephone Company of London, 1880 LR 6 QBD 244, <i>considered</i>	..	..	520, 532
———— v. Huggard Assests Ltd., (1953) AC 420, <i>referred to</i>	..	..	248, 354
———— v. Sillem, (1964) 2 H & C 431, 526, <i>referred to</i>	..	..	636, 654
B. N. Nagarajan v. State of Mysore, (1966) 3 SCR 682, <i>followed</i>	..	..	37, 41
Babu Barkya Thakur v. State of Bombay, <i>referred to</i>	..	..	248, 370
Badat & Company v. East India Trading Company, AIR 1964 SC 538, <i>followed</i>	..	..	69, 95
Balmukund v. Kamlawati, (1964) 6 SCR 321, <i>followed</i>	..	..	109, 116
Balwan Singh v. Laxmi Narain, (1960) 3 SCR 91, <i>followed</i>	..	..	504, 507
Banku Behari Dey v. Harendra Nath, 15 CWN 54, <i>approved</i>	..	..	12, 16
Barium Chemicals Ltd. v. Company Law Board, 1966 Supp SCR 311, <i>followed</i>	..	..	248, 386
Bayyana Bhimayya v. Government of A. P., (1961) 3 SCR 267, <i>distinguished</i>	..	..	69, 83
	<i>distinguished</i>	..	69, 90
	<i>distinguished</i>	..	69, 92

Bengal Chemical & Pharmaceutical Works Ltd. v. Workmen, <i>referred to</i>	..	235, 238
Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788, <i>referred to</i>	..	248, 297
<i>relied on</i>	..	248, 325
<i>referred to</i>	..	248, 343
<i>referred to</i>	..	248, 364
Best v. United States, 184 Federal Reporter (2d) 131, <i>approved</i>	..	248, 303
Bhagwan Das v. State of Rajasthan, 1959 SCR 854, <i>referred to</i>	..	149, 152
Bhaiyalal Shukla v. State of M. P., 1962 Supp 2 SCR 257, <i>followed</i>	..	552, 577
Bihar School Examination Board v. Subhash Chandra Sinha, (1970) 1 SCC 648, <i>distinguished</i>	..	405, 438
Black-Clawson International Ltd. v. Papierwerke Weldhof Asechaffenburg, (1975) 1 All ER 810, 814, <i>referred to</i>	..	636, 657
Board of High School & Intermediate Education, U. P. Allahabad v. Ghan-shyam Das Gupta, 1962 Supp 3 SCR 36, <i>referred to</i>	..	405, 443
Bombay Dying & Mfg. Co. Ltd. v. State of Bombay, 1958 SCR 1122, <i>followed</i>	..	44, 48
Boucher Pierre Andre v. Superintendent, Central Jail, (1975) 1 SCC 192, <i>followed</i>	..	490, 496
British Coal Corporation v. King, 1935 AC 500, <i>considered</i>	..	520, 530
Broken Hill South Ltd. v. Commr. of Taxation (N. S. W.), (1937) 56 CLR 337, <i>considered</i>	..	520, 537
Butterworthy v. Kingsway Motors Ltd., (1954) 2 All ER 694, <i>referred to</i>	..	69, 92
C. E. B. Draper & Son Ltd. v. Edward Turner & Son Ltd., (1964) 3 All ER 148, 150, <i>referred to</i>	..	248, 354
C. I. T. v. Maharaja Pratap Singh Bahadur, (1961) 2 SCR 760, <i>distinguished</i>	..	1, 8
C. S. T. v. Ram Bilas Ram Gopal, AIR 1970 All 518, <i>approved</i>	..	520, 543
<i>approved</i>	..	520, 550
<i>approved</i>	..	520, 551
Ch. Rajik Ram v. Ch. J. S. Chauhan, (1975) 4 SCC 769, <i>followed</i>	..	504, 508
Cape Brandy Syndicate v. Inland Revenue Commissioner, (1921) 1 KB 64, <i>referred to</i>	..	636, 657
Central Talkies Ltd. v. Dwarka Prasad, (1961) 3 SCR 495, <i>followed</i>	..	27, 33
Champaklal Chimanlal Shah v. Union of India, AIR 1964 SC 1854, <i>followed</i>	..	202, 205
Chandra Nath Bagchi v. Nabadwip Chandra Dutt, AIR 1931 Cal 476, <i>considered</i>	..	513, 517
Chhitter Mal Narain Das v. C. S. T., (1970) 3 SCC 809, <i>referred to</i>	..	520, 542
<i>overruled</i>	..	520, 550
Chinta Lingam v. Govt. of India, (1970) 3 SCC 768, <i>followed</i>	..	248, 388
Chiranjit Lal Chawdhuri v. Union of India, 1950 SCR 869, 911, <i>referred to</i>	..	37, 42
<i>referred to</i>	..	248, 369
Commissioner of Commercial Taxes v. R. S. Jhaver, (1968) 1 SCR 148, 154, <i>referred to</i>	..	405, 451
Police v. Gordhandas Bhanji, AIR 1952 SC 16, <i>followed</i>	..	405, 417
Commonwealth of Australia v. Bank of New South Wales, (1950) AC 235, <i>referred to</i>	..	248, 376
Cooke v. Charles A. Vogler Company, 1901 AC 102, 107, <i>referred to</i>	..	248, 355
Cooper v. Wandsworth Board of Works, (1863) 14 CBNS 180, <i>relied on</i>	..	248, 284
<i>referred to</i>	..	248, 384
<i>referred to</i>	..	248, 402
Co-zens v. North Devon Hospital Management Committee, (1966) 2 QB 330, 343, 346, 347, <i>referred to</i>	..	405, 445
Croft v. Dunphy, 1933 AC 155, <i>considered</i>	..	520, 531
Curwen v. Milbern, (1889), 42 Chd 424, <i>relied on</i>	..	44, 48
D. F. O. v. Ram Sanehi Singh, (1971) 3 SCC 864, <i>followed</i>	..	248, 289
D. Stephens v. Nosibolla, 1951 SCR 284, <i>relied on</i>	..	27, 36
De Vertenil v. Knaggs, (1918) AC 557, <i>referred to</i>	..	248, 384
Duni Chand Rataria v. Bhuwarka Brothers Ltd., (1955) 1 SCR 1071, <i>followed</i>	..	69, 77
<i>followed</i>	..	69, 83
<i>followed</i>	..	69, 89
Durayappah v. Fernando, (1967) 2 AC 337, <i>referred to</i>	..	248, 384
<i>referred to</i>	..	405, 437
Durga Shankar Mehta v. Thakur Raghuraj Singh, (1955) 1 SCR 267, <i>followed</i>	..	405, 424
<i>followed</i>	..	405, 458
Dwarkadas Shrinivas v. Solapur Spinning & Weaving Co. Ltd., 1954 SCR 674, <i>referred to</i>	..	248, 296
E. P. Royappa v. State of T. N., (1974) 4 SCC 3, <i>referred to</i>	..	248, 283
East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109, <i>relied on</i>	..	490, 496
Edwards v. A. G. for Canada, 1930 AC 124, <i>considered</i>	..	520, 530
Emperor v. Sourindra Mohan Chuckerbutty, (1910) 37 Cal 412, <i>cited</i>	..	173, 176

Employee's State Insurance Corporation v. Ganpathia Pillai, AIR 1961 Mad 176, <i>No longer good law</i>	194, 199
HC), <i>No longer good law</i>	194, 199
Ex Parte Grossman, (1925) 267 US 87, <i>considered</i>	520, 531
Express Newspapers (P) Ltd. v. Union of India, 1959 SCR 12, <i>followed</i>	248, 296
<i>relied on</i>	248, 325
<i>referred to</i>	248, 365
Federal Steam Navigation Co. Ltd. v. Deptt. of Trade & Industry, (1974) 2 All ER 97, <i>relied on</i>	636, 653
First National Bank v. Sant Lal, AIR 1959 Punj 328, <i>approved</i>	44, 48
Fontaine v. Chastarton, (1968) 112 Solicitor General 690, <i>relied on</i>	248, 286
Gallagher v. Lynn, 1937 AC 863, <i>referred to</i>	248, 377
Ganga Ram v. Union of India, (1970) 1 SCC 37, <i>followed</i>	37, 42
Ghani v. Jones, (1970) 1 QB 693, <i>referred to</i>	248, 320
<i>considered</i>	248, 331
Girdharilal v. Jukam Singh, (1977) 3 SCC 347, <i>relied on</i>	58, 61
Girja Shankar Kashi Ram v. Gujarat Spg. & Wvg. Co. Ltd. 1962 Supp 2 SCR 890, <i>followed</i>	162, 167
Gopal Dass Sindhi v. State of Assam, AIR 1961 SC 986, 988, 989, <i>followed</i>	173, 177
Verma v. S. K. Bhardwaj, (1962) 2 SCR 678, <i>distinguished</i>	58, 63
Marwari v. Emperor, AIR 1943 Pat 245, <i>cited</i>	173, 176
Governor General in Council, v. Raleigh Investment Co. Ltd., AIR 1944 FC 51, <i>referred to</i>	248, 356
Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240, <i>applied</i>	579, 580
Gursahai Saigal v. C. I. T., (1963) 3 SCR 893, <i>considered</i>	513, 517
Hamdard Davakhana (Wakf) Lal Kuan v. Union of India, (1960) 2 SCR 671, 691, <i>referred to</i>	248, 365
Hans Raj Kehar, v. State of U. P., (1975) 1 SCC 40, <i>referred to</i>	1, 4
Hardhan Saha v. State of W. B., (1975) 3 SCC 198, <i>followed</i>	248, 280
<i>followed</i>	248, 324
<i>referred to</i>	248, 362
<i>referred to</i>	248, 393
Hari Vishnu Kamath v. Syed Ahmed Ishaque, (1955) 1 SCR 1104, <i>followed</i>	405, 424
Hari Shankar Bagla v. State of M. P., (1955) 1 SCR 380, <i>followed</i>	405, 432
Hem Raj v. Ramji Lal, (1975) 4 SCC 671, <i>followed</i>	504, 508
Howard v. Borneman, (1974) 3 WLR 660, <i>applied</i>	405, 439
Hunoomanpersand Pandey v. Musummat Babbooe, (1856) 6 MIA 393, <i>followed</i>	109, 115
I. C. Golaknath v. State of Punjab, (1967) 2 SCR 762, <i>relied on</i>	248, 397
Inamati Mallappa Bassappa v. Desai Besavraj Ayyappa, 1959 SCR 611, 616, 622, <i>relied on</i>	405, 420
Indian Steel & Wire Products Ltd. v. State of Madras, (1968) 1 SCR 479, <i>followed</i>	520, 535
<i>followed</i>	520, 550
Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, 120, <i>followed</i>	405, 418
<i>followed</i>	405, 424
<i>followed</i>	405, 432
Jagannath v. Authorised Officer, Land Reforms, (1971) 2 SCC 893, <i>referred to</i>	615, 619
Jai Ram v. State of U. P., (1976) 2 SCC 191, <i>relied on</i>	596, 604
James v. Commonwealth of Australia, 1936 AC 578, <i>considered</i>	520, 530
Jamshedji v. Hussainbhai, AIR 1920 Bom 11, <i>approved</i>	12, 16
Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed, (1976) 1 SCC 671, <i>referred to</i>	37, 44
John v. Rees, (1969) 2 All ER 274, <i>relied on</i>	248, 340
Joy Chand v. Bhutnath Khan, AIR 1930 Pat 236, <i>approved</i>	98, 100
Jute & Gunny Brokers Ltd. v. Union of India, (1961) 3 SCR 820, <i>followed</i>	69, 77
<i>followed</i>	69, 81
<i>followed</i>	69, 91
K. Balasubramania Chetty v. N. M. Sumbandamoorthy Chetty, (1975) 1 SCC 242, <i>referred to</i>	171, 173
K. Chinnaswamy Reddy v. State of A. P., (1963) 3 SCR 412, <i>relied on</i>	27, 36
K. K. Chari v. R. M. Sheshadri, (1973) 1 SCC 761, <i>relied on</i>	58, 63
Kanchada Ramamurthy Subudhi v. Gopinath Naik, (1968) 2 SCR 559, <i>referred to</i>	58, 61
Kanhaiyalal v. Mannalal, (1976) 3 SCC 646, <i>followed</i>	504, 512
Karnail Singh v. State of Punjab, (1971) 3 SCC 616, <i>relied on</i>	178, 191
Kartar Singh v. Chaman Lal, (1969) 1 SCC 760, <i>referred to</i>	58, 63

Kartar Singh v. State of Punjab, (1962) 2 SCR 395, <i>referred to</i>	248, 379
Kashmira Singh v. State of Punjab, (1977) 4 SCC 291, 92, <i>followed</i>	579, 587
Kathi Raning Rawat v. State of Saurashtra, 1952 SCR 435, <i>relied on</i>	248, 283
Kavalappara Kottarathil Kochuni v. State of Madras & Kerala, (1960) 3 SCR 887, <i>referred to</i>	248, 339
<i>referred to</i>	248, 366
Kedarnath Jute Mfg. Co. Ltd. v. Commr. Tax Officer, (1965) 3 SCR 626, <i>referred to</i>	636, 651
Kent v. Dulles, 357 US 116, <i>referred to</i>	248, 305
<i>referred to</i>	248, 378
<i>relied on</i>	248, 336
<i>distinguished</i>	248, 327
Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, <i>referred to</i>	405, 431
Keventers Karmachari Sangh v. Lt. Governor of Delhi, (1971) 2 LLJ 375, <i>referred to</i>	634, 635
Kharak Singh v. State of U. P., (1964) 1 SCR 332, <i>relied on</i>	248, 278
<i>referred to</i>	248, 367
<i>relied on</i>	248, 391
Khub Lal v. Bishambhar Sahai, AIR 1925 All 103, <i>approved</i>	10, 11
Khudiram Das v. State of W. B., (1975) 2 SCC 81, <i>followed</i>	248, 282
<i>referred to</i>	248, 374
Killick Nixon Ltd. v. Employees, (1975) 2 SCC 260, <i>referred to</i>	235, 239
Kirkness v. John Hudson & Co. Ltd., 1955 AC 696, <i>considered</i>	520, 540
Kundur Rudrappa v. Mysore Revenue Appellate Tribunal, (1975) 2 SCC 411, <i>followed</i>	1, 6
L' Union St. Jacques De Montreal v. Be Lisle, 1874 LR 6 PC 31, <i>considered</i>	520, 531
Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., 1949 AC 134, <i>considered</i>	520, 531
Lakshmi Raman Acharya v. Chandan Singh, (1977) 1 SCC 423, <i>followed</i>	504, 508
Lallubhai Devchand Shah v. State of Gujarat, (1971) 3 SCC 767, <i>relied on</i>	622, 625
Les Affruteurs Reunis Societe Anonyme v. Leopold Walford (London) Ltd., <i>applied</i>	69, 82
Logendra Nath Jha v. Polailal Biswas, 1951 SCR 676, <i>relied on</i>	27, 36
M. Narayana Rao v. G. Venkata Reddy, (1977) 1 SCC 771, <i>followed</i>	504, 509
MacNaghten's Case, (1843) 10 CI & F 200, <i>referred to</i>	17, 17
Mahanth Ram Das v. Ganga Das, (1961) 3 SCR 763, <i>followed</i>	483, 490
— Vikram Dass v. Financial Commissioner, (1977) 4 SCC 69, <i>followed</i>	483, 489
Makhan Lal Malhotra v. Union of India, (1961) 1 SCR 120, <i>followed</i>	552, 577
Mallock v. Aberdeen Corp., (1971) 1 WLR 1578, 1598, <i>applied</i>	404, 445
Mani Subrat Jain v. State of Haryana, (1977) 1 SCC 486, <i>followed</i>	37, 44
Matajog Dubey v. H. C. Bhari, (1955) 2 SCR 925, 937, <i>relied on</i>	405, 451
Minoo Maneckshaw v. Union of India, (1974) 76 Bom LR 788, <i>referred to</i>	248, 384
Modi Spinning & Weaving Mills Co. Ltd. v. C. S. T., (1965) 1 SCR 592, <i>explained & distinguished</i>	636, 664
Mohd. Mohy-ud-Din v. King Emperor, AIR 1946 FC 27, <i>referred to</i>	248, 356
— Sabir v. State of J. & K., (1972) 4 SCC 558, <i>relied on</i>	248, 282
— Usman v. State of A. P., (1971) 2 SCC 188, <i>referred to</i>	37, 42
— Yasin Shah v. Ali Akbar Khan, (1977) 2 SCC 23, <i>followed</i>	504, 512
Morgan v. Deputy Federal Commr. of Land Tax. N. S. W., (1912) 15 CLR 661, <i>considered</i>	520, 530
Morvi Mercantile Bank Ltd. v. Union of India, (1965) 3 SCR 254, <i>followed</i>	69, 77
N. B. Khare v. Election Commission of India, 1958 SCR 648, <i>followed</i>	405, 424
N. M. Naik v. Colaba Land Mills, (1960) 1 LLJ 448 (Bom HC), <i>overruled</i>	162, 169
N. P. Ponnuswami v. Returning Officer, 1952 SCR 218, <i>followed</i>	405, 418
<i>followed</i>	405, 458
Nagendra Nath Dey v. Suresh Chandra Dey, AIR 1932 PC 165, <i>considered</i>	513, 517
Nagpur Electric Light & Power Co. Ltd. v. Regional Director, E. S. I. Corporation, AIR 1967 SC 1364, <i>followed</i>	194, 198
Narain Singh v. State of Punjab, (1963) 3 SCR 678, <i>considered</i>	130, 139
Narayanswami v. Pannerselvam, (1972) 3 SCC 717, <i>followed</i>	636, 653
Narendra Kumar v. Union of India, (1960) 2 SCR 375, <i>followed</i>	248, 314
— Madivalapa Kheri v. Manikrao Patil, (1977) 4 SCC 16, <i>followed</i>	504, 508
Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744, <i>referred to</i>	248, 295
<i>referred to</i>	248, 324
Navinchandra Mafatlal v. C. I. T., (1955) 1 SCR 829, <i>considered</i>	520, 530
Nemu Ram v. State of Assam, (1975) 1 SCC 318, <i>followed</i>	17, 18

New India Sugar Mills Ltd. v. C. S. T., 1963 Supp 2 SCR 459, <i>explained</i>	..	520, 525
	<i>overruled</i>	.. 520, 550
Niboyet v. Niboyet, 48 LJP 1, 10, <i>referred to</i>	..	248, 355
Niranjan Lal Bhargava v. State of U. P., 1969 ALJ, <i>followed</i>	..	102, 105
Nishi Kant Jha v. State of Bihar, (1969) 1 SCC 347, <i>followed</i>	..	130, 139
Norode Baran Mukherjee v. State of W. B., 1976 Cri LJ 370 (Cal), <i>Impliedly overruled</i>	..	173, 174
Nunc Sivayya v. Maddu Ranganayakulu, AIR 1935 PC 67, <i>applied</i>	..	69, 83
Oil & Natural Gas Commission v. State of Bihar, (1976) 4 SCC 42, <i>followed</i>	..	520, 545
Om Prakash Jain v. Charan Das, (1975) 4 SCC 849, <i>followed</i>	..	504, 508
P. S. Menon v. State of Kerala, AIR 1970 Ker 165, <i>explained</i>	..	552, 563
Parshotam Lal Dhingra v. Union of India, 1958 SCR 828, <i>referred to</i>	..	202, 206
Pearlberg v. Varty, (1971) 1 Weekly Law Reports 728, <i>relied on</i>	..	248, 292
	<i>applied</i>	.. 405, 438
	<i>applied</i>	.. 405, 444
Pramatha Nath v. Netra Nath, ILR (1905) 32 Cal 270, <i>overruled</i>	..	12, 15
Public Prosecutor (A.P.) v. L. Ramayya, 1975 Cri LJ 144, <i>approved</i>	..	27, 34
Purtapbore Co. Ltd. v. Cane Commissioner, Bihar, (1969) 1 SCC 308, <i>referred to</i>	..	248, 383
Queen v. Jameson, (1896) 2 QB Divn 425, 430, <i>referred to</i>	..	248, 355
R. v. Gaming Board ex. P. Benaim, (1970) 2 QB 417, <i>referred to</i>	..	248, 385
R. v. Oakes, (1959) 2 All ER 350, <i>relied on</i>	..	636, 653
R. v. Rose, (1898) 18 Cox CC 717, <i>relied on</i>	..	240, 243
	<i>relied on</i>	.. 579, 583
R. C. Cooper v. Union of India, (1970) 1 SCC 248, <i>followed</i>	..	248, 297
	<i>followed</i>	.. 248, 324
	<i>referred to</i>	.. 248, 343
	<i>considered</i>	.. 248, 364
	<i>relied on</i>	.. 248, 393
R. R. Cheri v. State of U. P., 1951 SCR 312, 320, <i>cited</i>	..	173, 176
Rahim Khan v. Khurshid Ahmed, (1974) 2 SCC 660, <i>followed</i>	..	504, 508
Rajendra Prasad v. State of Bihar, (1977) 2 SCC 205, <i>distinguished</i>	..	596, 603
Ram Chandra v. State of U. P., 1966 Supp SCR 393, <i>followed</i>	..	27, 33
— Banerjee v. Union of India, (1964) 2 SCR 135, <i>referred to</i>	..	202, 206
— Gopal v. State of M. P., 1969 SLR 429, <i>relied on</i>	..	202, 204
— Chaturvedi v. State of M. P., (1969) 2 SCC 240, <i>explained</i>	..	405, 440
— Krishna Dalmia v. S. R. Tendolkar, 1959 SCR 279, <i>followed</i>	..	552, 577
— Nandan Sharma v. Maya Devi, AIR 1975 Pat 283, <i>approved</i>	..	44, 48
— Singh v. State of Delhi, 1951 SCR 451, <i>referred to</i>	..	248, 295
	<i>referred to</i>	.. 248, 364
Ramji Prasad Singh v. Ram Bilas Jha, (1977) 1 SCC 260, <i>followed</i>	..	504, 508
Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, (1965) 1 SCR 970, <i>referred to</i>	..	102, 108
Re Central Provinces & Berar Act No. 14 of 1937, AIR 1939 FC 1, <i>considered</i>	..	520, 530
Re H. K. (an infant), (1967), 2 QB 617, <i>referred to</i>	..	248, 288
	<i>referred to</i>	.. 248, 385
	<i>applied</i>	.. 405, 433
Re Kerala Education Bill, 1959 SCR 995 <i>referred to</i>	..	248, 343
Regulation & Control of Radio Communication in Canada, in Re, 1932 AC 304, <i>considered</i>	..	520, 532
Rex. v. Electricity Commissioners, (1924) 1 KB 171, <i>referred to</i>	..	248, 287
— v. Legislative Committee of the Church Assembly, (1928) 1 KB 411, <i>referred to</i>	..	248, 286
Ridge v. Baldwin, 1964 AC 40, <i>relied on</i>	..	248, 287
	<i>referred to</i>	.. 248, 385
	<i>referred to</i>	.. 405, 435
— Nominees Ltd. v. Inland Revenue Commissioners, 1962 Ch 376, <i>considered</i>	..	520, 541
Rohtas Industries Ltd. v. S. D. Agarwal, (1969) 1 SCC 325, <i>referred to</i>	..	248, 318
	<i>followed</i>	.. 248, 386
Romesh Thapper v. State of Madras, 1950 SCR 594, <i>referred to</i>	..	248, 306
Roshan Lal v. Madan Lal, (1975) 2 SCC 785, <i>referred to</i>	..	58, 61
Royal Bank of Canada v. Larue, 1928 AC 187, <i>considered</i>	..	520, 531
Russel v. Duke of Norfolk, (1949) 1 All ER 109, <i>relied on</i>	..	248, 291
	<i>referred to</i>	.. 248, 385
	<i>referred to</i>	.. 405, 436
S. P. Vasudeva v. State of Haryana, (1976) 1 SCC 236, <i>followed</i>	..	202, 204
S. S. Sadashiva Rao v. Union of India, 1965 Mys LJ 605, <i>approved</i>	..	248, 304

Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842, referred to	..	248, 296
referred to	..	248, 325
referred to	..	248, 343
referred to	..	248, 366
Salar Jung Sugar Mills Ltd. v. State of Mysore, (1972) 1 SCC 23, followed	..	520, 543
Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash, (1955) 1 SCR 243, considered	..	520, 531
Saloman v. Saloman & Co. Ltd., 1897 AC 22 referred to	..	636, 657
Sampat Singh v. State of Rajasthan, (1969) 1 SCC 367, followed	..	130, 139
Sarwan Singh v. State of Punjab, (1976) 4 SCC 369, relied on	..	596, 604
Satwant Singh Sawhney v. D. Ramarathnam, Asstt. Passport Officer, Govt. of India, (1967) 3 SCR 525, referred to	..	248, 274
referred to	..	248, 323
referred to	..	248, 331
referred to	..	248, 377
referred to	..	248, 391
Schmidt v. Secretary of State for Home Affairs, (1969) 2 Ch D 149, relied on	..	248, 285
referred to	..	248, 340
referred to	..	248, 383
referred to	..	248, 433
referred to	..	405, 444
Secretary of State v. Babu Beni Prasad, AIR 1937 Pat 444, approved	..	98, 100
Selvaraiam Case, (1976) 1 All ER 12, 19, applied	..	405, 437
Shambhu Babu Chaugule v. State of Maharashtra, (1976) 1 SCC 438, relied on	..	596, 604
Nath Sarkar v. State of W. B., (1973) 1 SCC 856, followed	..	248, 280
referred to	..	248, 324
referred to	..	248, 343
referred to	..	248, 374
referred to	..	248, 393
Shamsher Singh v. State of Punjab, (1974) 2 SCC 831, followed	..	202, 204
Shyama Saran Das Gupta v. State, Cri. Appeal 434 of 1967, decided on April 11, 1975, overruled	..	173, 176
Sitabati Debi v. State of W. B., (1967) 2 SCR 949, referred to	..	248, 370
South Carolina v. United States, (1905) 199 US 437, considered	..	520, 531
State v. Captain Jagjit Singh, (1962) 3 SCR 622, followed	..	118, 128
State of Andhra Pradesh v. Kola Sreerama Murthy, (1963) 1 SCR 184, distinguished	..	69, 77
distinguished	..	69, 91
----- Bihar v. Kameshwar Singh, 1952 SCR 889, referred to	..	248, 365
----- v. Shiva Bhikshuk Mishra, (1970) 2 SCC 871, referred to	..	202, 206
----- Bombay v. Bhanji Manji, (1955) 1 SCR 777, considered	..	248, 370
----- v. F. N. Balsara, 1951 SCR 682, considered	..	520, 531
----- Gujarat v. G. M. Shah, 1974 Cri LJ 716 (Guj HC), overruled	..	27, 33
----- v. Gujarat Revenue Tribunal, (1977) 1 SCC 46, 57, relied on	..	513, 519
----- Haryana v. Subash Chander Marwaha, (1974) 3 SCC 220, referred to	..	37, 44
----- Jammu & Kashmir v. Triloki Nath Khosa, (1974) 1 SCC, 19, followed	..	37, 42
----- Madhya Pradesh v. Ranojirao Shinde, (1968) 3 SCR 489, considered	..	248, 370
----- v. Vasant Kumar, 1972 Jab LJ 80, distinguished	..	27, 33
----- Madras v. Gannon Dunkerley & Co. (Madras) Ltd., 1959 SCR 379, explained	..	520, 530
----- v. V. G. Row, 1952 SCR 597, referred to	..	248, 344
----- Mysore v. Krishna Murthy, (1973) 3 SCC 559, distinguished	..	552, 560
----- v. P. Narasing Rao, (1968) 1 SCR 407, followed	..	37, 42
----- v. Pandurang P. Naik, (1971) 1 Mys LJ 401, overruled	..	27, 33
----- Orissa v. Binapani Dei, (1967) 2 SCR 625, followed	..	248, 287
referred to	..	248, 402
----- v. Ram Narayan Das, (1961) 1 SCR 606, referred to	..	202, 206
----- Punjab v. Sukh Raj Bahadur, AIR 1968 SC 1089, relied on	..	202, 204
----- Rajasthan v. Karam Chand Thaper and Bros. Ltd., (1969) 1 SCR 861, referred to	..	520, 542
considered	..	520, 550
----- Tamil Nadu v. Cement Distributors Pvt. Ltd., (1973) 3 SCR 342, overruled	..	520, 544
----- Uttar Pradesh v. Akbar Ali Khan, (1966) 3 SCR 821, referred to	..	202, 206
----- West Bengal v. Administrator, Howrah Municipality, (1972) 1 SCC 366, followed	..	483, 489
----- v. Anwar Ali Sarkar, 1952 SCR 284, relied on	..	248, 283
----- v. Subodh Gopal Bose, 1954 SCR 587, referred to	..	248, 369

Sudhir Chandra Bhattacharjee v. State, Cri Appeal 23 to 26 of 1961, decided on March 29, 1967, <i>overruled</i>	..	173
Sugathadasa v. Jaya Singhi, (1958) 59 NLR 457, <i>referred to</i>	..	248, 384
Supdt. of Taxes, Dhubri v. Onkarmal Nathmal Trust, (1976) 1 SCC 766, 776, <i>relied on</i>	..	513, 519
Suresh Koshy George v. University of Kerala, (1969) 1 SCR 317, <i>referred to</i>	..	405, 433
T. Cajee v. U. Jormanik Siem, (1961) 1 SCR 750, 764, <i>followed</i>	..	37, 41
Textile Labours Association v. Ahmedabad Mills Owners Association, (1970) 3 SCC 890, 891, <i>followed</i>	..	162, 168
Tingley v. Dalby, 14 NW 145, <i>relied on</i>	..	240, 243
Tomalin v. S. Pearson & Sons Ltd., (1909) 2 KB 61, <i>referred to</i>	..	579, 583
Trivedi v. Nagrashna, (1961) 1 SCR 113, 117, <i>relied on</i>	..	248, 355
U. P. Electric Power & Supply Co. v. State of U. P., (1969) 1 SCC 817, <i>followed</i>	..	513, 519
Union of India v. J. N. Sinha, (1970) 2 SCC 458, <i>referred to</i>	..	248, 386
----- v. Kohli, (1973) 3 SCC 592, <i>followed</i>	..	248, 383
United Provinces v. Atiga Begum, AIR 1941 FC 16, <i>considered</i>	..	405, 440
----- States, v. Wong Kim Ark, (1898) 169 US 649, <i>considered</i>	..	37, 42
Vasudeo Kulkarni v. Surya Kant Bhatt, (1977) 2 SCC 298, <i>distinguished</i>	..	520, 530
Virendra v. State of Punjab, 1958 SCR 308, <i>referred to</i>	..	520, 531
Wallace Brothers & Company Limited v. C. I. T., Bombay City & Bombay Suburban District, AIR 1948 PC 118, <i>considered</i>	..	596, 603
----- v. C.I.T., Bombay, Sind & Baluchistan, AIR 1945 FC 9, <i>referred to</i>	..	248, 358
Wasim Khan v. State of U. P., 1956 SCR 191, <i>followed</i>	..	405, 432
West Virginia State Board of Education v. Barnette, 391 US 624 (1943), <i>referred to</i>	..	248, 356
Wiseman v. Borneman, 1971 AC 297, <i>relied on</i>	..	588, 595
----- <i>applied</i>	..	248, 342
----- <i>applied</i>	..	248, 285
----- <i>applied</i>	..	405, 437
----- <i>applied</i>	..	405, 438
----- <i>applied</i>	..	405, 439
Zemel v. Rusk, 381 US 1, <i>referred to</i>	..	405, 445
----- <i>relied on</i>	..	248, 309
----- <i>referred to</i>	..	248, 327
-----	..	248, 378

JOURNAL SECTION

THE DILEMMA OF THE PRESIDENT AND JUSTICIABILITY OF A VERDICT ON IMPEACHMENT

by

K. K. MATHEW*

Impeachment began in England in the 14th Century when the Commons prosecuted before the Lords the powerful officers of the country. For the English people impeachment was the chief institution to make the high officers chosen by the King accountable to Parliament rather than to the Crown. The impeachment of Warren Hastings was under way when the Federal Constitution of America was being framed. The American Constitution makers adopted this institution for removal of the President, their Chief Executive, from office, on conviction by the Senate after trial for "treason, bribery or other high crimes and misdemeanours". The King in England by virtue of the fiction of perfection that he can do no wrong is not liable to impeachment. Not only that in England the Crown is immune from impeachment but that this institution which was once used to topple giants like Stafford, Clarendon, Hastings and others has so shrivelled in its sweep that it has become an instrument for ouster of small judges.

In India every President before entering upon his office shall take an oath that he will faithfully discharge the functions of the President (execute the duties of his office) of India and will to the best of his ability, preserve, protect and defend the Constitution and the Law. Article 56 of the Constitution says that the President may be removed from office by impeachment "for violation of the Constitution". Article 61 provides that when a President is to be impeached, the charge shall be preferred by either House of Parliament. When a charge has been preferred by either House of Parliament the other House shall investigate the charge or cause the charge to be investigated. The President shall have the right to appear and to be represented at such investigation. If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution was so passed.

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It is rather difficult to understand why our Constitution makers while borrowing this institution from America chose to substitute "violation of the Constitution" as the ground for his removal from the office and omitted the specific grounds, namely, conviction for treason, bribery or other high crimes and misdemeanours for his removal, especially when it is seen that the form of the oath prescribed under the two Constitutions is practically the same. The light that is thrown for this departure in the Debates in the Constituent Assembly is not very illuminating. Mr. Karimuddin proposed that the President should be liable to impeachment, not only for violation of the Constitution but also for treason, bribery or other high crimes and misdemeanours. This amendment was not accepted by Dr. Ambedkar on the ground that the phrase "violation of the Constitution" was sufficiently comprehensive and included treason, bribery and other high crimes or misdemeanours¹. In the debates Dr. Ambedkar is reported to have said that the phrase "violation of the Constitution" is a large one and may well include treason, bribery or other high crimes and misdemeanours, because treason is certainly violation of the Constitution and bribery will be violation of the Constitution because it will be a violation of the oath by the President. And with regard to other high crimes, he said different provisions have been made for trial of the President.

Assuming this to be so, what are the other acts included in the phrase "violation of the Constitution". If under Article 74, as amended by the 42nd Amendment Act, 1976, the President is bound to act in accordance with the advice of the Council of Ministers except in the narrow area specified in the concurring judgment of Krishna Iyer, J. in *Shamsher Singh's case*² there is neither reason nor logic in impeaching him if the act done in pursuance of the advice constitutes a violation of the Constitution. But then, it is also difficult to see on the language of Article 56, how he can escape impeachment if the act done by him, in pursuance of the advice, amounts to a violation of the Constitution. Does not his oath oblige him to protect and defend the Constitution? Can he defend himself in an impeachment proceeding by saying that he violated the Constitution, as he was bound by the advice of the Council of Ministers? It sounds paradoxical that by observing the provision of the Constitution, namely Article 74, he can with impunity violate its other provisions. It has been suggested by Seervai in his *Constitutional Law of India*³ that if the Council of Ministers should advise the President to take action which is admittedly contrary to the Constitution and the law or which the members are driven to admit is contrary to the Constitution and the law, the President should reject such advice and if necessary dismiss the ministry if it persists in the advice. And if he is unable to form another ministry, he can direct a dissolution of the

1. See Shiva Rao's *The Framing of India's Constitution*, p. 355.

2. *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.

3. 2nd Ed., Vol II.

House of People and order a fresh general election. But does this offer a solution to the problem? If in a fresh election the same party is returned to power and the new Council of Ministers were to tender the same advice what should the President do? The Constitution offers no solution for such a contingency. The fresh mandate of the electorate as to constitutionality of the previous advice is a matter of no moment as that has to be determined ultimately by the House impeaching the President or the Court if a judicial review of the verdict of the House is competent. Assuming that in the case of an advice which involves the doing of an act by the President which patently violates the Constitution, the Council of Ministers would concur in the suggestion of the President to reject their advice on the score that it involves violation of the Constitution, what about cases in the twilight area? What about cases where there is scope for doubt that the advice by the Council of Ministers involves the doing of an act by the President which would violate the Constitution? In such a case is it the interpretation of the Constitution by the President or that by the Council of Ministers, which is final for the purpose? To put it differently, can the President say that in his view of the relevant constitutional provision the advice tendered involves the doing of an act by him which would violate the Constitution and decline to act on the advice or can the Council of Ministers say that their advice is final even with regard to the constitutionality of the act to be done by the President in pursuance of the advice? If the Council of Ministers does not accept the interpretation of the Constitution suggested by the President or the President does not accept the interpretation suggested by the Council of Ministers, what then? The dilemma for the President if he does not accept the interpretation of the Constitution by the Council of Ministers is that he will be liable to be impeached for not following the advice of the Council of Ministers, if the interpretation of the Council of Ministers is held to be right by the House conducting the investigation into the charge. It is said that in case of doubt the President can avoid this dilemma by referring the question to the Supreme Court under Article 143. But this can ex-hypothesi be done only on the basis of advice by the Council of Ministers and if the Council of Ministers were to refuse to tender that advice, the President will not be able to get the assistance of the opinion of the Supreme Court to enable him to decide whether the advice would involve the doing of an act by him in violation of the Constitution. Quite apart from this, in the case of an Ordinance to be promulgated by the President under Article 123 time might sometimes be the very essence of the act required to be done by him on the basis of the advice. If the situation is such that the President is to act immediately on the basis of the advice of the Council of Ministers the delay inevitably involved in getting the opinion of the Supreme Court might defeat the very purpose of the Ordinance.

If the act done in pursuance of the advice of the Council of Ministers is held by the House investigating the charge to be in violation of the Constitution, will it be open to the President to plead that he was ignorant

of the unconstitutionality of the act in question? It is a hackneyed proposition that everyone is presumed to know the law, though this is a slovenly way of putting the correct proposition that ignorance of law is no excuse. It can be argued that when the charge is one of "violation of the Constitution" the question that knowledge of the unconstitutionality of the act alone would make it a misdemeanour might not be material, as "violation of the Constitution" is a phrase with a more comprehensive content than misdemeanour.

Now when does a President violate the Constitution? Does he violate it when he gives his assent to a Bill passed by both Houses of Parliament on the basis of the advice of the Council of Ministers, if it contains a provision violating the Constitution? Or, does he violate it not only when he knows of the violation but also when he is ignorant of it? What happens when he gives assent to a Bill after he has sent the Bill or a specific provision in it for reconsideration on the score that it is unconstitutional and therefore, suggesting an amendment but has been passed again by the House without the amendment suggested as envisaged in the proviso to Article 111⁴. Again, as already stated, does he become guilty of violating the Constitution when he promulgates an Ordinance on the basis of the advice by the Council of Ministers to cope with an immediate situation if it or a provision in it is in violation of the Constitution? Does he violate any canon of Constitutional propriety if he takes time to examine its constitutionality before promulgating it? The executive power which is vested in him being primarily a power to execute the laws, does a President violate the Constitution if he executes an Act assented to by a previous President before it became so, in case it contains a provision violative of the Constitution? Should he consider the question of the constitutionality of an Act and each of its provisions before executing it and refuse to execute it or any provision in it if it is violative of the Constitution? These are disturbing interrogatories.

Even if the defence that he acted on the advice of the Council of Ministers is not available to a President, it is difficult to imagine that the Constitution makers wanted to expose him to the risk of impeachment if he gives his assent to a Bill or promulgates an Ordinance or executes a law, which is unconstitutional unless at any rate he is cognizant of its invalidity

4. Article 111 reads :

Assent to Bills.—When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom :

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

on the score of violation of the Constitution. If the view is taken that in these cases the President is liable to be impeached, no President will be safe unless his view of constitutionality of the Act, Ordinance or law tallies with that of the House investigating the charge or of the Court if a judicial review of the verdict is competent.

The present writer thinks that if the President is to be impeached, the violation of the Constitution by him must amount to a misdemeanour and that to constitute a misdemeanour some sort of mens rea is a pre-requisite; historically impeachment is a trial. The debates in the Constituent Assembly make it abundantly clear that the President will be tried on the charge of violation of the Constitution, though the words used in the article are that the House will investigate the charge. This would indicate that the charge that is to be investigated or tried by the House is quasi-criminal. Is it then too much to presume that knowledge of unconstitutionality or at any rate lack of diligence in employing all means necessary to acquire the knowledge, viz. negligence, is an essential element of the charge. This is perhaps the reason why the American Constitution makers were keen to specify the heads of the charge rather than be content with a vague phrase like "violation of the Constitution". The mere violation of the Constitution, unless it amounts to a misdemeanour or any of the other offences or crimes is not a ground for impeachment of a President in America. Nor does the present writer think that a President of India would be violating any canon of constitutional propriety if he bona fide takes time to examine the constitutionality of the act required to be done by him in pursuance to the advice of the Council of Ministers. This is a logical corollary of the proposition that a President is not bound by an advice which involves doing of an act by him in violation of the Constitution.

Now though the proceedings in impeachment is judicial or quasi-judicial in character, can the High Court or the Supreme Court interfere with the verdict of the House in a writ under Article 226 or in a petition for special leave under Article 136. Perhaps the only difficulty in the way of interference by the Court is the doctrine of political question. This doctrine is an expression of the classical idea of separation of powers and it means that some determinations by the Legislature or the Executive are not reviewable in Court even though they raise constitutional questions. The status of this doctrine has always been in dispute. As Mr. Justice Chandrachud puts it "the political question is an open sesame expression that can become a password for gaining or preventing admission into forbidden fields".⁵ To say that the question is a political question would be a legal decision about the jurisdiction of the Court. This does not in the least mean that the challenged action does not involve a constitutional question, but only that the decision of the Executive or the Legislature is not open to challenge.

5. *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 at p. 646.

When the Constitution has definitely committed to another organ of Government the decision of a question the Court shall not interfere even if the decision by the other branch is wrong. What is involved here is an act of constitutional interpretation to be made and judged by the standard that should govern the interpretation of the Constitution. In other words, the doctrine amounts to a determination that a question has been reserved by the Constitution for a branch of Government other than the Judiciary. In *Baker's case*⁶ it was said that the only proper judgment that may lead to an abstention from decision is that the question has been committed by the Constitution to an agency other than the Court and whatever difficulties there might be in making the decision, what is involved is an act of constitutional interpretation judged by standards that should govern the interpretation process. After reviewing the previous decisions, the Court said "that a textually demonstrable commitment of the issue to a co-ordinate department, a lack of judicially discoverable and manageable standard for resolving it, or an impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion or the impossibility of Court's undertaking independent resolution without expressing lack of respect due to a co-ordinate branch of Government or the potentiality of multifarious pronouncement by various departments of one question" would make the Court abstain from interference.

Thus it is said that since the sole power to investigate or try is in the House, there is a textually demonstrable commitment to a co-ordinate department and that any interference by a Court would be lack of respect to the co-ordinate branch and so the verdict of the House in an impeachment cannot be reviewed by the Court. A somewhat different view of the question has been taken by certain writers who say that although sometimes the determination of an issue that a matter is not within the jurisdiction of the Court is a matter of constitutional interpretation, yet often times the determination that an issue is not justiciable because it is a political question is rather an exercise in prudential discretion. According to this view the political question doctrine resists being domesticated under any simple rubric. They would say that it is only by play of words that the broad discretion that the courts have exercised has turned into an act of interpretation governed by the general interpretation process. According to them there is something different in kind and not in degree, something of prudence, not of construction and not of principle in this process. In other words it is their contention that the determination that a question is a political question often turns on considerations other than purely interpretational.

Is there something about the practice of the Court in the area of political question doctrine that departs from the familiar judicial working with rules and principles which characterise the every day business of the Court? What kind of legal system we might have when a Court has a

6. *Baker v. Carr*, 369 US 186.