REPORTABLE

IN THE SUPREME COURT OF INDIA

ORIGINAL CIVIL JURISDICTION

I.A. NO.8 OF 2011

IN

WRIT PETITION (CIVIL) NO.176 OF 2009

Ram Jethmalani & Ors. … **Petitioners**

Vs.

Union of India & Ors. … **Respondents**

O R D E R

1. Writ Petition (Civil) No.176 of 2009 was filed by Shri Ram Jethmalani and five others against the Union of India, the Reserve Bank of India, the Securities Exchange Board of India, the Director, Directorate of Enforcement and the Chairman, Central Board of Direct Taxes, Department of

Revenue, Ministry of Finance, Government of India, against the purported inaction of the Government to arrange for recovery of large sums of money deposited by Indian citizens in foreign banks and, in particular, in Swiss Banks. In that context the Petitioners, *inter alia,* prayed for the following reliefs :-

> "(a) that this Hon'ble Court may be pleased to issue notice to all the Respondents calling upon them to disclose all the facts which have come to their knowledge so far pertaining to the aforementioned issues and the steps taken by them in this regard;
>
> (b) to make orders from time to time to ensure that the outcome of the investigations are not suppressed or even unduly delayed;
>
> (c) the suitable directions be issued to the Respondent No.1 to apply to the Foreign Banks, more particularly the UBS Bank for freezing the amounts in the said foreign banks, particularly, the UBS Bank which as stated above is holding, inter alia, the Khan and Tapurias' assets."

2. On 4th July, 2011, on I.A. No.1 of 2009 in the Writ Petition several directions were given. In fact, the said order was divided into three parts. The first part of the order dealt with the alleged failure of the Central

Government to recover the large sums of money kept in such foreign banks and in tax havens having strong secrecy laws with regard to deposits made by individuals. The second part dealt with the unlawful activities allegedly funded out of such deposits and accounts which were a threat to the security and integrity of India. The amounts deposited in such tax havens in respect of one Shri Hassan Ali Khan and Shri Kashinath Tapuria and his wife Chandrika Tapuria were alleged to be in billions of dollars in UBS Bank in Zurich alone. Income Tax demands were made to Shri Hassan Ali Khan for Rs.40,000 crores and a similar demand was served on the Tapurias amounting to Rs.20,580 crores. On being convinced that, in the absence of any known source of income, the large sums of money involved in the various transactions by Hassan Ali Khan and the Tapurias were the proceeds of crime, which required a thorough investigation, this Court felt the necessity of appointing a Special Investigation Team to act on behalf and at the behest of the directions of this Court. It was noted by this Court that the issues involved were complex and would require expertise and knowledge of

different departments and the coordination of efforts between various agencies and departments. It was also recorded that on behalf of the Union of India, it had been submitted that a High Level Committee had recently been formed under the initiative of the Department of Revenue in the Ministry of Finance, composed of :

(i) Secretary, Department of Revenue, as the Chairman;
(ii) Deputy Governor, Reserve Bank of India;
(iii) Director (IB);
(iv) Director, Enforcement;
(v) Director, CBI;
(vi) Chairman, CBDT;
(vii) DG, Narcotics Control Bureau;
(viii) DG, Revenue Intelligence;
(ix) Director, Financial Intelligence Unit; and
(x) JS(FT & TR-I), CBDT.

with powers to co-pt, as necessary, representatives not below the rank of Joint Secretary such as the Home Secretary, Foreign Secretary, Defence Secretary and the

Secretary, Cabinet Secretariat. It was further recorded that the Union of India had claimed that such a multi-disciplinary group and committee would enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias and would also be able to take appropriate steps to bring back the monies deposited in foreign banks. In the light of such submission made on behalf of Union of India and citing the judgments of this Court in (1) Vineet Narain Vs. Union of India [(1996) 2 SCC 199],(2) NHRC Vs. State of Gujarat [(2004) 8 SCC 610], (3) Sanjiv Kumar Vs. State of Haryana [(2005) 5 SCC 517] and (4) Centre for PIL Vs. Union of India [(2011) 1 SCC 560], this Court completed the second part of the order by directing as follows :-

> 49. In light of the above we herewith order:
>
> (i) That the High Level Committee constituted by the Union of India, comprising of (i) Secretary, Department of Revenue; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii)DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director,

Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT be forthwith appointed with immediate effect as a special Investigation Team;

(ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;

(iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent judges of this Court: (a) Hon'ble Mr. Justice B.P. Jeevan Reddy as Chairman; and (b) Hon'ble Mr. Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;

(iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal or civil proceedings of: (a) all issues relating to the matters concerning and arising from unaccounted monies of Hassan Ali Khan and the Tapurias; (b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances of the stashing of unaccounted monies in foreign bank accounts by Indians or other entities operating in India; and (c) all other matters with respect to unaccounted monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. It is clarified here that within the ambit of

responsibilities described above, also lie the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted monies out of and/or bring such monies back into the country, and use of such monies in India or abroad. The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.

(v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time;

(vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning;

(vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad.

(viii) That the Special Investigation Team also be empowered to further investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.

3. The third part of the order deals with the disclosure of various documents referred to by the Union of India in relation to the names and particulars of various bank accounts of Indian citizens in the Principality of Liechtenstein, a small landlocked sovereign nation-state in Europe, which is generally acknowledged as a tax haven.

4. The third part of the order is not of relevance at this stage, since an application, being IA No.8 of 2011, has been

filed by the Union of India in the Writ Petition, purporting to be an application under Article 142 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966, seeking modification of the aforesaid order dated 4th July, 2011.

5. Before the Application could be moved by the learned Attorney General, Mr. Anil B. Divan, learned Senior Advocate appearing for the Writ Petitioners, took a preliminary objection that the interlocutory application was not maintainable on several counts. It was firstly urged that in effect, in the guise of an application for modification, the Respondents/Applicants were wanting either a re-hearing and/or review of the order passed on 4th July, 2011, disposing of I.A.No.1 of 2009. Mr. Divan pointed out that it was the Government itself which had set up a High Level Committee consisting of senior officers of different departments to take steps for retrieving the black money which had been deposited in banks in tax havens all over the world and, in particular, in Swiss Banks and it did not,

therefore, lie in the mouth of the Government to take a different stand when the same Committee had been converted into a Special Investigation Team with two former Judges of the Supreme Court to monitor the progress of the recovery proceedings.

6. Mr. Divan also contended that the formation of a Special Investigation Team to monitor the investigation is not a new concept and has been resorted to on different occasions in order that justice is done between the parties and the rule of law is not obstructed either by the investigating agency or otherwise. Mr. Divan urged that once the matter had been decided on merits and a direction had been given for the formation of a Special Investigation Team composed of the very officers who had been appointed as members of the High Level Committee for the very same purpose, the Government is not justified in objecting to the investigation being monitored by such Committee headed by two retired Judges of the Supreme Court with impeccable credentials. Mr. Divan submitted that the contention of the Respondents in I.A.

No.8 of 2011 was as if by appointing a Special Investigation Team, the Supreme Court had taken over the executive powers of the Union. It was submitted that although a case against the accused was pending since 2007, no attempt had been made to interrogate the accused in regard to the allegations made against them.

7. Mr. Divan submitted that possibly other fora were available to the Respondents, but the present I.A. would not provide any remedy to the Respondents. Mr. Divan urged that it was on account of the complete inertia of the investigating authority that in spite of huge sums of unaccounted money deposited in tax havens abroad, little or no action was taken to proceed with the investigation or even to interrogate the persons accused of having been involved in money laundering and acting against the interests of the country and its citizens. Mr. Divan submitted that the remedy available to the Respondents lay in a review petition under the provisions of Order 47 of the

Supreme Court Rules, 1966, and not by an interlocutory application and that too in a disposed of matter.

8. Mr. Shekhar Naphade, learned Senior Advocate who appeared for the Petitioner in Writ Petition (Civil) No.136 of 2011, supported the submissions made by Mr. Anil Divan with regard to the maintainability of the Interlocutory Application No.8 of 2011 filed by the Union of India. It was contended that neither the provisions of Article 142 of the Constitution nor Order 47 Rule 6 of the Supreme Court Rules were attracted in the facts of this case, inasmuch as, the said provisions conferred power and not jurisdiction on this Court in respect of a matter which was pending before it. Mr. Naphade submitted that Article 142 very clearly vested the Supreme Court with jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any case or matter pending before it. Mr. Naphade also contended that, as had been held by this Court, in Saurav Chaudhary Vs. Union of India [(2004) 5 SCC 618], this Court could exercise its jurisdiction under Article 142

of the Constitution at the time of rendition of the judgment and not thereafter. It was further observed that once judgment had been delivered by the Court, it could not recall the same and could only exercise its power of review in case it intended to take a different view from the one rendered in the main judgment. Mr. Naphade also urged that even the provisions of Order 47 Rule 6 of the Supreme Court Rules were of no assistance to the Union of India. It was submitted that the Rules framed under Article 145(1) of the Constitution only empowered the Supreme Court to frame Rules to regulate its practice and procedure and does not take in its sweep the power to create a new jurisdiction to entertain a cause or matter.

9. Reference was also made to the decision of this Court in Raja Soap Factory & Ors. Vs. S.P. Shantharaj & Ors.[(1965) 2 SCR 800], wherein it was observed that by jurisdiction what is meant is the extent of power which is conferred upon a Court by its Constitution to try a matter or a cause. Such

power is not capable of being enlarged because an extraordinary situation requires the Court to exercise it.

10. Mr. Naphade submitted that by virtue of this application, the Union of India was seeking to review a final order passed by this Court, treating the same to be an application for recalling the order. Mr. Naphade repeated and reiterated his submissions that the application filed on behalf of the Union of India and its authorities was not maintainable and could only be dismissed.

11. Replying to the submissions made by Mr. Divan and Mr. Naphade, the learned Attorney General submitted that in earlier cases also this question had been raised and considered by this Court. Referring to the decision of a Bench of Seven Judges in the case of A.R. Antulay Vs. R.S. Nayak & Anr. [(1988) 2 SCC 602], the learned Attorney General submitted that by a majority judgment this Court held that directions, if given in violation of the principles of natural justice, if subsequently questioned in another appeal instead of by way of a Review Petition under

Article 137, the same could be set aside by another Bench of the Court *ex debito justitiae* in exercise of its inherent powers. The majority amongst the Judges held that the want of jurisdiction could be addressed solely by a superior Court and, in practice, no decision could be reviewed collaterally by any inferior Court, but the superior Court could always correct its error either by way of a petition or *ex debito justitiae.* In fact, it was also observed that in certain situations, the Supreme Court could always invoke its power of review in exercise of its inherent jurisdiction in any proceeding pending before it, without insisting on the formalities of a review application. The learned Attorney General submitted that by appointing two retired Judges of the Supreme Court, Justice B.P. Jeevan Reddy as the Chairman and Justice M.B. Shah as the Vice-Chairman, and directing that the Special Investigation Team would function under their guidance and directions, would amount to interference with the executive authority of the different officials representing different sections of the administration which would lead to a chaotic situation. The

direction given to include the Director, Research & Analysis Wing, was also improper, since the said authority functioned under strict rules of secrecy, which could be jeopardized if its Director were to be included in the Special Investigation Team.

12. The learned Attorney General submitted that, in the event there was any doubt as to whether the powers of the Supreme Court under Article 142 of the Constitution could be invoked for doing complete justice in a matter which was not pending before it, the present application could always be treated as a Review Petition under Article 137 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966. The learned Attorney General submitted that in view of the magnitude of the transactions involved and that too without any accounting of the monies used, this Court should cut across technicalities and consider the matter pragmatically. The learned Attorney General submitted that the present application may, therefore, be treated as a Review Petition under Article 137 of the Constitution read

with Order 47 Rule 6 of the Supreme Court Rules, 1966 and be proceeded with accordingly, notwithstanding the objection taken on behalf of the Petitioners in regard to the different procedure to be adopted in respect of a review application. It was also submitted that as indicated in A.R. Antulay's case (supra), the Supreme Court can grant relief in exercise of its inherent powers as the guardian of the Constitution.

13. Reference was also made by the learned Attorney General to the decision of this Court in S. Nagaraj & Ors. Vs. State of Karnataka & Anr. [(1993) Supp. (4) SCC 595], which was heard along with several other cases by a Bench of three Judges. In the said cases an order had been passed on oral mentioning which ultimately resulted in several contempt petitions being filed. Two of the Hon'ble Judges, after considering the anomalous circumstances which had resulted from the passing of the order on oral mentioning, held that justice is a virtue which transcends all barriers and neither the rules of procedure nor technicalities of law can

stand in its way. It was further observed that the order of the Court should not be prejudicial to anyone and if the Court found that the order was passed under a mistake and it would not have exercised the jurisdiction, but for the erroneous assumption which in fact did not exist, and its perpetration would result in miscarriage of justice, then it would not on any principle be precluded from rectifying the order. Mistake is accepted as a valid reason to recall an order. Their Lordships emphasized the fact that rectification of an order stems from the fundamental principles that justice is above all. It is exercised to remove the error and not for disturbing finality. In the judgment it was also observed that the Supreme Court has the inherent power to make such orders as may be necessary for the interest of justice or to prevent the abuse of process of Court. The Court is, therefore, not precluded from recalling or reviewing its own order, if it is satisfied that it is necessary to do so for the sake of justice. It was pointed out that even the learned third Judge held that while the Government was mainly responsible for the

unfortunate state of affairs that should not desist the Supreme Court from revising or reviewing the said orders which had serious consequences. The learned third Judge also observed that it is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders will have serious consequences.

14. On a careful consideration of the submissions made on behalf of the respective parties in regard to the maintainability of I.A. No.8 of 2011 filed on behalf of the Union of India, wherein, *inter alia*, a prayer has been made to modify the order dated 4th July, 2011 and to delete the directions relating to the Special Investigation Team in paragraphs 49 and 50 of the said order, it appears that the I.A. is maintainable. In view of the preliminary objection relating to the maintainability of the interlocutory application filed on behalf of the Union of India, the said

issue regarding the maintainability of I.A. No.8 of 2011 has been taken up first.

15. From the arguments advanced on behalf of the respective parties, it appears at first blush that Mr. Anil B. Divan is technically correct in submitting that since there was no matter pending before this Court, the provisions of Article 142 of the Constitution would not be attracted and that even the inherent powers of this Court preserved under Order 47 Rule 6 of the Rules framed by the Supreme Court in exercise of its powers under Article 145 of the Constitution would not be applicable. However, this Court has preserved its inherent powers to make such orders as may be necessary for the ends of justice in Order 47 Rule 6 of the Supreme Court Rules, 1966, framed under Article 145 of the Constitution. As has been held in A.R. Antulay's case (supra) and in S. Nagaraj's case (supra), such a power was not only inherent in the Supreme Court, but the Supreme Court was also entitled to and under an obligation to do justice to exercise such powers as the guardian of the Constitution.

Justice transcends all barriers and neither rules of procedure nor technicalities can stand in its way, particularly if its implementation would result in injustice. In addition to the decision rendered by this Court in A.R. Antulay's case (supra) and in S. Nagaraj's case (supra), reference may also be made to another equally important pronouncement of this Court in Vineet Narain's case (supra), wherein the concept of continuing mandamus was introduced in order to maintain the credibility of the investigation being conducted.

16. Reference may also be made to the decision of this Court in Manganese Ore (India) Ltd. Vs. Chandi Lal Saha [(1991) Supp. 2 SCC 465], wherein this Court extended the benefit of its judgment to persons who were not even in appeal before it.

17. Even if the present application was to be dismissed as being not maintainable under Article 142 of the Constitution read with Order 47 Rule 6 of the Supreme Court Rules, 1966, it would not preclude the Applicants from filing an

application for review under Article 137 of the Constitution. As the very working of the Special Investigation Team appointed under the order of 4th July, 2011, is in question, it is necessary to cut across the technical tapes sought to be invoked on behalf of the Petitioners and hold that in view of the inherent powers vested in the Supreme Court of India, preserved in Order 47 Rule 6 of the Supreme Court Rules, 1966, and having regard to the fact that the Supreme Court is the guardian of the Constitution, I.A. No.8 of 2011, even in its present form is maintainable in the facts and circumstances of the case, which include threats to the security of the country.

18. The objections raised by Mr. Anil B. Divan and supported by Mr. Shekhar Naphade, regarding the maintainability of I.A. No.8 of 2011, are, therefore, rejected and the said application may therefore be proceeded with for hearing.

.....**J.**
(ALTAMAS KABIR)

New Delhi,
Dated: 23.09.2011.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. NO.8 OF 2011

IN

WRIT PETITION (CIVIL) NO.176 OF 2009

RAM JETHMALANI & ORS. ….PETITIONERS

VERSUS

UNION OF INDIA & ORS. ….RESPONDENTS

O R D E R

1. I have had the opportunity, and the benefit of reading, in draft, the learned opinion of Hon'ble Mr. Justice Altamas Kabir. However, with all humility and with due respect, I would not be able to concur with the

view taken by my Learned Brother. My Learned Brother has rejected the preliminary objections raised by Mr. Anil Divan and Mr. Shekhar Naphade, appearing for the writ petitioners and directed the application to proceed for hearing. In my opinion, the application is not maintainable for a number of reasons.

2. The application clearly states that the order passed by this Court in I.A. No. 1 on 4th July, 2011 impinges upon the doctrine of separation of powers. The application thereafter sets out the facts leading to the filing of the writ petition invoking Article 32 of the Constitution of India. The application sets out the prayers made in the writ petition. Thereafter, it is stated that the writ petition, as originally filed, did not contain any prayer for appointment of a Special Investigation Team. The application also points out that in the counter affidavit filed on behalf of the Union of India, it had been clearly stated that the Central Government had been alive to the need to be able to retrieve information about the alleged money lying deposited in the foreign accounts and highlighting steps

taken by it in his behalf. It further points out that it was on account of such an initiative, tax haven countries, including countries like Switzerland, made solemn attempts to enter into effective tax information exchange agreements with various countries. The application proceeds to delineate the steps taken and the strategy formulated to eradicate the menace of "Black Money". It states that the Government had joined the global crusade against Black Money. It had decided to create an appropriate legislative framework by incorporating various tax evasion measures in existing Acts. Thereafter, the application gives the details of the proposed new legislation for unearthing Black Money. After enumerating all the efforts made by the Government at national and international level, it is stated that above all the Government has constituted a Committee on 27th May, 2011 under the Chairman, C.B.D.T. to examine ways to strengthen laws to stop the generation of Black Money in the country, its legal transfer abroad and its recovery. The Committee also examined various other issues which are enumerated in the application. The application further proceeds to

tabulate the efforts to create further legislative and administrative framework to obtain information about illicit money of Indian citizens already parked outside the country. Thereafter, the application sets out the efforts already made and the results thereof. On the basis of that, it is stated that the Government has achieved substantial success not only in getting information on illicit money parked outside the country but also in stopping the transfer of illicit money outside the country. Thereafter, the details are given of the illicit money detected.

3. It is stated that in the order dated 4th July, 2011, these efforts have neither been adverted to nor evaluated before rendering the finding in Paragraph 46 of the judgment.

4. The application thereafter sets out various efforts made in the matter of investigation of the case of Hasan Ali Khan and Kashinath Tapuriah. The application thereafter reproduces the directions sought in I.A. No.1 of 2009, which was filed on 8th September, 2009. Thereafter, it is submitted that even in this application, no prayer was made for

appointment of a Special Investigation Team [SIT]. It is further submitted that such a prayer ought not to have been granted on the basis of written submissions of the learned counsel for the petitioners in the absence of requisite pleadings in the writ petition or in the absence of a formal prayer. The application further proceeds to state that it is filed invoking the inherent power of this Court under Article 142(1) of the Constitution of India for doing complete justice in any case or matter pending before it.

5. In the grounds of the application, it is stated that this Court while exercising its jurisdiction would not be pleased to attain to itself, the task entrusted to the executive. It is emphatically submitted in the application that the order is without jurisdiction since the constitution of the High Level Committee is within the realm of a decision on policy matters. It is also submitted that formation of a SIT headed by two former Judges of this Court not only impinges on the policy decision of the Government but also impinges upon the doctrine of separation of powers. This,

according to the application, would be beyond the jurisdiction conferred on this Court under Article 32 of the Constitution of India, which can be exercised for the enforcement of the rights conferred by Part III and for no other purpose. It is further submitted that the judgment proceeds on admissions, concessions, submissions and acknowledgments attributed to the counsel appearing for the Union of India. It is pointed out that such concessions and admissions do not appear to have been made. On the basis of the facts pleaded, the prayer is made for modification of the order dated 4th July, 2011 and deletion of the directions relating to SIT in Paragraphs 49 and 50. Since the directions given in these paragraphs have been reproduced verbatim by His Lordship, Justice Kabir, the same are not necessary to be reproduced herein again.

6. The aforesaid facts have been stated merely to indicate that the application would not be maintainable, in its present form, as in substance, it is more in the nature of a Memorandum of Appeal. In my

opinion, the application seeks to reopen the whole matter on merits which would not be permissible in an application for modification. Therefore, in my opinion, the application deserves to be dismissed at the threshold.

7. As the submissions made by the learned counsel for the parties have been succinctly noticed by my Learned Brother Altamas Kabir, J. in His Lordship's order, the same need not be repeated herein.

8. In my opinion, an application for clarification/modification touching the merits of the matter is not maintainable. The Court can consider the matter, if at all, only upon a review application on limited grounds. In considering the application for review, the procedure laid down under Order XL of the Supreme Court Rules, 1966 read with Article 137 would have to be followed. Review of a judgment is a serious matter and is, therefore, governed by constitutional and statutory provisions. This view of mine will find support from a number of earlier

decisions of this Court. It would, at this stage, be appropriate to make a reference to some of the observations made.

9. In the case of **Ram Chandra Singh** Vs. **Savitri Devi & Ors.**[1] this Court considered the issue as to whether an application for clarification/modification would be maintainable in the face of the provisions contained in Article 137 and Order XL Rule 1 of Supreme Court Rules. Upon consideration of the entire issue, it was observed as follows:-

> *"It is now well settled that an application for clarification or modification touching the merit of the matter would not be maintainable. A Court can rehear the matter upon review of its judgment but, therefore, the procedure laid down in Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966 as also Article 137 of the Constitution are required to be complied with as review of a judgment is governed by the constitutional as well as statutory provisions.*
>
> *…… …….. " The prayer of the applicant is that apart from the corrections which are required to be made in the judgment, as noticed hereinbefore, the merit of the matter may also be considered, inter alia, with reference to the pleadings of*

[1] 2004 (12) SCC 713

> *the parties. Such a course of action, in our opinion, is not contemplated in law. If there exist errors apparent on the face of the record, an application for review would be maintainable but an application for clarification and/or modification cannot be entertained unless it is shown that the same is necessary in the interest of justice. An application which is in effect and substance an application for review cannot be entertained dehors the statutory embargo contained in Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966."*

10. I am of the considered opinion that the present application would be an abuse of the process of the Court as it seeks to camouflage an application for Review as an application for modification. In my opinion, such a course ought not to be encouraged. It would be relevant to notice the observations made by this Court in paragraph 16 of the judgment in the case of **Delhi Administration** Vs. **Gurdip Singh Uban & Ors.**[2]**.**

> *"**16.** At the outset, we have to refer to the practice of filing review applications in large numbers in undeserving cases without properly examining whether the cases strictly come within the narrow confines of Rule XL of the Supreme Court Rules. In several cases, it has become almost everyday experience that review applications are filed mechanically as a matter of routine and the grounds for review are a mere reproduction of the grounds of*

[2] 2000 (7) SCC 296

> *special leave and there is no indication as to which ground strictly falls within the narrow limits of Rule XL of the Rules. We seriously deprecate this practice. If parties file review petitions indiscriminately, the time of the Court is unnecessarily wasted, even it be in chambers where the review petitions are listed. Greater care, seriousness and restraint is needed in filing review applications."*

11. In my opinion, ten years down the line, the situation is even worst than what is depicted by the aforesaid observations. Now we are facing an almost daily practice of having to consider applications for "modification and clarification".

12. In the aforesaid judgment, this Court also considered the nature and scope of the jurisdiction to review its own order/judgment. Since the application herein has been described as an application for "modification", it would be necessary to notice the observations made by this Court in Paragraph 17 and 18 of the judgment. The observations of this Court are as under:-

> *"**17.** We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme*

Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.

Order XL Rule 3 states as follows:
"3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party...."

In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open Court. What cannot be done directly cannot be permitted

> *to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in Sone Lal v. State of U.P deprecating a similar practice.)*
>
> ***18.*** *We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers."*

13. These observations leave no manner of doubt that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. It is clearly indicated that in those circumstances the Court could either reject the application straight away or permit withdrawal with leave to file a review application to be listed initially in chambers.

14. Examined on the touch stone of the observations made above, I am of the considered opinion that the application herein though described as an application for modification is in substance more in the nature of a

Memorandum of Appeal. At best, it could be said to be in substance an Application for Review. It certainly does not lie within the very narrow limits within which this Court would entertain an application for modification.

15. In yet another case of **Zahira Habibullah Sheikh & Anr.** Vs. **State of Gujarat & Ors.**[3] this Court, faced with a similar situation, had this to say :

> *"The petition is in essence and substance seeking for a review under the guise of making an application for direction and modification apparently being fully aware of the normal procedure that such applications for review are not, unless the Court directs, listed for open hearing in Court, at the initial stage at least, before ordering notice to the other side and could be summarily rejected, if found to be of no prima facie merit. The move adopted in itself is unjustified, and could not be countenanced also either by way of review or in the form of the present application as well. The nature of relief sought, and the reasons assigned are such that even under the pretext of filing a review such an exercise cannot be undertaken, virtually for rehearing and alteration of the judgment because it is not to the liking of the party, when there is no apparent error on record whatsoever to call for even a review. The said move is clearly misconceived and nothing but sheer abuse of process, which of late is found to be on the increase, more for selfish reasons than to further or strengthen the*

[3] (2004 (5) SCC 353)

> *cause of justice. The device thus adopted, being otherwise an impermissible move by mere change in nomenclature of the applications does not change the basic nature of the petition. Wishful thinking virtually based on surmises too, at any rate is no justification to adopt such undesirable practices. If at all, it should be for weighty and substantial reasons and not to exhibit the might or weight or even the affluence of the party concerned or those who represent such parties when they happen to be public authorities and institutions.*

16. This Court approved the observations made in the case of ***Gurdip Singh Uban*** (supra) and observed that what cannot be done directly cannot be permitted to be done indirectly. The Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance a clever move for review.

17. These observations were reiterated in the case of ***A.P. SRTC & Ors.*** Vs. ***Abdul Kareem*** [4]. This Court observed that the petition was in essence and substance seeking for a review under the guise of making an application for direction and modification apparently being fully aware of the normal procedure that such applications for review are not, unless

[4] 2007 (2) SCC 466

the Court directs, listed for open hearing in Court, at the initial stage at least, before ordering notice to the other side and could be summarily rejected, if found to be of no prima facie merit. The Court further observed that such a move ought not to be countenanced. The move was clearly misconceived and nothing but sheer abuse of process, which of late is found to be on the increase, more for selfish reasons than to further or strengthen the cause of justice.

18. To be fair, it must be noticed that the learned Attorney General appearing for the Union of India had relied on a number of judgments in support of his submissions that the Court would have inherent powers to modify its own order/judgment. The primary judgment relied upon by the learned Attorney General is in the case of **S. Nagaraj & Ors.** Vs. **State of Karnataka & Anr.**[5]. I am of the considered opinion that the aforesaid judgment would be of no assistance to the submissions made by the learned Attorney General. The aforesaid judgment was rendered in the background of very peculiar facts. It would appear that this Court

[5] 1993 (Supp.4) SCC 595

had passed an order having far reaching consequences and pre-judicially affecting the rights of other groups of employees under Articles 14 and 16 of the Constitution of India. The order had permitted backdoor entry of thousands of stipendiary graduates because of the negligence of the State in putting correct facts before the Court. The Government seemed to have woken up after considerable damage had already been done and moved an application for modification/clarification of the order dated 30th October, 1991. The learned Attorney General placed strong reliance on the observations made by this Court in Paragraph 18, 19 and 36 of the judgment in support of the submission that the Court should not decline to review its orders when it is brought to the notice of the Court that it would be in the interest of justice to modify the same. In order to appreciate the submission of learned Attorney General, it would be appropriate to notice the observations made by this Court in Paragraphs 18, 19 and 36 of the judgment, which are as under:-

> ***"18.*** *Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered*

for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

19. *Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental*

mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh that an order made by the Court was final and could not be altered:

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

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

> *"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent*

> *irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."*

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

36. *There is yet another circumstance. The question is, whether this Court should enforce the 1982 Rules as*

amended in 1987. The 1987 amendments have the effect of smuggling in thousands of persons into Government service by a back-door — without complying with the requirements of Articles 14 and 16. One can understand the rules as framed in 1982, but it is extremely difficult to appreciate or understand the reasons for which the 1987 amendment was brought in. The question, to repeat, is whether this Court should extend its arm — its discretionary power under Articles 136 and 32, as the case may be, to implement such unconstitutional rules and help these persons to gain a back-door entry into Government service — that too at the highest level in group 'C' services straightaway. It is true that no one has questioned the 1987 amendments. The petitioners do not question them because they are advantageous to them; they want them to be implemented. The Government cannot and does not question them because it has itself made them. The parties who are affected namely the persons awaiting employment under the Government probably do not even know what is happening. But where an unconstitutional provision of such vast impact is brought to the notice of this Court and it is asked to enforce it, it is the constitutional duty of this Court to refuse to do so. I am, therefore, of the firm opinion that this Court should refuse to make any orders directing implementation of the rules as amended in 1987. The proper direction would be to direct the absorption of the S.Gs. in accordance with the 1982 Rules as originally framed (i.e., without reference to the 1987 amendments) and to the extent provided therein. Of course those S.Gs. who have been absorbed already into group 'C' service in accordance with the said rules will remain unaffected since disturbing them, without notice to them and in view of all the circumstances of this case, may not be advisable. All those S.Gs. who have not so far been absorbed in group 'C' service shall

> *continue in the present status, drawing Rs 960 per month. They will be entitled for absorption in group 'C' posts only in accordance with the 1982 Rules, without reference to the 1987 amendments."*

Relying on these observations, learned Attorney General, submits that the Court should regardless of any technical objections proceed to hear the present application without insisting that the applicant should seek its relief in an application for review.

19. I am of the considered opinion that the facts and circumstances highlighted in the present application would not enable the applicant to satisfy the conditions under which this Court exercised its inherent jurisdiction in the **S. Nagaraj's case** (supra). A perusal of the judgment would clearly show that the Court was anxious to "even the balance". On the one side, there were orders of the Court passed on vague and incomplete affidavit, creating rights and hopes in favour of five thousand stipendiary graduates to be absorbed as First Division Assistant, and on the other hand, there were others, the likely injustice to whom had been highlighted in the affidavit filed by the Government and in the writ

petition filed by different sections of the employees. The Court in fact emphasised the principle of finality of orders and binding nature of directions issued by the Court which could only be overridden, if there is injustice inherent in the situation (see Page 615, Para 14 e & f). A little later in the judgment, in Paragraph 16, the Court observed as follows:-

> ***"16.*** *"Mere eligibility was not sufficient unless availability of posts was also established. In absence of posts and due to equitable considerations arising in favour of other employees the practical difficulty in appointing all the five thousand stipendiary graduates as First Division Assistants appears to be insurmountable.* ***Even so we have no hesitation in saying that we would have refused to modify our order dated October 30, 1991 at the instance of the Government but the Court cannot be unjust to other employees."*** *(emphasis supplied)*

20. These observations make it abundantly clear that the Court was dealing with a particularly unsavory situation created by the Government which had led to insurmountable difficulties and possible injustice to both the stipendiary Magistrates and other employees. The Court, therefore, observed that but for this unique situation, it would have refused to modify the order dated 30th October, 1991. In Paragraph 18,

the Court makes it clear that the order was passed under a mistake. The Court would not have exercised its jurisdiction but for the erroneous assumption, which in fact did not exist. In Paragraph 36, again, it is reiterated by the Court that it would be the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice and certain of its orders were based on wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences.

21. In my opinion, in the present case, there is no question of mistaken facts, being presented by anyone to the Court. The application also fails to indicate any miscarriage of justice or injustice which would be caused to any particular class. The other authorities cited by the learned Attorney General followed the judgment in **S. Nagaraj's case** (supra) and would not advance the cause of the applicant or Union of India any further.

22. The judgment in **Gurdip Singh Uban's case** (supra) rather supports the writ petitioner as noticed in the earlier part of this order. The learned Attorney General further submitted that this Court would be fully justified in passing the orders in exercise of its inherent jurisdiction under Article 142 of the Constitution of India. It can always correct its non errors brought to its notice either by way of a review petition or *ex debito justitiae*. In support of the submission, the learned Attorney general has relied on judgment of this Court in the case of **A.R. Antulay** Vs. **R.S. Nayak & Anr.**[6]

23. In my opinion, the aforesaid judgment was also delivered in view of the peculiar circumstances of the case. The Court therein set out the circumstances in which this Court can pass the appropriate orders unhindered by technical rules. The observations made in paragraph 48, which are of relevance, are as under :

> *"**48.** According to Shri Jethmalani, the doctrine of per incuriam has no application in the same proceedings. We are unable to accept this contention. We are of the opinion*

[6] 1988 (2) SCC 602

> *that this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner. See the observations in Prem Chand Garg v. Excise Commissioner."*

24. In my opinion, the aforesaid observations would not be applicable in the facts and circumstances of the present case. The application herein is not moved by an individual, who had been deprived of his fundamental rights by an order dated 4th July, 2011. The application is filed by the Union of India challenging the order on various legal and factual issues. In **Antulay's case** (supra), one of the grounds taken was that the directions have been issued by the Court without following the principle of *audi alteram partem*. In the present case, the directions had been issued after hearing the learned counsel for the parties at length and on numerous dates. These directions, in my opinion, cannot be recalled

in an application seeking only modification of the order. At this stage, it would also not be possible to treat the present application for modification as an application for review.

25. In view of the above, with utmost respect, it would not be possible to agree with the order passed by Hon'ble Mr. Justice Altamas Kabir. In my opinion, the applicant Union of India has failed to make out a case to enable this Court to treat the modification application as application for review and proceed to hear the same in open Court. In my opinion, the present application is wholly misconceived. It is, therefore, dismissed. Union of India is, however, at liberty to take recourse to any other legal remedy that may be available to it.

……..J.
[Surinder Singh Nijjar]

New Delhi;
September 23, 2011.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. NO.8 OF 2011

IN

WRIT PETITION (CIVIL) NO.176 OF 2009

RAM JETHMALANI & ORS. **Petitioner(s)**

VERSUS

UNION OF INDIA & ORS. **Respondent(s)**

O R D E R

Since we have differed in our views regarding the maintainability of I.A. No.8 of 2011 filed in W.P. No.176 of 2009, let the matter be placed before Hon'ble the Chief Justice of India, for reference to a third Judge.

.....J.
(ALTAMAS KABIR)

.....J.
(SURINDER SINGH NIJJAR)

New Delhi;
September 23, 2011.