INTRODUCTION

In a democratic country, the liberty and welfare of an individual is of paramount importance. The various wings of the State i.e. Legislative, Executive and Judiciary have to act in consortium to achieve the welfare of the individual. The experiences of the past have taught the mankind the lesson that concentration of power in one of the functionaries leads to despotism wherein the rights of the individual can easily be trampled upon. Therefore, democracy demands the distribution of powers among the functionaries of the State with due checks and balance so that there cannot be any misuse of power.

In the contemporary era, the power has been given to the judiciary which can put a check upon the Executive and the Legislature as and when they transgress their limits. The Judiciary is considered to be sentinel on qui vive.

A valuable pronouncement from the Chief Justice Patanjali Sastri in State of Madras v. V.G. Row\(^1\) stated as “--------if , then, the courts in this country face up to such important and none too easy tasks, it is not out of any desire to tilt at legislative authority in a crusader’s spirit but in discharge of a duty plainly laid upon them by the Constitution. This is specially true as regards the fundamental rights as to which this court has been assigned the role of the sentinel on the qui vive. While the court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine........”.

In the Report of the Law Commission\(^2\), it was stated that “The Constitution in express terms requires the court to act as a supervisory body in the matter of laws alleged to encroach upon the exercise of fundamental rights. The line as to how far a law shall go in derogation of the citizen’s fundamental rights is, according to the Constitution, to be drawn by none other than the judiciary. What contributes to the stability of the State is its judiciary. A nation may afford to lose its confidence in its king or even in its Parliament, but it would be a doom’s day if it loses its confidence in its judiciary”\(^3\).

The role of the judiciary on the whole has been commendable in the protection of the fundamental rights of the citizen. Several Articles in the

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1 AIR 1951 SC 458
3 V.G. Ramchandran; The Judicial Control (1964), p.4
Constitution, i.e., Articles 13, 32,136,226 and 227 guarantee judicial review. The doctrine of judicial review destined to establish the sovereignty of the judicial power was safely launched and equipped for future conquests.\(^4\)

In this unique role, the Supreme Court has proved itself to be political jurist with the judges themselves to be political statesman. In decision of *S.S. Bola v. B.D. Sardana\(^5\)*, the Supreme Court highlighted doctrine of judicial review as an instrument for welfare of people, social progress, peace and order, as a breath of constitutionalism meant for moulding the governmental process and help to regulate social and economic structure of society.

In *Minerva Mills v. Union of India\(^6\)*, the apex Court reiterated that the judicial review power is a basic feature and cannot be taken away by the Parliament in exercise of its constituent power.

In *S. P. Sampath Kumar v. Union of India\(^7\)*, Bhagwati, C.J. observed : “Judicial review is a basic and essential feature of the Constitution and if the power of judicial review is abrogated or taken away, the Constitution will cease to be what it is”.

Its historical and philosophical approach leads to test the enactment of only legal laws based on ethical and rational thinking, which protects and maintain individual liberty and fundamental freedoms, creates social and economic harmony and has glorious role of reconnecting political imbalance and deny democratic despotism by establishing constitutional balance and justice in the society Judicial Review has thus become linking force between the individual and the social interest. Political stability and ethical considerations have often counter balanced the ultra-vires acts by the judicial decisions.\(^8\)

India has a hierarchical judicial system in which the Supreme Court of India is the apex Court. The Supreme Court is invested with the power of judicial review under Article 32 Article 32(1) guarantees the right to move the Supreme Court for the enforcement of Fundamental rights and Article 32(2) invests the Supreme Court with the power to issue directions, orders or writs for the enforcement of Fundamental rights. The scope of this Article was first discussed in *Romesh Thapar*

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\(^5\) AIR 1997 SC 3127

\(^6\) AIR 1980 SC 1789

\(^7\) AIR 1987 SC 386

\(^8\) Nilay Anjaria; "Wisdom of Supreme Court: Political Jurisprudence VIA Constitutional Adjudication, AIR (J) 2005, pp.22-25
v. The State of Madras\textsuperscript{9}, where the court stated: “The Article does not merely confer power on the apex Court as Article 226 does on the High Courts to issue certain writs for the enforcement of the rights conferred by Part III, or for any purpose as a part of its general jurisdiction. In that case, it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a “guaranteed” remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted as the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights”.

The Supreme Court has described the significance of Article 32 in the followings words in \textit{Prem Chand Garg v. Excise Commissioner, U.P.}\textsuperscript{10} (Per Gajendragadkar, J),

“The fundamental right to move this court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this court should regard itself, as the protector and guarantor of Fundamental Rights” and should declare that “it cannot, consistently with the responsibility laid upon it, refuse to entertain application seeking protection against infringements of such rights ..... In discharging the duties assigned to it, this Court has to play the role of a ‘sentinel on the qui vive’ and it must always regard it as its solemn duty to protect the said Fundamental Rights ‘Zealously and vigilantly’.\textsuperscript{11}

Under Article 32, the Supreme Court enjoys a broad discretion in the matter of framing the writs to suit the exigencies of the particular case. The Supreme Court has characterized the jurisdiction conferred on it by Article 32 as “an important and integral part of the basic structure of the Constitution”. A right without a remedy is a legal conundrum of a most grotesque kind Article 32 confers one of the ‘highly cherished rights.\textsuperscript{12}

Especially in India, the apex Court has been given wide powers under the Constitution of India. The Supreme Court is a multi-jurisdictional court and may be regarded as the most powerful apex Court in the World. The apex Court enjoys

\begin{itemize}
  \item \textsuperscript{9} AIR 1950 SC 124
  \item \textsuperscript{10} AIR 1963 SC 996 : 1963 Supp (1) SCR 885
  \item \textsuperscript{11} Ibid, at p.999
  \item \textsuperscript{12} M.P. Jain; \textit{Indian Constitutional Law}, (2004), p.1308
\end{itemize}
original jurisdiction under Article 32, where the Supreme Court acts as the guardian of the Fundamental rights. Then under Article 131, the apex Court enjoys extraordinary original jurisdiction to the exclusion of any other court.

Under Article 131, the Supreme Court has exclusive original jurisdiction in any dispute between-

(i) the centre and a state
(ii) the centre and a State on one side, and a state on the other side;
(iii) two or more states

Under Article 131, the Supreme Court is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. The Supreme Court’s jurisdiction under Article 131 is subject to two limitations, viz,

1) As to the parties;
2) As to the Subject matter

Bhagwati, J., has observed in State of Karnataka v. Union of India\(^\text{13}\) defining the scope of Article 131;

“What has, therefore, to be seen in order to determine the applicability of Article 131 is whether there is any relational legal matter involving a right, liberty, power or immunity qua the parties to the dispute. If there is, the suit would be maintainable but not otherwise”.

The Supreme Court is primarily a court of appeal and enjoys extensive appellate jurisdiction under Articles 132 to 134.

**Appellate Jurisdiction**

Under Article 132, an appeal lies to the Supreme court from any judgment, decree or final order, whether in a civil, criminal or the other proceeding, of a High Court if it certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Appeal under it lie on grant of certificate by the High Court and in case of refusal by the High Court to grant a certificate, the supreme court under clause (2) of the said Article is empowered to grant special leave to appeal. The principle underlying the Article is that the final authority to interpret the Constitution must rest with the Supreme Court.\(^\text{14}\)

\(^{13}\) AIR 1978 SC 131

\(^{14}\) B.R. Aggarwal; *Practice and Procedure of the Supreme Court of India*, (1973), pp. 67-68
In State of Jammu & Kashmir v. Ganga Singh\textsuperscript{15}, the Supreme Court has commented on Article 132 as follows:

“The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. With that object the Article is freed from other limitations imposed under Articles 133 and 134 and the right of the widest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution”.

Article 133 has provided a right of appeal to a litigant in civil proceedings from any judgment, decree or final order of the High Court. Article 133, in substance, retains the old provision of the Civil Procedure Code (sections 109 and 110) in respect of appeals to the Privy Council from High Courts in civil matters except that the value of the subject matter has been increased.\textsuperscript{16} The appeal lies to the Supreme Court if the High Court certifies that:

1) that the case involves substantial question of law of general importance; and
2) that in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

The provisions of Article 134 confer a limited criminal appellate jurisdiction on the Supreme Court. The Supreme Court hears appeals only in exceptional criminal cases where justice demands interference by the apex Court to cope with them. Appeal to Supreme Court in criminal matters lie on a certificate granted by the concerned High Court. In Baladin v. State of U.P\textsuperscript{17}, it was stated that where the Supreme Court declines to accept the certificate under Article 134 (1) (c), it may permit the appellant to apply under Article 136 in proper cases.

Under Article 134 (2), Parliament is authorized to enlarge the criminal appellate jurisdiction and as such Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, further authorizing the Supreme Court to hear appeals from a High Court in following situations:

(i) If the High Court has on appeal reversed an order of acquittal of an accused and sentenced him to imprisonment for life or for a period of not less than 10 years.

\textsuperscript{15} AIR 1960 SC 356, p. 359
\textsuperscript{16} B.R. Aggarwal; op.cit, p.79-80
\textsuperscript{17} AIR 1956 SC 181
The High Court has withdrawn from trial before itself any case from subordinate Court and has sentenced accused to imprisonment for life or for a period of not less than 10 years.\textsuperscript{18}

Further the apex Court has a very extensive appellate jurisdiction under Article 136 from any court or tribunal in the country.

**Special Leave to Appeal: The Evolution**

When the compass and variety of jurisdiction and the powers of the Supreme Court, and the extent of the territory over which it presides, are taken into consideration, the Supreme Court of India will appear to be one of the most potent judicial organs in the world today. It is a significant Constitutional Court and exerts a potent influence on the molding and shaping of the constitutional jurisprudence in India.\textsuperscript{19} The *Law Commission* has aptly described the multi-faceted role played by the Supreme Court as follows:

“It is a federal court, in the sense that is the exclusive arbiter of disputes between the Union and the States or between one State and another. It is the highest Constitutional Court of the country, not only in its capacity as the protector of fundamental rights as a court of original jurisdiction, but also in its capacity as the final court of appeal in matters involving substantial question of law as to the interpretation of the Constitution. It is a national court, in the sense that, subject to certain restrictions, appeals lie to it from the judgments of the High Court on questions pertaining to ordinary law, that is to say even where question is not one of constitutional law.”\textsuperscript{20}

The power of the Supreme Court to grant special leave to appeal, an extraordinary appellate jurisdiction under Article 136 corresponds to the power which the Judicial Committee of the Privy Council had for granting special leave to appeal in exercise of the Royal Prerogative.\textsuperscript{21}

**Role of Privy Council**

Dr. M.P. Jain rightly opined, “Almost all system of our jurisprudence and every type of judicial institution was within the umbrella of the Privy Council. Every

\textsuperscript{18} M.P. Jain; *op. cit*, p.226
\textsuperscript{19} Upendra Baxi; *The Indian Supreme Court and Politics* (1980) as quoted in M.P. Jain; *Outlines of Indian Legal History*, (2005), p.353
\textsuperscript{20} 58th Report, 13 (1974)
\textsuperscript{21} Chitaley and Rau; *AIR Commentaries – The constitution of India*; 2nd Ed. (1971), pp.175-176
kind of dispute was to be adjudicated upon by the Privy Council because its jurisdictional area covered almost one-fifth of the human population in the world.”

The Privy Council sitting in England had played important role in the development of the judicial system of India. It was the Supreme appellate authority for India from 1726 up to October 1949.

The history of the Privy Council dates back to the Normans who conquered England in 1066 A.D. A small council called the Curia Regis or the King’s Court consisting of feudal Lords was formed to advise the King in administrative and legal matter. The Curia Regis exercised Supreme Legislative, Executive and Judicial powers, subject to general feudal customs. From the Curia Regis there developed in course of time the most important institutions of English Central Government, namely, the Exchequer and the Treasury (12th Century), the courts of Common law (13th – 14th Centuries) and Chancery (14th – 15th Centuries), and the House of Lords, i.e. the King’s Council in Parliament (14th Century).

Just as the Norman ruled through the instrumentality of the Curia Regis so the Tudors split the system into two interrelated but distinct bodies, (i) an inner administrative board of the Sovereign’s advisers (to be called the Privy Council) and (ii) a body called the Court of Star Chamber with mostly the functions of judicial nature. After the abolition of the Court of Star Chamber in 1941, the council lost all powers of jurisdiction over cases arising in England, except to hear petitions and appeals from colonies and an ancient right of entertaining from the Channel Islands and the Isle of Man. This jurisdiction was exercised by a special committee which came to be called the ‘Judicial Committee’. The importance of this committee grew with the expansion of the British Empire and by the Judicial Committee Act, 1833, when it was reorganized and thus acted as the court having highest appellate jurisdiction so far appeals from the overseas British Colonies were concerned.

Section 3 of the Judicial Committee Act, 1833 reads as: “.... All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before his majesty or his majesty in council from or in respect of the determination, sentence, rule or order of any court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by his Majesty, to the said judicial

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22 M.P. Jain; Outlines of Indian Legal History,(1966), p. 442
committee of his Privy council, and such appeals, causes and matters shall be heard
by the said judicial committee....”

The jurisdiction of the Privy Council to entertain appeals from the courts in
the King’s Dominion was based on the royal prerogative of the Sovereign as the
fountain of justice. This prerogative was described long ago in *Reg. v. Bertrand*\(^{25}\), as
“ inherent Prerogative right and on all proper occasion, the duty of the Queen-in-
Council to exercise an appellate jurisdiction with a view not only to ensure, as far as
may be, the due administration of justice in the individual case but also to preserve
the due course of procedure generally”.

Initially, the judicial function of the King-in-Council or the Privy Council
was not of much significance but as the overseas colonies of the England grew and
developed from the 17th Century onwards, Privy Council’s judicial function
assumed a capital importance. It is a principle of English law that a man has no right
to appeal from the decision of a court unless the right has been specially conferred
upon him. Consequently the appeal which came before the Privy Council in those
times was entertained as a matter of grace. The Privy Council might refuse to hear
any given petition. In the course of the eighteenth century, however, as the British
Empire expanded and British courts were set up in various parts of the World, such
as Canada and India, it became usual to make provision in the charters or enactments
establishing them for an appeal from their decisions to his Majesty’s Privy Council
with and without the leave of the colonial Court. The express right of appeal so
granted did not, however, in any way affect the power of the Privy Council to hear
any petition it chose, and so one finds two form of appeals to the Privy Council –
*appeals brought as of right and appeal brought with the Special leave of the council
i.e. where the colonial Constitution made no provision for an appeal or leave to
bring it had been refused by the colonial courts*.\(^{26}\)

*In Ibralebbe v. Reg*\(^{27}\), it was opined that even the appeals as of right, like
appeals by special leave, were under the Crown’s Prerogative right to act as final
resort in administration of justice.

\(^{25}\) LR IPC 520 (529)
\(^{26}\) Cross and Hall; *Radcliffe and Cross The English Legal System*; (1964), p. 356
\(^{27}\) [1964] 1 All ER 251
Appeals as of Right

Appellate jurisdiction of the Privy Council was made available for the first time to Indian by the Charter of 1726 by which Mayor’s Courts were established in three Presidencies of India. Each Mayor’s Court was empowered under the Charter to hear and try all civil suits pertaining to the persons living in the Presidency town and working in the Company’s subordinate court in 1774. The Regulating Act, 1773 provided for a right of appeal to the King-in-Council from the decisions of the Supreme Court. The party praying to leave to appeal to the King-in-Council had to present a petition to the Supreme Court within six months from the day of pronouncing of the judgment. In criminal matters, the Supreme Court had the discretion to allow or not to allow an appeal to the Privy Council. Apart from these provisions, the King-in-Council reserved to himself, full power and authority, upon the petition of any person aggrieved by a judgment, decree, order or rule of the Supreme Court to refuse or admit his appeal there from, upon such terms, and under such limitations, restrictions and regulations, as the King-in-Council thought fit. This provision thus reserved to the King-in-Council authority to grant special leave to appeal in those cases in which, according to the provisions, no appeal could lays a matter of right.28

Then in 1797, the Mayor’s court of Madras and Bombay gave pace to the Recorders’ courts in 1797 and the provisions analogous to those prevailing at Calcutta were made for regulating appeals from the Recorder’s court to the King-in-Council. Finally in 1800 and 1823, the Recorder’s court gave place to the Supreme Court at Madras and Bombay respectively. The Charters of Bombay and Madras Supreme Court reserved the right of the King-in-Council to refuse or admit any appeal on the petition of any person aggrieved by any decision of the Supreme Court.29

With the Act of Settlement in 1781, the status of Sadar Adalats was enhanced by constituting it into a court of record and also conferring a right of appeal from its decision to the King-in-Council. With this the Governor-General-in council enacted Regulation XVI of 1797 laying down certain rules to govern appeals from the Sadar Adalats to the Privy Council.30

28 M.P. Jain; Outlines of Indian Legal and Constitutional History, (2006), p. 289
29 Ibid
30 Kailash Rai; History of Courts Legislative and Legal Profession in India, (2002), p. 196
In 1802, the Sadar Diwani Adalat was established at Madras. In 1818, the Sadar Diwani Adalat at Calcutta relinquished and provisions were made for taking appeals from the Madras Adalat to the king-in-council. Regulation VIII of 1818 made rules for this purpose similar to those contained in the Bengal Regulation XVI of 1797.

In Bombay, the right to appeal to the Privy Council was allowed as early as in 1812, when a Regulation made rules regulating such appeal. The Regulation of 1812 was modified by Regulation V of 1818, which provided for the reception and transmission of appeals from the Sadar Diwani Adalat to the king-in-council and made rules for this purpose very much similar to those made at Bengal. Like Madras, in Bombay also, no appealable limit was prescribed for the purpose of appeals to the King-in-Council.

In 1827, the Elphinstone code of Bombay Regulations came into force. The provisions already in force for appeals from the Bombay Sadar Adalat to the King-in-Council were repeated.

In all Presidencies, the Regulations had reserved the Sovereign right to reject or receive all appeals notwithstanding any provisions contained in the Regulations.

In this way, there are two kinds of appeals to the Privy Council from the Sadar Diwani Adalat in the three Presidencies, appeals as ‘matter of right’ when conditions laid down in the Regulations for the purpose were fulfilled; appeals by ‘special leave’ to the Privy Council in all other cases.

With the establishment of High Courts by the Indian High Court Act, 1861, the Supreme Court and Sadar Adalats were abolished in Presidency Town of Bombay, Madras and Calcutta. An appeal could be made to the Privy Council from the High Courts in any case not being of criminal jurisdiction from any final judgment, decree or order of the High Court of the value of the subject matter was not less than rupees ten thousand or if the High Court declared that the case was fit one for such appeal to the Privy Council.31

In criminal cases, an appeal could lie to the Privy Council from any judgment or sentence of a High Court made in exercise of its original jurisdiction or in any case where a point of law had been reserved for the opinion of the High Court.

31 Subsequently, sections 109 to 112 of the Civil Procedure Code, 1908, contained provisions, relating to appeals from High Courts to the Privy Council
by court exercising original jurisdiction provided the High Court certifies that the case is one fit for appeal to the Privy Council.”

**Appeal by Special Leave**

The Royal Charters of 1726, 1774 and Legislations of 1773, 1781, 1797, 1818, 1861, 1911, 1915 laid down conditions under which appeals ‘as of right’ were permitted to the Privy Council. It did not necessarily exhaust the whole ambit of the Crown’s prerogative as the fountain of justice. The provisions regulating appeals to Privy Council contained in the charters of the High Court, or the Civil Procedure code, did not in any way bar, abrogate or curtail the full and unqualified exercise of the crown’s prerogative in receiving or rejecting appeals to the King-in-Council. It could grant special leave to appeal even where the High Court refused to grant necessary certificate or leave.

From the point of view of classification of appeals according to the subject matter, they could be classified into two broad categories, namely (i) Civil and (ii) Criminal

I. Appeals in civil matters could be made with or without special leave of the Privy Council. Appeals without leave were regulated by order in council or Important Act or Local Act. Special Leave could be granted by the Privy Council if in its opinion some important point of law was involved, unless it was restrained by some statute to do so.

II. In criminal cases, an appeal could be allowed by Crown in exercise of prerogative rights, if advised by judicial committee. Such cases were far and few to be used exceptionally where:

a) there had been violation of principles of natural justice;

b) violation of rules of procedure

c) Substantial and grave injustice was caused to the appellant in any manner.

Special leave to appeal could be granted by the Judicial Committee in cases where the law had been interpreted in such manner so as to create a bad precedent for future and no other course except granting of special leave and intervention by the Crown, could prevent the consequence thereof.”

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32 Section 411 (A) 4 of the Code of Criminal Procedure, 1898 contained these provisions
33 Dr. N.V. Paranjape; *Indian Legal and Constitutional History*, (2006), p-153
**Principles for granting of special leave to appeal**

**Civil Cases**

In civil matters, though special leave was not granted in all cases yet the attitude of the King-in-Council (Privy Council) was more flexible than in criminal matters.\(^{34}\) Generally speaking, the Privy Council would grant special leave to appeal in civil matters when there was a substantial question of law involved and when the case was of some public importance or of a substantial character.

*Viscount Haldane* is his judicial opinion in the famous case, *Hull v. Mackenna*\(^{35}\), expounded the position as follows:

“In other cases the practice which has grown up, or the written usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if in their Lordships’ opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally. I am not laying down precise rules now, but laying down the general principles unless the case is one involving some great principle and is of some very wide public interest. It is also necessary to keep certain discretion. We are not at all disposed to advise the Sovereign unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal .......... In India, leave to appeal is more freely given then elsewhere but the genesis of that are the requirement of India and the desire of the people of India...... It is within the Sovereign’s power (to grant special leave to appeal) but the sovereign looking at the matter exercises this discretion”

The same principles were applied in cases from India. *In Moti Chand v. Ganga Singh*\(^{36}\), Lord Davey observed:

“Now, the practice of this Board in advising His Majesty to exercise his prerogative and to give special leave to appeal is well known, and this Board does not advise His Majesty to exercise his prerogative in that manner unless there is some substantial question of law of general interest involved :”

The principles on which the Privy Council will grant special leave are quite indeterminate. It will not do so in electoral cases\(^ {37}\), on the score that there are

\(^{34}\) *Prince v. Gagnon*, (1882) 8. App. cas, 103; *Glergue v. Murray*, (1903) A.C. 521; (1926) 50 Bom. 573

\(^{35}\) 1926 IR 402

\(^{36}\) 29 IA 40
pressing reasons of convenience that such appeals should not be allowed and that the reference of these issues to courts is really a surrender of the right of the legislature to determine such issues itself, and is therefore of a special character, to which the ordinary rules of appeals should not apply. Moreover, if a court is established to deal with land questions on the basis of equity and good conscience, no appeal will lie\textsuperscript{38}. But no appeal will be allowed from a Court Martial under martial law\textsuperscript{39}, for such a body is clearly not a judicial body in the proper sense.\textsuperscript{40}

Thus, in civil cases, rules laid were not fixed but flexible rules. The Judicial Committee could decide each case on merits, in the light of the guiding principles as mentioned above, and then decide whether leave was to be granted or not in the specific case.

**Criminal Cases**

In Criminal cases, the Judicial Committee never wanted to act as a normal court of appeal of review; its approach was more restrictive. It intervened only to vindicate where there had been a miscarriage of justice to neglect of essential legal principles. There were two main reasons for this restrictive approach:

i) There was large number of criminal cases in colonies and if appeals were to be allowed freely, then the Privy Council would simply be overwhelmed by Criminal Cases without leaving it any time to consider more important legal questions:

ii) A long time must inevitably elapse before an appeal to the Privy Council could be disposed of and therefore would have resulted in the postponement of sentences or execution thereof passed on those found guilty of murder causing undue delay between commission of Crime and the punishment which would have diluted the entire deterrent effect of punishment, leaving the convicts in miserable suspense.\textsuperscript{41}

*In Ibrahim v. Rex*\textsuperscript{42}, the Privy Council inter-alia observed, “leave to appeal is not granted except where some clear departure from the requirements of justice exists; nor unless by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has

\begin{itemize}
  \item\textsuperscript{37} *Theberge v. Laudry*, (1876), 2 App. Cas 102
  \item\textsuperscript{38} *Moses v. Parker*, (1896), AC, 245
  \item\textsuperscript{39} *Tilomko v. A.G. of Natal* (1907) AC, 93
  \item\textsuperscript{40} A Berriedale Keith; *The Constitutional Law of the British Dominions*, (1933), p.226
  \item\textsuperscript{41} *Reg. v. Eduljee Byramjee*, 5 Moo PC 276
  \item\textsuperscript{42} 11 AC 469
\end{itemize}
been done ... there must be something which, in the particular, deprives the accused of the substance of fair trial or the protection of law or which in general, tend to divert the due and orderly administration of law into a new course which may be drawn into an evil precedent in future.”

Referring to its prerogative to grant special leave to appeal, the Privy Council in *Reg v. Eduljee Byramjee*\(^43\), and *Reg v. Aloo Paroo*\(^44\) the judicial committee considering the question of criminal appeal from the Bombay Supreme Court held that the Supreme Court had an absolute discretion to allow or deny an appeal in a criminal case to the Privy Council and that the King-in-Council had been left with no power to grant any leave in a criminal matter.

*In Aga Kurboolie Mahomed v. The Queen*\(^45\), it was observed that an appeal in criminal case could go to the Privy Council only if the concerned Supreme Court gave the necessary permission and this was done very sparingly.

The Act of 1781 while providing for appeals from the Sadar Diwani Adalat was silent on the question of appeal in Criminal matter from the decisions of the Sadar Nizamat Adalat. In 1862, the Privy Council considered the question of special leave to appeal to itself from the Sadar Nizamat Adalat at Calcutta in *Reg v. Joy Kissen*.\(^46\) In this case, on being convicted on a charge of forgery by the Adalat, the petitioner first presented his petition to the Adalat itself praying for leave to appeal to the Privy Council from his conviction. On this, the Adalat passed the following order:

This Court is not required, nor warranted by law to take any steps in criminal matters, which the parties concerned require to have brought before Her Majesty’s Privy Council. Any application with that object must be made to Judicial Committee of the Privy Council direct”

The Privy Council, while admitting that justice had not been well administered in this case, still refused special leave on three main grounds, namely;

i) It would involve investigation and examination of the entire evidence in the case *de novo*;

\(43\) 5 Moo PC 276
\(44\) 5 Moo PC 296
\(45\) 4 Moo PC 239
\(46\) 1 Moo PC (NS) 273 (1862)
ii) till that time there was no precedent to grant special leave nor had any petition praying for special leave ever come from any Dominion or colonies;

iii) The consequences of granting special leave would be destructive of administration of Criminal justice.

The Privy Council, however, hoped that justice would be done in the instant case by exercising the Royal Prerogative of granting pardon to the accused.

Until 1862, the viewpoint of the Privy Council regarding the grant of special leave to appeal in criminal cases was very right considering the stand taken by the Privy Council in the Joy Kissen\textsuperscript{47} case, it can be said that if such stand was continued, it would have been impossible to claim special leave in criminal cases. But, after 1862, the Privy Council somewhat relented its attitude and therefore, some criminal appeals came to be heard in it. In a number of cases, the Privy Council took occasion to lay down its circumstances under which it would grant special leave to appeal in criminal cases.

\textit{In Reil v. Reg}\textsuperscript{48}, it was stated that leave to appeal in criminal cases could only be given where some clear departure from the requirement of justice is alleged to have taken place.

\textit{In re : Abraham Mallory Dillet’s}\textsuperscript{49}, case, the Privy Council reiterated its earlier stand on grant of special leave to appeal in criminal cases and observed that invariably it would desist from reviewing or interfering with the course of criminal proceedings unless it is shown that there has been violation of the principles of natural justice or some substantial and grave injustice has been caused to the petitioner.

The first case from India in which the Privy Council intervened was \textit{Vaithinatha Pillai v. The King Emperor}\textsuperscript{50}, in 1913. In this case, man had been condemned to death upon no evidence at all. The matter was thoroughly examined by the Privy Council in \textit{Dal Singh v. The King Emperor}\textsuperscript{51}, it was observed that’ the general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases in

\textsuperscript{47} Ibid
\textsuperscript{48} (1885) 10 AC 675
\textsuperscript{49} (1887) 12 AC 459
\textsuperscript{50} 40 IA 193
\textsuperscript{51} 44 IA 137
the free fashion of a fully constituted court of criminal appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred, and not a mere mistake on the part of the court below, as for example, in the admission of improper evidence if it has not led to injustice of a grave character. Nor does the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the courts also.

In *Easwaramurthi v. Emperor*\(^5^2\), it was stated that in a criminal appeal brought by special leave, their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice.

From the above discussion, it is thus clear that Privy Council was reluctant to interfere in appeal by special leave in criminal cases but it did interfere when there was miscarriage of justice. The grant of special leave in criminal cases sparingly was however justified to keep the inflow of appeals in criminal cases within limits as this was the demand of the exigencies of the situation.

**The Judicial Changes in India**

During the investigation of possible constitutional reforms in India conducted by various bodies from the Simon Commission to the Joint Parliamentary Committee, the question of a Federal Court and of a Supreme Court was taken up. In 1928, the Nehru Report envisaged federal constitution for India. It suggested the creation of a Supreme Court, at the apex of the Indian Judiciary, which would take over the appellate work of the Privy Council. In 1933, the British Government issued a white paper setting out its proposal for constitutional reforms in India. The white paper proposed that there should be in India a Supreme Court, in addition to the Federal Court. The Joint Committee rejected this suggestion and proposed the establishment of only a Federal Court stating that such a court was ‘an essential element in a Federal Constitution ... at once the interpretation and guardian of the Constitution and a tribunal for the determination of disputes between the constituent units of the Federation’.\(^5^3\)

The Federal Court was actually established by section 200 of the Government of India Act, 1935, and its original jurisdiction, which in essence was

\(^{52}\) AIR 1944 PC 54
\(^{53}\) Report of the Joint Committee, HC 5, para 322
that suggested by the Joint Committee, was laid down in section 204. The actual authority of the court was again to be restricted. It was not to ‘pronounce any judgment other than a declaratory judgment’, which meant that it could declare what the law was but did not have the authority to exact compliance with its decision.\textsuperscript{54}

**Appellate Jurisdiction of Federal Court**

The Federal Court has, however exercised appellate jurisdiction under section 205 of the aforesaid Act, which provides that “An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High court certifies that the case involves a substantial question of law as to the interpretation of this Act or any order in council made there under, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly”

As regards the appellate jurisdiction, the Joint Parliamentary Committee observed:

“It is also proposed that the Federal Court shall have an exclusive appellate jurisdiction from any decision given by the High Court or any State court, so far is it involves the interpretation of the Constitution or of any rights or obligations arising there under; but that no appeal shall lie except with the leave of the Federal Court or the High Court of the Province or State, or unless in a civil case the value of the subject matter in dispute exceeds a specified sum. In this case also, we think that jurisdiction ought to be extended to include the interpretation of federal laws. It is essential that there should be some authoritative tribunal in India which can secure a uniform interpretation of federal laws throughout the whole of Federation.”\textsuperscript{55}

In the Government of India Act, 1935, there is no provision in the Act giving the Federal Court the power to entertain an application for special leave to appeal and the Federal court stands committed to the view that it will not interfere with the order of a High Court refusing to grant a certificate under section 205 even in cases where the High Court has acted perversely in withholding the certificate. The Federal Court held the view that as it has no power directly to order the High Court to grant a certificate, it would not exercise that power indirectly by way of proceedings for contempt of court. Thus it was opined that if the Federal Court

\textsuperscript{54} Granvillee Austin; *The Indian Constitution Cornerstone of a Nation* ,(1996), p. 168
\textsuperscript{55} Constitutional Proposals of the Sapru Committee; paras 246, 247, pp 186-187
should come to the conclusion that leave has been refused improperly, it should have the power to grant special leave and to entertain the appeal. The Judicial Committee of the Privy Council possesses such a power and so there is no good reason for withholding it from the Federal Court.”

After the independence of India in 1947, it was inevitable that an Independent India should abolish appeals to the Privy Council and the first step in this direction was taken by the Central Legislature in 1948 when it enacted the Federal Court (Enlargement of Jurisdiction) Act I of 1948 to provide for enlargement of the appellate jurisdiction of the Federal Court. Under the Act, appeals were lie to the Federal Court from any judgment of a High Court:

i) without the special leave to appeal of the Federal court, in the same circumstances in which appeals could have been brought to the Privy Council without any special leave, and

ii) with the special leave of the Federal Court, in any other case.

The Privy Council has tried to lay down from time to time certain principles for granting special leave in Criminal cases, which were reviewed by the Federal Court in *Kapildeo v. The King*. The Court discussed the various decision of the Privy Council and stated: “Though this court is no longer bound by the Privy Council practice and precedents, it sees no reason to depart from the principles which have been laid down by it defining the limits within which interference with the course of criminal justice dispensed with in the subordinate courts is warranted and to remove all misapprehensions on the subject”

Henceforth, no direct appeal was to lie to the Privy Council either with or without special leave, from any such judgment. All this, but did not completely abolish appeals to the Privy Council.

The constitution of the Republic of India was due to come in force from January 26, 1950 and consequently the jurisdiction of the Privy Council was to come to end. By the Abolition of the Privy Council Jurisdiction Act, 1949 which came into force of 10th October, 1949, all the powers that were possessed by the Judicial Committee of the Privy Council in regard to cases or matter arising in India became exercisable by the Federal Court of India, whether those powers were exercisable by

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56 Ibid
57 M.P. Jain; op. cit; p. 313
58 AIR 1950 FC 80
reason of statutory authority or under the prerogative of King. Hence the appellate powers of Judicial Committee of the Privy Council as well as those of the Federal Court were limited to appeals from Courts of Justice.\textsuperscript{59}

The last appeal from India which was disposed by the Privy Council was that of \textit{N.S. Krishnaswami Ayyangar v. Perumal Goundan}\textsuperscript{60}, which was disposed of on December 15, 1949 and with this came to an end India’s 200 years old connection with the Privy Council.

\textbf{Drafting of Article 112 (now Article 136)}

It marked the beginning of the exercise for framing draft provisions establishing the Supreme Court. The first Draft Constitution prepared by the Constitutional Advisor embodied the decision of the Assembly on the reports of its committees containing 240 clauses and 13 schedules. This first draft was placed before the Drafting Committee on October 27, 1947. It contained the provisions conferring power on Supreme Court similar to the power contained in the Government of India Act, 1985 from sections 205–207.\textsuperscript{61} The first draft provided that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court of a Province, if the High Court certifies that the case involves a substantial question of law as to interpretation of this Constitution and it shall be the duty of every such High Court to consider in every case whether or not any such question is involved and of its own motion to give or to withheld a certificate accordingly.\textsuperscript{62}

Where such a certificate is given any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground as well.\textsuperscript{63}

Further it was provide in the first draft Constitution that, subject to such rules as the Supreme Court may make in this behalf, an appeal shall lie to the Supreme Court from a judgment, decree or final order of a High Court in a province without any such certificate as aforesaid, if the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees, or the judgment, decree or final order involves directly

\textsuperscript{59} Chitaley and Rau; \textit{op. cit.}, pp. 187-188
\textsuperscript{60} AIR 1950 PC 105
\textsuperscript{61} B. Shiva Rao; \textit{The framing of India’s Constitution}, First Ed. (1968), p.3
\textsuperscript{62} Clause 93 (1)
\textsuperscript{63} Clause 93 (2)
or indirectly some claim or question respectively property of the like amount or value and where the judgment, decree or final order appealed from affirms the decision of the Court immediately below, the appeal involves some substantial question of law\textsuperscript{64}; or the Supreme Court gives special leave to appeal\textsuperscript{65}.

Moreover, an appeal shall lie in the Supreme Court from any judgment, decree or final order of a High Court in a Federal State if the case involves a substantial question of law as to the interpretation of this Constitution or of any law of the Federal Parliament, or of the Legislature of any unit other than the State concerned.\textsuperscript{66}

An appeal under this section shall be by way of special case to be stated for the opinion of the Supreme Court by the High Court, and the Supreme Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.\textsuperscript{67}

After scrutinizing the constitutional Adviser’s draft of the Constitution and other materials the Drafting Committee submitted to the President of the Constituent Assembly a revised Draft Constitution on February 21, 1948. The draft contained 315 Articles and 8 Schedules. In the Draft Constitution, with regard to the appellate jurisdiction of Supreme Court Article 110 and Article 111 were drafted. Besides these articles, there was Article 112 which conferred power of Special leave to appeal to the Supreme Court and it read as:

The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree or final order in any cause or matter, passed or made by any court or tribunal in the territory of India except the States for the time being specified in Part III of the First Schedule, in cases where the provisions of Article 110 or Article 111 of this Constitution do not apply.

When the Article was taken up for the discussion by Constituent Assembly on 16th October, 1949 Shri T.T. Krishnamachari moved on amendment to modify Article 112 to read as:

1) The Supreme Court, may in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by an court or tribunal in the territory of India.

\textsuperscript{64} Clause 94 (a)  
\textsuperscript{65} Clause 94 (b)  
\textsuperscript{66} Clause 95 (1)  
\textsuperscript{67} Clause 95 (2)
2) Nothing in Clause (1) of this article shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Through this amendment, it was suggested that in place of words ‘final order’ in the original draft, the words ‘judgment, determination, sentence or order’ should be inserted because it has the capacity to broaden the jurisdictional base of the apex Court.

Secondly, it was suggested that clause (2) should be added which should provide an exemption to any determination by Court Martial. The Honorable members were of the opinion that the same is the practice in other countries including United Kingdom.

This amendment was resisted by other members namely Prof. Shibban Lal Saksena, R.K. Sidhva and Pandit Thakur Das Bhargava etc. who pointed that in Courts-Martial cases, there are many Judges-Advocates who prepared the prosecution, hear the case and give the judgment which is against all the laws of jurisprudence.

Their emphasis was that there has been a significant change in the view point of persons concerning exclusion of martial-law cases and butchering in the name of discipline has been decried.

On this point, Dr. B.R. Ambedkar clarified that clause (2) does not altogether take away the powers of the Supreme Court or the High Court. It will be open to the Supreme Court as well as to the High Court to examine the question whether the exercise of jurisdiction is within the ambit of the law which creates and constitutes this court or tribunal. Moreover, if the Court-martial were to give a finding without any evidence, it will be open to the Supreme Court as well as the High Court to entertain an appeal in order to find out whether there is evidence but they would not consider whether there has been enough evidence. It would also be open for a member of the armed forces to appeal to the courts for the purpose of issuing prerogative writs in order to examine whether the proceedings of the Courts-martial against him are carried or under any particular law made by Parliament or whether they were arbitrary in character.
The amendment as suggested was adopted by the assembly and added to the Constitution.\textsuperscript{68}

Earlier to this i.e. On 6th June, 1949 Shri Ram Sahai moved an amendment to delete the last portion of the draft Article containing the words, ‘Except the states for the time being specified in part III of the first schedule, in cases the provisions of Article 110 or Article 111 of this Constitution do not apply’

He emphasized that there should not be any difference between provinces and Union of States. Furthermore Prof. Shibban Lal Saksena suggested for extension of powers of Supreme Court. The amendment as suggested was adopted and the jurisdiction of the Supreme Court was extended to the whole territory of India.\textsuperscript{69}

This way, the present Article 136 providing the powers to the Supreme Court of special leave to the appeal was incorporated in the Constitution of India.

**Article 136** reads as:

(1) Notwithstanding anything in this chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in Clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Article 136 confers a special jurisdiction on the Supreme Court. Articles 132 to 135 deal with ordinary appeals to the Supreme Court. They all lay down the conditions under which an appeal will ordinarily lie to the Supreme Court. But under Article 136 a discretion is conferred on the Supreme Court to grant Special Leave of appeal to itself irrespective of the fulfillment of such conditions. The Article commences with a non-obstante clause viz, “Notwithstanding anything in this chapter”. These words indicate that the intention was to disregard in extraordinary cases the limitation contained in the previous Articles on the Supreme Court’s power to entertain appeals.\textsuperscript{70}

\begin{thebibliography}{99}
\bibitem{68} CAD Vol. X, pp. 376-380
\bibitem{69} CAD, Vol. VIII, pp. 634-640
\end{thebibliography}
In Bharat Bank ltd. v. The Employees of the Bharat Bank\textsuperscript{71}, it was opined that the words ‘Notwithstanding anything in this chapter’, clearly indicates that the intention of Constitution is to disregard in extraordinary cases the limitations contained in the previous Articles.

Further with regard to these words, in Bengal Chemical and Pharmaceutical Works v. Workmen\textsuperscript{72}, it was opined that even if law says that an adjudication of particular tribunal will be final and conclusive, it cannot be presumed that there was an intention to exclude the exercise of the special power by the Supreme Court under Article 136.

Further Articles 133-134 relate to Civil and Criminal proceedings respectively. If a proceeding is neither civil nor criminal and does not involve any question of constitutional interpretation, the only way in which a party may appeal from an order made in such a proceeding is by obtaining special leave of the Supreme Court itself, under the present Article.

**Discretion**

Discretion is layman’s language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be.\textsuperscript{73} Discretion has been defined by the Coke in Rooke’s case\textsuperscript{74} as an understanding to discreen between fallacy and truth, between right and wrong, between shadow and substance, between equity and pretence, and not to do according to their will and private actions.

Discretion in general term means choosing from amongst the various available alternatives, but with reference to the rules of reason and justice and not according to personal whims. So, the essence of discretion is choice.\textsuperscript{75} While exercising discretionary powers, the court must keep in mind the well established principles of justice and fair play and should exercise the discretion if the ends of justice require it.\textsuperscript{76} Discretion should be exercised in the larger interest of justice (\textit{ex debito justitiae}). Article 136 does not confer a right on any party but confers a discretionary power on the Supreme Court. In short, exercise of power under Article 136 of the Constitution is ‘pleasurable jurisdiction’ of the Supreme Court.

\textsuperscript{71} AIR 1950 SC 188
\textsuperscript{72} AIR 1959 SC 633
\textsuperscript{73} I.P. Massey; Administrative Law. (2007) p.55
\textsuperscript{74} Justice Coke; Rooke’s Case (1598) 5. Co. Rep. 996
\textsuperscript{75} Ibid
\textsuperscript{76} Gujarat Steel Tubes Ltd. v. Mazdoor Sabha, AIR 1980 SC 1896
In *Pritam Singh v. State*\(^ {77}\), it was opined that the Court will exercise the discretionary power in exceptional circumstances to prevent the miscarriage of justice. The Court may exercise its power in cases where there has been an illegality or irregularity of procedure or violation of the principles of natural justice resulting in gross miscarriage of justice.\(^ {78}\) In the same manner, the Supreme Court may decline jurisdiction where the conduct of the petitioner is objectionable\(^ {79}\), or where appeal involves a matter of purely academic interest and is of no practical value\(^ {80}\) or where appeal is frivolous\(^ {81}\) and so on.

The Constitution does not impose any limitation as to the circumstances, which would justify or warrant the grant of Special Leave.\(^ {82}\)

In *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income-tax*\(^ {83}\), the Court has stated in this connection: “It is not possible to define the limitations on the exercise of the discretionary jurisdiction vested in the court by Article 136. The Limitations whatever they may be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. Beyond that, it is not possible to fetter the exercise of this discretionary power by any set formula”.

The matter lies within the complete discretion of the Supreme Court and the only limit upon it is the “Wisdom and good sense of the judges” of the Court.\(^ {64}\)

**Judgment**

This word has been used in the sense of a decision finally determining the rights of the parties in the proceedings\(^ {85}\) and not as defined in Section 2(9) of the Code of Civil Procedure.\(^ {86}\) The decision of vital issue which may ultimately affect the fate of the proceeding is not enough.\(^ {87}\)

It follows that an order which is not ‘final’ cannot be deemed to be a judgment.

\(^{77}\) AIR 1950 SC 169  
\(^{78}\) *State of U.P. v. Ram Manorath*, AIR 1972 SC 701  
\(^{79}\) *State of Maharashtra v. R.S. Nayak*, (1992) 2 SCC 463  
\(^{80}\) *Controller of Estate Duty v. Ratna Kumar Kumbhat*, 1993 Supp (1) SCC 420  
\(^{81}\) *State of Punjab v. Bir Singh*, 1992 Supp. (2) SCC 103  
\(^{82}\) *Subedar v. State of U.P.*, AIR 1971 SC 125  
\(^{83}\) AIR 1955 SC 65  
\(^{84}\) *Penu Balakrishna Iyer v. Ariya M. Ramaswami Iyer*, AIR 1965 SC 195  
\(^{85}\) *Kappaswami Rai. S. v. The King;*, AIR 1949 FC 1  
\(^{86}\) *Saifudin Saheb, Syedna Tauseer v. State of Bombay*, AIR 1958 SC 253  
\(^{87}\) *Amin Bros. Mohd. v. Dominon of Indian*, AIR 1950 FC 77
In order to be a ‘judgment’, it must be a decision pronounced by a court in a cause which it hears on the merit.\textsuperscript{88} Hence the following are not judgments within the meaning of this Article -

The order of the Court in a proceeding for the filing of an arbitration award, which in substance is nothing but the adjudication of a private tribunal with the imprimatur of the court stamped on it. An order of the High Court in appeal from an award in an arbitration proceeding is also not a judgment.

**Decree**

The word includes both preliminary and final decrees. Hence appeal lies to the Supreme Court from both. Certain questions are finally determined by a preliminary decree.\textsuperscript{89}

When appeal against a decree is pending, the court of appeal has seisin of the whole case and the whole matter becomes sub-judice again though for certain purposes. The decree of the trial court get merged with the decree of the appellate court. Therefore, the Court of appeal shall have all the powers and shall perform as nearly as may be, the same duties as are concerned and imposed on the court of original jurisdiction. An appeal pending before the Supreme Court is a continuation of the original proceedings and the entire court is at large.\textsuperscript{90}

**Determination**

The word ‘determination’ means and signifies the end of a controversy or litigation by the decision of a judge or arbitrator. It was said by Bakshi Sir Tek Chand that the word ‘determination’ was not in the original draft Constitution and it was added presumably with a view to widen the scope of Article 136 and hence include within it the decision of administrative and quasi-judicial tribunals also.\textsuperscript{91} It should not be supposed that the word ‘determination’ is a surplusage nor should it be taken to mean ‘judicial determination, accordingly to the principle of ejusdem generis, with reference to the words ‘judgment, decree, sentence or order’. On the other hand, the specific inclusion of the word ‘determination’ in the present Article would imply that it is not restricted to judicial determination only.

\textsuperscript{88} Hanskumar v. Union of India, AIR 1958 SC 947  
\textsuperscript{89} Rahimbhoy Habibbhoy v. Turner; C.A., (1891) 18 Bom. 155 PC  
\textsuperscript{90} D.D. Basu; Shorter Constitution of India, (2006) p. 555  
\textsuperscript{91} Bharat Bank v. Employees of Bharat Bank, AIR 1950 SC 188
Further in *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*\(^92\), the word determination was construed to mean “an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law of disposal.

*In Collector, Varnasi v. Gauri Shankar*\(^93\), the decision rendered by the High Court under Section 19(1)(f) of the Defence of India Act (1939) has been held to be a determination within the meaning of the Article. Such decision is not a ‘judgement’ ‘decree’ or ‘final order’ within the meaning of Article133.

**Order**

As per Section 2 (14) of the Code of Civil Procedure, the word ‘order’ means the formal expression of any decision of a civil court which is not a decree.

In *Jaswant Sugar Mills Ltd. Lakshmichand*\(^94\), it was held that the expression ‘order’ must also have similar meaning to that of determination except that it need not operate to end the dispute.

The word ‘order’ in Article has not been qualified by the adjective ‘final’ as is the case in Articles 132,133 and 134. The Supreme Court thus has the power to hear an appeal even from an interlocutory or an interim order.

In *Varadaraja Mudaliar v. A.V.A Subramania Mudaliar*\(^95\), the Supreme Court allowed an appeal against interlocutory order by the High Court for appointment of interim receiver under Section 115, CPC where the circumstances were extraordinary in as much as the receiver was appointed without prima facie case.

In *Ganesh Trading Co. v. Moji Ram*\(^96\), it was opined that where interference of the Supreme Court is necessary in order to promote uniform standards on basic questions for a sound administration of justice, eg, in a matter of leave to amend a plaint, the apex Court can interfere with interlocutory order.

Similarly in *Union of India v. Era Educational Trust*\(^97\), it was opined that where prima facie it appears that the said order cannot be justified by any judicial standard and the ends of justice and the need to maintain the judicial discipline

\(^92\) AIR 1963 SC 677  
\(^93\) AIR 1968 SC 384  
\(^94\) AIR 1963 SC 677  
\(^95\) (1968) SC [Cr. A. 1651/67, dated 18-12-1968]  
\(^96\) AIR 1978 SC 484  
\(^97\) (2000) 5 SCC 57
requires such interference and indicate reasons for it, the Supreme Court can interfere with such interlocutory order.

**In any Cause or Matter**

The expression is of a very wide import. While the word ‘proceeding’ is used in the preceding Articles 132-134, Article 136 uses the word ‘cause or matter’. The difference of words is not without meaning though there is no definition of these words in the Constitution itself. 98

In *Central Bank of India v. Their Workmen*, the apex Court opined that these words were particularly designed to confer the widest possible jurisdiction on the Supreme Court in the matter of the grant of Special Leave to appeal to the Supreme Court. Comparing the words used in the proceeding Articles in this respect, it is found that Article 132 refer to “civil, criminal or other proceeding”, Article 133 to a civil proceeding and Article 134 to a criminal proceeding, where as this Article 136 enables the Supreme Court to grant special leave in any cause or matter.

In *Pritam Singh v. State*, Fazl Ali, J. of the Supreme Court observed as follows: “By virtue of this Article we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals and in a variety of cases”.

Explaining the meaning of the word “cause”, Lord Selborne, L.C., in *Green v. Lord Penzance* observed as follows: “It is not a technical word signifying one kind or another, it is cause jurisdictions, any suit, action, matter or other similar proceeding completely brought before and litigated in a particular court”.

As to the meaning of “matter” in *Re Fenner and Lord*, it was observed that motion to set aside award is ‘matter’ within Rule.15 of Order. 13, Rules 15 to 18 of the R.S.C. 103

Thus, the words ‘cause or matter’ in Article 136 (1) of Indian Constitution are very comprehensive.

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99 AIR 1960 SC 12
100 AIR 1950 SC 169
101 (1881) 6 App. Cas 657 (671)
102 (1897) 1 QB 667 (669)
103 Chitaley and Rao; *op.cit*, p.187
Court or Tribunal

The word “Court” has a well-known meaning in the legislative history and practice show that in the *Halsbury’s Law of England*, the word “court” originally meant the king’s palace but subsequently acquired the meaning of

a) a place where justice was administered and

b) the person or persons who administer it

In the Evidence Act, it is defined as including all judges and Magistrates and all persons except arbitrators legally authorized to take evidence.

In *R.v. London County Council*\(^{104}\), Saville L.J., gave following meaning to the word “court” or “judicial authority”.

“It is not necessary that it should be a court in the sense that this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition, and it is not necessary to be strictly a court, if it is a tribunal which has to decide rightly after hearing evidence and opposition”.

In *Harinagar Sugar Mills v. Shyam Sunder*\(^{105}\), it was provided that the attributes of a court are that a court is the part of a tribunals set up by a state under its constitution to exercise the judicial power of the state, i.e. the power to decide controversies between its subjects, or between itself and its subjects- to uphold rights and to punish wrongs.

Moreover, it must be recognized by the law as a ‘court’; mere exercise of functions in a judicial manner is not enough. It must exercise the power to decide by reason of the sanction of law, and not by the voluntary submission of the parties to its jurisdiction. A court determines the controversy objectively and impartially.

The word ‘tribunal’ is wider than ‘court’; all courts are tribunals, but all tribunals are not courts. The expression “tribunal” means seat of judge, or a court of justice. Its necessary attribute is that it can give a final judgment between two parties which carries legal sanction by its own force. That the word “tribunal” in juxtaposition to the word ‘court’ could only mean a tribunal which exercised judicial functions of the state and did not include within its ambit a tribunal which had quasi-judicial or administrative powers. It was finally said that by the use of

\(^{104}\) (1931) 2 K.B. 215 ; (100 LJ KB 760)

\(^{105}\) AIR 1961 SC 1669
word ‘tribunal’ in Article 136, the intention was to give the same meaning as “Court”\footnote{Bharat Bank v. Employees of Bharat Bank; AIR 1950 SC 188}.

The expression ‘tribunal’ was defined in \textit{Durga Shankar Mehta v. Thakur Raghuraj Singh}\footnote{AIR 1954 SC 520}, a case under the Representation of the people Act, 1951. The Court stated: “The expression ‘tribunal’ as used in Article 136 does not mean the same thing as ‘court’ but includes within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions”.

In \textit{Engineering Mazdoor Sabha v. Hind Cycles Ltd.}\footnote{AIR 1963 SC 874} an appeal by special leave was filed against the award of the arbitrator. The apex Court had to consider the question whether the arbitrator whose award is challenged was a Tribunal under Article 136.

While dealing with the case, the apex Court firstly observed the scope of the Article 136(1) and opined that Article 136 (1) confers very wide powers on the Supreme Court and as such, its provisions have to be literally construed. It is significant that whereas Article 133(1) and 134(1) provide for appeals to Supreme Court against judgments, decrees or final orders passed by the High Court, no such limitation is prescribed by Article 136(2). All Courts and all Tribunals in the territory of India except in Clause (2) are subject to the appellate jurisdiction of the Supreme Court jurisdiction of the Supreme Court Article 136(1). It is also clear that whereas the appellate jurisdiction of the Supreme Court under Article 133(1) and 134(1) can be invoked only against final order, no such limitation is imposed by Article 136(1) i.e. appeal under Article 136(1) can be invoked even against an interlocutory order. The sweep of the provision is very wide and the court imposed limitation itself in its own discretion.

The apex Court observed that for invoking Article 136(1) two conditions must be satisfied:

i) the act complained against must have the character of a judicial or a quasi judicial act as distinguished from a mere executive or administrative act; and

ii) the authority whose act is complained against must be a court or a Tribunal.
Furthermore, the apex Court distinguishing a tribunal from the court stated that the expression ‘Court’ in the technical sense is a tribunal constituted by the State as a part of ordinary hierarchy of courts which are invested with State’s inherent judicial powers. A tribunal as distinguished from the court, exercises a judicial power and decides matter brought before it judicially or quasi-judicially but it does not constitute a court in the technical sense. The Tribunal, according to the dictionary meaning, is a seat of justice and in the discharge of its functions, it shares some of the characteristics of the court. The domestic tribunals appointed in the departmental proceedings as well as purely administrative tribunals are outside the scope of Art 136(1). The Tribunals which are contemplated by Article 136(1) are clothed with some of the powers of the Court. They can compel the witnesses to appear; they can administer oath; they are required to follow certain rules and procedure; the proceedings before them are required to comply with rules of natural justice; they must not be bound by the strict and technical rules of evidence but nevertheless they must decide on evidence adduced before them; they must not be bound by the other technical rules of law, but their decisions must nevertheless be consistent with the general principles of law; in other words they have to act judicially and reach this decision in an objective manner. The procedural rules which regulate the proceedings before the Tribunal and the powers conferred on them in dealing with matters brought before them are sometimes described as “trappings of a Court” and in determining a question as to whether a particular body or authority is a tribunal or not, sometimes a rough and ready test is applied by enquiring whether the said body or authority is clothed with the trappings of a court. The basic and essential condition which makes an authority or body a tribunal under Article 136 is that it should be constituted by the State and should be invested with the State’s inherent judicial power.

Henceforth, the apex Court observed that the provisions contained in the Industrial Disputes Act and rules framed thereunder required to act judicially in dealing with the matter entrusted to it and not in a purely administrative or executive capacity. The reference under section 10 A is not made by the government but by the parties themselves. The act of reference, therefore is not the act of appropriate government but of the parties themselves. Therefore, an arbitrator acting under section 10 A cannot be considered as Industrial Tribunal.
In *Jaswant Sugar Mills Ltd., Meerut v. Lakshmi Chand*\(^\text{109}\) a dispute arose between the appellant (Company) and the workmen with regard to bonus, leave, retaining allowance etc. which has pending before the Industrial Tribunal. Under the provisions of U.P. Industrial Disputes Act, if a dispute is pending before a Industrial Tribunal, the company requires the permission of Conciliation Officer for taking action against any workmen. As a result of the dispute workmen adopted slow down strike and the appellant charge-sheeted sixty three workmen for refusing to attend the work. The enquiry officer investigated the charges and held all the workmen guilty. But as the dispute with regard to bonus was pending before Industrial Tribunal, so permission of the Conciliation Officer was required for the discharge of the workmen. The Regional Conciliation Officer on application held only eleven workmen guilty and the rest fifty two were considered only as passive participants. Against this direction of Conciliation Officer, the company (appellant) preferred an appeal before the Labour Appellate Tribunal but that was also dismissed on the ground that the Conciliation Officer was not an “authority” within the meaning of the provisions of the Industrial Dispute (Appellate Tribunal) Act, 1950 and the appeal was incompetent. Then the appellant filed appeals by special leave before the apex Court against the direction of Conciliation Officer and the order of Labour Appellate Tribunal.

The apex Court in these appeals had to consider whether the direction made by the conciliation officer is a determination or an order and whether the conciliation officer is a ‘Tribunal’ within the meaning of the U.P. Industrial Dispute Act, 1947.

The apex Court opined that the expression ‘determination’ in the context in which it occurs in Article 136 signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression ‘order’ must have also a similar meaning except that it need not operate to end the dispute. Determination or order must be judicial or quasi judicial for appeal to Supreme Court and purely administrative or executive direction is not contemplated to be made the subject matter of appeal to the Supreme Court. The character of power conferred upon the Supreme Court original or appellate, by its constitution being judicial, the determination or order sought to be appealed from must have the character of judicial adjudication. A

\(^{109}\) AIR 1963 SC 677
judicial decision is not always the act of judge or a tribunal invested with power to determine question of law or fact, it must however be the act of a body or authority invested by law with authority to determine the rights of citizens and under a duty to act judicially. What distinguishes an act judicial or administrative is therefore the duty imposed upon the authority to act judicially.

Under Article 136, an appeal lies to the Supreme Court from adjudication of courts and tribunals only. Adjudication of a court or tribunal must doubtless be judicial; but every authority which by its constitution or authority specially conferred upon it is required to act judicially, is not necessarily a tribunal for the purpose of Article 136. The duty to act judicially imposed upon authority by statute does not necessarily clothe the authority with the judicial power of the state. In deciding whether an authority required to act judicially when dealing with matters affecting rights of citizens may be regarded as tribunal, though not a court, the principal incident is the investiture of the ‘trappings of a court’ such as authority to determine matters in cases initiated by the parties, sitting in public, power to compel attendance of witnesses and to examine them an oath, duty to follow fundamental rules of evidence, provision for imposing sanctions by way of imprisonment, fine etc.

On the analysis of the case, the apex Court observed that the conciliation officer has undoubtedly to act judicially in dealing with an application under Clause 29 but his order merely removes a statutory ban in certain eventualities, he is not invested with judicial power of the State; he cannot therefore be regarded as ‘tribunal’ within the meaning of Article 136 of the Constitution. Therefore, an appeal under Article 136 of the Constitution to the Supreme Court is not competent against the direction given by the Conciliation officer exercising power under clause 29 of the order issued by the Governor of U.P. under the U.P. Industrial Dispute Act, 1947. Moreover an authority under section 2(c) (III) to an industrial tribunal must be a body constituted for the purpose of adjudication of industrial disputes under a law made by a State. The conciliation officer not having invested with any such power, he cannot be regarded as an ‘authority’ within the meaning of section 2(c) (iii) of the Industrial Disputes (Appellate Tribunal) Act and hence no appeal lies to the Labour Appellate Tribunal under section 4 of the Industrial Disputes (Appellate Tribunal ) Act, 1950, against an order or direction issued by the Conciliation officer.
exercising authority under Clause 29 of the order promulgated by the Governor of the U.P. under the U.P. Industrial Disputes Act, 1947.

Similarly in *Indo-China Steam Navigation Co. Ltd v. Jagjit Singh*[^110], the court held that that a Custom Officer is not a Court or a tribunal while adjudicating upon matters under section 167 of the Sea Customs Act, whereas the Central Board of Revenue and the Central Government exercising appellate and revisional powers respectively under sections 190 and 191 of the Sea Customs Act are tribunals within the meaning of Article 136 (1)

In *Harinagar Sugar Mills Ltd v. Shyam Sunder Jhunjhunwala*[^111], one Banarasi Prasad who is the holder of stocks of shares transferred some shares to his son and daughter in law and asked the company to register the shares but the company refused. Against this refusal he filed a petition before High Court which the High Court rejected on the ground that the petition should be filed before the Civil Court. Then he preferred an appeal to the Central government under section 111 Clause (3) of the Indian Companies Act, 1956 but the Joint Secretary, Ministry of Finance also rejected the appeal and agreed with the contentions of the High Court. Then the transferee (respondent) applied for registration to the company and on refusal of the directors of the company appeals were preferred to the Central government. The Deputy Secretary to Government of India, Ministry of Finance, set aside the resolution passed by the board of directors in exercise of powers conferred under section 111 of the Indian Companies Act and ordered for the registration of the transfers. Against this order, the appellant preferred an appeal by special leave under Article 136 of the Constitution before the apex Court.

In this appeal, the apex Court had to consider two points i.e. whether the Central Government exercising appellate powers under section 111 of the Companies Act, 1956 before its amendment is a tribunal and subject to the appellate jurisdiction of the apex Court under Article 136 of the Constitution and whether the Central Government acted in excess of the jurisdiction.

*Shah J.*, speaking on behalf of majority opined that the proceedings started under Section 111 by way of an appeal before the Central government have all the trappings of a proceeding before a judicial tribunal. Before the Central government, pleadings have to be filed, evidence in support of the case is furnished by each party

[^110]: AIR 1964 SC 1140
[^111]: AIR 1961 SC 1669
and the disputes have to be decided according to law considering the representations made by the parties. So, the majority held that the Central government is a tribunal, exercising appellate powers under section 111 of the Companies Act and is subject to the appellate jurisdiction of the Supreme Court under Article 136 of the Constitution.

According to Hidayatullah, J., the word ‘Court’ is used to designate those tribunals which are set up in an original state for the administration of justice. By the administration of justice is meant the exercise of judicial power of the State to maintain and uphold ‘rights’ and to punish ‘wrongs’. By ‘Courts’ is meant court of civil judicature and by ‘tribunals’, those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. The real distinctions, it is said, is that Courts have “an air of detachment”. The word “Judicial” has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in Courts, but in respect of which it is necessary to bring to bear a judicial mind – that is, a mind to determine what is fair and just in respect of the matters under consideration. That an officer is required to decide matters before him “Judicially” in the second sense does not make him a court or even tribunal because that only establishes that he is following a standard of conduct, and is free from bias or interest.

The apex Court further observed that the articles of association conferred discretionary powers on the directors of the company to refuse to register the transfer but the Companies Act also provided a right of appeal which should be exercised with same limitations as provided under section 155 for a civil court. Therefore the Central government may order for registration where it finds that the directors have used their powers malafidely, arbitrarily or capriciously. Moreover, it was further observed that the Central government while making an order should
support its order with proper reasons and it does not matter that the proceedings are confidential.

On the other hand, Hidayatullah, J. opined that where the Articles of Association of a Company give absolute discretion to the Directors and empower them to withhold their reasons, the appeal taken to the Central government under section 111 of the Companies Act would involve decisions on such material as the parties place before it. It was further held that as the matter are of confidential nature and the Central government cannot make them public, the decision is not appealable. The Supreme Court should intervene only when it is practicable and in this case it is possible only if parties agreed on the point, not to treat the allegations as confidential. Furthermore, it was provided that the decision of Central government is of administrative nature and not of tribunal, so appeal cannot lie under Article 136.

In Associated Cement Companies ltd. v. P.N. Sharma\textsuperscript{112}, the court held that the basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign state. The test laid down by the Supreme Court are: “In considering the question about the status of a body or authority as a tribunal under Article 136(1), the main test to be applied is whether the body or the authority has been constituted by the state and has been clothed with the State’s inherent judicial power to deal with dispute between the parties and determine them on the merits fairly and objectively”.

**In the territory of India**

In order that this Article may apply it is necessary that the court or tribunal from whose decision the appeal to the Supreme Court is sought to be preferred must be situated in the territory of India.

In Janardhan Reddy v. State\textsuperscript{113}, the court held that the decision of the High court of Hyderabad passed before the coming into force of the constitution is not the decision of a court or tribunal in the territory of India and hence special leave cannot be granted under this Article in respect of such decision.

In K.S. Ramamurthy Reddiar v. Chief Commissioner, Pondicherry\textsuperscript{114}, the court held that the special leave cannot be granted in respect of an order passed by

\textsuperscript{112} AIR 1965 SC 1595

\textsuperscript{113} AIR 1951 SC 124

\textsuperscript{114} AIR 1963 SC 1464
the Appellate Authority in Pondicherry under the Motor Vehicle Act at the time when Pondicherry was not within the territory of India.

**Exception to Clause (1) of Article 136**

Clause (2) of Article 136 contains an exception to clause (1). It expressly exempts from appeal under this clause the decisions of courts or tribunals that may be constituted under any law relating to the Armed Forces. This clause, thus imposes a limitation on the power of the Supreme Court to grant special leave to appeal. No special leave to appeal before the Supreme Court can be granted against the determinations of the Military tribunals. The view was based on the ground that the Army Act intended the finding of the court Martial, as and when confirmed by a proper Confirming Officer, to be final subject only to the power of revision for which that Act provided.\(^{115}\)

**Pendency in Supreme Court**

<table>
<thead>
<tr>
<th>Institution (01-04-2014 to 30-06-2014)</th>
<th>Disposal (01-04-2014 to 30-06-2014)</th>
<th>Pendency (At the end of 31-10-2014)</th>
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<tbody>
<tr>
<td>Admission matters</td>
<td>Regular matters</td>
<td>Total matters</td>
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<tr>
<td>36,500</td>
<td>29,470</td>
<td>65,970</td>
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</tbody>
</table>

**NOTE :**

1. Out of the 65,970 pending matters as on 30-06-2014, if connected matters are excluded, the pendency is only of 38,159 matters as on 30-06-2014.
2. Out of the said 65,970 pending matters as on 30-06-2014, 15,409 matters are upto one year old and thus arrears (i.e., cases pending more than a year) are only of 50,561 matters as on 30-06-2014.

\(^{115}\) Chitaley and Rao; *Op. cit*, p. 221-222
The ratio of civil to criminal special leave petitions in the Supreme Court has also changed, albeit less dramatically, over the last forty years. In 1971, 74% of admission SLPs were civil; (26%). This dipped to 71% in 1975, increasing to 77% in 1980, 82% in 1985 and 86% in 1990. It then began dipping again to 83% in 1995, 77% in 2005, and 74% in 2010.

Indeed, the wide discretionary powers conferred on the Supreme Court of India has been used extensively by the apex Court which has raised certain doubts as to the efficacy of Article 136. In order to analyse and determine the judiciousness of discretionary power of the Supreme Court as well as to dispel the doubts concerning the use of power by the Supreme Court researcher thought it pertinent to analyse the working of the honourable apex Court with reference to the power under Article 136.

Therefore, the researcher identified and formulated the research problem as,

**“Appellate Jurisdiction of the Supreme Court of India With Special Reference to Article 136 of the Constitution : A Critical Appraisal”**

**Objectives**

1) Analyzing the nature and jurisdiction of the Supreme Court.

2) Determining the contours of plenary appellate jurisdiction of the Supreme Court.

3) Understanding the Scope and limitations of the discretionary power of the Supreme Court in appellate cases.

4) Evaluation of the judicial attitude concerning judicial discussion in matters of appeal.

5) Determining the common parameters after proportionality review.
Methodology

The whole study shall be conducted by the application of doctrinal method of study as applied in legal research. The method involves analysis of text books, case laws from various sources like All India Reporter, Supreme Court Cases, Supreme Court Weekly etc. It also involves Study of text and case laws regarding appellate jurisdiction of Privy Council, Federal Court and various other laws and finally arranging ordering and systematizing legal propositions and study of legal institutions.

1. The whole study shall tentatively be divided into following chapters:
2. Introduction
3. Appellate Powers of Supreme Court in Civil Cases: The Judicial Determination.
4. Judicial delineation concerning appellate powers of Supreme Court in Criminal Cases
5. Special Leave to Appeal: A study in reference to civil cases.
6. Special Leave to Appeal in Criminal Cases: The judicial approach