HIGH LEVEL COMMITTEE ON SIMULTANEOUS ELECTIONS

ANNEXURES

Volume X

Pages 7525-8374

2024

IMPORTANT JUDGMENTS

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4. IMPORTANT JUDGMENTS

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5130 OF 2013
(Arising out of SLP (C) No. 21455 of 2008)

S. Subramaniam Balaji .... Appellant(s)

Versus

The Government of
Tamil Nadu & Ors. ....
Respondent(s)

WITH

TRANSFERRED CASE NO 112 OF 2011

S. Subramaniam Balaji .... Appellant(s)

Versus

The Government of
Tamil Nadu & Ors. ....
Respondent(s)

J U D G M E N T

P. Sathasivam, J.

SLP (C) No. 21455 of 2008

1) Leave granted.

2) This appeal is directed against the final judgment and order dated 25.06.2007 passed by the Madurai Bench of

the Madras High Court in Writ Petition (C) Nos. 9013 of 2006 and 1071 of 2007 whereby the High Court dismissed the petitions filed by the appellant herein.

3) **Brief Facts:**

(a) The case relates to distribution of free gifts by the political parties (popularly known as 'freebies'). The Dravida Munnetra Kazhagam (DMK)- Respondent No. 8 herein, while releasing the election manifesto for the Assembly Elections 2006, announced a Scheme of free distribution of Colour Television Sets (CTVs) to each and every household which did not possess the same, if the said party/its alliance were elected to power. The Party justified the decision of distribution of free CTVs for the purpose of providing recreation and general knowledge to the household women, more particularly, those living in the rural areas. In pursuance of the same, follow up actions by way of enlisting the households which did not have a CTV set and door to door identification and distribution of application forms were initiated.

(b) This Scheme was challenged by one S. Subramaniam Balaji-the appellant herein, by way of filing writ petition

before the High Court on the ground that the expenditure to be incurred by the State Government for its implementation out of the State Exchequer is unauthorized, impermissible and *ultra vires* the Constitutional mandates. The appellant herein filed a complaint dated 24.04.2006 to the Election Commission of India seeking initiation of action in respect of the said promise under Section 123 of the Representation of People Act, 1951 (in short 'the RP Act'). The appellant herein also forwarded the complaint to the Chief Election Officer, Tamil Nadu.

(c) The DMK and its political allies emerged victorious in the State Assembly Election held in the month of May, 2006. In pursuit of fulfilling the promise made in the election manifesto, a policy decision was taken by the then government to provide one 14" CTV to all eligible families in the State. It was further decided by the Government to implement the Scheme in a phased manner and a provision of Rs. 750 crores was made in the budget for implementing the same. A Committee was constituted, headed by the then Chief Minister and eight

other legislative members of various political parties, in order to ensure transparency in the matter of implementation of the Scheme.

(d) For implementing the first phase of the Scheme, the work of procurement of around 30,000 CTVs was entrusted to Electronic Corporation of Tamil Nadu Ltd. (ELCOT), a State owned Corporation. The first phase of the Scheme was implemented on 15/17th September, 2006 by distributing around 30,000 CTVs to the identified families in all the districts of the State of Tamil Nadu.

(e) Being aggrieved by the implementation of the Scheme, the appellant herein filed another complaint to the Chief Secretary and the Revenue Secretary pointing out the unconstitutionality of the Scheme. He also preferred Writ Petition being Nos. 9013 of 2006 and 1071 of 2007 before the Madurai Bench of the High Court of Madras alleging the Scheme a corrupt practice to woo the gullible electorates with an eye on the vote bank. By order dated 25.06.2007, the High Court dismissed both the writ petitions filed by the appellant herein holding that the action of the Government in distributing free CTVs

cannot be branded as a waste of exchequer. Being aggrieved, the appellant herein has preferred this appeal by way of special leave before this Court.

Transferred Case (C) No. 112 of 2011

(f) In the month of February 2011, pursuant to the elections to the Tamil Nadu State Assembly, the ruling party (DMK) announced its manifesto with a volley of free gifts. In the same manner, the opposite party-All India Anna Dravida Munnetra Kazhagam (AIADMK) and its alliance also announced its election manifesto with free gifts to equalize the gifts offered by the DMK Party and promised to distribute free of cost the following items, viz., grinders, mixies, electric fans, laptop computers, 4 gms gold thalis, Rs. 50,000/- cash for women's marriage, green houses, 20 kgs. rice to all ration card holders even to those above the poverty line and free cattle and sheep, if the said party/its alliance were elected to power during the Tamil Nadu Assembly Elections 2011.

(g) The very same Scheme was also challenged by the appellant herein on the ground that such promises by the parties are unauthorized, impermissible and *ultra vires* the

Constitutional mandates. The appellant herein also filed a complaint dated 29.03.2011 to the Election Commission of India seeking initiation of action in respect of the said Scheme under Section 123 of the RP Act.

(h) The AIADMK and its political allies won the State Assembly Elections held in 2011. In order to fulfill the promise made in the election manifesto, a policy decision was taken by the then government to distribute the gifts and, pursuant to the same, tenders were floated by the Civil Supplies Department for mixies, grinders, fans etc., as well as by ELCOT for lap top computers.

(i) On 06.06.2011, the appellant herein filed another complaint to the Comptroller and Auditor General of India and the Accountant General of Tamil Nadu (Respondent Nos. 3 and 4 therein respectively) pointing out the unconstitutionality of the Scheme and transfer of consolidated funds of the State for the same. In the meanwhile, the appellant herein preferred a Writ Petition being No. 17122 of 2011 before the High Court of Madras alleging the Scheme a corrupt practice and to restrain the government from in any way proceeding with the

procurement, placement of tenders or making free distributions under various Schemes introduced to woo the voters. In view of the pendency of SLP (C) No. 21455 of 2008 in this Court relating to the similar issue, the appellant preferred a Transfer Petition (C) No. 947 of 2011 before this Court praying for the transfer of the said writ petition. By order dated 16.09.2011, this Court allowed the said petition and the same has been numbered as T.C No. 112 of 2011 and tagged with the abovesaid appeal.

4) Heard Mr. Arvind P. Datar, learned senior counsel for the appellant/petitioner, Mr. Shekhar Naphade, learned senior counsel for the State of Tamil Nadu, Mr. P.P. Malhotra, learned Additional Solicitor General for the Union of India and Ms. Meenakshi Arora, learned counsel for the Election Commission of India.

5) **Prayer/Relief Sought For:**

(a) When DMK started distribution of CTVs, the appellant/petitioner herein approached the High Court of Judicature at Madras, Bench at Madurai, by way of filing Writ Petition (C) No. 9013 of 2006 with a prayer to issue a writ of *mandamus* to forbear the respondents therein from

incurring any expenditure out of the public exchequer for the purchase and distribution of colour Televisions within the State of Tamil Nadu.

(b) After 5 years, when AIADMK elected to power, pursuant to their election manifesto, they started distributing various freebies, which was also challenged by the very same person – the appellant/petitioner herein by filing a writ petition being No. 17122 of 2011 before the High Court of Judicature at Madras praying for issuance of a writ to declare the free distribution of (i) grinders (ii) mixies (iii) electric fans (iv) laptop computers (v) 4 gm. gold thalis (vi) free green houses (vii) free 20 kgs. rice to all ration card holders even to those above the poverty line and (viii) free cattle and sheep *ultra* vires the provisions of Articles 14, 41, 162, 266(3) and 282 of the Constitution of India and Section 123(1) of the RP Act.

Contentions by the Appellant:

6) Mr. Datar, learned senior counsel for the appellant submitted that a "gift", "offer" or "promise" by a candidate or his agent, to induce an elector to vote in his favour would amount to "bribery" under Section 123 of

the RP Act. He further pointed out that to couch this offer/promise to give away a gift whose worth is estimable in money and that too from the consolidated fund of the State under the head “promise of publication” or “public policy” or “public good” is to defeat the purposes of the above Section viz., Section 123(1) of the RP Act. While elaborating his submissions, Mr. Datar raised his objections under the following heads:

(I) Article 282 of the Constitution of India only permits defraying of funds from the Consolidated Fund of the State for “public purpose”;

(II) The distributions made by the respondent-State is violative of Article 14 since there is no reasonable classification;

(III) Promises of free distribution of non-essential commodities in an election manifesto amounts to electoral bribe under Section 123 of the RP Act;

(IV) The Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed; and

(V) Safeguards must be built into schemes to ensure that

the distribution is made for a public purpose and is not misused.

(I) Article 282 of the Constitution of India only permits defraying of funds from the Consolidated Fund of the State for "public purpose".

7) Regarding the first contention relating to Article 282 of the Constitution of India which only permits use of monies out of the Consolidated Fund of the State for public purpose, it is useful to refer the said Article which reads as under:

> "**282.Expenditure defrayable by the Union or a State out of its revenue –** The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws."

8) It is pointed out by Mr. Datar that under Article 266(3) of the Constitution, the monies out of the Consolidated Fund of India or the Consolidated Fund of the State can only be appropriated in accordance with law and for the purposes and in the manner provided by the Constitution. Under Article 162, the extent of the executive power of the State is limited to the matters with respect to which the Legislature of the State has the

power to make laws. Likewise, under Article 282, the Union or the States may make grants for "any public purpose", even if such public purpose is not one with respect to which the State or the Union may make laws. By referring these Articles, Mr. Datar submitted that monies out of the Consolidated Fund of the State can only be appropriated for the execution of laws made by the State, or for any other "public purpose".

9) It is further pointed out that the State raises funds through taxation which can be used by the State only to discharge its constitutional functions. Taxpayers' contribution cannot be used to fund State largesse. While the taxpayer has no right to demand a *quid pro quo* benefit for the taxes paid, he has a right to expect that the taxes paid will not be gifted to other persons without general public benefit. The main intention of an act done for a public purpose must be the public, and that the act would remotely, or in a collateral manner, benefit the local public is not relevant at all.

10) According to Mr. Datar, the most important constitutional mandate is that a "public purpose" cannot

be the one that results in the creation of private assets. The exceptions that can be made to this overarching principle are the distributions that fulfill an essential need such as food, clothing, shelter, health or education. Even if certain distributions, such as the distribution of televisions might have some public benefit, it would not amount to public purpose since the dominant purpose of such a distribution is only the creation of private assets. Where the purposes of the expenditure are partly public and partly private, the Courts in the US have held that the entire act must fail. (vide ***Coates*** vs. ***Campbell and Others***, 37 Minn. 498).

11) While statutory authorities can confer social or economic benefits on particular sections of the community, their power is limited by the principle that such benefits must not be excessive or unreasonable. As Lord Atkinson stated in ***Roberts*** vs. ***Hopwood & Ors.*** 1925 AC 578, the State cannot act in furtherance of "eccentric principles of socialistic philanthropy". In view of the above, a reference was also made to ***Bromley London Borough Council, London*** vs. ***Greater Council***

& Anr. 1982 (2) WLR 62 and ***R*** vs. ***Secretary of State for Foreign Affairs*** (1995) 1 All ER 611.

12) In this context, it is pointed out that Article 41 of the Constitution of India states that the State, "within its economic capacity and development" can make effective provision for securing "public assistance" in certain special cases. Article 39(b) states that the State shall endeavour to ensure that the "material resources" of the community are so distributed as best to subserve the "common good". Both these articles imply that the goal of the Constitution, as evidenced by these Directive Principles, is to ensure that the State distributes its resources to secure "public assistance" and "common good", and must not create private assets.

13) It is also pointed out that the Constitutions of 17 States of the US explicitly prohibit the making of private gifts by the Government, and it is recognized even elsewhere in the US that the public funds cannot be used to make gifts to private persons.

14) It is further stated that the spending on free distribution must be weighed against the public benefits

that ensue from it and only if the public benefits outweigh the same, can the spending be classified as being for a public purpose. Mr. Datar asserted that when the literacy rate in the State of Tamil Nadu is around 73% and there are 234 habitations across the State with no school access whatsoever, distribution of free consumer goods to the people having ration cards cannot be justified as "public purpose".

15) In addition to CTVs by the previous Government, the following free distributions have been promised by the Government of Tamil Nadu in the Budget Speech for the year 2011-2012:

> "1. **60,000 green houses, at a cost of Rs.1.8 lakhs per house, totally amounting to Rs.1080 crores.** The green houses are being supplied to persons below the poverty line residing in rural areas. However, they are being supplied to persons who already own 300 sq. ft. of land.
>
> **Comment by the appellant:**
>
> The State is creating private assets through this distribution, when it can, instead build houses owned by the State which can be occupied by eligible persons.
>
> 2. **4 gms of gold for poor girls for thali, plus Rs.50000 cash for wedding purposes, totally amounting to Rs.514 crores.**
>
> **Comment by the appellant:**
>
> The State can achieve the same end of subsidizing marriages by providing institutions such as mandaps

and temples that can be used for marriage. There are no safeguards in any scheme proposed by the State to ensure that Rs.50,000 given in cash to the eligible beneficiaries will be used for the marriage, and not diverted for other purposes.

3. **Free mixies, grinders and fans for 25 lakh families, totally amounting to Rs.1250 crores.**

Comment by the appellant:

The reasons given by the State, of alleviating women of "domestic drudgery" are frivolous and do not amount to a "public purpose". Mixies, grinders and fans are luxuries and cannot be freely distributed by the Government. The distribution is being made to a large section of persons without even ascertaining whether the persons already own these goods and whether they require state assistance to acquire these goods.

4. **9.12 lakh laptops to all class XII students in Tamil Nadu amounting to Rs. 912 crores.**

Comment by the appellant:

No "public purpose" is served by such distribution. The State is duty bound to create computer labs in schools and colleges and not distribute such expensive articles as gifts. Classification of students eligible for the laptops suffers from overclassification, violative of Article 14 of the Constitution. The classification is also violative of Article 14 as it omitted certain categories of students.

5. **Free cattle to poor families in certain rural areas, Rs.56 crores.** Distribution of milch cows is being done, according to the State's Government Order, to "boost the productivity of milk in the State."

Comment by the appellant:

It is stated that the State does run a diary, and the constitutionally valid method to boost milk production is to spend on these institutions and not to create private assets under these Government Orders.

6. **Free rice to 1.83 crore families under the PDS system, amounting to Rs.4500 crores.**

Comment by the appellant:

Rice is already being distributed in the State at Rs.2 per kilo. Under this scheme, rice is being distributed free of cost, as a pure populist measure. As per the State's own submissions, rice is priced at Rs.2 under the Anthyodaya Anna Yojana, which is being followed throughout the country.

16) Mr. Datar, learned senior counsel for the appellant pointed out that the Constitution of India does not permit free distribution of goods such as colour televisions, mixies, grinders, laptops since these are consumer goods and only benefit the persons to whom they are distributed and not the public at large. Public spending on these goods to the tune of Rs.9000 crores far outweighs any public benefit that might arise from such distributions. When the same ends can be efficiently achieved without the creation of private assets, such as the creation of Community Computer Centers instead of distributing laptops, or setting up of Community Televisions at the Panchayat level resorting to make large scale free distribution, it clearly violate Articles 162, 266(3) and 282 of the Constitution. It is further pointed out that the fact that CTVs and other schemes of previous Government

were cancelled by the present Government shows that these were not for "public purpose" but only to serve the political objectives of a particular party.

II. The distributions made by the respondent fall foul of Article 14 since there is no reasonable classification

17) The right to equality under Article 14 of the Constitution requires that the State must make a reasonable classification based on intelligible differentia, and such classification must have a nexus with the object of the law. In making free distributions, the State, therefore, must show that it has identified the class of persons to whom such distributions are sought to be made using intelligible differentia, and that such differentia has a rational nexus with the object of the distribution. As held in ***Union of India & Anr.*** vs. ***International Trading Co. & Anr.*** 2003 (5) SCC 437, Article 14 applies to matters of government policy and such policy or action would be unconstitutional if it fails to satisfy the test of reasonableness.

18) This Court, in ***K.T. Moopil Nair*** vs.***State of Kerala***

AIR 1961 SC 552, held that a statute can offend Article 14 if it groups together persons who are dissimilar. In that case, a flat tax of Rs. 2 per acre was levied on land without ascertaining the income earning potential of such land, which was struck down as unconstitutional.

19) In the case on hand, the colour televisions, mixies and grinders were being distributed to all persons having ration card. While the distribution of these goods is supposedly being made to help people who cannot afford these items, the State has not made any attempt to find out if such persons already own a colour television, a mixie or a grinder. Further, the differentia of a ration card has no rational nexus with the object of free distribution of the items since a ration card does not indicate the income of the family or whether they already own these goods.

20) Similarly, in another Scheme, the State has promised to distribute free laptops to all the students studying in the State Board. Again, this classification is arbitrary since there are numerous similarly placed students in Central Board schools who were being excluded by this Scheme. The Scheme also excludes commerce, law and medical

college students and violates Article 14 by not providing intelligible differentia having a nexus with such distribution.

III. Promises of free distribution of non-essential commodities in election manifesto amounts to an electoral bribe under Section 123 of the RP Act.

21) Under Section 123(1)(A) of the RP Act, any "gift, offer or promise" by a candidate or his agent or by any other person, with the object of inducing a person to vote at an election amounts to "bribery", which is a "corrupt practice" under the said section. The key element in this section is that the voter must be influenced to vote in a particular manner. It has been held in ***Richardson-Garnder*** vs. ***Ekykn,*** (1869) 19 LT 613 that the making of charitable gifts on an extensive scale would lead to an inference that this was made to influence voters.

22) Mr. Datar pointed out that the plea that promises in the manifesto do not amount to bribery is completely baseless and finds no support in the plain words of the statute or in decided case laws. The statute very clearly

includes a “promise” within its ambit, and an unconstitutional promise clearly falls foul of the language of Section 123 of the RP Act. Such ‘freebies’ are in form part of an election manifesto but in substance is a bribe or inducement under section 123. If such practices are permitted, then the manifesto does indirectly what a candidate cannot do directly.

23) It is further pointed out that the promise of distribution was made at the time of elections and not after, and instead of focusing on basic necessities, it was on free distributions which indicates that the promise of free colour televisions, grinders, mixies, laptops, gold etc., was only made as an electoral bribe to induce voters.

24) Mr. Datar further pointed out that the intent of Section 123 of the RP Act is to ensure that no candidate violates the level playing field between the candidates. Therefore, whether such promises are made by the political party or by the candidate himself is irrelevant. The manifesto, where such illegal promises are made, implore the voters to vote for that particular party.

IV. The Comptroller and Auditor General of India has a duty to examine expenditures even before

they are deployed.

25) The Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Government, Government bodies and state-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General's (Duties, Powers etc.) Act, 1971. Section 13 of this Act states that the CAG shall audit all the expenditure from the Consolidated Fund of India, and of each State, and ascertain whether the moneys so spent were "legally available for and applicable to the service of purpose to which they have been applied or charged."

26) Section 15 of the Act states that where grants and loans have been given for any specific purpose to any authority or body other than a foreign state or an international organization, the CAG has the duty to scrutinize the procedure by which the loan or grant has been made.

27) The language of the provision suggests that the role of CAG is limited to review. However, this would rob the

CAG of the power to ensure that large-scale unauthorized spending of public funds, such as these free distributions, does not take place. The Section must be given purposive interpretation that would further its intent to ensure that the government's spending is only on purposes that are legally allowable. The Chancery Division has held in ***Kingston Cotton Mills Co. Re*** [1896] 2 Ch 279 that an auditor is a "watchdog". To perform his role as a watchdog, the CAG must be vigilant, watch for any large-scale illegal expenditures, and act upon them immediately.

V. Safeguards must be built into schemes to ensure that the distribution is made for a public purpose, and is not misused.

28) The Members of Parliament Local Area Development Scheme (MPLADS) was challenged before this Court in ***Bhim Singh*** vs. ***Union of India and Ors.***, (2010) 5 SCC 538 wherein the Constitution Bench of this Court upheld the scheme on the grounds that there were three levels of safeguards built into the scheme to ensure that the funds given to the Members of Parliament would not be misused. This Court held as under:

> "8) The court can strike down a law or scheme only on the basis of its vires or unconstitutionality but not on the basis of its viability. When a regime of accountability is available within the Scheme, it is not proper for the Court to strike it down, unless it violates any constitutional principle.
> 9) In the present Scheme, an accountability regime has been provided. Efforts must be made to make the regime more robust, but in its current form, cannot be struck down as unconstitutional."

29) The MPLAD Scheme clearly had prohibitions against spending on the creation of private assets and to make loans. It is pointed out that there is no scheme of accountability in the above mentioned promises for free distributions, hence, learned senior counsel prayed for necessary guidelines for proper utilization of public funds.

Contentions by the Respondents:

Contentions of the State of Tamil Nadu:

30) On the other hand, Mr. Shekhar Naphade, learned senior counsel for the State of Tamil Nadu while disputing the above claim submitted that the freebies, as promised in the election manifesto, would not come under the head "corrupt practices" and "electoral offences" in terms of the RP Act. He further submitted that in view of the mandates in the Directives Principles of State Policy in Part IV of the Constitution, it is incumbent on the State

Government to promote the welfare of the people, who are below the poverty line or unable to come up without their support. In any event, according to learned senior counsel, for every promise formulated in the form of election manifesto, after coming to power, the same were being implemented by framing various schemes/guidelines/eligibility criteria etc. as well as with the approval of legislature. Thus, it cannot be construed as a waste of public money or prohibited by any Statute or Scheme.

31) While elaborating his submissions, Mr. Shekhar Naphade replied for the contentions made by the appellant under the following heads:

(I) Political Parties are not State, therefore, not amenable to writ jurisdiction of the High Court under Article 226 or writ jurisdiction of the Supreme Court under Article 32 of the Constitution of India or any other provisions of the Constitution. For corrupt practices, the remedy is Election Petition.

(II) Non-application of Vishaka principle and the difficulties in implementing the directions, if any, that may be issued

by this Court.

(III) Promises of political parties do not constitute a corrupt practice.

(IV) The Schemes under challenge operate within the parameters of public purpose and Article 14 of the Constitution has no role to play.

(I) Political Parties are not State, therefore, not amenable to the writ jurisdiction of the High Court under Article 226 or the writ jurisdiction of the Hon'ble Supreme Court under Article 32 of the Constitution of India or any other provisions of the Constitution. For corrupt practices, the remedy is an Election Petition.

32) Learned senior counsel submitted that a political party is not a statutory Corporation. Similarly, a political party is also not a Government. It is also not an instrumentality or agency of the State. None of the parameters laid down by several judgments of this court for identifying an agency or instrumentality of the State apply to a political party and, therefore, no political party can be considered as a State or any agency or instrumentality of the State, hence, no writ can lie against a political party. [vide ***Federal Bank Ltd.*** vs. ***Sagar Thomas and Others***, (2003) 10 SCC 733.

33) Further, learned senior counsel put forth that it is the claim of the appellant that the promises like giving colour TVs, mixer-grinders, laptops etc. constitute a corrupt practice and, therefore, must vitiate an election. If the promise of the above nature is a corrupt practice, then the only remedy for the appellant is to file an Election Petition under Section 80, 80A read with other provisions of the RP Act. Under Section 81, such an Election Petition must be filed within 45 days from the date of the election. In the petition, the appellant must set out clearly and specifically the corrupt practice that he complains of and also set out as to how the returned candidate or his agent has committed the same or has connived at the same. An election Petition is to be tried on evidence and therefore, the writ petition is not a remedy.

(II) Non-application of Vishaka principle and the difficulties in implementing the directions, if any, that may be issued by this Court.

34) It was submitted that Entry 72 of List-I of the VIIth Schedule to the Constitution of India deals with election to Parliament and State Legislative Assemblies. In exercise of this power, the Parliament has enacted the RP Act. The

Act, as originally enacted, did not contain any provision relating to corrupt practice as contained in Section 123. Section 123 defines and enumerates "corrupt practices" exhaustively. Section 123 came as a result of recommendations of the Select Committee of the Parliament on the basis of which the said Act was amended by substituting Chapter 1 in Part VII of the Act by Act No. 27 of 1956. The Legislature has dealt with the subject of corrupt practice and it is not a case of legislative vacuum. The field of corrupt practice is covered by the provisions of the said Act. Once the Legislature has dealt with a particular topic, then the ***Vishakha*** principle (***Vishaka and Others*** vs ***State of Rajasthan and Others*** (1997) 6 SCC 241) has no applicability. This Court, in ***Vishaka (supra)*** and ***Aruna Ramachandra Shanbaug*** vs. ***Union of India and Others***, (2011) 4 SCC 454 and other cases has clearly held that if on a given topic there is no law enacted by a competent legislature, then this Court has power to issue directions under its inherent powers under Article 142 and 141 of the Constitution and the said directions would

operate and bind all concerned till the competent Legislature enacts a law on the concerned subject. Whether the present provisions of the said Act are adequate or not is a matter for the Parliament and the Parliament alone to decide. This Court, in exercise of powers under Article 141 and 142 or under any other provision of law, cannot issue a direction to include any practice not specified as corrupt practice under the Act as Corrupt Practice.

35) Further, learned senior counsel emphasized on the difficulties to implement the guidelines, if any, framed by this Court by referring to previous cases, viz., ***Union of India*** vs. ***Association for Democratic Reforms and Another*** (2002) 5 SCC 294 and ***People's Union for Civil Liberties (PUCL) and Anr.*** vs. ***Union of India and Anr.*** (2003) 4 SCC 399.

(III) Promises of political parties do not constitute a corrupt practice.

36) Learned senior counsel submitted that inasmuch as the words mentioned in Section 123 of the Act are clear and unambiguous, the same should be interpreted in the same manner as stated therein. Section 123 of the RP Act

is a penal statute and ought to be strictly construed. It is settled principle of law that an allegation of "corrupt practice" must be strictly proved as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices. In ***M.J. Jacob*** vs. ***A. Narayanan and Others***, (2009) 14 SCC 318, it has been held by this Court in paras 13 and 15 as under:

> **"13.** It is well settled that in an election petition for proving an allegation of corrupt practice the standard of proof is like that in a criminal case. In other words, the allegation must be proved beyond reasonable doubt, and if two views are possible then the benefit of doubt should go to the elected candidate vide *Manmohan Kalia* v. *Yash*, vide SCC p. 502, para 7 in which it is stated:
>
> > "*7*. ... It is now well settled by several authorities of this Court that an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices envisaged by the Act because if this test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election, which will adversely affect the electoral process."
>
> **15.** In *Surinder Singh* v. *Hardial Singh*, vide SCC p. 104, para 23 it was observed:
>
> > "*23*. ... It is thus clear beyond any doubt that for over 20 years the position has been uniformly accepted that charges of corrupt practice are to be equated with criminal charges and proof thereof would be not preponderance of probabilities as in civil action but proof beyond reasonable doubt as in criminal trials."

37) In ***Baldev Singh Mann*** vs. ***Surjit Singh Dhiman***,

(2009) 1 SCC 633, this Court observed as under:

> "19. .... The law is now well settled that the charge of a corrupt practice in an election petition should be proved almost like the criminal charge. The standard of proof is high and the burden of proof is on the election petitioner. Mere preponderance of probabilities is not enough, as may be the case in a civil dispute. Allegations of corrupt practices should be clear and precise and the charge should be proved to the hilt as in a criminal trial by clear, cogent and credible evidence.
>
> **21.** The Court in a number of cases has held that the charge of corrupt practice is quasi-criminal in character and it has to be proved as a criminal charge and proved in the court. In *Jeet Mohinder Singh case* the Court observed as under:
>
> "(*ii*) Charge of corrupt practice is quasi-criminal in character. If substantiated it leads not only to the setting aside of the election of the successful candidate, but also of his being disqualified to contest an election for a certain period. It may entail extinction of a person's public life and political career. A trial of an election petition though within the realm of civil law is akin to trial on a criminal charge. Two consequences follow. Firstly, the allegations relating to commission of a corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same. Secondly, the charges when put to issue should be proved by clear, cogent and credible evidence. To prove charge of corrupt practice a mere preponderance of probabilities would not be enough. There would be a presumption of innocence available to the person charged. The charge shall have to be proved to the hilt, the standard of proof being the same as in a criminal trial."

38) It is further submitted that the manifesto of the political party in question promises to achieve a social order removing economic inequalities, attain a social plane and attempts to reduce the degradations existing in our society where only a certain class of people are

elevated and entitled to economic upliftment. The mandate for social and economic transformation requires that material resources or their ownership and control be so distributed as to subserve the common good.

39) In ***Samatha*** vs. ***State of A.P. and Others***, (1997) 8 SCC 191, in paras 76 and 79, it has been held as under:

> **"76.** Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people. Dr B.R. Ambedkar, in his closing speech in the Constituent Assembly on 25-11-1949, had lucidly elucidated thus:
>
> "... What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will

have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

(Vide B. Shiva Rao's *The Framing of India's Constitution*: *Select Documents*, Vol. IV, pp. 944-45.)

79. It is necessary to consider at this juncture the meaning of the word "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate articles seek to establish, i.e., to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold the Government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interests of the weaker sections of the society so as to assimilate all the sections of the society in a secular integrated socialist Bharat with dignity of person and equality of status to all."

40) In ***Bhim Singh (supra)***, a Constitution Bench of this Court observed as under:

"58. The above analysis shows that Article 282 can be the source of power for emergent transfer of funds, like the MPLAD Scheme. Even otherwise, the MPLAD Scheme is voted upon and sanctioned by Parliament every year as a scheme for community development. We have already held that the scheme of the Constitution of India is that the power of the Union or State Legislature is not limited to the legislative powers to incur expenditure

only in respect of powers conferred upon it under the Seventh Schedule, but it can incur expenditure on any purpose not included within its legislative powers. However, the said purpose must be "public purpose". Judicial interference is permissible when the action of the Government is unconstitutional and not when such action is not wise or that the extent of expenditure is not for the good of the State. We are of the view that all such questions must be debated and decided in the legislature and not in court.

95. This argument is liable to be rejected as it is not based on any scientific analysis or empirical data. We also find this argument a half-hearted attempt to contest the constitutionality of the Scheme. MPLADS makes funds available to the sitting MPs for developmental work. If the MP utilises the funds properly, it would result in his better performance. If that leads to people voting for the incumbent candidate, it certainly does not violate any principle of free and fair elections.

96. As we have already noted, MPs are permitted to recommend specific kinds of works for the welfare of the people i.e. which relate to development and building of durable community assets (as provided by Clause 1.3 of the Guidelines). These works are to be conducted after approval of relevant authorities. In such circumstances, it cannot be claimed that these works amount to an unfair advantage or corrupt practices within the meaning of the Representation of the People Act, 1951. Of course such spending is subject to the above Act and the regulations of the Election Commission."

(IV) The Schemes under challenge operate within the parameters of public purpose and Article 14 of the Constitution has no role to play.

41) The argument of the appellant that giving of colour TVs, laptops, mixer-grinders etc. on the basis of the manifesto of the party that forms the Government is not an expense for a public purpose. This argument is devoid

of any merit according to learned senior counsel for the State of Tamil Nadu. It was submitted that the concept of State Largesse is essentially linked to Directive Principles of State Policy. Whether the State should frame a scheme, which directly gives benefits to improve the living standards or indirectly by increasing the means of livelihood, is for the State to decide. The preamble to the Constitution recognizes Socialism as one of the pillars of Indian Democracy. The preamble has been held to be a part of the Constitution by a catena of judgments including ***Keshavanand Bharati vs. State of Kerala*** (1973) 4 SCC 1461. The State largesse is directly linked to the principle of Socialism and, therefore, it is too late in the day for anybody to contend that the Government giving colour TVs, laptops, mixer-grinders, etc. that too to the eligible persons as prescribed by way of Government Order is not a public purpose. For the same reasons, it must be held that it is a part of Government function to take measures in connection with Government largesse.

42) It is further submitted that the political parties in their election manifesto promised to raise the standard of living

of the people and to formulate a scheme/policy for the upliftment of the poor. The distribution of basic necessities in today's time like TVs, mixers, fans and laptops to eligible persons fixing parameters, can by no stretch of imagination be said to be State largesse. A three-Judge Bench of this Court in ***Deepak Theatre, Dhuri*** vs. ***State of Punjab and Others***, 1992 Supp (1) SCC 684, held as under:

> **"5.** Witnessing a motion picture has become an amusement to every person; a reliever to the weary and fatigued; a reveller to the pleasure seeker; an imparter of education and enlightenment enlivening to news and current events; disseminator of scientific knowledge; perpetuator of cultural and spiritual heritage, to the teeming illiterate majority of population. Thus, cinemas have become tools to promote welfare of the people to secure and protect as effectively as it may a social order as per directives of the State policy enjoined under Article 38 of the Constitution. Mass media, through motion picture has thus become the vehicle of coverage to disseminate cultural heritage, knowledge, etc. The passage of time made manifest this growing imperative and the consequential need to provide easy access to all sections of the society to seek admission into theatre as per his paying capacity."

43) The grievance of the appellant is that the public resources are being used for the benefit of individuals. According to learned senior counsel for the respondent, this argument is completely misconceived. It was submitted that in catena of cases, this Court has held that

while judging the constitutional validity of any law or any State action, the Directive Principles of the State Policy can be taken into account. Article 38 contemplates that the State shall strive to promote the welfare of the people. Article 39 contemplates that the State shall take actions to provide adequate means of livelihood and for distribution of material resources of the community on an egalitarian principle. Article 41 contemplates that the State shall render assistance to citizens in certain circumstances and also in cases of undeserved want. Article 43 directs that the State shall "endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers". Similarly, Article 45 contemplates that the State shall endeavour to provide early childhood care and education to all children below the age of 6 years and Article 46 says that the State shall promote educational and economic interests of the weaker sections of the people. Article 47 contemplates that the State shall take steps to raise the level of nutrition and the standard of

living. The concept of livelihood and standard of living are bound to change in their content from time to time. This Court has dealt with the concept of minimum wage, the fair wage and the living wage while dealing with industrial disputes and has noted that these concepts are bound to change from time to time. What was once considered to be a luxury can become a necessity. The concept of livelihood is no longer confined to a bare physical survival in terms of food, clothing and shelter, but also now must necessarily include some provision for medicine, transport, education, recreation etc. How to implement the directive principles of State Policy is a matter within the domain of the Government, hence, the State distributing largesse in the form of distribution of colour TVs, laptops, mixer-grinders etc. to eligible and deserving persons is directly related to the directive principles of the State Policy.

44) The other facet of the argument is that this largesse is distributed irrespective of the income level and, therefore, violative of Article 14 as unequals are treated equally. Learned senior counsel submitted that this

principle of not to treat unequals as equals has no applicability as far as State largesse is concerned. This principle applies only where the law or the State action imposes some burden on the citizen either financial or otherwise.

45) Article 14 essentially contemplates equality in its absolute sense and classification can be taken recourse to if the State is unable or the State policy does not contemplate the same benefit or treatment to people who are not similarly situated. It is the philosophical sense decoded by this Court in the first part of Article 14 which is equal treatment for all without any distinction. This is the concept of formal equality which is not necessarily an antithesis to Article 14. The concept of equality based on classification is proportional equality. The formal equality applies when the State is in a position to frame a scheme or law which gives the same benefit to all without any distinction and the proportional equality applies when the State frames a law or a Scheme which gives benefit only to people who form a distinct class. It is in the case of proportional equality that the principles of intelligible

differentia having reasonable nexus to the object of legislation gets attracted. Article 14 does not prohibit formal equality. The Directive Principles of State Policy save proportional equality from falling in foul with formal equality contemplated by Article 14.

Contentions of the Union of India, CAG and Election Commission:

46) Mr. P.P. Malhotra, learned ASG also reiterated the stand taken by learned senior counsel for the State. It is the stand of the CAG that they have no role at this juncture, particularly, with reference to the prayer sought for. Ms. Meenakshi Arora, learned counsel for the Election Commission of India submitted that with the existing provisions in the RP Act, Election Commission is performing its duties, however, if this Court frames any further guidelines, they are ready to implement the same.

47) We have carefully considered the rival contentions, perused the relevant provisions, various Government orders, guidelines and details furnished in the counter affidavit. The following points arise for consideration:

Points for Consideration:

(i) Whether the promises made by the political parties in

the election manifesto would amount to 'corrupt practices' as per Section 123 of the RP Act?

(ii) Whether the schemes under challenge are within the ambit of public purpose and if yes, is it violative of Article 14?

(iii) Whether this Court has inherent power to issue guidelines by application of Vishaka principle?

(iv) Whether the Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?

(v) Whether the writ jurisdiction will lie against a political party?

Discussion:

Issue No. 1

Whether the promises made by the political parties in their election manifestos would amount to 'corrupt practices' as per Section 123 of the Representation of the People Act, 1951?

48) Before going into the acceptability or merits of the claim of the appellant and the stand of the respondents, it is desirable to reproduce certain provisions of the RP Act. Part VII of the RP Act deals with "corrupt practices" and "electoral offences" which was brought into force with

effect from 28.08.1956. Chapter I of Part VII deals with "corrupt practices". Section 123 is the only Section relevant for our purpose which reads thus:-

> **"123. Corrupt practices.-** The following shall be deemed to be corrupt practices for the purposes of this Act:
>
> (1) "Bribery", that is to say-
> (A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing-
> (a) a person to stand or not to stand as, or [to withdraw or not to withdraw] from being a candidate at an election, or
> (b) an elector to vote or refrain from voting at an election, or as a reward to-
> (i) a person for having so stood or not stood, or for [having withdrawn or not having withdrawn] his candidature; or
> (ii) an elector for having voted or refrained from voting;
>
> (B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward-
> (a) by a person for standing or not standing as, or for [withdrawing or not withdrawing] from being, a candidate; or
> (b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature.
>
> Explanation.- For the purposes of this clause the term" gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any elec- tion and duly entered in the account of election expenses referred to in Section 78.
>
> (2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the

candidate or his agent, or of any other person [with the consent of the candidate or his election agent], with the free exercise of any electoral right: Provided that-

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who-

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

(3B) The propagation of the practice or the commission

of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.
Explanation.- For the purposes of this clause," sati" and" glorification" in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act, 1987 .

(4) The publication by a candidate or his agent or by any other Person, [with the consent of a candidate or his election agent], of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal [of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate' s election.

(5) The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate or his election agent], [or the use of such vehicles or vessel for the free conveyance] of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under Section 25 or a place fixed under sub-section (1) of Section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:

Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt, practice under this clause.

Explanation.- In this clause, the expression" vehicle" means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for

drawing other vehicles or otherwise.

(6) The incurring or authorizing of expenditure in contravention of Section 77.

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person [with the consent of a candidate or his election agent], any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:-
(a) gazetted officers;
(b) stipendiary judges and magistrates;
(c) members of the armed forces of the Union;
(d) members of the police forces;
(e) excise officers;
(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and]
(g) such other class of persons in the service of the Government as may be prescribed:

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any, facilities or does any other act or thing for to or in relation to any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate' s election.

(h) class of persons in the service of a local authority, university, government company or institution or concern or undertaking appointed or deputed by the Election Commission in connection with the conduct of elections.

(8) Booth Capturing by a candidate or his agent or other person.

Explanation.- (1) In this Section the expression" agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.
(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate' s election if he acts as an election agent of that candidate.
(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof-
(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and
(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.]
(4) For the purposes of clause (8)," booth capturing" shall have the same meaning as in Section 135A."

49) Keeping the parameters fixed in the above Section, we have to analyze the claim of both the parties hereunder. A perusal of sub-sections 1-8 of Section 123 makes it clear that it speaks only about a **candidate** or **his agent** or **any other person**. There is no word about political parties. Taking note of the conditions mandated in those sub-sections, let us test the respective stand of

both the parties.

50) For deciding the issue whether the contents of the political manifesto would constitute a corrupt practice under Section 123 of RP Act, it is imperative to refer to the intention of the legislature behind incorporating the respective section. The purpose of incorporating Section 123 of the RP Act is to ensure that elections are held in a free and fair manner.

51) The object of provisions relating to corrupt practices was elucidated by this Court in ***Patangrao Kadam*** vs. ***Prithviraj Sayajirao Yadav Deshmukh and Ors.*** (2001) 3 SCC 594 as follows:-

> 14. "....Fair and free elections are essential requisites to maintain the purity of election and to sustain the faith of the people in election itself in a democratic set up. Clean, efficient and benevolent administration are the essential features of good governance which in turn depends upon persons of competency and good character. Hence those indulging in corrupt practices at an election cannot be spared and allowed to pollute the election process and this purpose is sought to be achieved by these provisions contained in the RP Act."

52) With this background, let us analyze the contention of the appellant. The gist of appellant's argument is that promises of freebies such as colour TVs, mixer-grinders, laptops, etc., are in form part of an election manifesto of a

political party but in substance is a bribe or inducement under Section 123. Thus, it is the stand of the appellant that the promise of this nature indeed induces the voters thereby affecting the level playing field between the candidates, which in turn disrupts free and fair election. Therefore, the appellants suggested for construing the promises made in the election manifesto as a corrupt practice under Section 123 of RP Act. He mainly relied on the principle that one cannot do indirectly what it cannot do directly.

53) As appealing this argument may sound good, the implementation of this suggestion becomes difficult on more than one count. Firstly, if we are to declare that every kind of promises made in the election manifesto is a corrupt practice, this will be flawed. Since all promises made in the election manifesto are not necessarily promising freebies *per se,* for instance, the election manifesto of a political party promising to develop a particular locality if they come into power, or promising cent percent employment for all young graduates, or such other acts. Therefore, it will be misleading to construe that

all promises in the election manifesto would amount to corrupt practice. Likewise, it is not within the domain of this Court to legislate what kind of promises can or cannot be made in the election manifesto.

54) Secondly, the manifesto of a political party is a statement of its policy. The question of implementing the manifesto arises only if the political party forms a Government. It is the promise of a future Government. It is not a promise of an individual candidate. Section 123 and other relevant provisions, upon their true construction, contemplate corrupt practice by individual candidate or his agent. Moreover, such corrupt practice is directly linked to his own election irrespective of the question whether his party forms a Government or not. The provisions of the RP Act clearly draw a distinction between an individual candidate put up by a political party and the political party as such. The provisions of the said Act prohibit an individual candidate from resorting to promises, which constitute a corrupt practice within the meaning of Section 123 of the RP Act. The provisions of the said Act place no fetter on the power of the political

parties to make promises in the election manifesto.

55) Thirdly, the provisions relating to corrupt practice are penal in nature and, therefore, the rule of strict interpretation must apply and hence, promises by a political party cannot constitute a corrupt practice on the part of the political party as the political party is not within the sweep of the provisions relating to corrupt practices. As the rule of strict interpretation applies, there is no scope for applying provisions relating to corrupt practice contained in the said Act to the manifesto of a political party.

56) Lastly, it is settled law that the courts cannot issue a direction for the purpose of laying down a new norm for characterizing any practice as corrupt practice. Such directions would amount to amending provisions of the said Act. The power to make law exclusively vests in the Union Parliament and as long as the field is covered by parliamentary enactments, no directions can be issued as sought by the appellant. As an outcome, we are not inclined to hold the promises made by the political parties in their election manifesto as corrupt practice under

Section 123 of the RP Act.

Issue No. 2

Whether the schemes under challenge are within the ambit of public purpose and if yes, is it violative of Article 14?

57) The concept of State largesse is essentially linked to Directive Principles of State Policy. Whether the State should frame a scheme, which directly gives benefits to improve the living standards or indirectly by increasing the means of livelihood, is for the State to decide and the role of the court is very limited in this regard.

58) It is not in dispute that television is a widely used tele-communication medium for receiving moving images. Today, television has a lot of positive effects and influences on our society and culture. Television gives helpful information and it is not an equipment aimed for entertainment alone. The State Government has also asserted that the purpose of distributing colour television sets is not restricted for providing recreation but to provide general knowledge to the people, more particularly, to the household women.

59) On behalf of the State of Tamil Nadu, it was explained that in order to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which social and economic justice can be achieved, the Government of Tamil Nadu has announced certain welfare schemes for raising the standard of living of the people by providing assistance to the deserving ones as envisaged under the Directive Principles of the Indian Constitution. In order to implement those schemes effectively, the Government of Tamil Nadu had exclusively formed a Special Programme Implementation Department. Guidelines for each Scheme were framed to identify the beneficiaries and mode of distribution.

60) It is pointed out by the State that the Government has issued necessary orders for the following schemes:

(i) Marriage Assistance Scheme;

(ii) Distribution of Milch Animals and Goats;

(iii) Solar Powered Green House Scheme;

(iv) Laptop Computer to students;

(v) Free Rice Scheme; and

(vi) Free distribution of Electric Fans, Mixies and Grinders to women.

The Schemes are as under:

“Marriage Assistance Scheme

1) The economic status of a family plays a vital role in enabling the poor parents who have daughters to fulfill the social obligation of marriage. Various Marriage Assistance Schemes being implemented by the Government of Tamil Nadu are in vogue to benefit the poor and the downtrodden for whom the marriage ceremony of their daughters impose a heavy burden. There are at present 5 marriage assistance schemes and they are as follows:

(i) Moovalur Ramamirtham Ammaiyar Ninaivu Marriage Assistance Scheme for poor girls
(ii) Dr. Dharmambal Ammaiyar Ninaivu Widow Re-marriage Assistance Scheme to encourage the remarriage of young widows
(iii) E.V.R. Maniammaiyar Ninaivu Marriage Assistance Scheme for daughters of poor widows
(iv) Annai Theresa Ninaivu Marriage Marriage Assistance Scheme for Orphan Girls.
(v) Dr. Muthulakshmi Reddy Minaivu Inter-caste Marriage Assistance Scheme

2) With the extraordinary rise in the price of gold, poor families and the abovementioned vulnerable categories find it difficult to buy even a small quantity of gold for the traditional ‘Thirumangalyam’ (Mangal Sutra). To mitigate the hardship of the poor families and vulnerable sections, the State Government has ordered the provision of 4 gms (1/2 sovereign) 22 ct. gold coin for making the ‘Thirumangalyam’ in addition to the already existing financial assistance of Rs.25,000/-. Moreover, with the aim of encouraging higher education among women, the present Government has also introduced a new scheme of providing financial assistance of Rs.50,000/- for graduates/diploma holders along with the four grams 22 carat gold coin for making the ‘Thirumangalayam’.

3) The guidelines for sanction of assistance under the various Marriage Assistance Scheme include that the annual income of the family should not exceed Rs.24,000/- and the minimum age limit for the girls should be 18 years. The detailed guidelines have been issued in G.O.(Ms.) No. 49, SW & NMP

Dept. dated 26.07.2011. The details pertaining to each scheme are as follows:

(A) Moovalur Ramamiratham Ammaiyar Ninaiyu Marriage Assistance Scheme

1.	Objectives of the Scheme	To help the poor parents financially in getting their daughter's married and to promote the educational status of poor girls.
2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes)
3.	To whom the benefit is due	Girls belonging to poor families
4.	When the benefit is due	Before marriage
5.	**Eligibility Criteria** a) Age Limit	Bride should have completed 18 years of age
	b) Income Limit	Not exceeding Rs.24,000/- per annum
	c) Other criteria	Only one girl from a family is eligible

(B) Dr. Dharmambal Ammaiyar Ninaivu Widow Re-marriage Assistance Scheme

1.	Objectives of the Scheme	To encourage widow remarriage and rehabilitate widows
2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	To the couple
4.	When the benefit is due	Within 6 months from the date of marriage
5.	**Eligibility Criteria** a) Age Limit	Minimum age of 20 years for the bride and below 40 years for the bridegroom.
	b) Income Limit	No income ceiling.

(C) E.V.R. Maniammaiyar Ninaivu Marriage Scheme for daughters of poor widows

1.	Objectives of the Scheme	To help the poor widows by providing financial assistance for the marriage of their daughters
2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	Daughter of poor widow
4.	When the benefit is due	Before marriage
5.	**Eligibility Criteria** a) Age Limit	18 years
	b) Income Limit	Not exceeding Rs.24,000/- per annum
	c) Other Criteria	Only one daughter of a poor widow is eligible

(D) Annai Theresa Ninaivu Marriage Assistance Scheme for Orphan Girls

1.	Objectives of the Scheme	To help the orphan girls financially for their marriage
2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	Orphan girls
4.	When the benefit is due	Before marriage
5.	**Eligibility Criteria** a) Age Limit	18 years
	b) Income Limit	Not exceeding Rs.24,000/- per annum

(E) Dr. Muthulakshmi Reddy Ninaivu Inter-Caste Marriage Assistance Scheme

1.	Objectives of the Scheme	To abolish caste and community feelings based on birth and wipe out the evils of untouchabiity by encouraging inter-caste marriage
2.	Assistance provided and Educational Qualification	Rs.25,000/- (Rs.15,000/- DD/Cheque, Rs.10,000/- NSC Certificate) along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- (Rs.30,000/- DD/cheque, Rs.20,000/- NSC Certificate) along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	Inter-caste married couple
4.	When the benefit is due	Considering the special constraints in such marriages the facility will be extended up to two years.
5.	**Eligibility Criteria** a) Age Limit	Minimum 18 years
	b) Income Limit	No Income limit

II. Distribution of Milch Animal and Goats

(i) It is highlighted by the State that with the growing population and shrinking land resources, the nutritional requirement of the State cannot be met by increasing the agricultural production alone. Moreover vagaries of monsoon, availability of water have added to the pressure on increasing the agricultural production. To compensate this, it is necessary to improve the animal production.

(ii) As per the Indian Council for Agriculture Research (ICAR) norms, the per capita requirement of milk and meat per individual per day is 260 gms per day and 15gms. per day respectively. At present, the per capita availability of milk and meat in Tamil Nadu is below the

recommended requirement. Hence, it is the need of the hour to increase the milk and meat production in the State to the State's human population requirements. Moreover, still a large population in the State live below the poverty line.

(iii) Hence, it has been proposed to improve the standard of living by providing the needy poor with a Milch cow (to 60000 families) and sheep/goats to about poorest of the poor (7 lakh families) spread across the State. The main aim of the above Schemes will be to improve the standard of living of the poorest of the poor.

(iv) Under the Scheme of free distribution of Milch Cows, it has been envisaged to distribute Milch Cows to the poor people selected by the Grama Sabha based on norms in such villages/districts which do not have adequate availability of milk. Likewise, the poorest of the poor living in the rural areas will be identified democratically by the Grama Sabha and will be given 4 sheep/goats in order to sustain their livelihood by rearing these sheep/goats.

A. The scheme for distribution of 60,000 lactating cows free of cost in rural village panchayats

(i) The Government of Tamil Nadu have planned to launch a Scheme to distribute 60,000 free Milch Cows to the poor beneficiaries in the rural areas in the next 5 years in order to give boost to the milk productivity of the State. This scheme will be called **"Scheme for free distribution of Milch Cows"**.

2. Selection of Villages for the Scheme

(i) The Commissioner of Animal Husbandry and Veterinary Services (CA&VS) will select the Village Panchayats to be taken for implementation during each of the 5 years in such a way that in a year, approximately 12,000 beneficiaries are distributed free Milch Cows in order to complete the distribution of 60,000 Milch Cows in 5 years.

(ii) The free Milch Cows will be distributed to the poor beneficiaries on a priority basis in such Districts that have lesser number of Co-operative Societies than the total number of revenue villages. In such Districts, the distribution will be undertaken in those Village Panchayats where there are no Primary Milk Cooperative

Societies at present. Consequent upon the distribution of the cows, action will be taken to form Primary Cooperative Societies of the beneficiaries in these villages and render the beneficiaries necessary hand-holding assistance by the Dairy Development Department. The Co-operative network has the following advantages for the beneficiaries:

(a) Availability of immediate opportunity of sale of milk through the Milk Cooperative Society at good prices.
(b) Availability of Breeding services as well as Veterinary care at the door steps through the Society as well as Milk Union.
(c) Opportunity to tap the benefits of various Central/State funded Schemes meant for the co-operative sector.

(iii) Out of the villages to be selected within the Districts concerned, the smaller village Panchayats will be prioritized by the Commissioner of Animal Husbandary & Veterinary Services for the implementation of the Scheme since it will be easier to form the Primary Milk Societies of smaller and cohesive units. Further, the Village Panchayats to be taken up each year will be grouped in appropriate geographical Clusters as to facilitate the economical collection of milk.

3. Breed of Milch Cows to be procured

(i) The breeding policy of the State envisages rearing of the Cross Bred Jersey Cows in the plains and Cross Bred Holstein-Friesian cows in the hilly areas of the State and the Cross Bred Cows yield, on an average, 2.5 times the milk yield of indigenous cows. It is, hence, proposed to supply Cross bred cows as per the Breeding Policy of the State. Further, in most of the cases, farmers prefer rearing of cows as compared to buffaloes. Hence, it is proposed to distribute only cows in this Scheme. Amongst the Cross Bred cows too, it is proposed to supply lactating cows that are in their first/second lactation so as to ensure a continuous production for next five lactations. The age of the animal should not be more than 5 years.

4. Identification of Beneficiaries

(i) The free Milch Cows will be distributed at the rate of one Cow per eligible household. In order to empower the women, it has been decided that the actual beneficiary will be the Woman of the household. In case there are any transgender residing in the Village Panchayat, who are otherwise eligible as per the criteria given below, they will also be considered to be eligible for the

Scheme.

(ii) **Criteria for eligibility** The beneficiaries should satisfy the following criteria:

- Women Headed households are to be given priority, (Widows, Destitutes and the Disabled women to be given priority within this group).
- Are below 60 years of age.
- Do not own land over 1 acre in their own name or family members' name (However, owning some land is preferable, since it will enable production of green fodder in own land).
- Do not own any cows/buffaloes at present.
- Are not employees of Central/State Government or any Organisation/cooperative or member of any Local Body (nor should their spouse or father/mother/parents-in-law/son/daughter/son-in-law/daughter-in-law be so).
- Have not benefited from the free Goats/Sheep Scheme of the Government.
- Should be permanent resident of the Village Panchayat.
- At least 30% beneficiaries from the Village Panchayat should necessarily belong to SC/ST (SC 29% and ST 1%) Communities.

(iii) In order to form a viable and successful procurement of milk by the Primary Milk Cooperative Societies, it is preferable that at least 50 members within a village Panchayat should pour the milk to the Milk Cooperative Society. Hence, ordinarily around 50 beneficiaries should be provided with cows in each of the selected Village Panchayats.

(iv) In the District, the District Collector will be overall in-charge of the process of identification of beneficiaries. The Regional Joint director (Animal Husbandry) (RJAD), Project Officer (Mahalir Thittam) and Assistant Director (Panchayats) will assist him in this regard. The District Collector will form a village Level Committee consisting of (i) Village Panchayat President, (ii) Vice-President, (iii) the senior most Ward member (by age) representing SC/ST Community, (iv) the Panchayat Level Federation (PLF) Coordinator, (v) an active SHG representative (vi) the Veterinary Assistant Surgeon (VAS) of the area and (vii) the Deputy, Block Development Officer (ADW) to identify and shortlist the list of beneficiaries per the norms specified. The District Collector should also ensure that necessary support is rendered to the Committee by the Village Panchayat Assistant concerned. The purpose of adding the Veterinary Assistant Surgeon and Deputy Block Development

Officer is to ensure that the short listed beneficiaries are conforming to the prescribed norms.

(v) After constituting the Village Level Committee for the selected Village Panchayats concerned, the District Collector should arrange to convene a meeting of all the members concerned and in that meeting, the details of the Scheme and the eligibility conditions are to be explained in detail. Since, the number of Village Panchayats per District will be ordinarily only about 10 per District per year, the District Collector should himself convene this meeting and convey the details.

(vi) The District Collector should, thereafter, fix a Special Meeting of the Grama Sabha in the Village Panchayat concerned to inform the details of the Scheme to the villagers. The Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will explain the salient features of the Scheme and the eligibility details of the beneficiaries in the meeting. Applications for the free Milch Cows will be sought for in this Special Gram Sabha Meeting from the interested beneficiaries.

(vii) A period of one week will also be given for further receipt of Applications. The Applications can be given to any of the village Level Committee members or directly to the Village Panchayat. Thereafter, the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will arrange a meeting of the village level Committee in the office of the Village Panchayat to scrutinize and list out the names of all the eligible beneficiaries for the Scheme.

(viii) The list prepared should also be got verified by the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) with the Village Administrative officer concerned, with regard to the land ownership details and the community details. (No certificate is however to be insisted upon and the scrutiny of the Village Level committee and subsequently the Gram Sabha will be considered to be final). Only after ensuring the eligibility of the proposed beneficiaries, the list will be approved by the village Level Committee.

(ix) The finalized list should be placed before the Gram Sabha for approval. The Gram Sabha should again ensure that 30% of the beneficiaries belong to SC/ST

communities.

(x) The District Collector should also arrange to send the Veterinary Assistant Surgeon/Deputy Block Development Officer or another official of the rank of Deputy Block Development Officer (in case the Deputy Block Development Officer is unable to attend) to participate in the Gram Sabha meeting and facilitate the discussion and finalization of the beneficiaries list.

(xi) The list finalized by Gram Sabha will be displayed in the Village Panchayat, Notice Board and other prominent places in the Village Panchayat.

B. Scheme for free distribution of goats/sheep to the poorest of the poor

The Government of Tamil Nadu have proposed to launch a "Scheme for free distribution of Goats/Sheep" for the poorest of poor in the rural areas in order to enhance their standard of living.

2. Implementation of the Scheme

(i) The Goats/Sheep can be procured within the State and also from outside the State. However, the procurement of Goats/Sheep in larger numbers from the other States is not preferable since this category of animals (also called 'small ruminants' in veterinary terminology) are fragile or prone to diseases when transported enmasse from long distances and different climatic zones. Hence, unlike the Scheme for procurement of free Milch Cows wherein cows only from other States are proposed to be procured, it has been decided to procure Goats/Sheep predominantly from the local market shandies available within the State in the proximity of the beneficiaries. If good quality animals are brought and supplied by the breeders in the village itself, the supply of Goats/Sheep through such breeders will be permitted.

(ii) It is presumed that about 6-7 lakh Goats/Sheep can be procured from the shandies within the State or from the neighbouring State shandies without causing shortage of availability of Goats/Sheep for meat purpose and without causing impact on the price of Goats/Sheep in the area.

(iii) In view of the availability of about 6-7 lakh Goats/Sheep in a year, the number of families to be assisted in each year will be 1.5 lakh and in the current year,

approximately one lakh families can be assisted since the first quarter of the year is already over. The Gram Sabha will be utilized to identify the poorest of the poor beneficiaries within each village.

3. Eligibility Norms

The beneficiaries will be the poorest of the poor families living in Village Panchayats (rural areas) who are identified by the village Level Committee as per the norms and whose name is approved by the Gram Sabha as the poorest of the poor in the village.

The free Goats/Sheep will be distributed at the rate of 4 Goats/Sheep per household. In order to empower the women, it has been decided that the actual beneficiary will be the Woman of the household. In case there are any transgender residing in the Village Panchayat, who are otherwise eligible as per the criteria given below, they will also be considered to be eligible for the Scheme.

The beneficiaries under this Scheme should satisfy the following eligibility criteria

- Must be the landless Agricultural labourers.
- Should be a permanent resident of the Village Panchayat.
- The beneficiary household should have at least one member between the age of 18 and 60 to effectively rear the Goats/Sheep.
- Should not own any Cow/Goat/Sheep at present.
- Should not be an employee of Central/State Government or any Organisation/Cooperative or member of any local body (nor should their spouse or father/mother/parents-in-law/son/daughter/son-in-law/daughter-in-law be so).
- Should not have benefited from the free Milch Cows Distribution Scheme of the Government.

2) **Atleast 30% beneficiaries from the Village Panchayat should necessarily belong to SC/ST (SC 29% and ST 1%) community.**

(i) The target number of beneficiaries for each District will be decided by the Commissioner of Animal Husbandry and Veterinary Services (CAH&VS) based on the strength of the rural population of the District. The Village Panchayat as well as the Block target

within the District will also be based on the proportionate rural population.

(ii) Within each District, the Village Panchayats will be selected in such a manner that approximately one-fifth of the beneficiaries will be covered in each Block in a year and the beneficiaries of a particular Village Panchyat will be fully covered within the year itself. The Commissioner of Animal Husbandry and Veterinary Services will work out the detailed Action Plan in this regard and convey to the District Collectors for implementation. In case of difficulties in implementation of the Scheme in some of the Village Panchayats having urbanized characters, the District Collector will, in consultation with the Commissioner of Animal Husbandry and Veterinary Services, re-allocate the surplus target to other deserving Village Panchayats.

(iii) In the District, the District Collector will be the overall in-charge of the process of identification of beneficiaries. The Regional Joint Director (Animal Husbandry) (RJAD), Project Officer (Mahalir Thittam) and Assistant Director (Panchayats) will assist him in this regard. The District Collector will form a Village Level Committee consisting of (i) Village Panchayat President, (ii) Vice-President, (iii) the senior most Ward member (by age) representing SC/ST Community, (iv) the Panchayat Level Federation (PLF) coordinator (v) an active SHG representative (vi) the Veterinary Assistant Surgeon (VAS) of the area and (vi) the Deputy Block Development Officer (ADW) to identify and shortlist the list of beneficiaries as per the norms specified. The District Collector should also ensure that necessary support is rendered to the Committee by the Village Panchayat Assistant concerned. The purpose of adding the VAS and Deputy BDO(ADW) is to ensure that the shortlisted beneficiaries are conforming to the prescribed norms.

(iv) After constituting the Village Level Committee for the selected Village Panchayats concerned, the District Collector should arrange to convene a meeting of all the members concerned and in that meeting, the details of the Scheme and the eligibility conditions are to be explained in detail. The District Collector should himself convene this meeting in one or more sessions in order to convey the details and the seriousness of the selection process.

(v) The District Collector should, thereafter, fix a Special Meeting of the Gram Sabha in the Village Panchayat concerned to inform the details of the Scheme to the

villagers. The Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will explain the salient features of the Scheme and the eligibility details of the beneficiaries in the meeting. Applications for the free Goats/Sheep will be sought for in this Special Gram Sabha Meeting from the interested beneficiaries.

(vi) A period of one week will also be given for further receipt of applications. The applications can be given to any of the Village Level Committee members or directly to the Village Panchyat. Thereafter, the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will arrange a meeting of the Village Level Committee in the office of the Village Panchayat to scrutinize and list out the names of all the eligible beneficiaries for the Scheme.

(vii) The list prepared should also be got verified by the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) with the village Administrative Officer concerned, to confirm the 'landless' status of the proposed beneficiaries and the community details. (No certificate is however to be insisted upon and the scrutiny of the Village Level Committee and subsequently the Gram Sabha will be considered to be final). Only after ensuring the eligibility of the proposed beneficiaries, the list will be approved by the Village Level Committee.

(viii) The finalized list should be placed before the Gram Sabha for approval. The Gram Sabha should again ensure that 30% of the beneficiaries belong to SC/ST (SC 29% and ST 1%) communities.

(ix) The District Collector should also arrange to send the Veterinary Assistant Surgeon/Deputy Block Development Officer (ADW) or another official of the rank of Deputy Block Development Officer (in case the Deputy Block Development Officer (ADW) is unable to attend) to participate in the Gram Sabha meeting and facilitate the discussion and finalization of the beneficiaries list.

III. Solar Powered Green House Scheme

1. The Government proposed to construct "Solar Powered Green House Scheme" for the benefit of the poor in the rural areas and measuring about 300 square feet with unit cost of Rs.1.80 lakhs by meeting the entire cost by Government. The scheme aims at providing Solar Powered Green House for the poor living below poverty line in rural areas. Accordingly, it is proposed to

construct 60,000 Solar Powered Green House of 300 sq. ft. each year for the next five years from 2011-2012 totalling 3 lakh house.

2. **Eligibility Criteria** :

1. The beneficiary under Solar Powered Green House Scheme should reside within the Village Panchayat and find a place in the below poverty line list.
2. He/she should own a site of 300 sq. ft. with clear title and patta.
3. Should not own any pacca concrete house and not benefited by any other housing scheme.
4. Rs.1.50 lakhs will be earmarked for construction of house and Rs.30,000/- for installing solar Powered Home Lighting System.
5. The scheme will be implemented by the District Collector so as to ensure that the construction of houses are completed in time.

IV. Laptop Computers to students

The State of Tamil Nadu have emerged as a favoured destination both for the domestic and multinational IT companies. This has opened new vistas of job opportunities for youth in Tamil Nadu. Further the students from lower rungs of the socio-economic pyramid also need to be equipped to participate in the emerging market. To provide level playing field by bridging the digital divide, develop skills and improve human resources in consonance with the millennium development goals, the Government of Tamil Nadu have decided to provide Laptop computers at free of cost to all students studying in Government and Government aided Higher Secondary Schools, Arts & Science colleges, Engineering Colleges and polytechnic colleges.

Accordingly the Government have issued order in G.O. (Ms) No.1, Special Programme Implementation Department dated 03.06.2011 for distribution of Laptop Computer at free of cost.

Under this scheme, the students studying in Government and Government aided schools, Arts and Science Colleges, Engineering Colleges and Polytechnics will be eligible. These students will be covered as follows:

Year	Schools	Arts/Science College	Engineering Colleges	Polytechnics
2011-12	Plus Two (12th std.)	1st & 3rd years students	2nd & 4th year students	1st & 3rd year students
2012-13	Plus Two (12th std.)	3rd year students	2nd & 4th Year students	1st & 3rd year students
2013-14	Plus Two (12th std.)	-	-	1st year student

During the year 2011-12, laptop computers will be distributed to 9.12 lakh students studying in 12th standard, 1st and 3rd year of Arts and Science Colleges, 2nd and 4th year of Engineering Colleges and 1st and 3rd year of Polytechnic colleges. The concerned Heads of Institutions will ensure that the dropouts/discontinued/transferred students are not included in the list of eligible students.

V. Free Rice Scheme

Note on the Scheme of Distribution of free rice under Universal Public Distribution System in Tamil Nadu

In Tamil Nadu Universal Public Distribution System is being followed and there is no differentiation as APL/BPL categories based on income criteria for supply of essential commodities to family cardholders under Public Distribution System. Hence, there is no differentiation like BPL/APL family cards in this State. Instead family cards have been issued on the basis of option exercised by the card holders under self-selection process to receive either rice with all commodities or to receive additional sugar in lieu of rice with other commodities after verifying the genuiness of the residence in this State.

Features of Universal Public Distribution System in Tamil Nadu

(1) Universal Public Distribution System is the heart and soul of State Food Policy. It is built on the principles of non-exclusion, easy access to Public Distribution System shops and adequate availability of food gain

at an affordable price.

(2) Though Government of India advocates Targeted Public Distribution system(TPDS), Government of Tamil Nadu is not in favour of rigid targeting, as it may lead to exclusion of large number of genuine Below Poverty Line (BPL) families and vulnerable Above Poverty Line (APL) families due to enumeration errors and improper bench marking.

(3) Poverty is a dynamic and relative concept and hence, it is difficult to design acceptable criteria and methodology to measure poverty. Thus any method used for identifying BPL families is bound to result in some amount of exclusion of deserving families. Further, due to unforeseen natural calamities like droughts, floods and disaster etc., a large number of vulnerable APL families may be forced into poverty trap again.

(4) Rigid government system will not be able to respond quickly to such situation. Thus targeted public distribution system approach will always have some families outside the Public Distribution system at any point of time in defeating the objective of total food security and elimination of hunger.

(5) On the other hand Universal Public Distribution System is based on principle of self selection. Only those who need subsidized food articles will go to the Public Distribution System shops and not the entire population.

(6) Based on these principles and out of years of experiences, Government of Tamil Nadu is convinced that Universal Public Distribution System assures better food security to the people and therefore has decided to continue with it.

Process for issue of family cards

On application for issue of family cards in the form prescribed (available in the website of the Department of Civil Supplies and Consumer Protection and can be downloaded and used – No cost for application), the Civil Supplies authorities verify the genuiness of the application and recommend for issue for family card or for rejection of cards as the case may be.

No income details are collected from the individual and this information is not entered in the family card also. As income, except in the case of persons employed in the organized sector, is a dynamic variable susceptible to undergo charges in sync with any unexpected events in the employment market, these details are not being

collected for the purpose of the existing Universal Public Distribution System.

On the other hand, option is given to the applicant to choose whether he would like to draw rice or not. If he selects not to draw rice, he is given the benefit of drawing 3kgs. extra sugar in lieu of rice in addition to the normal entitlement of ½ kg. per person per month subject to the maximum of 2kg per month per card.

VI. Free Distribution of Electric Fans, Mixies & Grinders to Women

This scheme is introduced as a welfare measure for women and intends universal coverage of women beneficiaries belonging to families holding family cards which are eligible for drawing rice. To make women more effective participants in the economy, it is imperative to relieve them from the domestic drudgery. Therefore, the Government have decided to distribute a package of electric Fan, Mixie and Grinder to all the women from the families holding family cards which are eligible to draw rice. This scheme is expected to improve the standard of living of the poor women apart from providing equal opportunities.

In pursuance to above, the Government have issued Orders in G.O. Ms. 2 Special Programme Implementation Department, Dated 03.06.2011 for free distribution of 25 lakh packages of electric fans, mixies and grinder during 2011-12. In total about 1.83 crore women beneficiaries will be covered in a phased manner.

2. **Eligibility Criteria**

All households having a family card which is eligible for drawing rice are eligible for electric fans, mixies and grinders, at free of cost, under this Scheme. The benefits will be distributed only to a woman member of these households.

In case, a household having family card which is eligible for drawing rice, does not have any woman member it will be given to the head of the family.

The family cards as on 30.06.2011 will be considered for distribution of the items during the current year (2011-12).

The benefits will be distributed to an eligible family only once.

> While distributing the benefits, priority should be given to rural areas within the Assembly Constituency followed by Town Panchayats, then Municipalities and Municipal Corporations, if any."

61) The concepts of livelihood and standard of living are bound to change in their content from time to time. It is factual that what was once considered to be a luxury has become a necessity in the present day. It is well settled that the concept of livelihood is no longer confined to bare physical survival in terms of food, clothing and shelter but also now necessarily includes basic medicines, preliminary education, transport, etc. Hence, the State distrusting largesse in the form of distribution of colour TVs, laptops, etc. to eligible and deserving persons is directly related to the directive principles of the State policy.

62) As a result, we are not inclined to agree with the argument of the appellant that giving of colour TVs, laptops, mixer-grinders etc. by the Government after adhering to due process is not an expense for public purpose. Judicial interference is permissible when the action of the government is unconstitutional and not when such action is not wise or that the extent of expenditure is not for the good of the State. We are of the view that all

such questions must be debated and decided in the legislature and not in court.

63) More so, the functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. As per Article 73 of the Constitution, the executive power of the Union of India is co-extensive with its legislative power. Similarly, the executive power of the State is co-extensive with its legislative power (Article 162). In ***Bhim Singh (supra)***, this Court has held that the Government can frame a scheme in exercise of its executive powers but if such a scheme entails any expenditure, then it is required to be backed by law. Article 266 of the Constitution lays down that all monies received by the Central Government or by the State Government by way of taxes or otherwise must be credited to the Consolidated Fund of India. Article 267 also constitutes Contingency Fund of India. If any money (except which is charged on the Consolidated Fund) is to be withdrawn for any governmental purpose, then there has to be an Appropriation Act under Article 266(3) read

with Article 114 of the Constitution. Every department of the Government presents its demand to the legislature concerned and the legislature votes on the same, and thereafter, the Appropriation Act is passed which authorizes the Government to withdraw the money from the Consolidated Fund. There are similar provisions relating to the State. The Contingency Fund can be established only by enacting a law in that behalf and not by an executive fiat. The law creating the Contingency Fund authorizes the purposes for which the amount in it can be spent. This is how the money is being spent by the Government on its schemes under the control of the Legislature.

64) In ***Bhim Singh (supra)***, Article 282 of the Constitution in the context of Government expenditure on various projects was considered. In that case, the Government in question had framed the scheme empowering the Members of Parliament to recommend works and projects in their respective constituencies. The said Scheme was challenged on the ground that the same has been formulated without enacting any law in that

behalf. This challenge was negatived by this Court principally on the ground that any expenditure which the Government incurs on the said Scheme is authorized by the Appropriation Act and the Appropriation Act is a law as contemplated by Article 282. This Court also negatived the challenge on the ground that the same is not for public purpose.

65) In addition to the legislative control by way of Appropriation Acts, the rules framed by the Parliament under Article 118 and by the State Legislatures under Article 208 of the Constitution of India, also create a mechanism to keep a check on the expenditure incurred by the Government.

66) As far as State of Tamil Nadu is concerned, the Legislature has framed rules under Article 208 of the Constitution and these rules are known as The Tamil Nadu Legislative Assembly Rules. Under Chapter XX of the said Rules, a Public Accounts Committee is set up and usually such Public Accounts Committee is headed by a Member of the Opposite Party. The Public Accounts Committee scrutinizes the Government accounts and submits its

report to the Legislature for its consideration. So, apart from the Appropriation Act, there is also effective control over the Government accounts and expenses through the Public Accounts Committee.

67) In addition to the Legislative control, the founding fathers of the Constitution have also thought it fit to keep a check on Government accounts and expenses through an agency outside the Legislature also. Article 148 has created a constitutional functionary in the form of the Comptroller and Auditor General of India (CAG). CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective control over the Government accounts.

68) If we analyze the abovementioned articles and the rules of procedure, it is established that there are various checks and balances within the mandate of the Constitution before a scheme can be implemented. As long as the schemes come within the realm of public purpose and monies for the schemes is withdrawn with appropriate Appropriation bill, the court has limited power to interfere in such schemes.

69) Further, the appellant contended by referring to various foreign cases to highlight the principle that public money cannot be used to create private assets. In our opinion, there is no merit in this contention also. The purpose of the schemes is to enforce the directive principles of state policy. In what way the state chooses to implement the directive principles of state policy is a policy decision of the State and this Court cannot interfere with such decisions. Ordinarily, this Court cannot interfere with policy decisions of the government unless they are clearly in violation of some statutory or Constitutional provision or is shockingly arbitrary in nature. In ***Ekta Shakti Foundation*** vs. ***Government of NCT of Delhi*** (2006) 10 SCC 337, it was held:-

> 10 "While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere. The correctness of the reasons which prompted the Government in decision making, taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

In the light of settled principle and observing that in the given case no such circumstances prevail as envisaged for judicial enquiry; we are not persuaded to interfere with the policy decision.

70) With regard to the contention that distribution of State largesse in the form of colour TVs, laptops, mixer-grinders, etc., violates Article 14 of Constitution as the unequals are treated equally. Before we venture to answer this question, we must recall that these measures relate to implementation of Directive Principles of State Policy. Therefore, the principle of not to treat unequals as equal has no applicability as far as State largesse is concerned. This principle applies only where the law or the State action imposes some burden on the citizen either financial or otherwise. Besides, while implementing the directive principles, it is for the Government concerned to take into account its financial resources and the need of the people. There cannot be a straight jacket formula. If certain benefits are restricted to a particular class that can obviously be on account of the limited resources of the State. All welfare measures cannot at one go be made

available to all the citizens. The State can gradually extend the benefit and this principle has been recognized by this Court in several judgments.

Issue No. 3

Whether this Court has inherent power to issue guidelines by application of Vishaka principle?

71) It is the stand of the appellant that there is legislative vacuum in the given case. Hence, the judiciary is warranted to legislate in this regard to fill the gap by application of ***Vishaka*** principle. However, learned counsel for the respondent made a distinction between the ***Vishaka (supra)*** and the given case. While highlighting that in ***Vishaka (supra)***, there was no legislation to punish the act of sexual harassment at work place, therefore, the judiciary noting the legislative vacuum framed temporary guidelines until the legislatures passed a bill in that regard. However, in the case at hand, there is a special legislation, namely, the Representation of People Act wherein Section 123 enumerates

exhaustively a series of acts as “corrupt practice”. Therefore, this is not a case of legislative vacuum where the judiciary can apply its inherent power to frame guidelines.

Issue No. 4:

Whether Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?

72) As reiterated earlier, the Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Governments, Government bodies and state-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General’s (Duties, Powers etc.) Act, 1971. The functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective

control over the government accounts and expenditure incurred on these schemes only after implementation of the same. As a result, the duty of the CAG will arise only after the expenditure has incurred.

Issue No. 5

Whether the writ jurisdiction will lie against a political party?

73) Learned senior counsel for the respondent (State of Tamil Nadu) raised the issue of jurisdiction stating that political parties are not State within the meaning of Article 12 of the Constitution of India and therefore, no writ of any nature can be issued against them either under Article 226 or Article 32 of the Constitution of India or any other provision of the Constitution or any other law. The correct forum is the Election Tribunal and not writ jurisdiction.

74) Admittedly, the respondents never raised any objection relating to the jurisdiction in the High Court or even in the pleadings before this Court. It is only in the oral submissions that this issue has been raised.

75) In the matters relating to pecuniary jurisdiction and

territorial jurisdiction, the objection as to jurisdiction has to be taken at the earliest possible opportunity. But, this case relates to the jurisdiction over the subject matter. This is totally distinct and stands on a different footing. As such, the question of subject matter jurisdiction can be raised even in the appeal stage. However, as this petition is fit for dismissal *de hors* the jurisdiction issue, the jurisdiction issue is left open.

76) **Summary:**

(i) After examining and considering the parameters laid in Section 123 of RP Act, we arrived at a conclusion that the promises in the election manifesto cannot be read into Section 123 for declaring it to be a corrupt practice. Thus, promises in the election manifesto do not constitute as a corrupt practice under the prevailing law. A reference to a decision of this Court will be timely. In ***Prof. Ramchandra G. Kapse*** vs. ***Haribansh Ramakbal Singh*** (1996) 1 SCC 206 this Court held that "..Ex facie contents of a manifesto, by itself, cannot be a corrupt practice committed by a candidate of that party."

(ii) Further, it has been decided that the schemes

challenged in this writ petition falls within the realm of fulfilling the Directive Principles of State Policy thereby falling within the scope of public purpose.

(iii) The mandate of the Constitution provides various checks and balances before a Scheme can be implemented. Therefore, as long as the schemes come within the realm of public purpose and monies withdrawn for the implementation of schemes by passing suitable Appropriation Bill, the court has limited jurisdiction to interfere in such schemes.

(iv) We have also emphasized on the fact that judicial interference is permissible only when the action of the government is unconstitutional or contrary to a statutory provision and not when such action is not wise or that the extent of expenditure is not for the good of the State.

(v) It is also asserted that the schemes challenged under this petition are in consonance with Article 14 of the Constitution.

(vi) As there is no legislative vacuum in the case on hand, the scope for application of Vishaka principle does not arise.

(vii) The duty of the CAG will arise only after the expenditure has incurred.

(viii) Since this petition is fit for dismissal *dehors* the jurisdiction issue, the issue of jurisdiction is left open.

Directions:

77) Although, the law is obvious that the promises in the election manifesto cannot be construed as 'corrupt practice' under Section 123 of RP Act, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people. It shakes the root of free and fair elections to a large degree. The Election Commission through its counsel also conveyed the same feeling both in the affidavit and in the argument that the promise of such freebies at government cost disturbs the level playing field and vitiates the electoral process and thereby expressed willingness to implement any directions or decision of this Court in this regard.

78) As observed in the earlier part of the judgment, this Court has limited power to issue directions to the legislature to legislate on a particular issue. However, the Election Commission, in order to ensure level playing field

between the contesting parties and candidates in elections and also in order to see that the purity of the election process does not get vitiated, as in past been issuing instructions under the Model Code of Conduct. The fountainhead of the powers under which the commission issues these orders is Article 324 of the Constitution, which mandates the commission to hold free and fair elections. It is equally imperative to acknowledge that the Election Commission cannot issue such orders if the subject matter of the order of commission is covered by a legislative measure.

79) Therefore, considering that there is no enactment that directly governs the contents of the election manifesto, we hereby direct the Election Commission to frame guidelines for the same in consultation with all the recognized political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power etc. In the similar way, a separate head for guidelines for election manifesto released by a political party can also be included in the Model Code of Conduct for the Guidance of

Political Parties & Candidates. We are mindful of the fact that generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of election manifesto is directly associated with the election process.

80) We hereby direct the Election Commission to take up this task as early as possible owing to its utmost importance. We also record the need for a separate legislation to be passed by the legislature in this regard for governing the political parties in our democratic society.

81) In the light of the above discussion, taking note of statutory provisions of the RP Act, which controls only candidate or his agent, mandates provided under the directive principles, various guidelines such as income limit, preference to women, agricultural labourer etc as detailed in the counter affidavit by the State, we find no

merit in the appeal as well as in the transferred case. With the above observation as mentioned in paragraph Nos. 77-80, the appeal and the transferred case are dismissed. No order as to costs.

.....J.
(P. SATHASIVAM)

.....J.
(RANJAN GOGOI)

NEW DELHI;
JULY 05, 2013.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 161 OF 2004

People's Union for Civil Liberties & Anr. .... Petitioner (s)

Versus

Union of India & Anr. .... Respondent(s)

J U D G M E N T

P.Sathasivam, CJI.

1) The present writ petition, under Article 32 of the Constitution of India, has been filed by the petitioners herein challenging the constitutional validity of Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 (in short 'the Rules') to the extent that these provisions violate the secrecy of voting which is fundamental to the free and fair elections and is required to be maintained as per Section 128 of the

Representation of the People Act, 1951 (in short 'the RP Act') and Rules 39 and 49-M of the Rules.

2) The petitioners herein have preferred this petition for the issuance of a writ or direction(s) of like nature on the ground that though the above said Rules, viz., Rules 41(2) & (3) and 49-O, recognize the right of a voter not to vote but still the secrecy of his having not voted is not maintained in its implementation and thus the impugned rules, to the extent of such violation of the right to secrecy, are not only *ultra vires* to the said Rules but also violative of Articles 19(1)(a) and 21 of the Constitution of India besides International Covenants.

3) In the above backdrop, the petitioners herein prayed for declaring Rules 41(2) & (3) and 49-O of the Rules *ultra vires* and unconstitutional and also prayed for a direction to the Election Commission of India-Respondent No. 2 herein, to provide necessary provision in the ballot papers as well as in the electronic voting machines for the protection of the right of not to vote in order to keep the exercise of such right a

secret under the existing RP Act/the Rules or under Article 324 of the Constitution.

4) On 23.02.2009, a Division Bench of this Court, on an objection with regard to maintainability of the writ petition on the ground that right to vote is not a fundamental right but is a statutory right, after considering ***Union of India*** vs. ***Association for Democratic Reforms and Anr.*** (2002) 5 SCC 294 and ***People's Union for Civil Liberties*** vs. ***Union of India*** (2003) 4 SCC 399 held that even though the judgment in ***Kuldip Nayar & Ors.*** vs. ***Union of India & Ors.*** (2006) 7 SCC 1 did not overrule or discard the ratio laid down in the judgments mentioned above, however, it creates a doubt in this regard, referred the matter to a larger Bench to arrive at a decision.

5) One Centre for Consumer Education and Association for Democratic Reforms have filed applications for impleadment in this Writ Petition. Impleadment applications are allowed.

6) Heard Mr. Rajinder Sachhar, learned senior counsel for the petitioners, Mr. P.P. Malhotra, learned Additional Solicitor General for the Union of India-Respondent No. 1 herein, Ms. Meenakshi Arora, learned counsel for the Election Commission of India-Respondent No. 2 herein, Ms Kamini Jaiswal and Mr. Raghenth Basant, learned counsel for the impleading parties.

Contentions:

7) Mr. Rajinder Sachhar, learned senior counsel for the petitioners, by taking us through various provisions, particularly, Section 128 of the RP Act as well as Rules 39, 41, 49-M and 49-O of the Rules submitted that in terms of Rule 41(2) of the Rules, an elector has a right not to vote but still the secrecy of his having not voted is not maintained under Rules 41(2) and (3) thereof. He further pointed out that similarly according to Rule 49-O of the Rules, the right of a voter who decides not to vote has been accepted but the secrecy is not maintained. According to him, in case an elector decides not to record his vote, a remark to this effect

shall be made against the said entry in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Hence, if a voter decides not to vote, his record will be maintained by the Presiding Officer which will thereby disclose that he has decided not to vote. The main substance of the arguments of learned senior counsel for the petitioners is that though right not to vote is recognized by Rules 41 and 49-O of the Rules and is also a part of the freedom of expression of a voter, if a voter chooses to exercise the said right, it has to be kept secret. Learned senior counsel further submitted that both the above provisions, to the extent of such violation of the secrecy clause are not only *ultra vires* but also contrary to Section 128 of the RP Act, Rules 39 and 49-M of the Rules as well as Articles 19(1)(a) and 21 of the Constitution.

8) On the other hand, Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the Union of India submitted that the right to vote is neither a fundamental right nor a

constitutional right nor a common law right but is a pure and simple statutory right. He asserted that neither the RP Act nor the Constitution of India declares the right to vote as anything more than a statutory right and hence the present writ petition is not maintainable. He further pointed out that in view of the decision of the Constitution Bench in ***Kuldip Nayar (supra)***, the reference for deciding the same by a larger Bench was unnecessary. He further pointed out that in view of the above decision, the earlier two decisions of this Court, viz., ***Association for Democratic Reforms and Another (supra)*** and ***People's Union for Civil Liberties (supra)***, stood impliedly overruled, hence, on this ground also reference to a larger Bench was not required. He further pointed out that though the power of Election Commission under Article 324 of the Constitution is wide enough, but still the same can, in no manner, be construed as to cover those areas, which are already covered by the statutory provisions. He further pointed out that even from the existing provisions, it is clear that secrecy of ballot is a principle which has been formulated to ensure that in no case it shall be known to the

candidates or their representatives that in whose favour a particular voter has voted so that he can exercise his right to vote freely and fearlessly. He also pointed out that the right of secrecy has been extended to only those voters who have exercised their right to vote and the same, in no manner, can be extended to those who have not voted at all. Finally, he submitted that since Section 2(d) of the RP Act specifically defines "election" to mean an election to fill a seat, it cannot be construed as an election not to fill a seat.

9) Ms. Meenakshi Arora, learned counsel appearing for the Election Commission of India – Respondent No. 2 herein, by pointing out various provisions both from the RP Act and the Rules submitted that inasmuch as secrecy is an essential feature of "free and fair elections", Rules 41(2) & (3) and 49-O of the Rules violate the requirement of secrecy.

10) Ms. Kamini Jaiswal and Mr. Raghenth Basant, learned counsel appearing for the impleading parties, while agreeing with the stand of the petitioners as well as the Election

Commission of India, prayed that necessary directions may be issued for providing another button viz., “None of the Above” (NOTA) in the Electronic Voting Machines (EVMs) so that the voters who come to the polling booth and decide not to vote for any of the candidates, are able to exercise their right not to vote while maintaining their right of secrecy.

11) We have carefully considered the rival submissions and perused the relevant provisions of the RP Act and the Rules.

Discussion:

12) In order to answer the above contentions, it is vital to refer to the relevant provisions of the RP Act and the Rules. Sections 79(d) and 128 of the RP Act read as under:

> **“79(d)--**“electoral right” means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.
>
> **128 - Maintenance of secrecy of voting--**(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some

purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy:

Provided that the provisions of this sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both."

Rules 39(1), 41, 49-M and 49-O of the Rules read as under:

"**39. Maintenance of secrecy of voting by electors within polling station and voting procedure**.--(1) Every elector to whom a ballot paper has been issued under rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

41. Spoilt and returned ballot papers.--(1) An elector who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper may, on returning it to the presiding officer and on satisfying him of the inadvertence, be given another ballot paper, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked "Spoilt: cancelled" by the presiding officer.

(2) If an elector after obtaining a ballot paper decides not to use it, he shall return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

(3) All ballot papers cancelled under sub-rule (1) or sub-rule (2) shall be kept in a separate packet.

49M. Maintenance of secrecy of voting by electors within the polling station and voting procedures.--(1) Every elector who has been permitted to vote under rule 49L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) Immediately on being permitted to vote the elector shall proceed to the presiding officer or the polling officer incharge of the control unit of the voting machine who shall, by pressing the appropriate button on the control unit, activate the balloting unit; for recording of elector's vote.

(3) The elector shall thereafter forthwith--

(a) proceed to the voting compartment;

(b) record his vote by pressing the button on the balloting unit against the name and symbol of the candidate for whom he intends to vote; and

(c) come out of the voting compartment and leave the polling station.

(4) Every elector shall vote without undue delay.

(5) No elector shall be allowed to enter the voting compartment when another elector is inside it.

(6) If an elector who has been permitted to vote under rule 49L or rule 49P refuses after warning given by the presiding officer to observe the procedure laid down in sub-rule (3) of the said rules, the presiding officer or a polling officer under the direction of the presiding officer shall not allow such elector to vote.

(7) Where an elector is not allowed to vote under sub-rule (6), a remark to the effect that voting procedure has been violated shall be made against the elector's name in the register of voters in Form 17A by the presiding officer under his signature.

49-O. Elector deciding not to vote.--If an elector, after his electoral roll number has been duly entered in the register of voters in Form 17A and has put his signature or thumb impression thereon as required under sub-rule (1) of rule 49L, decide not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark."

13) Apart from the above provisions, it is also relevant to refer Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights, which read as under:

"**21(3)** The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

"**25.** Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) *** *** ***;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;"

14) Articles 19(1)(a) and 21 of the Constitution, which are also pertinent for this matter, are as under:

"**19 - Protection of certain rights regarding freedom of speech, etc.--** (1) All citizens shall have the right-

(a) to freedom of speech and expression;

xxxxx

21 - Protection of life and personal liberty--No person shall be deprived of his life or personal liberty except according to procedure established by law."

15) From the above provisions, it is clear that in case an elector decides not to record his vote, a remark to this effect shall be made in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Form 17-A reads as under:

"FORM 17A
[See rule 49L)
REGISTER OF VOTERS

Election to the House of the People/ Legislative Assembly of the State/ Union territory .....from.....Constituency No. and Name of Polling Station.....Part No. of Electoral Roll.....

Sl. No.	Sl. No. of elector in the electoral roll	Details of the document produced by the elector in proof of his/ her identification	Signature/ Thumb impression of elector	Remarks
(1)	(2)	(3)	(4)	(5)
1.				
2.				
3.				
4.				

etc.

Signature of the Presiding Officer"

16) Before elaborating the contentions relating to the above provisions with reference to the secrecy of voting, let us first consider the issue of maintainability of the Writ Petition as raised by the Union of India. In the present Writ Petition, which is of the year 2004, the petitioners have prayed for the following reliefs:

> "(i) declaring that Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 are ultra vires and unconstitutional to the extent they violate secrecy of vote;

(ii) direct the Election Commission under the existing Representation of People Act, 1951 and the Conduct of Election Rules, 1961 and/ or under Article 324 to provide necessary provision in the ballot papers and the voting machines for protection of right not to vote and to keep the exercise of such right secret;"

17) It is relevant to point out that initially the present Writ Petition came up for hearing before a Bench of two-Judges. During the course of hearing, an objection was raised with regard to the maintainability of the Writ Petition under Article 32 on the ground that the right claimed by the petitioners is not a fundamental right as enshrined in Part III of the Constitution. It is the categorical objection of the Union of India that inasmuch as the writ petition under Article 32 would lie to this Court only for the violation of fundamental rights and since the right to vote is not a fundamental right, the present Writ Petition under Article 32 is not maintainable. It is the specific stand of the Union of India that right to vote is not a fundamental right but merely a statutory right. It is further pointed out that this Court, in Para 20 of the referral order dated 23.02.2009, reported in (2009) 3 SCC 200, observed that since in ***Kuldip Nayar (supra),*** the judgments of this Court in ***Association for Democratic***

Reforms (supra) and ***People's Union for Civil Liberties (supra)*** have not been specifically overruled which tend to create a doubt whether the right to vote is a fundamental right or not and referred the same to a larger Bench stating that the issue requires clarity. In view of the reference, we have to decide:

(i) Whether there is any doubt or confusion with regard to the right of a voter in ***Kuldip Nayar (supra)***;

(ii) Whether earlier two judgments viz., ***Association for Democratic Reforms (supra)*** and ***People's Union for Civil Liberties (supra)*** referred to by the Constitution Bench in ***Kuldip Nayar (supra)*** stand impliedly overruled.

18) Though, Mr. Malhotra relied on a large number of decisions, we are of the view that there is no need to refer to those decisions except a reference to the decision of this Court in ***Kuldip Nayar (supra), Association for Democratic Reforms (supra)*** and ***People's Union for Civil Liberties (supra)***.

19) A three-Judge Bench of this Court comprising M.B Shah, P. Venkatarama Reddi and D.M. Dharmadhikari, JJ. expressed separate but concurring opinions in the ***People's Union for Civil Liberties (supra)***. In para 97, Reddi, J made an observation as to the right to vote being a Constitutional right if not a fundamental right which reads as under:

> "97. In *Jyoti Basu v. Debi Ghosal* [1982] 3 SCR 318 this Court again pointed out in no uncertain terms that:
>
> > 8 "a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right."
>
> With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely, R.P. act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met...."

Similarly, in para 123, point No. 2 Reddi, J., held as under:-

> "(2) The right to vote at the elections to the House of the People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter."

Except the above two paragraphs, this aspect has nowhere been discussed or elaborated wherein all the three Judges, in their separate but concurring judgments, have taken the pains to specifically distinguish between right to vote and freedom of voting as a species of freedom of expression. In succinct, the ratio of the judgment was that though the right to vote is a statutory right but the decision taken by a voter after verifying the credentials of the candidate either to vote or not is his right of expression under Article 19(1)(a) of the Constitution.

20) As a result, the judgments in ***Association for Democratic Reforms (supra)*** and ***People's Union for Civil Liberties (supra)*** have not disturbed the position that right to vote is a statutory right. Both the judgments have only added that the right to know the background of a

candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote. In ***People's Union for Civil Liberties (supra),*** Shah J., in para 78D, held as under:-

> "...However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution..."

P. Venkatrama Reddi, J., in Para 97, held as under:-

> "...Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(*a*) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom..."

Dharmadhikari, J., in para 127, held as under:-

> "...This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his

> right as a voter which is to be regulated by statutory law on the election like the RP Act…"

In view of the above, Para 362 in ***Kuldip Nayar (supra)*** does not hold to the contrary, which reads as under:-

> "We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in *Jyoti Basu* v. *Debi Ghosal* that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right".

21) After a careful perusal of the verdicts of this Court in ***Kuldip Nayar (supra), Association for Democratic Reforms (supra)*** and ***People's Union for Civil Liberties (supra),*** we are of the considered view that ***Kuldip Nayar (supra)*** does not overrule the other two decisions rather it only reaffirms what has already been said by the two aforesaid decisions. The said paragraphs recognize that right to vote is a statutory right and also in ***People's Union for Civil Liberties (supra)*** it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression". Therefore, it

cannot be said that ***Kuldip Nayar (supra)*** has observed anything to the contrary. In view of the whole debate of whether these two decisions were overruled or discarded because of the opening line in Para 362 of ***Kuldip Nayar (supra)*** i.e., "we do not agree with the above submissions..." we are of the opinion that this line must be read as a whole and not in isolation. The contention of the petitioners in ***Kuldip Nayar (supra)*** was that majority view in ***People's Union for Civil Liberties (supra)*** held that right to vote is a Constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution. It is this contention on which the Constitution Bench did not agree too in the opening line in para 362 and thereafter went on to clarify that in fact in ***People's Union for Civil Liberties (supra),*** a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. Thus, there is no contradiction as to the fact that right to vote is neither a fundamental right nor a Constitutional right but a pure and simple statutory right. The same has been settled in a catena of cases and it is

clearly not an issue in dispute in the present case. With the above observation, we hold that there is no doubt or confusion persisting in the Constitution Bench judgment of this Court in ***Kuldip Nayar (supra)*** and the decisions in ***Association for Democratic Reforms (supra)*** and ***People's Union for Civil Liberties (PUCL) (supra)*** do not stand impliedly overruled.

Whether the present writ petition under Article 32 is maintainable:

22) In the earlier part of our judgment, we have quoted the reliefs prayed for by the petitioners in the writ petition. Mr. Malhotra, learned Additional Solicitor General, by citing various decisions submitted that since right to vote is not a fundamental right but is merely a statutory right, hence, the present writ petition under Article 32 is not maintainable and is liable to be dismissed. He referred to the following decisions of this Court in ***N.P. Ponnuswami*** vs. ***Returning officer,*** 1952 SCR 218, ***Jamuna Prasad Mukhariya*** vs. ***Lachhi Ram,*** 1955 (1) SCR 608, ***University of Delhi*** vs.

Anand Vardhan Chandal, (2000) 10 SCC 648, ***Kuldip Nayar (supra)*** **and** ***K. Krishna Murthy (Dr.)*** vs. ***Union of India,*** (2010) 7 SCC 202, wherein it has been held that the right to vote is not a fundamental right but is merely a statutory right.

23) In ***Kochunni*** vs. ***State of Madras,*** 1959 (2) Supp. SCR 316, this Court held that the right to move before this Court under Article 32, when a fundamental right has been breached, is a substantive fundamental right by itself. In a series of cases, this Court has held that it is the duty of this Court to enforce the guaranteed fundamental rights.[Vide ***Daryo*** vs. ***State of U.P.*** 1962 (1) SCR 574].

24) The decision taken by a voter after verifying the credentials of the candidate either to vote or not is a form of expression under Article 19(1)(a) of the Constitution. The fundamental right under Article 19(1)(a) read with statutory right under Section 79(d) of the RP Act is violated unreasonably if right not to vote effectively is denied and

secrecy is breached. This is how Articles 14 and 19(1)(a) are required to be read for deciding the issue raised in this writ petition. The casting of the vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1)(a) of the Constitution of India (Vide: ***Association for Democratic Reforms (supra)*** and ***People's Union for Civil Liberties (supra)***. Therefore, any violation of the said rights gives the aggrieved person the right to approach this Court under Article 32 of the Constitution of India. In view of the above said decisions as well as the observations of the Constitution Bench in ***Kuldip Nayar (supra)***, a *prima facie* case exists for the exercise of jurisdiction of this Court under Article 32.

25) Apart from the above, we would not be justified in asking the petitioners to approach the High Court to vindicate their grievance by way of a writ petition under Article 226 of the Constitution of India at this juncture. Considering the reliefs prayed for which relate to the right of a voter and applicable to all eligible voters, it may not be

appropriate to direct the petitioners to go to each and every High Court and seek appropriate relief. Accordingly, apart from our conclusion on legal issue, in view of the fact that the writ petition is pending before this Court for the last more than nine years, it may not be proper to reject the same on the ground, as pleaded by learned ASG. For the reasons mentioned above, we reject the said contention and hold that this Court is competent to hear the issues raised in this writ petition filed under Article 32 of the Constitution.

Discussion about the relief prayed for in the writ petition:

26) We have already quoted the relevant provisions, particularly, Section 128 of the RP Act, Rules 39, 41, 49M and 49-O of the Rules. It is clear from the above provisions that secrecy of casting vote is duly recognized and is necessary for strengthening democracy. We are of the opinion that paragraph Nos. 441, 442 and 452 to 454 of the decision of the Constitution Bench in ***Kuldip Nayar (supra)***, are relevant for this purpose which are extracted hereinbelow:

"441. Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimisation. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations.

442. The electoral systems world over contemplate variations. No one yardstick can be applied to an electoral system. The question whether election is direct or indirect and for which House members are to be chosen is a relevant aspect. All over the world in democracies, members of the House of Representatives are chosen directly by popular vote. Secrecy there is a must and insisted upon; in representative democracy, particularly to the upper chamber, indirect means of election adopted on party lines is well accepted practice.

452. Parliamentary democracy and multi-party system are an inherent part of the basic structure of the Indian Constitution. It is the political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures. The context in which general elections are held, secrecy of the vote is necessary in order to maintain the purity of the electoral system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted. But here we are concerned with a voter who is elected on the ticket of a political party. In this view, the context entirely changes.

453. That the concept of "constituency-based representation" is different from "proportional representation" has been eloquently brought out in United Democratic Movement v. President of the Republic of South Africa where the question before the Supreme Court was: whether "floor crossing" was fundamental to the Constitution of South Africa. In this judgment the concept of proportional representation vis-à-vis constituency-based representation is highlighted…

> 454. The distinguishing feature between "constituency-based representation" and "proportional representation" in a representative democracy is that in the case of the list system of proportional representation, members are elected on party lines. They are subject to party discipline. They are liable to be expelled for breach of discipline. Therefore, to give effect to the concept of proportional representation, Parliament can suggest "open ballot". In such a case, it cannot be said that "free and fair elections" would stand defeated by "open ballot". As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes. This distinction is indicated also in the Australian judgment in R. v. Jones. **In constituency-based representation, "secrecy" is the basis** whereas in the case of proportional representation in a representative democracy the basis can be "open ballot" and it would not violate the concept of "free and fair elections", which concept is one of the pillars of democracy."

27) The above discussion in the cited paragraphs makes it clear that in direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed.

28) After referring to Section 128 of the RP Act and Rule 39 of the Rules, this Court in ***S. Raghbir Singh Gill*** vs. ***S. Gurcharan Singh Tohra and Others*** 1980 (Supp) SCC 53 held as under:

> "14...Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammelled by any constraint, which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy."

29) In the earlier part of this judgment, we have referred to Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights, which also recognize the right of secrecy.

30) With regard to the first prayer of the petitioners, viz., extension of principle of secrecy of ballot to those voters who decide not to vote, Mr. Malhotra, learned ASG submitted that principle of secrecy of ballot is extended only to those voters who have cast their votes in favour of one or the other candidates, but the same, in no manner, can be read as extended to even those voters who have not voted in the

election. He further pointed out that the principle of secrecy of ballot pre-supposes validly cast vote and the object of secrecy is to assure a voter to allow him to cast his vote without any fear and in no manner it will be disclosed that in whose favour he has voted or he will not be compelled to disclose in whose favour he voted. The pith and substance of his argument is that secrecy of ballot is a principle which has been formulated to ensure a voter (who has exercised his right to vote) that in no case it shall be known to the candidates or their representatives that in whose favour a particular voter has voted so that he can exercise his right to vote freely and fearlessly. The stand of the Union of India as projected by learned ASG is that the principle of secrecy of ballot is extended only to those voters who have cast their vote and the same in no manner can be extended to those who have not voted at all.

31) Right to vote as well as right not to vote have been statutorily recognized under Section 79(d) of the RP Act and Rules 41(2) & (3) and 49-O of the Rules respectively.

Whether a voter decides to cast his vote or decides not to cast his vote, in both cases, secrecy has to be maintained. It cannot be said that if a voter decides to cast his vote, secrecy will be maintained under Section 128 of the RP Act read with Rules 39 and 49M of the Rules and if in case a voter decides not to cast his vote, secrecy will not be maintained. Therefore, a part of Rule 49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows the secrecy to be violated, is arbitrary, unreasonable and violative of Article 19 and is also *ultra vires* Sections 79(d) and 128 of the RP Act.

32) As regards the question as to whether the right of expression under Article 19 stands infringed when secrecy of the poll is not maintained, it is useful to refer ***S. Raghbir Singh (supra)*** wherein this Court deliberated on the interpretation of Section 94 of the RP Act which mandates that no elector can be compelled as a witness to disclose his vote. In that case, this Court found that the "secrecy of ballots constitutes a postulate of constitutional democracy.

A remote or distinct possibility that the voter at some point of time may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise". Secrecy of ballot, thus, was held to be a privilege granted in public interest to an individual. It is pertinent to note that in the said case, the issue of the disclosure by an elector of his vote arose in the first place because there was an allegation that the postal ballot of an MLA was tampered with to secure the victory of one of the candidates to the Rajya Sabha. Therefore, seemingly there was a conflict between the "fair vote" and "secret ballot".

33) In ***Kuldip Nayar (supra)***, this Court held that though secrecy of ballots is a vital principle for ensuring free and fair elections, the higher principle is free and fair elections. However, in the same case, this Court made a copious distinction between "constituency based representation" and "proportional representation". It was held that while in the

former, secrecy is the basis, in the latter the system of open ballot and it would not be violative of "free and fair elections". In the said case, ***R*** vs. ***Jones,*** (1972) 128 CLR 221 and ***United Democractic Movement*** vs. ***President of the Republic of South Africa,*** (2003) 1 SA 495 were also cited with approval.

34) Therefore, in view of the decisions of this Court in ***S. Raghubir Singh Gill (supra)*** and ***Kuldip Nayar (supra)***, the policy is clear that secrecy principle is integral to free and fair elections which can be removed only when it can be shown that there is any conflict between secrecy and the "higher principle" of free elections. The instant case concerns elections to Central and State Legislatures that are undoubtedly "constituency based". No discernible public interest shall be served by disclosing the elector's vote or his identity. Therefore, secrecy is an essential feature of the "free and fair elections" and Rule 49-O undoubtedly violates that requirement.

35) In ***Lily Thomas*** vs. ***Speaker, Lok Sabha,*** (1993) 4 SCC 234, this Court held that "voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question" and that "right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well".

36) In view of the same, this Court also referred to the Practice and Procedure of the Parliament for voting which provides for three buttons: viz., AYES, NOES and ABSTAIN whereby a member can abstain or refuse from expressing his opinion by casting vote in favour or against the motion. The constitutional interpretation given by this Court was based on inherent philosophy of parliamentary sovereignty.

37) A perusal of Section 79(d) of the RP Act, Rules 41(2) & (3) and Rule 49-O of the Rules make it clear that a right not to vote has been recognized both under the RP Act and the Rules. A positive 'right not to vote' is a part of expression of

a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as 'right to vote'. A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained, which the Election Commission has not only recognized but has also asserted.

38) The Law Commission of India, in its 170th Report relating to Reform of the Electoral Laws recommended for implementation of the concept of negative vote and also pointed out its advantages.

39) In India, elections traditionally have been held with ballot papers. As explained by the Election Commission, from 1998 onwards, the Electronic Voting Machines (EVMs) were introduced on a large scale. Formerly, under the ballots paper system, it was possible to secretly cast a neutral/negative vote by going to the polling booth, marking presence and dropping one's ballot in the ballot box without making any mark on the same. However, under the system of EVMs, such secret neutral voting is not possible, in view of the provision of Rule 49B of the Rules and the design of the EVM and other related voting procedures. Rule 49B of the Rules mandates that the names of the candidates shall be arranged on the balloting unit in the same order in which they appear in the list of contesting candidates and there is no provision for a neutral button.

40) It was further clarified by the Election Commission that EVM comprises of two units, i.e. control and balloting units, which are interconnected by a cable. While the balloting unit is placed in a screened enclosure where an elector may cast

his vote in secrecy, the control unit remains under the charge of the Presiding Officer and so placed that all polling agents and others present have an unhindered view of all the operations. The balloting unit, placed inside the screened compartment at the polling station gets activated for recording votes only when the button marked “Ballot” on the control unit is pressed by the presiding officer/polling officer in charge. Once the ballot button is pressed, the Control unit emanates red light while the ballot unit which has been activated to receive the vote emanates green light. Once an elector casts his vote by pressing balloting button against the candidate of his choice, he can see a red light glow against the name and symbol of that candidate and a high-pitched beep sound emanates from the machine. Upon such casting of vote, the balloting unit is blocked, green light emanates on the control unit, which is in public gaze, and the high pitched beep sound is heard by one and all. Thereafter, the EVM has to re-activate for the next elector by pressing “ballot button”. However, should an elector choose not to cast his vote in favour of any of the candidates labeled on the EVM, and

consequently, not press any of the labeled button neither will the light on the control unit change from red to green nor will the beep sound emanate. Hence, all present in the poll booth at the relevant time will come to know that a vote has not been cast by the elector.

41) Rule 49-O of the Rules provides that if an elector, after his electoral roll number has been entered in the register of electors in Form 17-A, decides not to record his vote on the EVM, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and signature/thumb impression of the elector shall be obtained against such remark. As is apparent, mechanism of casting vote through EVM and Rule 49-O compromise on the secrecy of the vote as the elector is not provided any privacy when the fact of the neutral/negative voting goes into record.

42) Rules 49A to 49X of the Rules come under Chapter II of Part IV of the Rules. Chapter II deals with voting by Electronic Voting Machines only. Therefore, Rule 49-O, which

talks about Form 17-A, is applicable only in cases of voting by EVMs. The said Chapter was introduced in the Rules by way of an amendment dated 24.03.1992. Voting by ballot papers is governed by Chapter I of Part IV of the Rules. Rule 39 talks about secrecy while voting by ballot and Rule 41 talks about ballot papers. However, as said earlier, in the case of voting by ballot paper, the candidate always had the option of not putting the cross mark against the names of any of the candidates and thereby record his disapproval for all the candidates in the fray. Even though such a ballot paper would be considered as an invalid vote, the voter still had the right not to vote for anybody without compromising on his/her right of secrecy. However, with the introduction of EVMs, the said option of not voting for anybody without compromising the right of secrecy is not available to the voter since the voting machines did not have 'None of the Above' (NOTA) button.

43) It is also pointed out that in order to rectify this serious defect, on 10.12.2001, the Election Commission addressed a

letter to the Secretary, Ministry of Law and Justice stating, *inter alia*, that the "electoral right" under Section 79(d) includes a right not to cast vote and sought to provide a panel in the EVMs so that an elector may indicate that he does not wish to vote for any of the aforementioned candidates. The letter also stated that such number of votes expressing dissatisfaction with all the candidates may be recorded in a result sheet. It is also brought to our notice that no action was taken on the said letter dated 10.12.2001.

44) The Election Commission further pointed out that in the larger interest of promoting democracy, a provision for "None of the Above" or "NOTA" button should be made in the EVMs/ ballot papers. It is also highlighted that such an action, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent/disapproval against the contesting candidates and will have the benefit of reducing bogus voting.

45) Democracy and free elections are part of the basic structure of the Constitution. In ***Indira Nehru Gandhi*** vs. ***Raj Narain,*** 1975 Supp 1 SCC 198, Khanna, J., held that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place new representatives. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. In the said case, Article 19 was not in issue and the observations were in the context of basic structure of the Constitution. Thereafter, this Court reiterated that democracy is the basic structure of the Constitution in ***Mohinder Singh Gill and Another*** vs. ***Chief Election Commissioner, New Delhi and Others,*** (1978) 1 SCC 405 and ***Kihoto Hollohon vs. Zachillhu and Others,*** 1992 (Supp) 2 SCC 651.

46) In order to protect the right in terms of Section 79(d) and Rule 49-O, viz., “right not to vote”, we are of the view

that this Court is competent/well within its power to issue directions that secrecy of a voter who decides not to cast his vote has to be protected in the same manner as the Statute has protected the right of a voter who decides to cast his vote in favour of a candidate. This Court is also justified in giving such directions in order to give effect to the right of expression under Article 19(1)(a) and to avoid any discrimination by directing the Election Commission to provide NOTA button in the EVMs.

47) With regard to the above, Mr. Malhotra, learned ASG, by drawing our attention to Section 62 of the RP Act, contended that this Section enables a person to cast a vote and it has no scope for negative voting. Section 62(1) of the RP Act reads as under:

> "**62. Right to vote**.(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency."

48) Mr. Malhotra, learned ASG has also pointed out that elections are conducted to fill a seat by electing a person by a positive voting in his favour and there is no concept of negative voting under the RP Act. According to him, the Act does not envisage that a voter has any right to cast a negative vote if he does not like any of the candidates. Referring to Section 2(d) of the RP Act, he asserted that election is only a means of choice or election between various candidates to fill a seat. Finally, he concluded that negative voting (NOTA) has no legal consequence and there shall be no motivation for the voters to travel to the polling booth and reject all the candidates, which would have the same effect of not going to the polling station at all.

49) However, correspondingly, we should also appreciate that the election is a mechanism, which ultimately represents the will of the people. The essence of the electoral system should be to ensure freedom of voters to exercise their free choice. Article 19 guarantees all individuals the right to speak, criticize, and disagree on a particular issue. It

stands on the spirit of tolerance and allows people to have diverse views, ideas and ideologies. Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 i.e., the right to liberty.

50) Eventually, voters' participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy. But, there is no yardstick to determine what the correct and right voter participation is. If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters' participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.

Conclusion:

51) Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair

elections would alone guarantee the growth of a healthy democracy in the country. The 'Fair' denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting.

52) No doubt, the right to vote is a statutory right but it is equally vital to recollect that this statutory right is the essence of democracy. Without this, democracy will fail to

thrive. Therefore, even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand.

53) Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people.

54) Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal,

duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons.

55) Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity.

56) The direction can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not

turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate think about them.

57) As mentioned above, the voting machines in the Parliament have three buttons, namely, AYES, NOES, and ABSTAIN. Therefore, it can be seen that an option has been given to the members to press the ABSTAIN button. Similarly, the NOTA button being sought for by the petitioners is exactly similar to the ABSTAIN button since by pressing the NOTA button the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote.

58) The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy. The

following countries have provided for neutral/protest/negative voting in their electoral systems:

S.No	Name of the Country	Method of Voting	Form of Negative Vote
1.	France	Electronic	NOTA
2.	Belgium	Electronic	NOTA
3.	Brazil	Ballot Paper	NOTA
4.	Greece	Ballot Paper	NOTA
5.	Ukraine	Ballot Paper	NOTA
6.	Chile	Ballot Paper	NOTA
7.	Bangladesh	Ballot Paper	NOTA
8.	State of Nevada, USA	Ballot Paper	NOTA
9.	Finland	Ballot Paper	Blank Vote and/or ‘write in*’
10.	Sweden	Ballot Paper	Blank Vote and/or ‘write in*’
11.	United States of America	Electronic/Ballot (Depending on State)	Blank Vote and/or ‘write in*’
12.	Colombia	Ballot Paper	Blank Vote

13.	Spain	Ballot Paper	Blank Vote

* Write-in' – The 'write-in' form of negative voting allows a voter to cast a vote in favour of any fictional name/candidate.

59) The Election Commission also brought to the notice of this Court that the present electronic voting machines can be used in a constituency where the number of contesting candidates is up to 64. However, in the event of there being more than 64 candidates in the poll fray, the conventional system of ballot paper is resorted to. Learned counsel appearing for the Election Commission also asserted through supplementary written submission that the Election Commission of India is presently exploring the possibility of developing balloting unit with 200 panels. Therefore, it was submitted that if in case this Court decides to uphold the prayers of the petitioners herein, the additional panel on the balloting unit after the last panel containing the name and election symbol of the last contesting candidate can be utilized as the NOTA button. Further, it was explicitly

asserted in the written submission that the provision for the above facility for a negative or neutral vote can be provided in the existing electronic voting machines without any additional cost or administrative effort or change in design or technology of the existing machines. For illustration, if there are 12 candidates contesting an election, the 13th panel on the balloting unit will contain the words like "None of the above" and the ballot button against this panel will be kept open and the elector who does not wish to vote for any of the abovementioned 12 contesting candidates, can press the button against the 13th panel and his vote will be accordingly recorded by the control unit. At the time of the counting, the votes recorded against serial number 13 will indicate as to how many electors have decided not to vote for any candidate.

60) Taking note of the submissions of Election Commission, we are of the view that the implementation of the NOTA button will not require much effort except for allotting the last panel in the EVM for the same.

61) In the light of the above discussion, we hold that Rules 41(2) & (3) and 49-O of the Rules are *ultra vires* Section 128 of the RP Act and Article 19(1)(a) of the Constitution to the extent they violate secrecy of voting. In view of our conclusion, we direct the Election Commission to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. Inasmuch as the Election Commission itself is in favour of the provision for NOTA in EVMs, we direct the Election Commission to implement the same either in a phased manner or at a time with the assistance of the Government of India. We also direct the Government of India to provide necessary help for implementation of the above direction. Besides, we also direct the Election Commission to undertake awareness programmes to educate the masses.

62) The writ petition is disposed of with the aforesaid directions.

.....CJI.
(P. SATHASIVAM)

.....J.
(RANJANA PRAKASH DESAI)

.....J.
(RANJAN GOGOI)

NEW DELHI;
SEPTEMBER 27, 2013.

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
WRIT PETITION (CRL.) NO. 48 OF 2014

Union of India ...Petitioner

VERSUS

V. Sriharan @ Murugan & Ors. ...Respondents

With

Writ Petition (Crl.) No.185/2014
Writ Petition (Crl.) No.150/2014
Writ Petition (Crl.) No.66/2014
Criminal Appeal No.1215/2011

J U D G M E N T

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

1. The Petitioner has challenged the letter dated 19.02.2014 issued by the Chief Secretary, Government of Tamil Nadu to the Secretary, Government of India wherein the State of Tamil Nadu proposed to remit the sentence of life imprisonment and to release the respondent Nos. 1 to 7 in the Writ Petition who were convicted in the Rajiv Gandhi assassination case. As far as respondent Nos. 1 to 3 are concerned, originally they were imposed with the sentence of death. In the judgment reported as **V. Sriharan alias Murugan v. Union of India & Ors. - (2014) 4 SCC 242**, the sentence of death was commuted by this Court. Immediately thereafter, the impugned letter came to be issued by the State of Tamil Nadu which gave rise for the filing of the present Writ Petition. While dealing with the said Writ

Petition, the learned Judges thought it fit to refer seven questions for consideration by the Constitution Bench in the judgment reported as **Union of India v. V. Sriharan @ Murugan & Ors. - 2014 (11) SCC 1** and that is how this Writ Petition has now been placed before us. In paragraph 52, the questions have been framed for consideration by this Bench. The said paragraph reads as under:

> **"52.1** Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of **Swamy Shraddananda(2)**, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?
>
> 52.2 Whether the "Appropriate Government" is permitted to exercise the power of remission under Section 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?
>
> 52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is co-extensive?
>
> 52.4 Whether the Union or the State has primacy over the subject matter enlisted in List III of the Seventh

Schedule to the Constitution of India for exercise of power of remission?

52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?

52.6 Whether *suo motu* exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-clause (2) of the same Section is mandatory or not?

52.7 Whether the term "'Consultation'" stipulated in Section 435(1) of the Code implies "'Concurrence'"?"

2. It was felt that the questions raised were of utmost critical concern for the whole of the country, as the decision on the questions would determine the procedure for awarding sentence in criminal justice system. When we refer to the questions as mentioned in paragraph 52 and when we heard the learned Solicitor General for the petitioner and the counsel who appeared for the State of Tamil Nadu as well as respondent Nos. 1 to 7, we find that the following issues arise for our consideration:

(a) Maintainability of this Writ Petition under Article 32 of the Constitution by the Union of India.

(b) (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?

(ii) Whether as held in **Shraddananda case** a special

category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?

(c) Whether the Appropriate Government is permitted to grant remission under Sections 432/433 Code of Criminal Procedure after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its Constitutional power(s) under Article 32?

(d) Whether Union or the State has primacy for the exercise of power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission?

(e) Whether there can be two Appropriate Governments under Section 432(7) of the Code?

(f) Whether the power under Section 432(1) can be exercised *suo motu*, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not?

(g) Whether the expression "'Consultation'" stipulated in Section 435(1) of the Code implies "Concurrence"?

3. On the question of maintainability of the Writ Petition by the Union of India, according to learned Solicitor General, the same cannot be permitted to be raised in this Reference since the said question was not raised and considered in the order of Reference reported as **Union of India v. V. Sriharan alias Murugan & Ors. (supra)**, and that when notice was issued in the Writ Petition to all the States on 09.07.2014 then also this question was not considered, that the scheme of Code of Criminal Procedure was to protect the interest of victims at the hands of accused which onerous responsibility is cast on the agency of the Central Government, namely, the CBI which took over the investigation on the very next

day of the crime and, therefore, the Union of India has every locus to file the writ petition, that since the issue raised in the Writ Petition cannot be worked out by way of suit under Article 131 of the Constitution since the accused are private parties, Writ Petition is the only remedy available, that after the questions of general importance are answered, the individual cases will go before the Regular Benches and, therefore, the Union of India is only concerned about the questions of general importance and lastly if Union of India is held to be the Appropriate Government in a case of this nature, then the State will be denuded of all powers under Sections 432/433 Code of Criminal Procedure and consequently any attempted exercise will fall to the ground.

4. Mr. Rakesh Dwivedi, learned Senior Counsel who appeared for the State of Tamil Nadu would, however, contend that the Writ Petition does not reflect any violation of fundamental right for invoking Article 32, that the maintainability question was raised as could be seen from the additional grounds raised by the Union of India in the Writ Petition itself though the question was not considered in the order of Reference. Mr. Ram Jethmalani, learned Senior Counsel who appeared for the private respondent(s) by referring to Articles 143 and 145(3) read along with the proviso to the

said sub-Article submitted that when no question of law was likely to arise, the referral itself need not have been made and, therefore, there is nothing to be answered. By referring to each of the sub-paragraphs in paragraph 52 of the Reference order, the learned Senior Counsel submitted that none of them would fall under the category of Constitutional question and, therefore, the Writ Petition was not maintainable. The learned Senior Counsel by referring to the correspondence exchanged between the State and the Union of India and the judgment reported as **V. Sriharan alias Murugan v. Union of India & Ors. (supra)** by which the sentence was commuted by this Court as stated in particular paragraph 32 of the said judgment, contended that in that judgment itself while it was held that commutation was made subject to the procedural checks mentioned in Section 432 and further substantive check in Section 433-A of the Code there is nothing more to be considered in this Writ Petition.

5. Having considered the objections raised on the ground of maintainability, having heard the respective counsel on the said question and having regard to the nature of issues which have been referred for consideration by this Constitution Bench, as rightly contended by the learned Solicitor General, we are also convinced that answer to those questions would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various

Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Criminal Procedure and thereby serious public interest would arise for consideration and, therefore, we do not find it appropriate to reject the Reference on the narrow technical ground of maintainability. We, therefore, proceed to find an answer to the questions referred for consideration by this Constitution Bench.

6. Having thus steered clear of the preliminary objections raised by the respondents on the ground of maintainability even before entering into the discussion on the various questions referred, it will have to be stated that though in the Writ Petition the challenge is to the letter of State of Tamil Nadu dated 19.02.2014, by which, before granting remission of the sentences imposed on the private respondent Nos.1 to 7, the State Government approached the Union of India by way of 'Consultation' as has been stipulated in Section 435(1) of Cr.P.C, the questions which have been referred for the consideration of the Constitution Bench have nothing to do with the challenge raised in the Writ Petition as against the letter dated 19.02.2014. Therefore, at this juncture we do not propose to examine the correctness or validity or the power of the State of Tamil Nadu in having issued the letter dated 19.02.2014. It may be, that depending upon the ultimate

answers rendered to the various questions referred for our consideration, we ourselves may deal with the challenge raised as against the letter of the State Government dated 19.02.2014 or may leave it open for consideration by the appropriate Bench which may deal with the Writ Petition on merits.

7. In fact in this context, the submission of Learned Solicitor General that the answers to the various questions referred for consideration by the Constitution Bench may throw light on individual cases which are pending or which may arise in future for being disposed of in tune with the answers that may be rendered needs to be appreciated.

8. Keeping the above factors in mind, precisely the nature of questions culminates as follows:

(i) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission?

(ii) Whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond grant of remission?

(iii) Whether the power under Sections 432 and 433 Code of Criminal Procedure by Appropriate Government would be available even after the Constitutional power

under Articles 72 and 161 by the President and the Governor is exercised as well as the power exercised by this Court under Article 32?

(iv) Whether State or the Central Government have the primacy under Section 432(7) of Code of Criminal Procedure?

(v) Whether there can be two Appropriate Governments under Section 432(7)?

(vi) Whether power under Section 432(1) can be exercised *suo motu* without following the procedure prescribed under section 432(2)?

(vii) Whether the expression "Consultation" stipulated in 435(1) really means "Concurrence"?

9. In order to appreciate the various contentions raised on the above questions by the respective parties and also to arrive at a just conclusion and render an appropriate answer, it is necessary to note the relevant provisions in the Constitution, the Indian Penal Code and the Code of Criminal Procedure The relevant provisions of the Constitution which require to be noted are Articles 72, 73, 161, 162, 246(4), 245(2), 249, 250 as well as some of the Entries in List I, II and III of the Seventh Schedule. In the Indian Penal Code the relevant provisions required to be stated are Sections 6, 7, 17, 45, 46, 53, 54, 55, 55A, 57, 65, 222, 392, 457, 458, 370, 376A 376B and 376E. In

the Code of Criminal Procedure, the provisions relevant for our purpose are Sections 2(y), 4, 432, 433, 434, 433A and 435. The said provisions can be noted as and when we examine those provisions and make an analysis of its application in the context in which we have to deal with those provisions in the case on hand.

10. Keeping in mind the above perception, we proceed to examine the provisions contained in the Constitution. Articles 72, 73, 161 and 162 of the Constitution read as under:

> "**Article 72.- Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases .-** (1) the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-
>
> (a) In all cases where the punishment or sentence is by a Court Martial ;
>
> (b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends;
>
> (c) In all cases where the sentence is a sentence of death.
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.
>
> (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Article 73. Extent of executive power of the Union
(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(*a*) to the matters with respect to which Parliament has power to make laws; and
(*b*) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (*a*) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Article 161.- Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Article 162.- Extent of executive power of State

> Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

11. Under Article 72, there is all pervasive power with the President as the Executive Head of the Union as stated under Article 53, to grant pardons, reprieves, respite and remission of punishments apart from the power to suspend, remit or commute the sentence of any person convicted of any offence. Therefore, the substantive part of sub-Article (1), when read, shows the enormous Constitutional power vested with the President to do away with the conviction imposed on any person of any offence apart from granting the lesser relief of reprieve, respite or remission of punishment. The power also includes power to suspend, remit or commute the sentence of any person convicted of any offence. Sub-Article (1), therefore, discloses that the power of the President can go to the extent of wiping of the conviction of the person of any offence by granting a pardon apart from the power to remit the punishment or to suspend or commute the sentence.

12. For the present purpose, we do not find any need to deal with Article 72(1)(a). However, we are very much concerned with Article 72(1)(b) which has to be read along with Article 73 of the Constitution. Reading Article 72(1)(b) in isolation, it prescribes the power of the President for the grant of pardon, reprieve, remission, commutation etc. in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends. In this context when we refer to sub-Article (1) (a) of Article 73 which has set out the extent of Executive Power of the Union, it discloses that the said power is controlled only by the proviso contained therein. Therefore, reading Article 72(1)(b) along with Article 73(1)(a) in respect of a matter in which the absolute power of the President for grant of pardon etc. will remain in the event of express provisions in the Constitution or in any law made by the Parliament specifying the Executive Power of the Centre so prescribed. When we refer to Article 72(1)(c) the power of the President extends to all cases where the sentence is a sentence of death.

13. When we examine the above all pervasive power vested with the President, a small area is carved out under Article 72(3), wherein, in respect of cases where the sentence is a sentence of death, it is provided that irrespective of such enormous power vested with the

President relating to cases where sentence of death is the punishment, the power to suspend, remit or commute a sentence of death by the Governor would still be available under any law for the time being in force which fall within the Executive Power exercisable by the Governor of the State. Article 72(1)(c) read along with Article 72(3) is also referable to the proviso to Article 73(1) as well as Articles 161 and 162.

14. When we read the proviso, while making reference to the availability of the Executive Power of the Union under Article 73(1)(a), we find a restriction imposed in the exercise of such power in any State with reference to a matter with respect to which the Legislature of the State has also power to make laws, save as expressly provided in the Constitution or any law made by the Parliament conferment of Executive Power with the Centre. Therefore, the exercise of the Executive Power of the union under Article 73(1)(a) would be subject to the provisions of the said saving clause vis-a-vis any State. Therefore, reading Article 72(1)(a) and (3) along with the proviso to Article 73(1)(a) it emerges that wherever the Constitution expressly provides as such or a law is made by the Parliament that empowers all pervasive Executive Power of the Union as provided under Article 73(1)(a), the same could be extended in any State even if the dual power to make laws are available to the States as well.

15. When we come to Article 161 which empowers the Governor to grant pardon etc. which is more or less identical to the power vested with the President under Article 72, though not to the full extent, the said Article empowers the Governor of a State to grant pardon, respite, reprieve or remission or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State extends. It will be necessary to keep in mind while reading Article 161, the nature and the extent to which the extended Executive Power of the Union is available under Article 73(1)(a), as controlled under the proviso to the said Article.

16. Before deliberating upon the extent of Executive power which can also be exercised by the State, reference should also be made to Article 162 which prescribes the extent of Executive Power of the State. The Executive Power of the State under the said Article extends to the matters with respect to which the Legislature of the State has power to make laws. The proviso to Article 162 which is more or less identical to the words expressed in the proviso to Article 73(1)(a) when applied would result in a situation where the result of the consequences that would follow by applying the proviso to Article 73(1)(a) would be the resultant position.

17. Pithily stated under the proviso to Article 73(1)(a) where there is an express provision in the Constitution or any law is made by the Parliament, providing for specific Executive Power with the Centre, then the Executive Power referred to in sub-clause (a) of sub-article (1) of Article 73 would be available to the Union and would also extend in any State to matters with respect to which the Legislature of the State has also powers to make laws. In other words, it can be stated that, in the absence of any such express provision in the Constitution or any law made by the Parliament in that regard, the enormous Executive Power of the Union stipulated in Article 73(1)(a), would not be available for the Union to be extended to any State to matters with respect to which the Legislature of the State has also powers to make laws. To put it differently, in order to enable the Executive Power of the Union to extend to any State with respect to which the Legislature of a State has also got power to make laws, there must be an express provision providing for Executive Power in the Constitution or any law made by the Parliament. Therefore, the said prescription, namely, the saving clause provided in the proviso to Article 73(1)(a) will be of paramount consideration for the Union to exercise its Executive Power while examining the provision providing for the extent of Executive Power of the State as contained in Article 162.

18. Before examining the questions referred for consideration, it will be necessary to make a detailed analysis of the Constitutional and statutory provisions that would be required to be applied. When we refer to Article 161, that is the power of the Governor to grant pardon etc., as well as to suspend, remit etc., the last set of expressions contained in the said Article, namely, "to a matter to which the Executive Power of the State extends", makes it clear that the exercise of such power by the Governor of State is restricted to the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State is extended. In other words, such power of the Governor is regulated by the Executive Power of the State as has been stipulated in Article 162. In turn, we have to analyze the extent, to which the Executive Power of the Union as provided under Article 73(1)(a) regulated by the proviso to the said sub-article (1), which stipulates that the overall Executive Power of the Union is regulated to the extent to which the legislature of State has also got the power to make laws subject, however, to the express provisions in the Constitution or in any law made by Parliament. The proviso to Article 162 only re-emphasizes the said extent of coextensive legislative power of the State to make any laws at par with the Parliament which again will be subject to, as well as, limited by the express provision providing for Executive Power with the Centre in

the Constitution or in any law made by Parliament upon the Union or its authorities. In respect of the punishments or convictions of any offence against any law relating to a matter to which the Executive Power of the State extends, the power of pardon etc. or power to suspend or remit or commute etc., available to the Governor of a State under Article 161 would be available as has been stipulated therein.

19. In this respect, when we examine the opening set of expressions in Article 73(1), namely:

> "subject to the provisions of this Constitution, the Executive Power of the Union extend……."

It will be appropriate to refer to Articles 246(4), 245(2), 249 and 250. Each of the said Articles will show the specific power conferred on the Union in certain extraordinary situations as well as, in respect of areas which remain untouched by any of the States. Such powers referred to in these Articles are *de hors* the specific power provided under Article 73(1)(a), namely, with respect to matters for which Parliament has power to make laws.

20. In this context, it will also be relevant to analyze the scope of Article 162 which prescribes the extent of Executive Power of the State. Proviso to Article 162 in a way slightly expands the Executive

Power of the Union with respect to matters to which the State Legislature as well as the Parliament has power to make laws. In such matters the Executive Power of the State is limited and controlled to the extent to which the power of the Union as well as its authorities are expressly conferred by the Constitution or the laws made by Parliament.

21. If we apply the above Constitutional prescription of the Executive Power of the Union vis-à-vis the Executive Power of the State in the present context with which we are concerned, namely, the power of remission, commutation etc., it is well known that the powers relating to those actions are contained, governed and regulated by the provisions under the Criminal Procedure Code, which is the law made by Parliament covered by Entry 1 in List III (viz.), Concurrent List of the Seventh Schedule of the Constitution. What is prescribed in the proviso to Article 73(1)(a) is in relation to "matters with respect to which the legislature of the State has also power to make laws" (Emphasis supplied). In other words, having regard to the fact that 'criminal law is one of the items prescribed in List III, under Article 246(2), the State Legislature has also got power to make laws in that subject. It is also to be borne in mind that The Indian Penal Code and The Code of Criminal Procedure are the laws made by the Parliament.

22. Therefore, the resultant position would be that, the Executive Power of the Union and its authorities in relation to grant of remission, commutation etc., are available and can be exercised by virtue of the implication of Article 73(1)(a) read along with its proviso and the exercise of such power by the State would be controlled and limited as stipulated in the proviso to Article 162 to the extent to which such control and limitations are prescribed in the Code of Criminal Procedure.

23. On an analysis of the above-referred Constitutional provisions, namely, 72, 73, 161 and 162 what emerges is:

(a) The President is vested with the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive Power of the Union extends as has been provided under Article 73(1)(a) subject, however, to the stipulations contained in the proviso therein.

(b) Insofar as cases where the sentence is sentence of death such power to suspend, remit or commute the sentence provided under Article 72(1) would be available even to the Governor of a State wherever such sentence of death came to be made under any law for the time being in force.

(c) The Executive Power of the Union as provided under Article 73(1)(a) will also extend to a State if such Executive Power is expressly provided in the

Constitution or in any law made by the Parliament even with respect to matters with respect to which the Legislature of a State has also got the power to make laws.

(d) The power of the Governor of any State to grant pardon etc., or to suspend, remit or commute sentence etc., would be available in respect of sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State extends and not beyond.

(e) The extent of Executive Power of the State which extend to all matters with respect to which the legislature of the State has power to make laws is, however, subject to and limited by the Executive Power expressly conferred under the Constitution or by any law made by Parliament upon the Union or the authorities of the Union.

24. Keeping the above legal principles that emerge from a reading of Articles 72, 73, 161 and 162, further analysis will have to be made as to the extent to which any such restrictions have been made providing for exclusive power of the Union or co-extensive power of the State under the Constitution as well as the laws made by the Parliament with reference to which the Legislature of the State has also got the power to make laws.

25. The express provision contained in the Constitution prescribing the Executive Power of the Union as well as on its authorities can be found in Article 53. However, the nature of power stated therein has

nothing to do with the one referred to either in Article 73 (1)(a) or 162 of the Constitution. Under Articles 53 and 156 of the Constitution, the Executive Power of the Union and the State are to be exercised in the name of the President and the Governor of the State respectively. Though, under Articles 123, 213 and 239B of the Constitution, the power to issue Ordinance is vested with the President, the Governor and the Administrator of the Union, the State and the Union Territory of Puducherry respectively by way of an executive action, this Court has clarified that the exercise of such power would be on par with the Legislative action and not by way of an administrative action. Reference can be had to the decisions reported as **K. Nagaraj and others v. State of Andhra Pradesh and another - 1985(1) SCC 523** @ 548 paragraph 31 and **T. Venkata Reddy and others v. State of Andhra Pradesh - 1985(3) SCC 198** paragraph 14.

26. Under Article 246(2) of the Constitution, Parliament and the State have equal power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule. Under Article 246(4), the Parliament is vested with the power to make laws for any part of the territory of India which is not part of any State. Article 247 of the Constitution is referable to Entry 11A of List III of Seventh Schedule. The said Entry is for administration of justice, Constitution and organization of all Courts, except the Supreme Court and the

High Courts. Under Article 247, Parliament is empowered to provide for establishment of certain additional Courts. Whereas under Articles 233, 234 and 237 falling under Chapter VI of the Constitution appointment of District Judges, recruitment of persons other than District Judges, their service conditions and application of the provisions under the said Chapter are all by the Governor of the State as its Executive Head subject, however in 'Consultation' with the High Court exercising jurisdiction in relation to such State. Here and now it can be noted that having regard to the specific provisions contained in Article 247 of the Constitution, the Central Government may enact a law providing for establishment of additional Courts but unless the Executive Power of the Union to the specific extent is expressly provided in the said Article or in the Statute if any, enacted for making the appointments then the saving clause under the proviso to Article 73(1) (a) will have no application.

27. Under Articles 249 and 250 of the Constitution, Parliament is empowered to legislate with respect to a matter in the State List in the National Interest and if a Proclamation of Emergency is in operation. Therefore, in exercise of said superscriptive power any law is made, it must be stated that exercise of any action by way of executive action would again be covered by the proviso to Article 73(1)(a) of the

Constitution. Similarly, under Article 251 of the Constitution where any inconsistency between the laws made by Parliament under Articles 249 and 250 and the laws made by State Legislature, the laws made by the Parliament whether made before or after the laws made by the State would to the extent of repugnancy prevail so long as the law made by the Parliament continues to have effect. Under Article 252 of the Constitution, *de hors* the powers prescribed under Articles 249 and 250, with the express resolution of two or more of State Legislatures, the Parliament is empowered to make laws applicable to such States. Further any such laws made can also be adopted by such other States whose Legislature passes necessary resolution to the said effect. Here again in the event of such situations governed by Articles 251 and 252 of Constitution emerge, the saving clause prescribed in the proviso to Article 73(1)(a) will have application.

28. Irrespective of special situations under which the laws made by the Parliament would prevail over any State to the extent of repugnancy, as stipulated in Articles 249, 250 and 251 of the Constitution, Article 254 provides for supervening power of the laws made by the Parliament by virtue of its competence, in respect of Entries found in the Concurrent List if any repugnancy conflicting with the such laws of Parliament by any of the laws of the State is

found, to that extent such laws of the State would become inoperative and the laws of the Parliament would prevail, subject, however, to stipulations contained in sub-Article (2) of Article 254 and the proviso.

29. Article 256 of the Constitution is yet another *superscriptus (Latin)* Executive Power of the Union obligating the Executive Power of the State to be subordinate to such power. Under the head Administrative relations falling under Chapter II of Part XI of the Constitution, Articles 256, 257, 258 and 258A are placed. Article 257(1) prescribes the Executive Power of the State to ensure that it does not impede or prejudice the exercise of the Executive Power of the Union apart from the authority to give such directions to State as may appear to the Government of India to be necessary for that purpose. Under Article 258, the Executive Head of the Union, namely, the President is empowered to confer the Executive Power of the Union on the States in certain cases. A converse provision is contained in Article 258A of the Constitution by which, the Executive Head of the State, namely, the Governor can entrust the Executive Power of the State with the Centre. Here again, we find that all these Articles are closely referable to the saving clause provided under the proviso to Article 73(1)(a) of the Constitution.

30. The saving clause contained in Article 277 of the Constitution is yet another provision, whereunder, the authority of the Union in relation to levy of taxes can be allowed to be continued to be levied by the States and the local bodies, having regard to such levies being in vogue prior to the commencement of the Constitution. However, the Union is empowered to assert its authority by making a specific law to that effect by the Parliament under the very same Article.

31. Under the head 'Miscellaneous Financial Provisions' the Union or the State can make any grant for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislative of the State, as the case may be, can make laws.

32. Article 285 of the Constitution is yet another provision where the power of the Union to get its properties lying in a State to be exempted from payment of any tax. Similarly, under Article 286 restrictions on the State as to imposition of tax on the sale or purchase of goods outside the State is prescribed, which can be ascribed by a law of the Parliament.

33. Article 289 prescribes the extent of the executive and legislative power of the Union and the Parliament in relation to exemption of property and income of a State from Union taxation.

34. The Executive Power of the Union and of each State as regards carrying on of any trade or business as to the acquisition, holding and disposal of property and the making of contracts for any purpose is prescribed under Article 298.

35. The above Articles 277, 282, 285, 286 and 289 fall under Part XII, Chapter I and Article 298 under Chapter III.

36. Articles 302, 303, 304 and 307 falling under Part XIII of the Constitution read along with Entry 42 of List I, Entry 26 of List II and Entry 33 of List III provides the relative and corresponding executive and legislative power of the Union and the States with reference to Trade, Commerce and intercourse within the territory of India.

37. Articles 352 and 353 of the Constitution falling under Part XVIII of the Constitution prescribe the power of the President to declare Proclamation of Emergency under certain contingencies and the effect of proclamation of emergency. Under Article 355 of the Constitution, the duty has been cast on the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution.

38. Article 369 of the Constitution falling under Part XXI empowers the Parliament to make laws with respect to certain matters in the

State Lists for a limited period of five years and to cease after the said period by way of temporary and transitional measure.

39. Thus a close reading of the various Constitutional provisions on the Executive Power of the Centre and the State disclose the Constitutional scheme of the framers of the Constitution to prescribe different types of such Executive Powers to be exercised befitting different situations. However, the cardinal basic principle which weighed with the framers of the Constitution in a democratic federal set up is clear to the pointer that it should be based on "a series of agreements as well as series of compromises". In fact, the temporary Chairman of the Constituent Assembly, the Late Dr. Sachidananda Sinha, the oldest Parliamentarian in India, by virtue of his long experience, advised; "that reasonable agreements and judicious compromises are nowhere more called for than in framing a Constitution for a country like India". His ultimate request was that; "the Constitution that you are going to plan, may similarly be reared for 'immortality', if the rule of man may justly aspire to such a title, and it may be a structure of adamantine strength, which will outlast and overcome all present and future destructive forces". With those lofty ideas, the Constitution came to be framed.

40. We are, therefore, able to discern from a reading of the various provisions of the Constitution referred to above, to be read in conjunction with Articles 72, 73, 161 and 162, which disclose the dichotomy of powers providing for segregation, combination, specific exclusion (temporary or permanent), interrelation, voluntary surrender, one time or transitional or temporary measures, validating, *superscriptus*, etc. We are also able to clearly note that while the Executive Power of the State is by and large susceptible to being controlled by the Executive Power of the Union under very many circumstances specifically warranting for such control, the reverse is not the case. It is quite apparent that while the federal fabric of the set up is kept intact, when it comes to the question of National Interest or any other emergent or unforeseen situations warranting control in the nature of a super-terrestrial order (celestial) the Executive Power of the Union can be exercised like a bull in the China shop.

41. At the risk of repetition we can even quote some of such provisions in the Constitution which by themselves expressly provide for such supreme control, as well as, some other provisions which enable the Parliament to prescribe such provisions by way of an enactment as and when it warrants. For instance, under Article 247 of the Constitution, by virtue of Entry 11A of List III of the Seventh

Schedule, the Parliament is empowered to provide for establishment of certain additional Courts at times of need. In fact, it can be validly stated that the establishment of Fast Track Courts in the various States and appointment of *ad hoc* Judges at the level of Entry level District Judges though not in the cadre strength, came to be made taking into account the enormous number of undertrial prisoners facing Sessions cases of grievous offences in different States. This is one such provision which expressly provided for remedying the situation in the Constitution itself specifically covered by the proviso to Article 73(1)(a) and the proviso to Article 162 of the Constitution. Similar such provisions in the Constitution containing express powers can be noted in Articles 256, 257, 258, 285 and 286 of the Constitution. We can quote any number such Articles specifically and expressly providing for higher Executive Power of the Union governed by Article 73(1)(a) of the Constitution.

42. Quite apart, we can also cite some of the Articles under which the Parliament is enabled to promulgate laws which can specifically provide for specific Executive Power vesting with the Union to be exercisable in supersession of the Executive Power of the State. Such provisions are contained in Articles 246(2), 249, 250, 277, 286 and 369 of the Constitution.

43. Having thus made an elaborate analysis of the Constitutional provisions relating to the relative Executive Power of the Union and the State as it exists and exercisable by the respective authorities in the given situations, we wish to examine the provisions specifically available in the Indian Penal Code, Criminal Procedure Code, as well as the Special enactment, namely, the Delhi Special Police Establishment Act under which the CBI operates, to understand the extent of powers exercisable by the State and the Centre in order to find an answer to the various questions referred for our consideration.

44. In the Indian Penal Code, the provisions for our purpose can be segregated into two categories, namely, those by which various terms occurring in the Penal Code are defined or explained and those which specifically provide for particular nature of punishments that can be imposed for the nature of offence involved. Sections 17, 45, 46, 53, 54, 55, 55A are some of the provisions by which the expressions occurring in the other provisions of the Code are defined or explained. Under Section 17, the word 'Government' would mean the 'Central Government' or the 'State Government'. Under Section 45, the expression 'life' would denote the life of a human being, unless the contrary appears from the context. Similarly, the expression 'death' would mean death of a human being unless the contrary appears

from the context. Section 53 prescribes five kinds of punishments that can be imposed for different offences provided for in the Penal Code which ranges from the imposition of 'fine' to the capital punishment of 'death'. Section 54 empowers the Appropriate Government to commute the punishment of death imposed on an offender for any other punishment even without the consent of the offender. Similar such power in the case of life imprisonment is prescribed under Section 55 to be exercised by the Appropriate Government, but in any case for a term not exceeding fourteen years. Section 55A defines the term "Appropriate Government" with particular reference to Sections 54 and 55 of the Penal Code.

45. Having thus noted those provisions which highlight the various expressions used in the Penal Code to be understood while dealing with the nature of offences committed and the punishments to be imposed, the other provisions which specify the extent of punishment to be imposed are also required to be noted. For many of the offences, the prescribed punishments have been specified to be imposed upto a certain limit, namely, number of years or fine or with both. There are certain offences for which it is specifically provided that such punishment of imprisonment to be either life or a specific term, namely, seven years or ten years or fourteen years and so on. To quote a few, under Section 370(5), (6) and (7) for the offence of

trafficking in person, such punishments shall not be less than fourteen years, imprisonment for life to mean imprisonment for the remainder of that person's natural life apart from fine. Similar such punishments are provided under Sections 376(2), 376A, 376D and 376E.

46. At this juncture, without going into much detail, we only wish to note that the Penal Code prescribes five different punishments starting from fine to the imposition of capital punishment of Death depending upon the nature of offence committed. As far as the punishment of life imprisonment and death is concerned, it is specifically explained that it would mean the life of a human being or the death of a human being, with a rider, unless the contrary appears from the context, which means something written or spoken that immediately precede or follow or that the circumstances relevant to something under consideration to be seen in the context. For instance, when we refer to the punishment provided for the offence under Section 376A or 376D while prescribing life imprisonment as the maximum punishment that can be imposed, it is specifically stipulated that such life imprisonment would mean for the remainder of that person's natural life. We also wish to note that under Sections 54 and 55 of the Penal Code, the power of the Appropriate Government to commute the Death sentence and life sentence is

provided which exercise of power is more elaborately specified in the Code of Criminal Procedure. While dealing with the provisions of Criminal Procedure Code on this aspect we will make reference to such of those provisions in the Penal Code which are required to be noted and considered. In this context, it is also relevant to note the provisions in the Penal Code wherein the punishment of death is provided apart from other punishments. Such provisions are Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307, 376A, 376E, 396 and 364A. The said provisions are required to be read along with Sections 366 to 371 and 392 of Code of Criminal Procedure. We will make a detailed reference to the above provisions of Penal Code and Code of Criminal Procedure while considering the second part of the first question referred for our consideration.

47. When we come to the provisions of Criminal Procedure Code, for our present purpose, we may refer to Sections 2(y), 432, 433, 433A, 434 and 435. Section 2(y) of the Code specifies that words and expressions used in the Code and not defined but defined in the Indian Penal Code (45 of 1860) will have the same meaning respectively assigned to them in that Code. Section 432 prescribes the power of the Appropriate Government to suspend or remit sentences. Section 432 (7) defines the expression 'Appropriate Government' for the purpose of Sections 432 and 433. Section 433

enumerates the power of the Appropriate Government for commutation of sentences, namely, fine, simple imprisonment, rigorous imprisonment, life imprisonment as well as the punishment of death. Section 433A which came to be inserted by Act 45 of 1978 w.e.f. 18.12.1978, imposes a restriction on the power of Appropriate Government for remissions or suspensions or commutation of punishments provided under Sections 432 and 433 by specifying that exercise of such power in relation to the punishment of death or life imprisonment to ensure at least fourteen years of imprisonment. Under Section 434 in regard to sentences of death, concurrent powers of Central Government are prescribed which is provided for in Sections 432 and 433 upon the State Government. Section 435 of the Code imposes a restriction upon the State Government to consult the Central Government while exercising its powers under Sections 432 and 433 of the Code under certain contingencies.

48. In the case on hand, we are also obliged to refer to the provisions of the Delhi Special Police Establishment Act of 1946 (hereinafter referred to as the "Special Act") as the Reference which arose from the Writ Petition was dealt with under the said Act. The Special Act came to be enacted to make provision for the Constitution of special force in Delhi for the investigation of certain offences in the Union Territory. Under Section 3 of the Special Act, the Central Government can, by

Notification in the official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment. Under Section 4, the superintendence of the Delhi Special Police Establishment vests with the Central Government. Section 5 of the Special Act, however, empowers the Central Government to extend the application of the said Act to any area of any State other than Union Territories, the powers and jurisdiction of the members of the Special Police Establishment for the investigation of any offences or classes of offences specified in a Notification under Section 3. However, such empowerment on the Central Government is always subject to the consent of the concerned State Government over whose area the Special Police Establishment can be allowed to operate.

49. Having noted the scope and ambit of the said Special Act, it is also necessary for our present purpose to refer to the communication of the Principal Secretary (Home) to Government of Tamil Nadu addressed to the Joint Secretary to Government of India, Department of Personal and Training dated 22.05.1991 forwarding the order of Government of Tamil Nadu, conveying its consent under Section 6 of the Special Act for the extension of the powers and jurisdiction of members of Special Police Establishment to investigate the case in Crime No.329/91 under Sections 302, 307, 326 IPC and under

Sections 3 and 5 of The Indian Explosive Substances Act, 1908 registered in Sriperumbudur P.S., Changai Anna (West) District, Tamil Nadu relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. Pursuant to the said communication and order of State of Tamil Nadu dated 22.05.1991, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training issued the Notification dated 23rd May, 1991 extending the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Tamil Nadu for investigation of the offences registered in Crime No.329/91 in Sriperumbudur Police Station of Changai Anna (West) District of Tamil Nadu. Relevant part of the said Notification reads as under:-

> "a) Offences punishable under Section 302, 307, 326 of the Indian Penal Code, 1860 (Act No.45 of 1860) and under Section 5 and 6 of the Indian Explosive Substances Act 1908 (Act No.6 of 1903) relating to case in Crime No.329/91 registered in Sriperumbudur Police Station Changai-Anna (West) District, Tamil Nadu;
>
> b) Attempts, abetments and conspiracies in relation to or in connection with the offences mentioned above and any other offence or offences committed in the course of the same transaction arising out of the same facts."

50. Having thus noted the relevant provisions in the Constitution, the Penal Code, Code of Criminal Procedure and the Special Act, we wish to deal with the question referred for our consideration in seriatim. The first question framed for the consideration of the Constitution Bench reads as under:

> 'Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (supra), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission'.

51. This question contains two parts. The first part poses a question as to whether life imprisonment as a punishment provided for under Section 53 of the Penal Code and as defined under Section 45 of the said Code means imprisonment for the rest of one's life or a convict has a right to claim remission. The second part is based on the ruling of **Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka** reported in **(2008) 13 SCC 767**.

52. Before answering the first part of this question, it will be worthwhile to refer to at least two earlier Constitution Bench

decisions which cover this very question. The first one is reported as **Gopal Vinayak Godse v. The State of Maharashtra and others - (1961) 3 SCR 440**. The first question that was considered in that decision was:

> "whether, under the relevant statutory provisions, an accused who was sentenced to transportation for life could legally be imprisoned in one of the jails in India; and if so what was the term for which he could be so imprisoned".

We are concerned with the second part of the said question, namely, as to what was the term for which a life convict could be imprisoned. This Court answered the said question in the following words:

> "A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life".

The learned Judges also took note of the various punishments provided for in Section 53 of the Penal Code before rendering the said answer. However, we do not find any reference to Section 45 of the Penal Code which defines 'life' to denote the life of a human being unless the contrary appears from the context.

53. Having noted the ratio of the above said decision in this question, we can also profitably refer to a subsequent Constitution Bench decision reported as **Maru Ram etc., etc. v. Union of India and another - 1981 (1) SCR 1196**. At pages 1222-1223, this Court while endorsing the earlier ratio laid down in **Godse (supra)** held as under:

> "A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totaled upto 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoners cannot claim his liberty. The reason is that life sentence is nothing less than life-long imprisonment. Moreover, the penalty then and now is the same – life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by Section 433A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14 years jail life once we realize the truism that a life sentence is a sentence for a whole life. See Sambha Ji Krishan Ji. v. State of Maharashtra, AIR 1974 SC 147 and State of Madhya Pradesh v. Ratan Singh & Ors. [1976] Supp. SCR 552" **(Emphasis added)**

Again at page 1248 it is held as under:

> "We follow Godse's case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government".

54. In an earlier decision of this Court reported as **Sambha Ji Krishan Ji v. State of Maharashtra - AIR 1974 SC 147**, in paragraph 4 it is held as under:

> "**4**.....As regards the third contention, the legal position is that a person sentenced to transportation for life may be detained in prison for life. Accordingly, this Court cannot interfere on the mere ground that if the period of remission claimed by him is taken into account, he is entitled to be released. It is for the Government to decide whether he should be given any remissions and whether he should be released earlier."

55. Again in another judgment reported as **State of Madhya Pradesh v. Ratan Singh and others - (1976) 3 SCC 470**, it was held as under in paragraph 9:

> "**9.** From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following proposition emerge:
>
> **(i)** that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;"
>
> **(Emphasis added)**

It will have to be stated that Section 401 referred to therein is the corresponding present Section 432.

56. We also wish to make reference to the statement of law made by the Constitution Bench in **Maru Ram (supra)** at pages 1221 and 1222. At page 1221, it was held:

> "Here, again, if the sentence is to run until life lasts, remissions, quantified in time cannot reach a point of zero. This is the ratio of Godse."

57. In the decision reported as **Ranjit Singh alias Roda v. Union Territory of Chandigarh - (1984) 1 SCC 31** while commuting the death to life imprisonment, it was held that:

> "the two life sentences should run consecutively, to ensure that even if any remission is granted for the first life sentence, the second one can commence thereafter".

It is quite apparent that this Court by stating as above has affirmed the legal position that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Code of Criminal Procedure by the Appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz., the President or the Governor of the State, respectively.

58. In the decision reported as **Ashok Kumar alias Golu v. Union of India and others - (1991) 3 SCC 498**, it was specifically ruled that the decision in **Bhagirath (supra)** does not run counter to **Godse (supra)** and **Maru Ram (supra)**, paragraph 15 is relevant for our purpose, which reads as under:

> "**15**. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or Constitutional power has been exercised under Article 72/161 of the Constitution. In Bhagirath case the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim the benefit of Section 428 of the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him. Referring to Section 57, IPC, the Constitution Bench reiterated the legal position as under:
>
> "The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose."
>
> These observations are consistent with the ratio laid down in Godse and Maru Ram cases. Coming next to the question of set off under Section 428 of the Code, this Court held:

"The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life."

We fail to see any departure from the ratio of Godse case; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the court while allowing the appeal/writ petition. The court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that orders have been passed by the appropriate authority under Section 433 of the Code of Criminal Procedure'. These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set off the period of detention as undertrial would enure to the benefit of the convict provided the Appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of Bhagirath case, therefore, does not run counter to the ratio of this Court in the case of Godse or Maru Ram."

(underlining is ours)

59. In **Subash Chander v. Krishan Lal and others** - **(2001) 4 SCC 458**, this Court followed **Godse (supra)** and **Ratan Singh (supra)** and held that a sentence for life means a sentence for entire life of the

prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence under Section 401 of Code of Criminal Procedure.

60. Paragraphs 20 and 21 can be usefully referred to which read as under:

> "**20**. Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years. The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. In *Gopal Vinayak Godse* v. *State of Maharashtra* the petitioner convict contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in *Pandit Kishori Lal* v. *King Emperor* this Court held: (SCR pp. 444-45)
>
> > "If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by Appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10:

'Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.'

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

21. In *State of M.P.* v. *Ratan Singh* this Court held that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions. "A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure", observed the Court (at SCC p. 477, para 9). To the same effect are the judgments in *Sohan Lal* v. *Asha Ram*, *Bhagirath* v. *Delhi Admn.* and the latest judgment in *Zahid Hussein* v. *State of W.B.*

(Emphasis added)

61. Having noted the above referred to two Constitution Bench decisions in **Godse (supra)** and **Maru Ram (supra)** which were

consistently followed in the subsequent decisions in **Sambha Ji Krishan Ji (supra)**, **Ratan Singh (supra)**, **Ranjit Singh (supra)**, **Ashok Kumar (supra)** and **Subash Chander (supra)**. The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Code of Criminal Procedure.

62. As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant Rules based on his/her good behavior or such other stipulations prescribed therein. The other remission is the grant of it by the Appropriate Government in exercise of its power under Section 432 Code of Criminal Procedure Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again

depend upon an answer to the second part of the first question based on the principles laid down in **Swamy Shraddananda (supra)**.

63. With that when we come to the second part of the first question which pertains to the special category of sentence to be considered in substitute of Death Penalty by imposing a life sentence i.e., the entirety of the life or a term of imprisonment which can be less than full life term but more than 14 years and put that category beyond application of remission which has been propounded in paragraphs 91 and 92 of **Swamy Shraddananda (supra)** and has come to stay as on this date.

64. To understand and appreciate the principle set down in the said decision, it will be necessary to note the special features analysed by this Court in the said judgment. At the very outset, it must be stated that the said decision was a well thought out one. This Court before laying down the principles therein noted the manner in which the appellant in that case comprehended a scheme with a view to grab the wealth of the victim, who was a married woman and who was seduced by the appellant solely with a view to make an unholy accumulation of the wealth at the cost of the victim, who went all out to get separated from her first husband by getting a divorce, married the appellant whole heartedly reposing very high amount of faith, trust and confidence and went to the extent of executing a Power of Attorney in

favour of the appellant for dealing with all her valuable properties. This Court has stated that when the victim at some point of time realized the evil designs of the appellant and found total mistrust in him, the appellant set the clock for her elimination. It will be more appropriate to note the observation made in the said judgment after noting the manner in which the process of elimination was schemed by the appellant. Paragraphs 28, 29 and 30 of the **Swamy Shraddananda (2) (supra)** judgment gives graphic description of the 'witchcrafted' scheme formulated and executed with all perfection by the appellant and the said paragraphs can be extracted herein which are as under:

> "**28.** These are, in brief, the facts of the case. On these facts, Mr. Sanjay Hegde, learned counsel for the State of Karnataka, supported the view taken by Katju, J. (as indeed by the High Court and the trial court) and submitted that the appellant deserved nothing less than death. In order to bring out the full horror of the crime Mr. Hegde reconstructed it before the Court. He said that after five years of marriage Shakereh's infatuation for the appellant had worn thin. She could see through his fraud and see him for what he was, a lowly charlatan. The appellant could sense that his game was up but he was not willing to let go of all the wealth and the lavish lifestyle that he had gotten used to. He decided to kill Shakereh and take over all her wealth directly.
>
> **29.** In furtherance of his aim he conceived a terrible plan and executed it to perfection. He got a large pit dug up at a "safe" place just outside their bedroom. The person who was to lie into it was told that it was intended for the construction of a soak pit for the toilet.

He got the bottom of one of the walls of the bedroom knocked off making a clearing to push the wooden box through; God only knows saying what to the person who was to pass through it. He got a large wooden box (7 × 2 × 2 ft) made and brought to 81, Richmond Road where it was kept in the guest house, mercifully out of sight of the person for whom it was meant. Having thus completed all his preparations he administered a very heavy dose of sleeping drugs to her on 28-5-1991 when the servant couple, on receiving information in the morning regarding a death in their family in a village in Andhra Pradesh asked permission for leave and some money in advance. However, before giving them the money asked for and letting them go, the appellant got the large wooden box brought from the guest house to the bedroom by Raju (with the help of three or four other persons called for the purpose) where, according to Raju, he saw Shakereh (for the last time) lying on the bed, deep in sleep. After the servants had gone away and the field was clear the appellant transferred Shakereh along with the mattress, the pillow and the bed sheet from the bed to the box, in all probability while she was still alive. He then shut the lid of the box and pushed it through the opening made in the wall into the pit, dug just outside the room, got the pit filled up with earth and the surface cemented and covered with stone slabs.

30. What the appellant did after committing murder of Shakereh was, according to Mr. Hegde even more shocking. He continued to live, like a ghoul, in the same house and in the same room and started a massive game of deception. To Sabah, who desperately wanted to meet her mother or at least to talk to her, he constantly fed lies and represented to the world at large that Shakereh was alive and well but was simply avoiding any social contacts. Behind the facade of deception he went on selling Shakereh's properties as quickly as possible to convert those into cash for easy appropriation. In conclusion, Mr. Hegde submitted that it was truly a murder most foul and Katju, J. was perfectly right in holding that this case came under the first, second and the fifth of the five categories, held by

this Court as calling for the death sentence in *Machhi Singh* v. *State of Punjab."*

65. After noting the beastly character of the appellant, this Court made a detailed reference to those decisions in which the "rarest of rare case" principle was formulated and followed subsequently, namely, **Machhi Singh and ors. v. State of Punjab** reported in **(1983) 3 SCC 470**, **Bachan Singh v. State of Punjab** reported in **(1980) 2 SCC 684**, **Jag Mohan Singh v. State of U.P.** reported in **(1973) 1 SCC 20**. While making reference to the said decisions and considering the submissions made at the Bar that for the sake of saving the Constitutional validity of the provision providing for "Death Penalty" this Court must step in to clearly define its scope by unmistakably making the types of grave murders and other capital offence that would attract death penalty rather than the alternative punishment of imprisonment for life. His Lordship Justice Aftab Alam, the author of the judgment has expressed the impermissibility of this Court in agreeing to the said submission in his own inimitable style in paragraphs 34, 36, 43, 45 and 47 in the following words:

> "**34.** As on the earlier occasion, in *Bachan Singh* too the Court rejected the submission. The Court did not accept the contention that asking the Court to state special reasons for awarding death sentence amounted to leaving the Court to do something that was essentially a legislative function. The Court held that the exercise of judicial discretion on well-established

principles and on the facts of each case was not the same as to legislate. On the contrary, the Court observed, any attempt to standardise or to identify the types of cases for the purpose of death sentence would amount to taking up the legislative function. The Court said that a "standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation" and "the *Court would not* by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do".

36. Arguing against standardisation of cases for the purpose of death sentence the Court observed that *even within a single category offence there are infinite, unpredictable and unforeseeable variations*. No two cases are exactly identical. *There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus*. The Court further observed that *standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity*.

43. In *Machhi Singh* the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in *Machhi Singh* was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the *Machhi Singh* categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh*, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were

no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in *Bachan Singh*, therefore, we respectfully wish to say that even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in *Bachan Singh* itself.

45. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether, it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The Court is in a position to judge "the rarest of rare cases" or an "exceptional case" or an "extreme case" only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison.

47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is

> no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence."
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> **(underlining is ours)**

66. After noting the above principles, particularly culled out from the decision in which the very principle namely "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of rare case principle nor **Machhi Singh (supra)** categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, **Aloke Nath Dutta and Ors. v. State of West Bengal** reported in **(2007) 12 SCC 230**. This Court in **Swamy Shraddananda (supra)** also made a reference to a report called "Lethal Lottery, the Death Penalty in India" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puduchery wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred and one of the main facets made in the report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such

inconsistencies and lamented over the same in the following words in paragraph 52:

> "**52.** The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

67. We fully endorse the above anguish expressed by this Court and as rightly put, the situation is a matter of serious concern for this Court and wish to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. After having expressed its anguish in so many words this Court proceeded to examine the detailed facts of the appellant's role in that case and noted the criminal magnanimity shown by him in killing the victim by stating that he devised a plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most and that the way of killing

appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim and that at least before the High Court he confessed his guilt. It must be stated that the manner in which the victim was sedated and buried while she was alive in the chamber no one would knew whether at all she regained her senses and if so what amount of torments and trauma she would have undergone before her breath came to a halt. Nevertheless, nobody had the opportunity ever to remotely imagine the amount of such ghastly, horrendous gruesome feeling the victim would have undergone in her last moments. In these circumstances, it was further expressed by this Court that this Court must not be understood to mean that the crime committed by the appellant in that case was not grave or the motive behind the crime was not highly depressed. With these expressions, it was held that this Court was hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The hangman's noose was thus taken off the appellant's neck.

68. If one were to judge the case of the said appellant in the above background of details from the standpoint of the victim's side, it can be said without any hesitation that one would have unhesitatingly imposed the death sentence. That may be called as the human reaction of anyone who is affected by the conduct of the convict of such a ghastly crime. That may even be called as the reaction or

reflection in the common man's point of view. But in an organized society where the Rule of Law prevails, for every conduct of a human being, right or wrong, there is a well set methodology followed based on time tested, well thought out principles of law either to reward or punish anyone which was crystallized from time immemorial by taking into account very many factors, such as the person concerned, his or her past conduct, the background in which one was brought up, the educational and knowledge base, the surroundings in which one was brought up, the societal background, the wherewithal, the circumstances that prevailed at the time when any act was committed or carried out whether there was any preplan prevalent, whether it was an individual action or personal action or happened at the instance of anybody else or such action happened to occur unknowingly, so on so forth. It is for this reason, we find that the criminal law jurisprudence was developed by setting forth very many ingredients while describing the various crimes, and by providing different kinds of punishment and even relating to such punishment different degrees, in order to ensure that the crimes alleged are befitting the nature and extent of commission of such crimes and the punishments to be imposed meets with the requirement or the gravity of the crime committed.

69. Keeping the above perception of the Rule of Law and the settled principle of Criminal Law Jurisprudence, this Court expressed its concern as to in what manner even while let loose of the said appellant of the capital punishment of death also felt that any scope of the appellant being let out after 14 years of imprisonment by applying the concept of remission being granted would not meet the ends of justice. With that view, this Court expressed its well thought out reasoning for adopting a course whereby such heartless, hardened, money minded, lecherous, paid assassins though are not meted out with the death penalty are in any case allowed to live their life but at the same time the common man and the vulnerable lot are protected from their evil designs and treacherous behavior. Paragraph 56 can be usefully referred to understand the lucidity with which the whole issue was understood and a standard laid down for others to follows:

> "**56.** But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? <u>The answer lies in breaking this standardisation that, in practice, renders the</u>

sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment *when awarded as a substitute for death penalty* would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh* v. *State of Punjab*. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

> "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, *at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large*. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."

We think that it is time that the course suggested in *Dalbir Singh* should receive a formal recognition by the Court."

(underlining is ours)

70. Even after stating its grounds for the above conclusion, this Court also noticed the earlier decisions of this Court wherein such

course was adopted, namely, in **Dalbir Singh and ors. v. State of Punjab** - **(1979) 3 SCC 745**, **Subash Chander (supra)**, **Shri Bhagavan v. State of Rajasthan - (2001) 6 SCC 296**, **Ratan Singh (supra)**, **Bhagirath v. Delhi Administration - (1985) 2 SCC 580**, **Prakash Dhawal Khairnar (Patil) v. State of Maharashtra - (2002) 2 SCC 35**, **Ram Anup Singh and Ors. v. State of Bihar - (2002) 6 SCC 686**, **Mohd. Munna v. Union of India and Ors. - (2005) 7 SCC 417**, **Jayawant Dattatraya Suryarao v. State of Maharashtra - (2001) 10 SCC 109**, **Nazir Khan and others v. State of Delhi - (2003) 8 SCC 461**, **Ashok Kumar (supra)** and **Satpal alias Sadhu v. State of Haryana and ors.-(1992) 4 SCC 172**.

71. Having thus noted the need for carrying out a special term of imprisonment to be imposed, based on sound legal principles, this Court also considered some of the decisions of this Court wherein the mandate of Section 433 Code of Criminal Procedure was considered at length wherein it was held that exercise of power under Section 433 was an executive discretion and the High Court in its review jurisdiction had no power to commute the sentence imposed where a minimum sentence was provided. It was a converse situation which this Court held has no application and the submissions were rejected as wholly misconceived. Thereafter, a detailed reference was made to

Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the Indian Penal Code to understand the sentencing procedure prevalent in the Code and after making reference to the provisions relating to grant of remission in Sections 432, 433, 433A, 434 and 435 of Code of Criminal Procedure concluded as under in paragraphs 91 and 92:

> "**91.** The legal position as enunciated in *Pandit Kishori Lal*, *Gopal Vinayak Godse*, *Maru Ram*, *Ratan Singh* and *Shri Bhagwan* and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.
>
> **92.** The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the

options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

(Emphasis added)

72. Thus on a detailed reference to **Swamy Shraddananda (supra)** judgment, it can be straight away held in our view, that no more need be stated. But we wish to make reference to certain paragraphs from the concurring judgment of Justice Fazal Ali in **Maru Ram (supra)**, pages 1251, 1252 and 1256 are relevant which are as under:

"The dominant purpose and the avowed object of the legislature in introducing Section 433-A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country. It is true that there appears to be a modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentance and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realizes the consequences of playing with human lives. In the world of today and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.

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The question, therefore, is — should the country take the risk of innocent lives being lost at the hands of

criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible.

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Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offences, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in *Bachan Singh* v. *State of Punjab*. In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes from being released through easy remissions or substituted form of punishments without undergoing at least a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of remissions has committed repeated offences. The mere fact that a long-term sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the Penal Code but what would have happened if deterrent

punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty forever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a one-sided concept, nor does Article 21 of the Constitution contemplate such a concept. If a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Article 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which an appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals."

(Emphasis added)

73. The above chiseled words of the learned Judge throw much light on the sentencing aspect of different criminals depending upon the nature of crimes committed by them. Having noted the above observations of the learned Judge which came to be made about three and a half decades ago, we find that what was anticipated by the learned Judge has now come true and today we find that criminals are let loose endangering the lives of several thousand innocent people in our country. Such hardened criminals are in the good books of several powerful men of ill-gotten wealth and power mongers for whom they act as paid assassins and *Goondas*. Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that in most of the cases, even the kith and kin, close relatives, friends, neighbours and passersby who happen to witness the occurrence are threatened and though they initially give statements to the police, invariably turn hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. As was anticipated by the learned Judge, it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man. In this scenario, if any further lenience is shown in the matter of imposition of sentence, at least in respect of capital punishment or life imprisonment, it can only be said that that will only lead to further

chaos and there will be no Rule of Law, but only anarchy will rule the country enabling the criminals and their gangs to dictate terms. Therefore, any sympathy shown will only amount to a misplaced one which the courts cannot afford to take. Applying these well thought out principles, it can be said that the conclusions drawn by this Court in **Swamy Shraddananda (supra)** is well founded and can be applied without anything more, at least until as lamented by Justice Fazal Ali the necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal is inducted so that he may undergo such a mental or psychological revolution that he realizes the consequence of playing with human lives. It is also appropriate where His Lordship observed that in the world of today and particularly in our country, this ideal is yet to be achieved and that it will take a long time to reach that goal.

74. Therefore, in the present juncture, when we take judicial notice of the crime rate in our country, we find that criminals of all types of crimes are on the increase. Be it white collar crimes, vindictive crimes, crimes against children and women, hapless widow, old aged parents, sexual offences, retaliation murder, planned and calculated murder, through paid assassins, gangsters operating in the developed cities indulging in killing for a price, kidnapping and killing for ransom, killing by terrorists and militants, organized crime syndicates, etc., are

the order of the day. While on the one side peace loving citizens who are in the majority are solely concerned with their peaceful existence by following the Rule of Law and aspire to thrive in the society anticipating every protection and support from the governance of the State and its administration, it is common knowledge, as days pass on it is a big question mark whether one will be able to lead a normal peaceful life without being hindered at the hands of such unlawful elements, who enjoy in many cases the support of very many highly placed persons. In this context, it will be relevant to note the PRECEPTS OF LAW which are: to live honourably, to injure no other man and to render everyone his due. There are murders and other serious offences orchestrated for political rivalry, business rivalry, family rivalry, etc., which in the recent times have increased manifold and in this process, the casualty are the common men whose day to day functioning is greatly prejudiced and people in the helm of affairs have no concern for them. Even those who propagate for lessening the gravity of imposition of severe punishment are unmindful of such consequences and are only keen to indulge in propagation of rescuing the convicts from being meted out with appropriate punishments. We are at a loss to understand as to for what reason or purpose such propagation is carried on and what benefit the society at large is going to derive.

75. Faced with the above situation prevailing in the Society, it is also common knowledge that the disposal of cases by Courts is getting delayed for variety of reasons. Major among them are the disproportionate Judges: population ratio and lack of proper infrastructure for the institution of judiciary. Sometime in 2009 when the statistics was taken it was found that the Judges:population ratio was 8 Judges for 1 million population in India, whereas it was 50 Judges per million population in western countries. The above factors also added to the large pendency of criminal and civil cases in the Courts which results in abnormal delay in the guilty getting punished then and there. In the normal course, it takes a minimum of a year for a murder case being tried and concluded, while the appeal arising out of such concluded trial at the High Court level takes not less than 5 to 10 years and when it reaches this Court, it takes a minimum of another 5 years for the ultimate conclusion. Such enormous delay in the disposal of cases also comes in handy for the criminals to indulge in more and more of such heinous crimes and in that process, the interest of the common man is sacrificed.

76. Keeping the above hard reality in mind, when we examine the issue, the question is 'whether as held in **Shraddananda (supra)**, a special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is

good in law? When we analyze the issue in the light of the principles laid down in very many judgments starting from **Godse (supra), Maru Ram (supra), Sambha Ji Krishan Ji (supra), Ratan Singh (supra)**, it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's life span.

77. In this context, the principles which weighed with this Court in **Machhi Singh (supra)** to inflict the capital punishment of death were the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the targeted personality of victim of murder. The said five categories cannot be held to be exhaustive. It cannot also be said even if a convict falls under one or the other of the categories, yet, this Court has in numerable causes by giving adequate justification to alter the punishment from 'Death' to 'Life'. Therefore, the law makers entrusted the task of analyzing and appreciating the gravity of the offence committed in such cases with the institution of judiciary reposing very high amount of confidence and trust. Therefore, when in a case where the judicial mind after weighing the pros and cons of the crime committed, in a golden scale and keeping in mind the paramount interest of the society and to safeguard it from the unmindful conduct of such offenders, takes a decision to ensure that such offenders don't deserve to be let loose in the society for a

certain period, can it be said that such a decision is impermissible in law. In the first instance, as noted earlier, life sentence in a given case only means the entirety of the life of a person unless the context otherwise stipulates. Therefore, where the life sentence means, a person's life span in incarnation, the Court cannot be held to have in anyway violated the law in doing so. Only other question is how far the Court will be justified in stipulating a condition that such life imprisonment will have to be served by an offender in jail without providing scope for grant of any remission by way of statutory executive action. As has been stated by this Court in **Maru Ram (supra)** by the Constitution Bench, that the Constitutional power of remission provided under Articles 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the statutory power of remission, etc., as compared to Constitution power under Articles 72 and 161 looks similar, they are not the same. Therefore, we confine ourselves to the implication of statutory power of remission, etc., provided under the Criminal Procedure Code entrusted with the Executive of the State as against the well thought out judicial decisions in the imposition of sentence for the related grievous crimes for which either capital punishment or a life sentence is provided for. When the said distinction can be clearly ascertained, it must be held that there is a vast difference between an executive action for the

grant of commutation, remission etc., as against a judicial decision. Time and again, it is held that judicial action forms part of the basic structure of the Constitution. We can state with certain amount of confidence and certainty, that there will be no match for a judicial decision by any of the authority other than Constitutional Authority, though in the form of an executive action, having regard to the higher pedestal in which such Constitutional Heads are placed whose action will remain unquestionable except for lack of certain basic features which has also been noted in the various decisions of this Court including **Maru Ram (supra)**.

78. Though we are not attempting to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It is not to be said that such distinctive role to be played by the Executive of the State would be in the nature of a subordinate role to the judiciary. In this context, it can be said without any scope of controversy that when by way of a judicial decision, after a detailed analysis, having regard to the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his

life or for a specific period of 20 years, or 30 years or 40 years, such a conclusion should survive without any interruption. Therefore, in order to ensure that such punishment imposed, which is legally provided for in the Indian Penal Code read along with Criminal Procedure Code to operate without any interruption, the inherent power of the Court concerned should empower the Court in public interest as well as in the interest of the society at large to make it certain that such punishment imposed will operate as imposed by stating that no remission or other such liberal approach should not come into effect to nullify such imposition.

79. In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A assumes significance. His contention was that under Section 433-A what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and upto the end of one's life span. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said Section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person shall not be released from prison unless he had served <u>at least</u> fourteen years of imprisonment." Therefore, when the minimum imprisonment is prescribed under the Statute, there will be every justification for the

Court which considers the nature of offence for which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the Court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases. For a statutory authority competent to consider a case for remission after the imposition of punishment by Court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his *mens rea* to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the Authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict. In this context, the concurring judgment of Justice Fazal Ali in **Maru Ram (supra)**, as stated in pages 1251, 1251 and 1258 on the sentencing aspect noted in earlier paragraphs requires to be kept in view.

80. There is one other valid ground for our above conclusion. In paragraph 46 of this judgment, we have noted the provision in the Penal Code which provides for imposing the punishment of death. There are also several dimensions to this view to be borne in mind. In this context, it will be worthwhile to refer to the fundamental principles which weighed with our Constitution makers while entrusting the highest power with the head of the State, namely, the President in Article 72 of the Constitution. In the leading judgment of the Constitution Bench in **Kehar Singh v. Union of India** - (1989) 1 SCC 204, this Court prefaced its judgment in paragraph 7 highlighting the said principle in the following words:

> "**7.**The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:
>
> > "We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic ... do hereby adopt, enact and give to ourselves this Constitution."
>
> To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position

given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr.Justice Holmes, speaking for the Court in *W.I. Biddle* v. *Vuco Perovich* enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of

argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in *Maru Ram* v. *Union of India*, that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State."

(Underlining is ours)

81. Again in paragraphs 8 and 10, this Court made a detailed analysis of the effect of the grant of pardon or remission vis-à-vis the judicial pronouncement and explained the distinguishing features in their respective fields in uncontroverted terms. Paragraphs 8 and 10 can also be usefully extracted which are as under:

8. To what areas does the power to scrutinise extend? In *Ex parte William Wells* the United States Supreme Court pointed out that it was to be used "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice". And in *Ex parte Garland* decided shortly after the Civil War, Mr. Justice Field observed:

"The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence … if granted after conviction, it removes the

penalties and disabilities and restores him to all his civil rights...."

The classic exposition of the law is to be found in *Ex parte Philip Grossman* where Chief Justice Taft explained:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."

10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In *U.S.* v. *Benz* Sutherland, J., observed:

The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the

judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In *Sarat Chandra Rabha* v. *Khagendranath Nath,* Wanchoo, J., speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by a trial court, and after discussing the law relating to the power to grant pardon, he said:

"Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was.

and again:

Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by a court; but where a sentence imposed by a court is remitted in part under Section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence

> imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission."
>
> It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.
>
> **(Underlining is ours)**

82. Having thus noted the well thought out principles underlying the exercise of judicial power and the higher Executive power of the State without affecting the core of the judicial pronouncements, we wish to refer to some statistics noted in that very judgment in paragraph 17 as to the number of convicts hanged as compared to the number of murders that had taken place during the relevant period, namely, between 1974 to 1978. It was found that there were 29 persons hanged during that period while the number of murders was noted as 85,000. It reveals that in a period of almost four years as against the huge number of victims, the execution of death penalty was restricted to the minimal i.e. it was 0.034%. We only point out that great care and caution weighed with the Courts and the Executive to ensure that under no circumstance an innocent is subjected to the capital punishment even if the real culprit may in that process be benefited. After all in a civilized society, the rule of law should prevail and the

right of a human being should not be snatched away even in the process of decision making which again is entrusted with another set of human beings as they are claimed to be experts and well informed legally as well as are men in the know of things.

83. Keeping the above principles in mind, when we make a study of the vexed question, we find that the law makers have restricted the power to impose death sentence to only 12 Sections in the Penal Code, namely, Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307(2nd para), 376A, 376E, 396 and 364A. Apart from the Penal Code such punishments of death are provided in certain other draconian laws like TADA, MCOCA etc. Therefore, it was held by this Court in umpteen numbers of judgments that death sentence is an exception rather than a rule. That apart, even after applying such great precautionary prescription when the trial Courts reach a conclusion to impose the maximum punishment of death, further safe guards are provided under the Criminal Procedure Code and the Special Acts to make a still more concretized effort by the higher Courts to ensure that no stone is left unturned for the imposition of such capital punishments.

84. In this context, we can make specific reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure wherein Sections 366 to 371, are placed for the relevant consideration to be

mandatorily made when a death penalty is imposed by the trial Court. Under Section 366, whenever a Sessions Court passes a sentence of death, the proceedings should be mandatorily submitted to the High Court and the sentence of death is automatically suspended until the same is confirmed by the High Court. Under Chapter XXVIII of the Code, even while exercising the process of confirmation by the High Court, very many other safe guards such as, further enquiries, letting in additional evidence, ordering a new trial on the same or amended charge or amend the conviction or convict the accused of any other offence of lesser degree is provided for. Further in order to ensure meticulous and high amount of precaution to be undertaken, the consideration of such confirmation process is to be carried out by a minimum of two Judges of the High Court. In the event of difference of opinion amongst them, the case is to be placed before a third Judge as provided under Section 392 of the Code. Statutory prescriptions apart, by way of judicial pronouncements, it has been repeatedly held that imposition of death penalty should be restricted to in the rarest of rare cases again to ensure that the Courts adopt a precautionary principle of very high order when it comes to the question of imposition of death penalty.

85. Again keeping in mind the above statutory prescriptions relating to imposition of capital punishment or the alternate punishment of

life imprisonment, meaning thereby till the end of the convict's life, we wish to analyze the scope and extent to which such alternate punishment can be directed to be imposed. In the first place, it must be noted that the law makers themselves have bestowed great care and caution when they decided to prescribe the capital punishment of death and its alternate to life imprisonment, restricted the scope for such imposition to the least minimum of 12 instances alone. As has been noted by us earlier, by way of interpretation process, this Court has laid down that such imposition of capital punishment can only be in the rarest of rare cases. In the later decisions, as the law developed, this court laid down and quoted very many circumstances which can be said to be coming within the four corners of the said rarest of rare principle, though such instances are not exhaustive. The above legal principle come to be introduced in the first instance in the decision reported as **Bachan Singh v. State of Punjab -** AIR 1980 SC 898. It was held as under:

> "151..... A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.....
> 207: There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it

cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

Subsequently, it was elaborated in the decision reported as **Machhi Singh and Others v. State of Punjab – AIR 1983 SC 957** it was held as under:

"32: The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety

without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

(*a*) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or

infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

33: In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii)Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

34: In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

(Emphasis added)

These revered principles were subsequently adopted or explained or upheld in following cases reported as **Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra –** 2009 (6) SC 498, **Aloke Nath Dutta (supra), Prajeet Kumar Singh v. State of Bihar - (2008) 4 SCC 434, B.A. Umesh v. Registrar General, High Court of Karnataka - (2011) 3 SCC 85, State of Rajasthan v. Kashi Ram - (2006) 12 SCC 254** and **Atbir v. Government of NCT of Delhi - (2010) 9 SCC 1** and also in a peculiar case of **D.K. Basu v. State of West Bengal – AIR 1997 SC 610** where this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying

the reasons in support of such decision, the Court awarded death penalty in that case.

86. In a recent decision of this Court reported as **Vikram Singh alias Vicky & another v. Union of India & others – AIR 2015 SC 3577** this Court had occasion to examine the sentencing aspect. That case arose out of an order passed by the High Court in a writ petition moved before the High Court of Punjab and Haryana praying for a Mandamus to strike down Section 364A of IPC and for an order restraining the execution of death sentence awarded to the appellant therein. A Division Bench of the High Court of Punjab and Haryana while dismissing the writ petition took the view that the question whether Section 364A of IPC was attracted to the case at hand and whether a person found guilty of an offence punishable under the provision could be sentenced to death was not only raised by the appellant therein as an argument before the High Court in an appeal filed by them against their conviction and sentence imposed which was noticed and found against them. The High Court dismissed the writ petition by noting the regular appeal filed earlier by the appellant therein against the conviction and sentence which was also upheld by this Court while dismissing the subsequent writ petition. While upholding the said judgment of the High Court on the sentencing aspect, this Court has noticed as under in paragraph 49:

"**49.** To sum up:

(a) Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed.

(b) Prescribing punishments is the function of the legislature and not the Courts.

(c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that are necessary to meet those needs.

(d) Courts show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences.

(e) Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency.

(f) Absence of objective standards for determining the legality of the prescribed sentence makes the job of the Court reviewing the punishment difficult.

(g) Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive.

(h) In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentences of imprisonment being held disproportionate."

When we are on the question of sentencing aspect we feel it appropriate to make a reference to the principles culled out in the said judgment.

87. Having thus noted the serious analysis made by this Court in the imposition of Death sentence and the principle of rarest of rare cases

formulated in the case of **Bachan Singh (supra)** which was subsequently elaborated in **Machhi Singh (supra)**, followed in the later decisions and is being applied and developed, we also wish to note some of the submissions of the counsel for the respondents by relying upon the report of Justice Malimath Committee on Reform in Criminal Justice System submitted in 2003 and the report of Justice Verma's Committee on Amendment to Criminal Law and the introduction of some of the punishments in the Penal Code, namely, Sections 370(6), 376A, 376D and 376E which prescribe the punishment of imprisonment for life which shall mean imprisonment for the remainder of that persons' natural life. It was further contended that some special Acts like TADA specifically prescribe that the imposition of such punishment shall remain and no remission can be considered. The submission was made to suggest that in law when a punishment is prescribed it is only that punishment that can be inflicted and nothing more. In other words, when the penal provision prescribes the punishment of Death or Life, the Court should at the conclusion of the trial or at its confirmation, should merely impose the punishment of Death or Life and nothing more. Though the submission looks attractive, on a deeper scrutiny, we find that the said submission has no force. As has been noted by us in the earlier paragraphs where we have discussed the first part of this

question, namely, what is meant by life imprisonment, we have found an answer based on earlier Constitution Bench decisions of this Court that life imprisonment means rest of one's life who is imposed with the said punishment. In the report relied upon and the practices followed in various other countries were also highlighted to support the above submission. Having thus considered the submissions, with utmost care, we find that it is nowhere prescribed in the Penal Code or for that matter any of the provisions where Death Penalty or Life Imprisonment is provided for, any prohibition that the imprisonment cannot be imposed for any specific period within the said life span. When life imprisonment means the whole life span of the person convicted, can it be said, that the Court which is empowered to impose the said punishment cannot specify the period upto which the said sentence of life should remain befitting the nature of the crime committed, while at the same time apply the rarest of rare principle, the Court's conscience does not persuade it to confirm the death penalty. In such context when we consider the views expressed in **Shraddananda (supra)** in paragraphs 91 and 92, the same is fully justified and needs to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it

seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed. We also note that when the report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in **Swamy Shraddananda (supra)**. Insofar as Justice Verma Committee report of 2013 was concerned, the amendments introduced after the said report in Sections 370(6), 376A, 376D and 376E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well thought out principles stated in **Swamy Shraddananda (supra)**. In fact, Justice Verma Committee report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to **Mohd. Munna (supra)**, **Rameshbhai Chandubhai Rathod v. State of Gujarat – 2011 (2) SCC 764** and **State of Uttar Pradesh v. Sanjay Kumar - 2012 (8) SCC 537** and nothing more. Further, the said Amendment can only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end

of the convict's life span. As far as the reference to prescription of different type of punishments in certain other countries need not dissuade us to declare the legal position based on the punishment prescribed in the Penal Code and the enormity of the crimes that are being committed in this country. For the very same reasons, we are not able to subscribe to the submissions of Mr. Dwivedi and Shri Andhyarujina that by awarding such punishment of specified period of life imprisonment, the Court would be entering the domain of the Executive or violative of the principle of separation of powers. By so specifying, it must be held that, the Courts even while ordering the punishment prescribed in the Penal Code only seek to ensure that such imposition of punishment is commensurate to the nature of crime committed and in that process no injustice is caused either to the victim or the accused who having committed the crime is bound to undergo the required punishment. It must be noted that the highest executive power prescribed under the Constitution in Articles 72 and 161 remains untouched for grant of pardon, suspend, remit, reprieve or commute any sentence awarded. As far as the apprehension that by declaring such a sentencing process, in regard to the offences falling under Section 302 and other offences for which capital punishment or in the alternate life imprisonment is prescribed, such powers would also be available to the trial Court,

namely, the Sessions Court is concerned, the said apprehension can be sufficiently safeguarded by making a detailed reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure which we shall make in the subsequent paragraphs of this judgment. As far as the other apprehension that by prohibiting the consideration of any remission the executive power under Sections 432 and 433 are concerned, it will have to be held that such prohibition will lose its force the moment, the specified period is undergone and the Appropriate Government's power to consider grant of remission will automatically get revived. Here again, it can be stated at the risk of repetition that the higher executive power provided under the Constitution will always remain and can be exercised without any restriction.

88. As far as the argument based on ray of hope is concerned, it must be stated that however much forceful, the contention may be, as was argued by Mr. Dwivedi, the learned Senior Counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic

manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of hope should prevail and kept intact. For instance, in the case relating to the murder of the former Prime Minister, in whom the people of this country reposed great faith and confidence when he was entrusted with such great responsible office in the fond hope that he will do his best to develop this country in all trusts, all the hope of the entire people of this country was shattered by a planned murder which has been mentioned in detail in the judgment of this Court which we have extracted in paragraph No.147. Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright.

89. Having thus noted the various submissions on this question, we have highlighted the various prescriptions in the cited judgments to demonstrate as to how the highest Court of this land is conscious of the onerous responsibility reposed on this institution by the Constitution makers in order to ensure that even if there is a Penal provision for the imposition of capital punishment of death provided for in the statute, before deciding to impose the said sentence, there would be no scope for anyone to even remotely suggest that there was

any dearth or deficiency or lack of consideration on any aspect in carrying out the said onerous duty and responsibility. When the highest Court of this land has thus laid down the law and the principles to be applied in the matter of such graver punishments and such principles are dutifully followed by the High Courts, when the cases are placed before it by virtue of the provisions contained in Chapter XXVIII of Code of Criminal Procedure, it must be held that it will also be permissible for this Court to go one step further and stipulate as to what extent such great precautionary principle can be further emphasized.

90. Before doing so, we also wish to note each one of the 12 crimes for which, the penalty of death and life is prescribed. Under Section 120B, when prescribing the penalty for criminal conspiracy in respect of offence for which death penalty or life imprisonment is provided for in the Penal Code, every one of the accused who was a party to such criminal conspiracy in the commission of the offence is to be treated as having abetted the crime and thereby liable to be punished and imposed with the same punishment as was to be imposed on the actual offender. Under Section 121 the provision for capital punishment is for the offence of waging or attempting to wage a war or abetting the waging of war against the Government of India. In other words, in the event of such offence found proved, such a convict

can be held to have indulged in a crime against the whole of the NATION meaning thereby against every other Indian citizen and the whole territory of this country. Under Section 132, the punishment of death is provided for an offender who abets the committing of MUTINY by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India and in the event of such MUTINY been committed as a sequel to such abetment. MUTINY in its ordinary dictionary meaning is an open revolt against Constitutional authority, especially by soldiers or sailors against their officers. It can be, therefore, clearly visualized that in the event of such MUTINY taking place by the Army personnel what would be plight of this country and the safety and interest of more than 120 million people living in this country. Under the later part of Section 194 whoever tenders or fabricates false evidence clearly intending thereby that such act would cause any innocent person be convicted of capital punishment and any such innocent person is convicted of and executed of such capital punishment, the person who tendered such fake and fabricated evidence be punished with punishment of death. Under the Second Part of Section 195A if any person threatens any other person to give false evidence and as a consequence of such Act any other person is though innocent, but convicted and sentenced to death in consequence of such false evidence, the person at whose threat the

false evidence came to be tendered is held to be liable to be meted out with the same punishment of death.

91. Under Section 302, whoever commits murder of another person is liable to be punished with death or life imprisonment. Under Section 305, whoever abets the commission of suicide of a person under 18 years of age i.e. a minor or juvenile, any insane person, any idiot or any person in a state of intoxication is liable to be punished with death or life imprisonment. It is relevant to note that the categories of persons whose suicide is abetted by the offender would be persons who in the description of law are supposedly unaware of committing such act which they actually perform but for the abetment of the offender.

92. Under the Second Part of Section 307, if attempt to murder is found proved against an offender who has already been convicted and sentenced to undergo life imprisonment, then he is also liable to be inflicted with the sentence of death. Under Section 376A whoever committed the offence of rape and in the course of commission of such offence, also responsible for committing the death of the victim or such injury caused by the offence is such that the victim is in a persistent vegetative state, then the minimum punishment provided for is 20 years or life imprisonment or death.

93. Under Section 376E whoever who was once convicted for the offence under Sections 376, 376A or 376D is subsequently convicted of an offence under any of the said Sections would be punishable for life imprisonment meaning thereby imprisonment for the remainder of his life span or with death. Under Section 376D for the offence of gang rape, the punishment provided for is imprisonment for a minimum period of 20 years and can extend upto life imprisonment meaning thereby the remainder of that person's life.

94. Under Section 364A kidnapping for ransom, etc. in order to compel the Government or any foreign State or international, intergovernmental organization or another person to do or abstain from doing any act to pay a ransom shall be punishable with death or life imprisonment.

95. Under Section 396, if any one of five or more persons conjointly committed decoity, everyone of those persons are liable to be punished with death or life imprisonment.

96. Thus, each one of the offences above noted, for which the penalty of death or life imprisonment or specified minimum period of imprisonment is provided for, are of such magnitude for which the imposition of anyone of the said punishment provided for cannot be held to be excessive or not warranted. In each individual case, the manner of commission or the *modus operandi* adopted or the

situations in which the act was committed or the situation in which the victim was situated or the status of the person who suffered the onslaught or the consequences that ensued by virtue of the commission of the offence committed and so on and so forth may vary in very many degrees. It was for this reason, the law makers, while prescribing different punishments for different crimes, thought it fit to prescribe extreme punishments for such crimes of grotesque (monstrous) nature.

97. While that be so it cannot also be lost sight of that it will be next to impossible for even the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary who is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the

nature of such grave offences found proved and depending upon the facts noted what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the Courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae.

98. The said process of determination must be held to be available with the Courts by virtue of the extent of punishments provided for such specified nature of crimes and such power is to be derived from those penal provisions themselves. We must also state, by that approach, we do not find any violation of law or conflict with any other provision of Penal Code, but the same would be in compliance of those relevant provisions themselves which provide for imposition of such punishments.

99. That apart, as has been noted by us earlier, while the description of the offences and the prescription of punishments are provided for in the Penal Code which can be imposed only through the Courts of law, under Chapter XXVIII of Code of Criminal Procedure, at least in regard to the confirmation of the capital punishment of death penalty, the whole procedure has been mandatorily prescribed to ensure that such punishment gets the consideration by a Division Bench consisting of two Hon'ble Judges of the High Court for its approval. As noted earlier, the said Chapter XXVIII can be said to be a separate Code by itself providing for a detailed consideration to be made by the Division Bench of the High Court, which can do and undo with the whole trial held or even order for retrial on the same set of charges or of different charges and also impose appropriate punishment befitting the nature of offence found proved.

100. Such prescription contained in the Code of Criminal Procedure, though procedural, the substantive part rests in the Penal Code for the ultimate Confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Code of Criminal Procedure and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in

the Penal Code and the Code of Criminal Procedure, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment.

101. Once we steer clear of such distinctive features in the two enactments, one substantive and the other procedural, one will have no hurdle or difficulty in working out the different provisions in the two different enactments without doing any violence to one or the other. Having thus noted the above aspects on the punishment prescription in the Penal Code and the procedural prescription in the Code of Criminal Procedure, we can authoritatively state that the power derived by the Courts of law in the various specified provisions providing for imposition of capital punishments in the Penal Code such power can be appropriately exercised by the adjudicating Courts in the matter of ultimate imposition of punishments in such a way to ensure that the other procedural provisions contained in the Code of Criminal Procedure relating to grant of remission, commutation, suspension etc. on the prescribed authority, not speaking of similar powers under Articles 72 and 162 of the Constitution which are

untouchable, cannot be held to be or can in any manner overlap the power already exercised by the Courts of justice.

102. In fact, while saying so we must also point out that such exercise of power in the imposition of death penalty or life imprisonment by the Sessions Judge will get the scrutiny by the Division Bench of the High Court mandatorily when the penalty is death and invariably even in respect of life imprisonment gets scrutinized by the Division Bench by virtue of the appeal remedy provided in the Code of Criminal Procedure. Therefore, our conclusion as stated above can be reinforced by stating that the punishment part of such specified offences are always examined at least once after the Sessions Court's verdict by the High Court and that too by a Division Bench consisting of two Hon'ble Judges.

103. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the concerned convict will get an opportunity to get such verdict tested by filing further appeal by way of Special Leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment when comes under the scrutiny of

the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

104. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.

105. Viewed in that respect, we state that the ratio laid down in **Swamy Shraddananda (supra)** that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in **Sangeet and Anr. v.**

State of Haryana – 2013 (2) SCC 452 that the deprival of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same.

106. With that we come to the next important question, namely:

> "Whether the Appropriate Government is permitted to grant remission under Section 432/433 of Code of Criminal Procedure after the pardon power is exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court of its Constitutional Power under Article 32."

For the above discussion the relevant provisions of Code of Criminal Procedure, 1973 are extracted as under:

> "**Section 432**.- **Power to suspend or remit sentences** – (1) when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
> (2) whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.
> (3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer,

without warrant and remanded to undergo the unexpired portion of the sentence.
(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.
(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,-
(a) Where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) Where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.
(7) In this section and in Section 433, the expression "appropriate Government" means,-
(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government:
(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.
Section 433.-Power to commute sentence- The appropriate Government may, without the consent of the person sentenced commute-
(a) A sentence of death, for any other punishment provided by the Indian Penal Code

(b) A sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) A sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) A sentence of simple imprisonment, or fine."

107. Last part of the second question refers to the exercise of power by this Court under Article 32 of the Constitution pertaining to a case of remission. To understand the background in which the said part of the question was framed, we can look into paragraphs 29 to 31 of the Order of Reference. On behalf of the Union of India, it was contended that once the power of commutation/remission has been exercised in a particular case of a convict by a Constitutional forum particularly this Court, then there cannot be a further exercise of the Executive Power for the purpose of commuting/remitting the sentence of the said convict in the same case by invoking Sections 432 and 433 of Code of Criminal Procedure.

108. While stoutly resisting the said submission made on behalf of the Union of India, Mr. Dwivedi, learned Senior Counsel, who appeared for the State of Tamil Nadu contended that in the case on hand, this Court while commuting the death sentence of some of the convicts did not exercise the Executive Power of the State, and that it only exercised its judicial power in the context of breach of Article 21 of the Constitution. It was further contended that if the stand of Union of India is accepted then in every case where this Court thought it fit to

commute sentence for breach of Article 21 of the Constitution, that would foreclose even the right of a convict to seek for further commutation or remission before the Appropriate Government irrespective of any precarious situation of the convict, i.e., even if the physical condition of the convict may be such that he may be vegetable by virtue of his old age or terminal illness. It was also pointed out that in **V. Sriharan alias Murugan v. Union of India & Ors. - (2014) 4 SCC 242** dated 18.02.2014, this Court while commuting the sentence of death into one of life also specifically observed that such commutation was independent of the power of remission under the Constitution, as well as, the Statute. In this context, when we refer the power of commutation/remission as provided under Code of Criminal Procedure, namely, Sections 432, 433, 433A, 434 and 435, it is quite apparent that the exercise of power under Article 32 of the Constitution by this Court is independent of the Executive Power of the State under the Statue. As rightly pointed out by Mr. Dwivedi, learned Senior Counsel in his submissions made earlier, such exercise of power was in the context of breach of Article 21 of the Constitution. In the present case, it was so exercised to commute the sentence of death into one of life imprisonment. It may also arise while considering wrongful exercise or perverted exercise of power of remission by the Statutory or Constitutional authority.

Certainly there would have been no scope for this Court to consider a case of claim for remission to be ordered under Article 32 of the Constitution. In other words, it has been consistently held by this Court that when it comes to the question of reviewing order of remission passed which is patently illegal or fraught with stark illegality on Constitutional violation or rejection of a claim for remission, without any justification or colourful exercise of power, in either case by the Executive Authority of the State, there may be scope for reviewing such orders passed by adducing adequate reasons. Barring such exceptional circumstances, this Court has noted in numerous occasions, the power of remission always vests with the State Executive and this Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It was time and again reiterated that the power of commutation exclusively rest with the Appropriate Government. To quote a few, reference can be had to the decisions reported as **State of Punjab v. Kesar Singh - (1996) 5 SCC 495**, **Delhi Administration (now NCT of Delhi) v. Manohar Lal - (2002) 7 SCC 222** which were followed in **State (Government of NCT of Delhi) v. Prem Raj - (2003) 7 SCC 121**. Paragraph 13 of the last of the decision can be quoted for its lucid expression on this issue which reads as under:

"**13.** An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Admn. (now NCT of Delhi)* v. *Manohar Lal*. The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In *State of Punjab* v. *Kesar Singh* this Court observed as follows [though it was in the context of Section 433(*b*)]: (SCC pp. 495-96, para 3)

"The mandate of Section 433 Code of Criminal Procedure enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts…… That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside."

(Underlining is ours)

109. The first part of the said question pertains to the power of the Appropriate Government to grant remission after the parallel power is exercised under Articles 72 and 161 of the Constitution by the President and the Governor of the State respectively. In this context, a reference to Articles 72 and 161 of the Constitution on the one hand and Sections 432 and 433 of Code of Criminal Procedure on the other needs to be noted. When we refer to Article 72, necessarily a reference will have to be made to Articles 53 and 74 as well. Under Article 53 of

the Constitution the Executive Power of the Union vests in the President and such power should be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 74, the exercise of the functions of the President should always be based on the aid and advise of the Council of Ministers headed by the Prime Minister. Under the proviso to the said Article, the President can at best seek for reconsideration of any such advice and should act based on such reconsidered advice. Article 74(2) in fact, has insulated any such advice being enquired into by any Court. Identical provisions are contained in Articles 154, 161 and 163 of the Constitution relating to the Governor of the State. Reading the above provisions, it is clear that the president of the Union and the Governor of the State while functioning as the Executive Head of the respective bodies, only have to act based on the advice of the Council of Ministers of the Union or the State. While so, when we look into the statutory prescription contained in Sections 432 and 433 of the Code of Criminal Procedure though the exercise of the power under both the provisions vests with the Appropriate Government either State or the Centre, it can only be exercised by the Executive Authorities headed by the President or the Governor as the case may be. In the first blush though it may appear that exercise of such power under Sections 432 and 433 is nothing but the one

exercisable by the same authority as the Executive Head, it must be noted that the real position is different. For instance, when we refer to Section 432, the power is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further under sub-section (2) of Section 432, it is stipulated that exercise of power of suspension or remission may require the opinion of the presiding Judge of the Court before or by which the conviction was held or confirmed. There is also provision for imposing conditions while deciding to suspend or remit any sentence or punishment. There are other stipulations contained in Section 432. Likewise, when we refer to Section 433 it is provided therein that the Appropriate Government may without the consent of the persons sentenced commute any of the sentence to any other sentence which ranges from Death sentence to fine. One significant feature in the Constitutional power which is apparent is that the President is empowered under Article 72 of the Constitution to grant pardons, reprieves, respites or remission, suspend or commute the sentence. Similar such power is also vested with the Governor of the State. Whereas under Sections 432 and 433 of the Code of Criminal Procedure the power is restricted to suspension, remission and commutation. It can also be noted that there is no specific provision prohibiting the execution of the power under Sections 432 and 433 of Code of Criminal Procedure when once

similar such power was exercised by the Constitutional Authorities under Articles 72 and 161 of the Constitution. There is also no such implied prohibition to that effect.

110. In this context, learned Solicitor General submitted that while the power under Articles 72 and 161 of the Constitution can be exercised more than once, the same is not the position with Sections 432 and 433 of Code of Criminal Procedure. The learned Solicitor General contended that since the exercise of power under Articles 72 and 161 is with the aid of the Council of Ministers, it must be held that Sections 432 and 433 of Code of Criminal Procedure are only enabling provisions for exercise of power under Articles 72 and 161 of the Constitution. In support of the said submission, the learned Solicitor General, sought to rely upon the passage in **Maru Ram (supra)** to the effect that:

> "since Sections 432 and 433(a) are statutory expression and *modus operandi* of the Constitutional power ……..".

Though the submission looks attractive, we are not convinced. We find that the said set of expression cannot be strictly stated to be the conclusion of the Court. In fact, if we read the entire sentence, we find that it was part of the submission made which the Court declined. On the other hand, in the ultimate analysis, the Majority view was summarized wherein it was held at page 1248 as under:

> "**4**. We hold that Sections 432 and 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power, and Section 433A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the Constitutional power to pardon, commute and the like."

111. Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Sections 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. We answer the said question on the above terms.

112. The next questions for consideration are:

> "Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?
>
> Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?
>
> Whether there can be two Appropriate Governments in a

given case under Section 432(7) of the Code?"

113. According to the respondents, it is the State Government which is the Appropriate Government in a case of this nature, unless it is specifically taken over by way of a Statute from the State Government. Reference was made to proviso to Article 162 of the Constitution as well as Section 432(7) of Code of Criminal Procedure where the expression used is "subject to and limited by" which has got greater significance. It was also contended on behalf of the respondents that Penal Code is a compilations of offences, in different situations for which different consequence will follow. By way of an analysis it was pointed out that Penal Code is under the concurrent list and when the conviction is one under Section 302 simpliciter, then, the jurisdiction for consideration of remission would be with the State Government and that if the said Section also attracted the provisions of TADA, then the Centre would get exclusive jurisdiction. By making reference to Section 55A(a) of the Penal Code and Section 434 of Code of Criminal Procedure it was contended that when the conviction and sentence is under Section 302 I.P.C., without the aid of TADA or any other Central Act, State Government gets jurisdiction which will be the Appropriate Government. In this context, our attention was drawn to the fact that in the Rajiv Gandhi murder case, respondents Santhan, Murugan, Nalini and Arivu @ Perarivalan were awarded death sentence, while 3

other accused, namely, Ravichandran, Robert Payas and Jayakumar were given life imprisonment and that Nalini's death sentence was commuted by the Governor of the State in the year 2000, while the claim of 3 others was rejected.

114. Later, by the judgment dated 18.02.2014, the death sentence of three others was also commuted to life by this Court. In support of the submission reliance was placed upon the decisions of this Court in **Ratan Singh (supra)**, **State of Madhya Pradesh v. Ajit Singh and others - (1976) 3 SCC 616**, **Hanumant Dass v. Vinay Kumar and ors. - (1982) 2 SCC 177** and **Govt. of A.P. and others v. M.T. Khan - (2004) 1 SCC 616**.

115. Reference was also made to the Constituent Assembly debates on Article 59 which corresponds to Article 72 in the present form and Article 60 which correspondents to Article 73(1)(a) of the present form. In the course of the debates, an amendment was sought to be introduced to Article 59(3) and in this context, the member who moved the amendment stated thus:

> "Sir, in my opinion, the President only should have power to suspend, remit or commute a sentence of death. He is the supreme Head of the State. It follows therefore that he should have the supreme powers also. I am of opinion that rulers of States or Provincial Government should not be vested with this supreme power……"

116. Dr. Ambedkar while making his comment on the amendment proposed stated thus:

> "Yes: Sir: It might be desirable that I explain in a few words in its general outline the scheme embodied in article 59. It is this: the power of commutation of sentence for offences enacted by the Federal Law is vested in the President of the Union. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the State. In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned. This is the scheme."
>
> **(Underlining is ours)**

117. After the above discussions on the proposed amendments, when it was put to vote, the amendment was negatived.

118. Similarly the amendment to the proviso to Article 60 was preferred by a member who in his address stated thus:

> "The object of my amendment is to preserve the Executive Power of the States or provinces at least in so far as the subjects which are included in the concurrent list. It has been pointed out during the general discussions that the scheme of the Draft Constitution is to whittle down the powers of the States considerably and, though the plan is said to be a federal one, in actual fact it is a unitary form of Government that is sought to be imposed in the Country by the Draft Constitution……"
>
> **(Emphasis added)**

119. After an elaborate discussion, when the opinion of Dr. Ambedkar was sought, he addressed the Assembly and stated thus:

> "The Hon'ble Dr. B.R. Ambedkar (Bombay:General): Mr. Vice- President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to

this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so, I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to executive laws which relate to what is called the concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the provincial or State Legislature, shall ordinarily apply to the province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the concurrent list is concerned will rest with the union, the provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre."

(Emphasis added)

Thereafter further discussions were held and ultimately when the amendment was put to vote, the same was negatived.

120. It was, therefore, contended that in the absence of a specific law pertaining to the exercise of power under Sections 432 and 433, the States will continue to exercise their power of remission and commutation and that cannot be prevented. As against the above submissions, learned Solicitor General contended that a reference to the relevant provision of the Penal Code and the Code of Criminal

Procedure read along with the Constitutional provisions disclose that Entry I of List III of the Seventh Schedule makes a clear specification of the jurisdiction of the Centre and the State and any overlapping is taken care of in the respective entries themselves. The learned Solicitor General also brought to our notice the incorporation of Section 432(7) in the Code of Criminal Procedure providing for a comprehensive definition of 'Appropriate Government' based on the recommendations of the Law Commission in its Forty First Report. By the said report, the law Commission indicated that the definition of 'Appropriate Government' as made in Sections 54, 55 and 55A needs to be omitted in the Indian Penal Code as redundant while making a comprehensive provision in Section 402 (now the corresponding present Section 433). Paragraphs 29.10, 29.11 and 29.12 of the said report can be noted for the purpose for which the amendment was suggested and its implications:

> "**29.10**. **Power to commute sentences.-** Sub-section (1) of section 402 enables the Appropriate Government to commute sentences without the consent of the person sentenced. This general provision has, however, to be read with sections 54 and 55 of the Indian Penal Code which contain special provisions in regard to commutation of sentences of death and of imprisonment for life. The definition of "Appropriate Government" contained in sub-section (3) of section 402 is substantially the same as that contained in section 55A of the Indian Penal Code. It would obviously be desirable to remove this duplication and to state the law in one place. In the present definition of "Appropriate

Government" in section 402(3), the reference to the State Government is somewhat ambiguous. It will be noticed that clause (b) of section 55A of the Indian Penal Code specifies the particulars State Government which is competent to order commutation as "the Government of the State within which the offender is sentenced".

29.11. Section 402 revised: sections 54, 55 and 55A of I.P.C. to be omitted.- We, therefore, propose that sections 54,55 and 55A may be omitted from the Indian Penal Code and their substance incorporated in section 402 of the Criminal Procedure Code. This section may be revised as follows:-

"402. Power to commute sentence.-(1) The Appropriate Government may, without the consent of the person sentenced,-

(a) commute a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) commute a sentence of imprisonment for life, for imprisonment of either description for a term, not exceeding fourteen years or for fine;

(c) commute a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced or for fine;

(d) commute a sentence of simple imprisonment, for fine.

(2) In this section and in section 401, the expression "Appropriate Government" means-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of section 401 is passed under, any law relating to a matter to which the Executive Power of the Union extends, the Central Government; and

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

29.12. The power to suspend or remit sentences under section 401 and the power to commute sentences under section 402 are thus divided between the Central Government and the State Government on the Constitutional lines indicated in Articles 72 and 161. If, for instance, a person is convicted at the same trial for an offence punishable under the Arms Act or the Explosives Act and for an offence punishable under the

> Indian Penal Code and sentenced to different terms of imprisonment but running concurrently, both Governments will have to pass orders before the sentences are effectively suspended, remitted or commuted. Cases may occur where the State Government's order simply mentions the nature of the sentence remitted or commuted and is treated as sufficient warrant by the prison authorities though strictly under the law, a corresponding order of the Central Government is required in regard to the sentence for the offence falling within the Union List. The legal provisions are, however, clear on the point and we do not consider that any clarification is required."

121. The learned Solicitor General also relied upon the judgment of this Court in **G.V. Ramanaiah v. The Superintendent of Central Jail, Rajahmundry and others - AIR 1974 SC 31** and contended that where the offence is dealt with by the prosecuting agency of the Central Government, by virtue of the proviso to Article 73 of the Constitution, the Executive Power of the Central Government is saved and, therefore, in such cases, it is the Central Government which is the Appropriate Government.

122. Having noted the respective submissions of the parties, the sum and substance of the submission of the respondent State as well as other respondents is that a conspectus consideration of the definition of the "Appropriate Government" under the Penal Code read along with Section 432(7) of Code of Criminal Procedure, where the conviction was under the penal provision of IPC and was not under

any Central Act, the whole authority for consideration of suspension of sentence or remission of sentence or commutation rests solely with the State Government within whose jurisdiction, the conviction came to be imposed. It was, however, submitted that if the conviction was also under any of the Central Act, then and then alone the Central Government becomes the 'Appropriate Government' and not otherwise. It was in support of the said submission, reliance was placed upon the decisions of this Court in **Ratan Singh (supra)**, **Ajit Singh (supra)**, **Hanumant Dass (supra)** and **M.T. Khan (supra)**. The Constituent Assembly debates on the corresponding Articles viz., Articles 72 and 73 were also highlighted to show the intention of the Constituent Assembly while inserting the above said Articles to show the primacy of the State Government under certain circumstances and that of the Central Government under certain other circumstances which the Members of the Assembly wanted to emphasis.

123. The question posed for our consideration is whether there can be two Appropriate Governments under Section 432(7) of the Code of Criminal Procedure and whether Union or the State has primacy for the exercise of the power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission as a co-extensive power. To find an answer to the combined questions, we can make reference to Section 55A of the Penal Code which defines

"Appropriate Government" referred to in Sections 54 and 55 of the Penal Code. Sections 54 and 55 of the Penal Code pertain to commutation of sentence of death and imprisonment for life respectively by the Appropriate Government. In that context, in Section 55A, the expressions "Appropriate Government" has been defined to mean in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the Executive Power of the Union extends, the Central Government. The definition, therefore, makes it clear that insofar as it relates to commutation of death sentence, the Appropriate Government is the Central Government. That apart, if the sentence of death or life is for an offence against any law relating to a matter to which the Executive Power of the Union extends, then again, the 'Appropriate Government' is the Central Government. We have dealt with *in extenso* while examining Section 73(1) (a) with particular reference to the proviso as to under what circumstance the Executive Power of the Central Government will continue to remain as provided under Article 73(1)(a). We can make a reference to that part of our discussion, where we have explained the implication of the proviso to Article 73(1)(a) in order to note the extent of the Executive Power of the Central Government under the said Article. Therefore, in those cases, where by virtue of any law passed by the Parliament or any of the provisions of the

Constitution empowering the Central Government to act by specifically conferring Executive Authority, then in all those situations, the Executive Power of the Central Government will remain even if the State Government is also empowered to pass legislations under the Constitution. By virtue of the said Constitutional provision contained in the proviso to Article 73(1) (a), if the Executive Power of the Central Government remains, applying Section 55A (a) of the Penal Code, it can be stated without any scope of controversy that the Central Government would be the Appropriate Government in those cases, where the sentence is of death or is for an offence relating to a matter wherein the Executive Power of the Union gets extended. This is one test to be applied for ascertaining as who will be the Appropriate Government for passing order of commutation of sentence of death as well as life imprisonment in the context of Sections 54 and 55 of Penal Code.

124. Keeping it aside for a while, when we refer to Section 55A (b), it is provided therein that in cases where the sentence, whether of death or not, is for an offence against any law relating to a matter to which the Executive Power of the State extends, the Government of the State within which the offender is sentenced will be the Appropriate Government. Sub-clause (b) of Section 55A postulates different circumstances viz., the sentence whether of death or not is for an

offence relating to a matter to which the Executive Power of the State extends, then if the imposition of such sentence was within the four corners of the State concerned, then the Appropriate Government would be the State Government. In fact in this context, the submission made on behalf of the respondents needs to be appreciated that if there was a conviction for an offence under Section 302 IPC simpliciter, even if the prosecuting agency was the Central Government, the State Government would be the Appropriate Government within whose jurisdiction the imposition of sentence came to be made either of death or not. While analyzing Section 55A, vis-à-vis Sections 54 and 55 of the Penal Code, wherever the Executive Power of the Union extends, the Appropriate Government would be the Central Government and in all other cases, the Appropriate Government would be the concerned State within whose jurisdiction the sentence came to be imposed.

125. With that analysis made with reference to Section 55 of the Penal Code, when we refer to Section 432(7) of Code of Criminal Procedure, here again, we find the definition "Appropriate Government" is made with particular reference to and in the context of Sections 432 and 433 of Code of Criminal Procedure. Under Section 432(1) to (6) the prescription is relating to the power to suspend or remit sentences, the procedure to be followed, the conditions to be imposed and the

consequences in the event of breach of any conditions imposed. Similarly, Section 433 pertains to the power of the Appropriate Government to commute the sentence of death, imprisonment for life, sentence of rigorous imprisonment and sentence of simple imprisonment to some other lesser punishment up to imposition of fine. The power under Section 433 can be exercised only by the Appropriate Government. It is in the above context of the prescription contained in Sections 432 (1) to (6) and 433(a) to (d), the definition of 'Appropriate Government' under Section 432(7) has to be analysed. Section 432(7) defines the 'Appropriate Government' to mean; in cases where the sentence is for an offence against or the order referred to in sub-section (6) of Section 432 is passed under any law relating to a matter to which the Executive Power of the Union extends, it is the Central Government. Therefore, what is to be seen is whether the sentence passed is for an offence against any law relating to a matter to which the Executive Power of the Union extends. Here again, our elaborate discussion on Article 73(1)(a) and its proviso need to be read together. It is imperative and necessary to refer to the discussions on Articles 72, 73, 161 and 162 of the Constitution, inasmuch as how to ascertain the Executive Power of the Centre and the State has been basically set out only in those Constitutional provisions. In other words, only by applying the said Constitutional provisions, the

Executive Power of the Centre and the State can be precisely ascertained. To put it differently, Section 432(7) does not prescribe or explain as to how to ascertain the Executive Power of the Centre and the State, which can be ascertained only by analyzing the above said Articles 72, 73, 161 and 162 of the Constitution. If the offence falls under any such law which the Parliament is empowered to enact as such law has been enacted, on which subject law can also be enacted by any of the States, then the Executive Power of the Centre by virtue of such enactment passed by the Parliament providing for enforcement of such Executive Power, would result in the Central Government becoming the Appropriate Government in respect of any sentence passed against such law. At the risk of repetition, we can refer to Article 73(1)(a) with its proviso to understand the Constitutional prescription vis-à-vis its application for the purpose of ascertaining the Appropriate Government under Section 432(7) of the Code. When we read the proviso to Article 73(1) (a) closely, we note that the emphasis is on the 'Executive Power' which should have been expressly provided in the Constitution or in any law made by the Parliament in order to apply the saving Clause under the proviso. Once the said prescription is clearly understood, what is to be examined in a situation where any question arises as to who is the 'Appropriate Government' in any particular case, then if either under the law in which the prosecution

came to be launched is exclusively under a Central enactment, then the Centre would be the 'Appropriate Government' even if the situs is in any particular State. Therefore, if the order passed by a Criminal Court covered by sub-section (6) of Section 432 was under any law relating to a matter where the Executive Power of the Union extends by virtue of enactment of such Executive Power under a law made by the Parliament or expressly provided in the Constitution, then, the Central Government would be the Appropriate Government. Therefore, what is to be noted is, whether the sentence passed under a law relating to a matter to which the Executive Power of the Union extends, as has been stipulated in the proviso to Article 73(1)(a). In this context, it will be worthwhile to make reference to what Dr. Ambedkar explained, when some of the Members of the Assembly moved certain amendments to enhance the powers of the State with particular reference to Article 60 of the Draft Constitution which corresponds to Article 73 as was ultimately passed. In the words of Dr. Ambedkar himself it was said:

> "The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so.....It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre.

If the said prescription is satisfied than it would be the Central Government who will be the Appropriate Government.

126. For the purpose of ascertaining which Government would be the Appropriate Government as defined under Section 432(7), what is to be seen is the sentence imposed by the criminal court under the Code of Criminal Procedure or any other law which restricts the liberty of any person or imposes any liability upon him or his property. If such sentence imposed is under any of the Sections of the Penal Code, for which the Executive Power of the Central Government is specifically provided for under a Parliament enactment or prescribed in the Constitution itself then the 'Appropriate Government' would be the Central Government. To understand this position more explicitly, we can make reference to Article 72(1)(a) of the Constitution which while specifying the power of the Executive head of the country, namely, the President it is specifically provided that the power to grant pardons, etc. or grant of remissions etc. or commutation of sentence of any person convicted of any offence in all cases where the punishment or sentence is by a Court Martial, then it is clear to the effect that under the Constitution itself the Executive Power is specifically conferred on the Centre. While referring to various Constitutional provisions, we have also noted such express Executive Power conferred on the Centre

in respect of matters with reference to which the State is also empowered to make laws. If under the provisions of the Code the sentence is imposed, within the territorial jurisdiction of the State concerned, then the 'Appropriate Government' would be the State Government. Therefore, to ascertain who will be Appropriate Government whether the Centre or the State, the first test should be under what provision of the Code of Criminal Procedure the criminal Court passed the order of sentence. If the order of sentence is passed under any other law which restricts the liberty of a person, then which is that law under which the sentence was passed to be ascertained. If the order of sentence imposed any liability upon any person or his property, then again it is to be verified under which provision of the Code of Criminal Procedure or any other law under which it was passed will have to be ascertained. In the ascertainment of the above questions, if it transpires that the implication to the proviso to Article 73(1)(a) gets attracted, namely, specific conferment of Executive Power with the Centre, then the Central Government will get power to act and consequently, the case will be covered by Section 432(7) (a) of the Code and as a sequel to it, Central Government will be the 'Appropriate Government' to pass orders under Sections 432 and 433 of the Code of Criminal Procedure.

127. In order to understand this proposition of law, we can make a reference to the decision relied upon by the learned Solicitor General in **G.V. Ramanaiah (supra)**. That was a case where the offence was dealt with and the conviction was imposed under Sections 489A to 489D of the Penal Code. The convicts were sentenced to rigorous imprisonment for a period of ten years. The conviction came to be made by the criminal Court of the State of A.P. The question that came up for consideration was as to who would be the 'Appropriate Government' for grant of remission as was provided under Section 401 of the Code of Criminal Procedure which is the corresponding Section for 432 of Code of Criminal Procedure. In that context, this Court noted that the four sections, viz., Sections 489(A) to 489(D) were added to the Penal Code under the caption "of currency notes and Bank notes" by the Currency Notes Forgery Act, 1899. This Court noted that the bunch of those Sections were the law by itself and that the same would be covered by the expression "currency coinage and legal tender" which are expressly included in Entry 36 of the Union List in the Seventh Schedule of the Constitution. Entry No.93 of the Union List in the same Schedule conferred on the Parliament the power to legislate with regard to offences against laws with respect to any of the matter in the Union List. It was, therefore, held that the offenses for which those persons were convicted were offences relating

to a matter to which the Executive Power of the Union extended and the Appropriate Government competent to remit the sentence would be the Central Government and not the State Government. The said decision throws added light on this aspect.

128. Therefore, whether under any of the provisions of the Criminal Procedure Code or under any Special enactment enacted by the Central Government by virtue of its enabling power to bring forth such enactment even though the State Government is also empowered to make any law on that subject, having regard to the proviso to Article 73(1)(a), if the conviction is for any of the offences against such provision contained in the Code of Criminal Procedure or under such special enactments of the Centre if the Executive Power is specified in the enactment with the Central Government then the Appropriate Government would be the Central Government. Under Section 432(7)(b) barring cases falling under 432(7)(a) in all other cases, where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, then alone the Appropriate Government would be the State.

129. Therefore, keeping the above prescription in mind contained in Section 432(7) and Section 55A of the IPC, it will have to be ascertained whether in the facts and circumstances of a case, where

the Criminal Court imposes the sentence and if such sentence pertains to any Section of the Penal Code or under any other law for which the Executive Power of the center extends, then in those cases the Central Government would be the 'Appropriate Government'. Again in respect of cases, where the sentence is imposed by the Criminal Court under any law which falls within the proviso to Article 73(1)(a) of the Constitution and thereby the Executive Power of the Centre is conferred and gets attracted, then again, the Appropriate Government would be the Centre Government. In all other cases, if the sentence order is passed by the Court within the territorial jurisdiction of the concerned State, the concerned State Government would be the Appropriate Government for exercising its power of remission, suspension as well as commutation as provided under Sections 432 and 433 of the Code of Criminal Procedure. Keeping the above prescription in mind, every case will have to be tested to find out which is the Appropriate Government State or the Centre.

130. However, when it comes to the question of primacy to the Executive Power of the Union to the exclusion of the Executive Power of the State, where the power is co-extensive, in the first instance, it will have to be seen again whether, the sentence ordered by the Criminal Court is found under any law relating to which the Executive Power of the Union extends. In that respect, in our considered view,

the first test should be whether the offence for which the sentence was imposed was under a law with respect to which the Executive Power of the Union extends. For instance, if the sentence was imposed under TADA Act, as the said law pertains to the Union Government, the Executive Power of the Union alone will apply to the exclusion of the State Executive Power, in which case, there will be no question of considering the application of the Executive Power of the State.

131. But in cases which are governed by the proviso to Article 73(1) (a) of the Constitution, different situations may arise. For instance, as was dealt with by this Court in **G.V. Ramanaiah (supra)**, the offence was dealt with by the criminal Court under Section 489(A) to 489(D) of the Penal Code. While dealing with the said case, this Court noted that though the offences fell under the provisions of the Penal Code, which law was covered by Entry 1 of List III of the Seventh Schedule, namely, the Concurrent List which enabled both the Centre as well as the State Government to pass any law, having regard to the special feature in that case, wherein, currency notes and bank notes to which the offences related, were all matters falling under Entries 36 and 93 of the Union List of the Seventh Schedule, it was held that the power of remission fell exclusively within the competence of the Union. Therefore, in such cases the Union Government will get exclusive

jurisdiction to pass orders under Sections 432 and 433 Code of Criminal Procedure.

132. Secondly, in yet another situation where the law came to be enacted by the Union in exercise of its powers under Articles 248, 249, 250, 251 and 252 of the Constitution, though the legislative power of the States would remain, yet, the combined effect of these Articles read along with Article 73(1) (a) of the Constitution will give primacy to the Union Government in the event of any laws passed by the Centre prescribes the Executive Power to vest with it to the exclusion of the Executive Power of the State then such power will remain with the Centre. In other words, here again, the co-extensive power of the State to enact any law would be present, but having regard to the Constitutional prescription under Articles 248 to 252 of the Constitution by which if specific Executive Power is conferred then the Union Government will get primacy to the exclusion of State.

133. Thirdly, a situation may arise where the authority to bring about a law may be available both to the Union as well as the State, that the law made by the Parliament may invest the Executive Power with the Centre while, the State may also enjoy similar such Executive Power by virtue of a law which State Legislature was also competent to make. In these situations, the ratio laid down by this Court in the decision in **G.V. Ramanaiah (supra)** will have to be applied and ascertain which

of the two, namely, either the State or the Union would gain primacy to pass any order of remission, etc. In this context, it will be relevant to note the proviso to Article 162 of the Constitution, which reads as under:

> **"Article 162.- Extent of executive power of State**
>
> xxx xxx xxx
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

If the proviso applies to a case, the Executive Power of the State should yield to the Executive Power of the Centre expressly conferred by the Constitution or by any law made by Parliament upon the Union or its authorities.

134. Therefore, the answer to the question should be to the effect that where the case falls under the first test noted herein, it will be governed by Section 432(7)(a) of the Code of Criminal Procedure in which event, the power will be exclusive to the Union. In cases which fall under the situation as was dealt with by this Court in **G.V. Ramanaiah (supra)**, there again the power would exclusively remain with the Centre. Cases falling under second situation like the one covered by Articles 248 to 252 of the Constitution, wherein, the

competence to legislate laws was with the State, and thereby if the Executive Power of the State will be available, having regard to the mandate of these Articles which empowers the Union also to make laws and thereby if the Executive Power of the Union also gets extended, though the power is co-extensive, it must be held that having regard to the special features set out in the Constitution in these situations, the Union will get the primacy to the exclusion of the State.

135. Therefore, we answer the question Nos.52.3, 52.4 and 52.5 to the above extent leaving it open for the parties concerned, namely, the Centre or the State to apply the test and find out who will be the 'Appropriate Government' for exercising the power under Sections 432 and 433 of the Criminal Procedure Code.

136. Next, we take up the question:

> "Whether *suo motu* exercise of power of remission under Section 432(1) is permissible in the scheme of the Section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?"

Section 432(1) and (2) reads as under:

> "**432. Power to suspend or remit sentences.-**(1) When any person has been sentenced to punishment for an offence, the Appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

> (2) Whenever an application is made to the Appropriate Government for the suspension or remission of a sentence, the Appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists."

137. Sub-section (1) of Section 432 empowers the Appropriate Government either to suspend the execution of a sentence or remit the whole or any part of the punishment to which he has been sentenced. While passing such orders, it can impose any conditions or without any condition. In the event of imposing any condition such condition must be acceptable to the person convicted. Such order can be passed at any time.

138. Sub-section (2) of Section 432 pertains to the opinion to be secured from the presiding Judge of the Court who convicted the person and imposed the sentence or the Court which ultimately confirmed such conviction. Whenever any application is made to the Appropriate Government for suspension or remission of sentence, such opinion to be rendered must say whether the prayer made in the application should be granted or refused. It should also contain reasons along with the opinion, certified copy of the record of the trial or such other record which exists should also be forwarded.

139. Before making an analysis on the question referred for our consideration, certain observations of the Constitution Bench of this Court in **Maru Ram (supra)** which was stated in the context of the power exercisable under Articles 72 and 161 of the Constitution needs to be noted. Such observations relating to the Constitutional power of the President and Governor, of course with the aid and advice of the Council of Ministers, is on a higher plane and are stated to be 'untouchable' and 'unapproachable'. It was also held that the Constitutional power, as compared to the power exercisable under Sections 432 and 433 looks similar but not the same, in the sense that the statutory power under Sections 432 and 433 is different in source, substance and strength and it is not as that of the Constitutional power. Such statement of law was made by the Constitution Bench to hold that notwithstanding Sections 433A which provides for minimum of 14 years incarnation for a lifer to get the benefit of remission, etc., the President and the Governor can continue to exercise the power of Constitution and release without the requirement of the minimum period of imprisonment. But the significant aspect of the ruling is a word of caution even to such exercise of higher Constitutional power with high amount of circumspection and is always susceptible to be interfered with by judicial forum in the event of any such exercise being demonstrated to

be fraught with arbitrariness or *mala fide* and should act in trust to our Great Master, the Rule of Law. In fact the Bench quoted certain examples like the Chief Minister of a State releasing everyone in the prison in his State on his birthday or because a son was born to him and went to the extent of stating that it would be an outrage on the Constitution to let such madness to survive.

140. We must state that such observations and legal principles stated in the context of Articles 72 and 161 of the Constitution will have greater force and application when we examine the scope and ambit of the power exercisable by the Appropriate Government under Section 432(1) and (2) of Code of Criminal Procedure.

141. Keeping the above principles in mind, when we analyze Section 432(1), it must be held that the power to suspend or remit any sentence will have to be considered and ordered with much more care and caution, in particular the interest of the public at large. In this background, when we analyze Section 432(1), we find that it only refers to the nature of power available to the Appropriate Government as regards the suspension of sentence or remission to be granted at any length. Extent of power is one thing and the procedure to be followed for the exercise of the power is different thing. There is no indication in Section 432(1) that such power can be exercised based on any application. What is not prescribed in the statute cannot be

imagined or inferred. Therefore, when there is no reference to any application being made by the offender, cannot be taken to mean that such power can be exercised by the authority concerned on its own. More so, when a detailed procedure to be followed is clearly set out in Section 432(2). It is not as if by exercising such power under Section 432(1), the Appropriate Government will be involving itself in any great welfare measures to the public or the society at large. It can never be held that such power being exercised *suo motu* any great development act would be the result. After all such exercise of power of suspension or remission is only going to grant some relief to the offender who has been found to have committed either a heinous crime or at least a crime affecting the society at large. Therefore, when in the course of exercise of larger Constitutional powers of similar kind under Articles 72 and 161 of the Constitution it has been opined by this Court to be exercised with great care and caution, the one exercisable under a statute, namely, under Section 432(1) which is lesser in degree should necessarily be held to be exercisable in tune with the adjunct provision contained in the same section. Viewed in that respect, we find that the procedure to be followed whenever any application for remission is moved, the safeguard provided under Section 432(2) should be the sine-quo-non for the ultimate power to be exercised under Section 432 (1).

142. By following the said procedure prescribed under Section 432(2), the action of the Appropriate Government is bound to survive and stand the scrutiny of all concerned including judicial forum. It must be remembered, barring minor offences, in cases involving heinous crimes like, murder, kidnapping, rape robbery, dacoity, etc., and such other offences of such magnitude, the verdict of the trial Court is invariably dealt with and considered by the High Court and in many cases by the Supreme Court. Thus, having regard to the nature of opinion to be rendered by the presiding officer of the concerned Court will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors which will enable the Appropriate Government to take the right decision as to whether or not suspension or remission of sentence should be granted. It must also be borne in mind that while for the exercise of the Constitutional power under Articles 72 and 161, the Executive Head will have the benefit of act and advice of the Council of Ministers, for the exercise of power under Section 432(1), the Appropriate Government will get the valuable opinion of the judicial forum, which will definitely throw much light on the issue relating to grant of suspension or remission.

143. Therefore, it can safely be held that the exercise of power under Section 432(1) should always be based on an application of the person

concerned as provided under Section 432(2) and after duly following the procedure prescribed under Section 432(2). We, therefore, fully approve the declaration of law made by this Court in **Sangeet (supra)** in paragraph 61 that the power of Appropriate Government under Section 432(1) Code of Criminal Procedure cannot be *suo motu* for the simple reason that this Section is only an enabling provision. We also hold that such a procedure to be followed under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the Appropriate Government. We, therefore, answer the said question to the effect that the *suo motu* power of remission cannot be exercised under Section 432(1), that it can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

144. We are now left with the question namely:

> "Whether the term "'Consultation'" stipulated in Section 435(1) of the Code implies "'Concurrence'"?"

It is relevant to extract Section 435(1) of Code of Criminal Procedure, which reads as under:

> "**Section 435**. **State Government to act after consultation with Central Government in certain cases**.-(1) the powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence.
>
> (a) Which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or
>
> (b) Which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, of
>
> (c) Which was committed by a person in the service of the Central Government, while acting or purporting to act in the discharge of his official duty,
>
> shall not be exercised by the State Government except after consultation with the Central Government."

Answer to this question depends wholly on the interpretation of Section 435 of Code of Criminal Procedure. After referring to the said Section, learned Solicitor General referred to the convictions imposed on the accused/respondents in the Late Rajiv Gandhi Murder case. Learned Solicitor General pointed out that though 26 accused were convicted by the Special Court, this Court confirmed the conviction only as against the 7 respondents in that Writ Petition and the rest of the accused were all acquitted, namely, 19 of them. He also pointed out that the conviction of the Special Court under TADA Act was set aside by this Court. While the conviction of the respondents under

Sections 212 and 216 of I.P.C, Section 14 of Foreigners Act, Section 25(1-B) of Arms Act, Section 5 of Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of The Wireless Telegraph Act were all confirmed by this Court. That apart conviction under Section 120-B I.P.C. read with Section 302 I.P.C. against all the seven respondents was also confirmed by this Court. In the ultimate conclusion, this Court confirmed the death sentence against A-1 Nalini, A-2 Santhan, A-3 Murugan and A-18 Arivu and the sentence of Death against A-9 Robert Payas, A-10 Jayakumar and A-16 Ravichandran was altered as imprisonment for life. Subsequently in the judgment in **V. Sriharan (supra)** even the death sentence against A-2 Santhan, A-3 Murugan and A-18 Arivu was also commuted into imprisonment for life meaning thereby end of one's life, subject to remission granted by the Appropriate Government under Section 432 of the Code of Criminal Procedure, 1973, which in turn, subject to the procedural checks mentioned in the said provision and further substantive checks in Section 433 A of the Code.

145. As far as the remission provided under Section 432 is concerned, the same will consist of the remission of the sentence of a prisoner by virtue of good behavior, etc., under the Jail Manual, Prisoners' Act and Rules and other Regulations providing for earning of such remission and remission of the sentence itself by imposing conditions. Keeping

the above factual matrix in the Rajiv Gandhi Murder case, vis-à-vis the 7 respondents therein as a sample situation, we proceed to analyze these questions arising under Section 435 Code of Criminal Procedure Learned Solicitor General in his submissions contended that since the punishments imposed on the respondents under the various Central Acts such as Foreigners Act, Passport Act, etc., have all been completed by the respondents, the requirement of Section 435(2) does not arise and, therefore, there will be no impediment for the State Government to exercise its power under Section 435(2) of the Code of Criminal Procedure According to the learned Solicitor General, since the period of imprisonment under various Central Acts has already been suffered by the respondents, the requirement of passing order of suspension, remission or commutation by the Central Government does not arise and it is for the State Government to pass order of suspension, remission or commutation under Section 435(2) Code of Criminal Procedure The learned Solicitor General, however, contended that by virtue of the fact that whole investigation right from the beginning was entrusted with the C.B.I. under the Delhi Police Establishment Act and the ultimate conviction of the respondents under the provisions of Indian Penal Code came to be made by the Special Court and commutation of the same with certain modifications as regards the sentence part alone by this Court, by virtue of the

proviso to Article 73(1)(a) of the Constitution, the Executive Authority of the Union gets the power to pass order either under Article 72 of the Constitution or under Sections 432 to 435 of Code of Criminal Procedure and to that extent the scope and ambit of the power of the State Government gets restricted and, therefore, in the event of the State Government, in its right as the Appropriate Government seeks to exercise its power under Section 435(1) Code of Criminal Procedure such exercise of power in the present context can be exercised only with the 'Concurrence' of the Central Government and the expression 'Consultation' made in Section 435(1) should be held as such. In support of his submissions the learned Solicitor General relied upon **Lalu Prasad Yadav & Anr. v. State of Bihar & Anr. - (2010) 5 SCC 1**, **Supreme Court Advocates on Record Association and ors. v. Union of India** - **(1993) 4 SCC 441**, **State of Gujarat and Anr. v. Justice R.A. Mehta (Retired) and ors.** - **(2013) 3 SCC 1** and **N. Kannadasan v. Ajoy Khose and Ors. - (2009) 7 SCC 1.**

146. As against the above submissions, Mr. Dwivedi, learned Senior Counsel for the State of Tamil Nadu prefaced his submissions by contending that while proposing to grant remission to the respondents, the State Government did not undermine the nature of crime committed and the impact of the remission that may be caused on the society, as well as, the concern of the State Government in this

case. The learned Senior Counsel also submitted that the State Government is not going to act in haste and is very much alive to the fact that the person murdered was a former Prime Minister of this country and the State cannot take things lightly while considering the remission to be granted to the Respondents. The learned Senior Counsel, therefore, contended that in the process of 'Consultation', the views of the Central Government will be duly considered before passing final orders on the proposed remission. According to learned Senior Counsel under Section 435(1), the act of 'Consultation' prescribed is a rider to the exercise of Executive Power of the State to be exercised under Sections 432 and 433 in respect of cases falling under Sections 435(1)(a) to (c). By referring to Sections 435(2) the learned Senior Counsel contended that in the said sub-section cautiously the Parliament has used the expression 'Concurrence' while in Section 435(1) the expression used is 'Consultation'. It is, therefore, pointed out that the distinctive idea of 'Consultation' and 'Concurrence' has been clearly disclosed. The learned Senior Counsel then pointed out that while acting under Section 435(1), what is relevant is the Sentence and not the Conviction, which can be erased only by grant of pardon and grant of remission will have no implication on the conviction. By referring to Section 435(1)(b) & (c), the learned Senior Counsel pointed out that with reference to those

offences where the investigation can be carried out entirely by the State Government and the offence would only relate to the property of the Central Government and the services of person concerned in the services of the Centre what is contemplated is only 'Consultation'. It was contended that when the 'Consultation' process is invoked by the State Government, Union of India can suggest whatever safeguards to be made to ensure that even while granting remission, necessary safeguard is imposed. The learned Senior Counsel also submitted that paramount consideration should be the interest of the Nation which is the basic feature of the Constitution and, therefore, 'Consultation' means effective and meaningful 'Consultation' and that the State cannot act in an irresponsible manner keeping the Nation at peril. The learned Senior Counsel contended that though the CBI conducted the investigation and all the materials were gathered by the CBI, after the conviction, every material is open and, therefore, it cannot be said that the State Government had no material with it. The learned Senior Counsel also pointed out that the jail representation is with the State Government and it will be open to the State to consider the recorded materials by the Court and invoke its power under Sections 432 and 433 of Code of Criminal Procedure. The learned Senior Counsel further contended that in the process of 'Consultation', the Union Government will be able to consider any other material within its

knowledge and make an effective report. If such valuable materials reflected in the 'Consultation' process are ignored by the State, then the Court's power of Review can always be invoked. The learned Senior Counsel relied upon the decisions reported in **State of U.P. and another v. Johri Mal – (2004) 4 SCC 714**, **Justice Chandrashekaraiah (Retired) v. Janekere C. Krishna and others - (2013) 3 SCC 117** and **S.R. Bommai and others v. Union of India and others - (1994) 3 SCC 1** in support of his submissions.

147. In order to appreciate the respective submissions, it will be necessary to refer to the relevant Government orders passed by the State of Tamil Nadu and the consequential Notification issued by the Government of India after the gruesome murder of Late Rajiv Gandhi, the former Prime Minister of India on 21.05.1991 at 10.19 p.m. at Sriperumbudur in Tamil Nadu. It will be worthwhile to trace back the manner by which the accused targeted their killing as has been succinctly narrated in the judgment reported in **State through Superintendent of Police, CBI/SIT v. Nalini and others - (1999) 5 SCC 253**. Paragraphs 23 to 29 are relevant which read as under:

> **"23.** On 21-5-1991, Haribabu bought a garland made of sandalwood presumably for using it as a camouflage (for murdering Rajiv Gandhi). He also secured a camera. Nalini (A-1) wangled leave from her immediate boss (she was working in a company as PA to the Managing Director) under the pretext that she wanted to go to Kanchipuram for buying a saree. Instead she went to

her mother's place. Padma (A-21) is her mother. Murugan (A-3) was waiting for her and on his instruction Nalini rushed to her house at Villiwakkam (Madras). Sivarasan reached the house of Jayakumar (A-10) and he got armed himself with a pistol and then he proceeded to the house of Vijayan (A-12).

24. Sivarasan directed Suba and Dhanu to get themselves ready for the final event. Suba and Dhanu entered into an inner room. Dhanu was fitted with a bomb on her person together with a battery and switch. The loosely stitched salwar-kameez which was purchased earlier was worn by Dhanu and it helped her to conceal the bomb and the other accessories thereto. Sivarasan asked Vijayan (A-12) to fetch an auto-rickshaw.

25. The auto-rickshaw which Vijayan (A-12) brought was not taken close to his house as Sivarasan had cautioned him in advance. He took Suba and Dhanu in the auto-rickshaw and dropped them at the house of Nalini (A-1). Suba expressed gratitude of herself and her colleagues to Nalini (A-1) for the wholehearted participation made by her in the mission they had undertaken. She then told Nalini that Dhanu was going to create history by murdering Rajiv Gandhi. The three women went with Sivarasan to a nearby temple where Dhanu offered her last prayers. They then went to "Parry's Corner" (which is a starting place of many bus services at Madras). Haribabu was waiting there with the camera and garland.

26. All the 5 proceeded to Sriperumbudur by bus. After reaching there they waited for the arrival of Rajiv Gandhi. Sivarasan instructed Nalini (A-1) to provide necessary cover to Suba and Dhanu so that their identity as Sri Lankan girls would not be disclosed due to linguistic accent. Sivarasan further instructed her to be with Suba and to escort her after the assassination to the spot where Indira Gandhi's statue is situate and to wait there for 10 minutes for Sivarasan to reach.

27. Nalini (A-1), Suba and Dhanu first sat in the enclosure earmarked for ladies at the meeting place at Sriperumbudur. As the time of arrival of Rajiv Gandhi was nearing Sivarasan took Dhanu alone from that place. He collected the garland from Suba and escorted Dhanu to go near the rostrum. Dhanu could reach near the red carpet where a little girl (Kokila) and her mother (Latha Kannan) were waiting to present a poem written by Kokila on Rajiv Gandhi.

28. When Rajiv Gandhi arrived at the meeting place Nalini (A-1) and Suba got out of the enclosure and moved away. Rajiv Gandhi went near the little girl Kokila. He would have either received the poem or was about to receive the same, and at that moment the hideous battery switch was clawed by the assassin herself. Suddenly the pawn bomb got herself blown up as the incendiary device exploded with a deadening sound. All human lives within a certain radius were smashed to shreds. The head of a female, without its torso, was seen flinging up in the air and rolling down. In a twinkle, 18 human lives were turned into fragments of flesh among which was included the former Prime Minister of India Rajiv Gandhi and his personal security men, besides Dhanu and Haribabu. Many others who sustained injuries in the explosion, however, survived.

29. Thus the conspirators perpetrated their prime target achievement at 10.19 p.m. on 21-5-1991 at Sriperumbudur in Tamil Nadu.

148. Closely followed, after the above occurrence, the Principal Secretary to the Government of Tamil Nadu addressed a D.O. letter dated 22.05.1991 to the Joint Secretary to the Government of India, conveying the order of the Government of Tamil Nadu expressing its consent under Section 6 of the Delhi Special Police Establishment Act 1946 to the extension of powers and jurisdiction of members of the

Delhi Special Police Establishment to investigate the case in Crime No.329/91 under Sections 302, 307 and 326 IPC and under Section 3 & 5 of The Explosive Substances Act, registered in Sriperumbudur police station, Changai Anna (West) District, Tamil Nadu, relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. The Notification of the Government of Tamil Nadu under Section 6 of the 1946 Act mentioned the State of Tamil Nadu's consent to the extension of powers to the members of Delhi Special Police Establishment in the WHOLE of the State of Tamil Nadu for the investigation of the crime in Crime No.329/91. In turn, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training passed its Notification dated 23.05.1991 extending power and jurisdiction of the members of the Delhi Special Police Establishment to the WHOLE of the State of Tamil Nadu for investigation in respect of crime No.329/91. That is how the Central Government came into the picture in the investigation of the crime, the conviction by the Special Court of 26 persons and the ultimate confirmation insofar as it was against the present Respondents alone setting aside the conviction as against the 19 accused.

149. The above noted facts disclose that the case is covered by Section 435(1)(a) of Code of Criminal Procedure. Therefore, as per Section

435(1) the power of State Government to remit or commute the sentence under Sections 432 and 433 Code of Criminal Procedure should not be exercised except after due 'Consultation' with the Central Government. Since the expression 'shall' is used in the said sub-section, it is mandatory for the State Government to resort to the 'Consultation' process without which, the power cannot be exercised. As rightly submitted by the learned Senior Counsel for the State of Tamil Nadu, such 'Consultation' cannot be an empty formality and it should be an effective one. While on the one hand the power to grant remission under Section 432 and commute the sentence under Section 433 conferred on the Appropriate Government is available, as we have noted, the exercise of such power insofar as it related to remission or suspension under Section 432 is not *suo motu*, but can be made only based on an application and also circumscribed by the other provisions, namely, Section 432(2), whereby the opinion of the Presiding Judge who imposed or confirmed the conviction should be given due consideration. Further, we have also explained how to ascertain as to who will be the Appropriate Government as has been stipulated under Section 432(7) of Code of Criminal Procedure which applied to the exercise of power both under Section 432 and as well as 433 Code of Criminal Procedure In this context, we have also analyzed as to how far the proviso to Article 73(1) (a) of the Constitution will

ensure greater Executive Power on the Centre over the State wherever the State Legislature has also got power to make laws. Having analyzed the implication of the said proviso, vis-à-vis, Articles 161, 162 and Entry 1 and 2 of List III of the Seventh Schedule, by virtue of which, the Central Government gets primacy as an Appropriate Government in matter of this kind. Having regard to our above reasoning on the interpretation of the Constitutional provisions read along with the provisions of Code of Criminal Procedure, our conclusion as to who will be the Appropriate Government has to be ascertained in every such case. In the event of the Central Government becoming the Appropriate Government by applying the tests which we have laid based on Section 432(7) read along with the proviso to Article 73(1)(a) of the Constitution and the relevant entries of List III of the Seventh Schedule of the Constitution, then in those cases there would be no scope for the State Government to exercise its power at all under Section 432 Code of Criminal Procedure In the event of the State Government getting jurisdiction as the Appropriate Government and after complying with the requirement, namely, any application for remission being made by the person convicted and after obtaining the report of the concerned Presiding Officer as required under Section 432(2), if Section 435(1)(a) or (b) or (c) is attracted, then the question for consideration would be whether the expression "Consultation" is

mere 'Consultation' or to be read as "Concurrence" of the Central Government.

150. In this context, it will be advantageous to refer to the Nine-Judge Constitution Bench decision of this Court reported in **Supreme Court Advocates on Record Association (supra)**. In the majority judgment authored by Justice J.S. Verma, the learned Judge while examining the question referred to the Bench on the interpretation of Articles 124(2) and 217(1) of the Constitution as it stood which related to appointment of Judges to the Supreme Court and High Courts quoted the precautionary statement made by Dr. Rajendra Prasad in his speech as President of the Constituent Assembly while moving for adoption of the Constitution of India. A portion of the said quote relevant for our purpose reads as under:

> "**429**…….There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. *It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups* and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance. … In India today I feel that the work that confronts us is even more difficult than the work which we had when we were engaged in the struggle. We did not have then any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share. We have all these now, and the temptations are really great. *Would to God that we shall have the wisdom and the strength to rise above them and to serve the country which we have succeeded*

in liberating".

151. Again in paragraph 432, the principle is stated as to how construction of a Constitutional Provision is to be analyzed which reads as under:

> "**432.** .....A fortiori any construction of the Constitutional provisions which conflicts with this Constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, an alien concept."
>
> **(Emphasis added)**

152. By thus laying down the broad principles to be applied, considered the construction of the expression "Consultation" to be made with the Chief Justice of India for the purpose of composition of higher judiciary as used in Article 124(2) and 217(1) of the Constitution and held as under in paragraph 433:

> "**433.** It is with this perception that the nature of primacy, if any, of the Chief Justice of India, in the present context, has to be examined in the Constitutional scheme. The hue of the word "Consultation", when the 'Consultation' is with the Chief Justice of India as the head of the Indian Judiciary, for the purpose of composition of higher judiciary, has to be distinguished from the colour the same word "Consultation" may take in the context of the executive associated in that process to assist in the selection of the best available material."

153. Thereafter tracing the relevant provisions in the pre-Constitutional era, namely, the Government of India Act, 1919, and the Government of India Act, 1935, wherein the appointment of

Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown or in other words, of the Executive with no specific provision for 'Consultation' with the Chief Justice in the appointment process, further noted, the purpose for which the obligation of "Consultation" with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1) came to be incorporated was highlighted. Thereafter, the Bench expressed its reasoning as to why in the said context, the expression "Consultation" was used instead of "Concurrence". Paragraph 450 of the said judgment gives enough guidance to anyone dealing with such issue which reads as under:

> "**450.** It is obvious, that the provision for 'Consultation' with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the

> executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the Constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word "Consultation" instead of "Concurrence" was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts."
>
> **(Emphasis added)**

154. We must state that in the first place, whatever stated by the said larger Constitution Bench while interpreting an expression in a Constitutional provision, having regard to its general application can be equally applied while interpreting a similar expression in any other statute. We find that the basic principles set out in the above quoted paragraphs of the said decision can be usefully referred to, relied upon and used as a test while examining a similar expression used, namely, in Section 435(1) of Code of Criminal Procedure. While quoting the statement of Dr. Rajendra Prasad, what was highlighted was the various differences that exist in our country including 'provincial differences', the necessity to ensure that men will not sacrifice the interests of the country at large for the sake of smaller groups and areas, the existence of conflicting claims to reconcile after our liberation, and the determination to save the country rather than yielding to the pressure of smaller groups. It was also stated in the

context of Articles 124(2) and 217(1) as to how the independence of judiciary to be the paramount criteria and any construction that conflict with such said avowed object of the Constitution to be eschewed. Thereafter, while analyzing the primacy of the Chief Justice of India for the purpose of appointment of Judges, analyzed as to how our Constitutional functionary qua the others who together participate in the performance of the function assumes significance only when they cannot reach an agreed conclusion. It was again stated as to see who would be best equipped and likely to be more correct for achieving the purpose and perform the task satisfactorily. It was stated that primacy should be in one who qualifies to be treated as the 'expert' in the field and comparatively greater weight to his opinion may then to be attached. We find that the above tests indicated in the larger Constitution Bench judgment can be applied in a situation like the one which we are facing at the present juncture.

155. Again in a recent decision of this Court reported in **R.A. Mehta (Retired) (supra)** to which one of us was a party (Fakkir Mohamed Ibrahim Kalifulla, J.) it was held as under in paragraph 32:

> "**32.** Thus, in view of the above, the meaning of "*Consultation*" varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, 'Consultation' means a free and fair discussion on a

particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has *primacy* of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, 'Consultation' may mean *'Concurrence'*. The court must examine the fact situation in a given case to determine whether the process of 'Consultation' as required under the particular situation did in fact stand complete."

(Emphasis added)

156. The principles laid down in the larger Constitution Bench decision reported in **Supreme Court Advocates on Record Association (supra)** was also followed in **N. Kannadasan (supra)**.

157. While noting the above principles laid down in the larger Constitution Bench decision and the subsequent decisions on the interpretation of the expression, we must also duly refer to the reliance placed upon the decision in **S.R. Bommai (supra)**, **Johri Mal (supra)** and **Justice Chandrashekaraiah (Retired) (supra)**. The judgment in **S.R. Bommai (supra)** is again a larger Constitution Bench of Nine-Judges known as **Bommai case (supra)**, in which our attention was drawn to paragraphs 274 to 276, wherein, Justice B.P. Jeevan Reddy pointed out that 'federation' or 'federal form of Government' has no fixed meaning, that it only broadly indicates a division of powers between the Centre and the States, and that no two

federal Constitutions are alike. It was stated that, therefore, it will be futile to try to ascertain and fit our Constitution into any particular mould. It was also stated that in the light of our historical process and the Constitutional evolution, ours is not a case of independent States coming together to form a federation as in the case of U.S.A. The learned judge also explained that the founding fathers of our Constitution wished to establish a strong Centre and that in the light of the past history of this sub-continent such a decision was inevitably taken perforce. It was also stated that the establishment of a strong Centre was a necessity. It will be appropriate to extract paragraph 275 to appreciate the analysis of the scheme of the Constitution made by the learned Judge which reads as under:

> "**275.** A review of the provisions of the Constitution shows unmistakably that while creating a federation, the Founding Fathers wished to establish a strong Centre. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. In a land as varied as India is, a strong Centre is perhaps a necessity. This bias towards Centre is reflected in the distribution of legislative heads between the Centre and States. All the more important heads of legislation are placed in List I. Even among the legislative heads mentioned in List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain entries in List I to some or the other extent. Even in the Concurrent List (List III), the parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the Centre. By the 42nd Amendment, quite a few of the entries in List II were omitted and/or transferred to other lists. Above all, Article 3

empowers Parliament to form new States out of existing States either by merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Reorganisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty-seven States and one area. Even the names of the States can be changed by Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the legislatures of the affected States. There is single citizenship, unlike USA. The judicial organ, one of the three organs of the State, is one and single for the entire country — again unlike USA, where you have the federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a Proclamation of emergency, Parliament can make laws with respect to any matter in List II (Article 250). Similarly, Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the States and the proponents of the States' autonomy. Several taxes are collected by the Centre and made over, either partly or fully, to the States. Suffice it to say that Centre has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the Centre including the one in Article 355 — the duty to protect every State against external aggression and internal disturbance. Indeed, this very article confers greater power upon the Centre in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power."

158. After making reference to the division of powers set out in the

various Articles as well as the Lists I to III of Seventh Schedule and its purported insertion in the Constitutional provisions, highlighted the need for empowering the Centre on the higher side as compared with the States while also referring to the corresponding obligations of the Centre. While referring to Article 355 of the Constitution in that context, it was said "the duty to protect every State against external aggression and internal disturbance. Indeed this very Article confers greater power upon the Centre in the name of casting an obligation upon it (viz.) to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power. Simultaneously, in paragraph 276, the learned Judge also noted that while under the Constitution, greater power is conferred upon the Centre *viz-a-viz* the States, it does not mean that States are mere appendages of the Centre and that within the sphere allotted to them, States are supreme. It was, therefore, said that Courts should not adopt and approach, an interpretation which has the effect of or tend to have the effect of whittling down the powers reserved to the States. Ultimately, the learned Judge noted a word of caution to emphasize that Courts should be careful not to upset the delicately crafted Constitutional scheme by a process of interpretation.

159. In **Johri Mal (supra)**, this Court considered the effect of the expression "Consultation" contained in The Legal Remembrancer's

Manual, in the State of Uttar Pradesh which provides in Clause 7.03 the requirement of 'Consultation' by the District Officer with the District Judge before considering anyone for being appointed as District Government council. In the said judgment it was noticed that in Uttar Pradesh, the State government by way of amendment omitted sub-sections (1), (4) (5) and (6) of Section 24 which provided for "Consultation" with the High Court for appointment of Public Prosecutor for the High Court and with District Judge for appointment of such posts at the District level. Therefore, the only proviso akin to such prescription was made only in The Legal Remembrancer's Manual which is a compilation of executive order and not a 'Law' within the meaning of Article 13 of the Constitution. In the light of the said situation, this Court while referring to **Supreme Court Advocates on Record Association (supra)** made a distinction as to how the appointment of District Government counsel cannot be equated with the appointment of High Court Judges and Supreme Court Judges in whose appointment this Court held that the expression "Consultation" would amount to "Concurrence". It was, however, held that even in the case of appointment of District Government counsel, the 'Consultation' by the District Magistrate with the District Judge should be an effective one. Similarly, in the judgment reported in **Justice Chandrasekaraiah (Retd.) (supra)** this

Court considered the expression "Consultation" occurring in Section 3 (2) (a) (b) of the Karnataka Lok Ayukta Act, 1984 relating to appointment of Lokayukta and Upa-Lokayukta, took the view that while 'Consultation' by the Chief Minister with the Chief Justice as one of the consultees is mandatory, since the appointment to those positions is not a judicial or Constitutional authority but is a *sui generis* quasi judicial authority, 'Consultation' will not amount to "Concurrence". Therefore, the said judgment is also clearly distinguishable.

160. Having considered the submissions of the respective counsel for the Union of India, State of Tamil Nadu and the other counsel and also the larger Constitution Bench decisions and the subsequent decisions of this Court as well as the specific prescription contained in Section 435(1)(a) read along with Articles 72, 73(i)(a), 161 and 162 of the Constitution, the following principles can be derived to note how and in what manner the expression "Consultation" occurring in Section 435(1)(a) can be construed:-

(a) Section 435(1) mandatorily requires the State Government, if it is the 'Appropriate Government' to consult the Central Government if the consideration of grant of remission or commutation under Section 432 or 433 in a case which falls within any of the three sub-clauses (a)(b)(c) of Section 435(1).

(b) The expression "Consultation" may mean differently in different situation depending on the nature and purpose of the statute.

(c) When it came to the question of appointment of judges to the High Court and the Supreme Court, since it pertains to high Constitutional office, the status of Chief Justice of India assumed greater significance and primacy and, therefore, in that context, the expression "Consultation" would only mean "Concurrence".

(d) While considering the appointment to the post of Chairman of State Consumer Forum, since the said post comes within four corners of judicial post having regard to the nature of functions to be performed, 'Consultation' with the Chief Justice of the High Court would give primacy to the Chief Justice.

(e) The founding fathers of our Nation wished to establish a strong Centre taking into account the past history of this subcontinent which was under the grip of very many foreign forces by taking advantage of the communal differences, caste differences, language differences, provincial differences and so on which necessitated men of strong character, men of vision, men who will not sacrifice the interest of the Nation for the sake of smaller groups and areas and who will rise above the prejudices which are born of these differences, as visualized by the first

President of this Nation Dr. Rajendra Prasad.

(f) Again in the golden words of that great personality, in the pre-independence era while we were engaged in the struggle we did not have any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share and we have all these now and the temptations are really great. Therefore, we should rise above all these, have the wisdom and strength and save the country which we got liberated after a great struggle.

(g) The ratio and principles laid down by this Court as regards the interpretation and construction of Constitutional provisions which conflicts with the Constitutional goal to be achieved should be eschewed and interest of the Nation in such situation should be the paramount consideration. Such principles laid down in the said context should equally apply even while interpreting a statutory provision having application at the National, level in order to achieve the avowed object of National integration and larger public interest.

(h) The nature of 'Consultation' contemplated in Section 435(1)(a) has to be examined in the touchstone of the above principles laid down by the larger Bench judgment in **Supreme Court Advocates on Record Association (supra)**. In this context, the specific reference made therein to the statement of Dr. Rajendra

Prasad, namely, where various differences that exist, in our country including provincial differences, the necessity to ensure that men will not sacrifice the interest of the country at large, for the sake of smaller groups and areas assumes significance.

(i) To ascertain, in this context, when more than one authority or functionary participate together in the performance of a function, who assumes significance, keeping in mind the various above principles and objectives to be achieved, who would be best equipped and likely to be more correct for achieving the purpose and perform the task satisfactorily in safeguarding the interest of the entire community of this Great Nation. Accordingly, primacy in one who qualifies to be treated as in know of things far better than any other, then comparatively greater weight to their opinion and decision to be attached.

(j) To be alive to the real nature of Federal set up, we have in our country, which is not comparable with any other country and having extraordinarily different features in different States, say different religions, different castes, different languages, different cultures, vast difference between the poor and the rich, not a case of independent States coming together to form a Federation as in the case of United States of America. Therefore, the absolute necessity to establish a strong Centre to ensure that

when it comes to the question of Unity of the Nation either from internal disturbance or any external aggression, the interest of the Nation is protected from any evil forces. The establishment of a strong Centre was therefore a necessity as felt by our founding fathers of the Nation. In this context Article 355 of the Constitution requires to be noted under which, the Centre is entrusted with the duty to protect every State against external aggression and internal disturbance and also to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. However, within the spheres allotted to the respective States, they are supreme.

(k) In the light of the above general principles, while interpreting Section 435(1)(a) which mandates that any State Government while acting as the 'Appropriate Government' for exercising its powers under Sections 432 and 433 of Code of Criminal Procedure and consider for remission or commutation to necessarily consult the Central Government. In this context the requirement of the implication of Section 432(7) (a) has to be kept in mind, more particularly in the light of the prescription contained in Article 73(1)(a) and Article 162 read along with its proviso, which asserts the status of the Central Government Authorities as possessing all pervasive right to hold the Executive

Power by virtue of express conferment under the Constitution or under any law made by the Parliament though the State Legislature may also have the power to make laws on those subjects.

(l) In a situation as the one arising in the above context, it must be stated, that by virtue of such status available with the Central Government possessing the Executive Power, having regard to the pronouncement of the larger Constitution Bench decision of this Court in **Supreme Court Advocates on Record Association (supra)** and **S.R. Bommai (supra)**, the Executive Power of the Center should prevail over the State as possessing higher Constitutional power specifically adorned on the Central Government under Article 73(1)(a).

(m) Cases, wherein, the investigation is held by the agencies under the Delhi Special Police Establishment Act, 1946 or by any other agency engaged to make investigation into an offence under the Central Act other than the Code of Criminal Procedure, and where such offences investigated assumes significance having regard to the implication that it caused or likely to cause in the interest of the Nation or in respect of National figures of very high status by resorting to diabolic criminal conduct at the instance of any person whether such person belong to this country or of any

foreign origin, either individually or representing anybody of personnel or an organization or a group, it must be stated that such situation should necessarily be taken as the one coming within the category of internal or external aggression or disturbance and thereby casting a duty on the Centre as prescribed under Article 355 of the Constitution to act in the interest of the Nation as a whole and also ensure that the Government of every State is carried in accordance with the provisions of the Constitution. Such situation cannot held to be interfering with the independent existence of the State concerned.

(n) Similar test should be applied where application of Section 435(1) (b) or (c). It can be visualized that where the property of the Central Government referred to relates to the security borders of this country or the property in the control and possession of the Army or other security forces of the country or the warships or such other properties or the personnel happen to be in the services of the Centre holding very sensitive positions and in possession of very many internal secrets or other vulnerable information and indulged in conduct putting the interest of the Nation in peril, it cannot be said that in such cases, the nature of 'Consultation' will be a mere formality. It

must be held that even in those cases the requirement of 'Consultation' will assume greater significance and primacy to the Center.

161. It must also be noted that the nature of requirement contemplated and prescribed in Section 435(1) and (2) is distinct and different. As because the expression "Concurrence" is used in sub-section (2) it cannot be held that the expression "Consultation" used in sub-section (1) is lesser in force. As was pointed out by us in sub-para 'n', the situations arising under sub-section (1) (a) to (c) will have far more far reaching consequences if allowed to be operated upon without proper check. Therefore, even though the expression used in sub-section (1) is 'Consultation', in effect, the said requirement is to be expressed far more strictly and with utmost care and caution, as each one of the sub-clauses (a) to (c) contained in the said sub-section, if not properly applied in its context may result in serious violation of Constitutional mandate as has been set out in Article 355 of the Constitution. It is therefore imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of Central Government, it will assume primacy and consequently the process of "Consultation" should in reality be held as the requirement of "Concurrence".

162. For our present purpose, we can apply the above principles to the cases which come up for consideration, including the one covered by the present Writ Petition. Having paid our detailed analysis as above on the various questions, we proceed to answer the questions in seriatim.

163. Answer to the preliminary objection as to the maintainability of the Writ Petition:

Writ Petition at the instance of Union of India is maintainable.

Answers to the questions referred in seriatim

Question 52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda* (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Ans. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the

Court.

We hold that the ratio laid down in **Swamy Shraddananda (supra)** that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative.

> **Question No.52.2** Whether the "Appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

Ans. The exercise of power under Sections 432 and 433 of Code of Criminal Procedure will be available to the Appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this Court is concerned, it is held that the powers under Sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government.

Question Nos. 52.3, 52.4 and 52.5

> **52.3** Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the

Executive Power of the State where the power of the Union is coextensive?

52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?

Ans. The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in **G.V. Ramanaiah (supra)** should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the

offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government.

Question 52.6 Whether *suo motu* exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?

Ans. No *suo motu* power of remission is exercisable under Section 432(1) of Code of Criminal Procedure It can only be initiated based on an application of the person convicted as provided under Section 432 (2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court.

Question No.52.7 Whether the term "Consultation" stipulated in Section 435(1) of the Code implies "Concurrence"?

Ans. Having regard to the principles culled out in paragraph 160 (a) to (n), it is imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently the process of "Consultation" in reality be held as the requirement of "Concurrence".

We thus answer the above questions accordingly.

.....C.J.I.
[H.L. Dattu]

.....J.
[Fakkir Mohamed Ibrahim Kalifulla]

.....J.
[Pinaki Chandra Ghose]

New Delhi
December 02, 2015

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL.) NO.48 OF 2014

UNION OF INDIA ETC. …. PETITIONERS

Versus

V. SRIHARAN @ MURUGAN
& ORS. ETC. …. RESPONDENTS

WITH
WRIT PETITION (CRL.) NO.185 OF 2014
WRIT PETITION (CRL.) NO.150 OF 2014
WRIT PETITION (CRL.) NO.66 OF 2014 &
CRIMINAL APPEAL NO.1215 OF 2011

J U D G M E N T

Uday Umesh Lalit, J.

WRIT PETITION (CRL.) NO.48 OF 2014

1. This Writ Petition has been placed before the Constitution Bench pursuant to reference made by a Bench of three learned Judges of this Court in its order dated 25.04.2014[1], hereinafter referred to as the Referral Order.

Background Facts:-

2. On the night of 21.05.1991 Rajiv Gandhi, former Prime Minister of India was assassinated by a human bomb at Sriperumbudur in Tamil Nadu. With him

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2014(11) SCC 1

fifteen persons including nine policemen died and forty three persons suffered injuries. Crime No.329 of 1991 of Sriperumbudur Police Station was immediately registered. On 22.05.1991 a notification was issued by the Governor of Tamil Nadu under Section 6 of Delhi Special Police Establishment Act (Act No.25 of 1946) according consent to the extension of the powers and jurisdiction of the members of the Delhi Police Establishment to the whole of the State of Tamil Nadu for the investigation of the offences in relation to Crime No.329 of 1991. This was followed by a notification issued by the Government of India on 23.05.1991 under Section 5 read with Section 6 of Act No.25 of 1946 extending such powers and jurisdiction to the whole of the State of Tamil Nadu for investigation of offences relating to Crime No. 329 of 1991. After due investigation, a charge of conspiracy for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA for short), Indian Penal Code (IPC for short), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946 and the Indian Wireless Telegraphy Act, 1933 was laid against forty-one persons, twelve of whom were already dead and three were marked as absconding. Remaining twenty six persons faced the trial before the Designated Court which found them guilty of all the charges and awarded punishment of fine of varying amounts, rigorous imprisonment of different periods and sentenced all of them to death. The Designated Court referred the case to this Court for confirmation of death sentence of all the convicts. The convicts also filed appeals against their

conviction and the sentence awarded to them. These cases were heard together.

3. In the aforesaid Death Reference Cases and the appeals, this Court rendered its judgment on 11.05.1999, reported in ***State through Superintendent of Police, CBI/SIT*** *v.* ***Nalini and others***[2]. At the end of the judgment, the following order was passed by this Court:

> "732. The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA Act are set aside in respect of all those appellants who were found guilty by the trial court under the said counts.
>
> 733. The conviction and sentence passed by the trial court of the offences under Sections 212 and 216 of the Indian Penal Code, Section 14 of the Foreigners Act, 1946, Section 25(1-B) of the Arms Act, Section 5 of the Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of the Wireless Telegraphy Act, 1933, in respect of those accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those counts it is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed.
>
> 734. The conviction for the offence under Section 120-B read with Section 302 Indian Penal Code as against A-1 (Nalini), A-2 (Santhan @ Raviraj), A-3 (Murugan @ Thas), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivalan @ Arivu) is confirmed.
>
> 735. We set aside the conviction and sentence of the offences under Section 302 read with Section 120-B passed by the trial court on the remaining accused.
>
> 736. The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed. The death sentence passed on A-9 (Robert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The Reference is answered accordingly.

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[2] 1999 (5) SCC 253

737. In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu), all the remaining appellants shall be set at liberty forthwith."

4. Two sets of Review Petitions were preferred against the aforesaid judgment dated 11.05.1999. One was by convicts A-1, A-2, A-3 and A-18 on the question of death sentence awarded to them. These convicts did not challenge their conviction. The other was by the State through Central Bureau of Investigation (CBI for short), against that part of the judgment which held that no offence under Section 3(3) of TADA was made out. These Review Petitions were dismissed by order dated 08.10.1999[3]. Wadhwa, J. with whom Quardi J. concurred, did not find any error in the judgment sought to be reviewed and therefore dismissed both sets of Review Petitions. Thomas J. opined that the Review Petition filed in respect of A-1 (Nalini) alone be allowed and her sentence be altered to imprisonment for life. Thus, in the light of the order of the majority, these Review Petitions were dismissed.

5. The convicts A-1, A-2, A-3 and A-18 then preferred Mercy Petitions before the Governor of Tamil Nadu on 17.10.1999 which were rejected on 27.10.1999. The rejection was challenged before Madras High Court which by its order dated 25.11.1999 set-aside the order of rejection and directed reconsideration of those Mercy Petitions. Thereafter Mercy Petition of A-1 (Nalini) was allowed while those in respect of the convicts A-2, A-3 and A-18

Suthendraraja alias Suthenthira Raja alias Santhan and others vs. State through DSP/CBI, SIT, CHENNAI (1999) 9 SCC 323

were rejected by the Governor on 25.04.2000. Said convicts A-2, A-3 and A-18 thereafter preferred Mercy Petitions on 26.4.2000 to the President of India under Article 72 of the Constitution. The Mercy Petitions were rejected by the President on 12.08.2011 which led to the filing of Writ Petitions in Madras High Court. Those Writ Petitions were transferred by this Court to itself by order dated 01.05.2012[4]. By its judgment dated 18.02.2014 in ***V. Sriharan @ Murugan*** v. ***Union of India and others***[5] a Bench of three learned Judges of this Court commuted the death sentences awarded to convicts A-2, A-3 and A-18 to that of imprisonment for life and passed certain directions. Paragraph 32 of the judgment is quoted hereunder:

> "32.8 In the light of the above discussion and observations, in the cases of V. Sriharan alias Murugan, T. Suthendraraja alias Santhan and A.G. Perarivalan alias Arivu, we commute their death sentence into imprisonment for life. Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government under Section 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code. All the writ petitions are allowed on the above terms and the transferred cases are, accordingly, disposed of."

6. On the next day i.e. 19.02.2014 Chief Secretary, Government of Tamil Nadu wrote to the Secretary, Government of India, Ministry of Home Affairs that Government of Tamil Nadu proposed to remit the sentence of life imprisonment imposed on convicts A-2, A-3 and A-18 as well as on the other convicts namely A-9, A-10 and A-16. It stated that these six convicted accused

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L.K. Venkat v. *Union of India and others* (2012) 5 SCC 292

2014 (4) SCC 242

had already served imprisonment for 23 years, that since the crime was investigated by the CBI, as per Section 435 of Cr.P.C. the Central Government was required to be consulted and as such the Central Government was requested to indicate its views within three days on the proposal to remit the sentence of life imprisonment and release those six convicts.

7. Union of India immediately filed Crl.M.P. Nos.4623-25 of 2014 on 20.02.2014 in the cases which were disposed of by the judgment dated 18.02.20145 praying that the State of Tamil Nadu be restrained from releasing the convicts. On 20.02.2014 said Crl.M.P. Nos.4623-25 of 2014 were taken up by this Court and the following order was passed:

> "Taken on Board.
>
> Issue notice to the State of Tamil Nadu; Inspector General of Prisons, Chennai; the Superintendent, Central Prison, Vellore and the convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu returnable on 6th March, 2014.
>
> Mr. Rakesh Dwivedi, learned senior counsel accepts notice on behalf of the State of Tamil Nadu and other two officers.
>
> Till such date, both parties are directed to maintain status quo prevailing as on date in respect of convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu.
>
> List on 6th March, 2014."

8. On 20.02.2014 Union of India filed Review Petitions being R.P. (Crl.) Nos.247-249 of 2014 against the judgment dated 18.02.20145 which were later

dismissed on 01.04.2014. It also filed Writ Petition No.48 of 2014 i.e. the present writ petition on 24.02.2014 with following prayer:

> "(a) Issue an appropriate writ in the nature of a mandamus, or certiorari, and quash the letter no.58720/Cts IA/2008 dated 19.02.2014 and the Decision of the Respondent no.8, Government of Tamil Nadu to consider commutation/remission of the sentences awarded to the Respondents No.1 to 7;"

9. After hearing rival submissions in the present writ petition, the Referral Order was passed which formulated and referred seven questions for the consideration of the Constitution Bench. Paragraph Nos. 49 and 52 to 54 of the Referral Order were to the following effect:-

> *"**49**.* The issue of such a nature has been raised for the first time in this Court, which has wide ramification in determining the scope of application of power of remission by the executives, both the Centre and the State. Accordingly, we refer this matter to the Constitution Bench to decide the issue pertaining to whether once power of remission under Articles 72 or 161 or by this Court exercising constitutional power under Article 32 is exercised, is there any scope for further consideration for remission by the executive."

> **52.** The following questions are framed for the consideration of the Constitution Bench:

> **52.1.** Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of ***Swamy Shraddananda(2)***[6] a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

(2008) 13 SCC 767

52.2. Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case?

52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?

52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?

52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

53. All the issues raised in the given case are of utmost critical concern for the whole of the country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system. Accordingly, we direct to list Writ Petition (Crl.) No. 48 of 2014 before the Constitution Bench as early as possible, preferably within a period of three months.

54. All the interim orders granted earlier will continue till a final decision is taken by the Constitution Bench in Writ Petition (Crl.) No. 48 of 2014."

10. In terms of the Referral Order, this petition came up before the Constitution Bench on 09.03.2014 which issued notices to all the State Governments and pending notice the State Governments were restrained from

exercising power of remission to life convicts. This order was subsequently varied by this Court on 23.07.2015 and the order so varied is presently in operation. While the present writ petition was under consideration by this Court, Curative Petitions Nos.22-24 of 2015 arising out of the dismissal of the review petition vide order dated 01.04.2014 came up before this Court which were dismissed by order dated 28.07.2015.

PRELIMINARY OBJECTIONS

11. At the outset when the present writ petition was taken up for hearing, Mr. Rakesh Dwivedi, learned Senior Advocate appearing for the State of Tamil Nadu and Mr. Ram Jethmalani, learned Senior Advocate appearing for the respondents convicts raised preliminary objections regarding maintainability of this writ petition at the instance of Union of India. It was argued that in the petition as originally filed, nothing was indicated about alleged violation of any fundamental right of any one and it was only when the State had raised preliminary submissions, that additional grounds were preferred by Union of India seeking to espouse the cause of the victims. It was submitted that the issues sought to be raised by Union of India as regards the powers and jurisdiction of the State of Tamil Nadu were essentially federal in nature and that the only remedy available for agitating such issues could be through a suit under Article 131 of the Constitution. In response, it was submitted by Mr. Ranjit Kumar, learned Solicitor General that neither at the stage when the

Referral Order was passed, nor at the stage when notices were issued to various State Governments, such preliminary objections were advanced and that the issue had now receded in the background. It was submitted that after Criminal Law Amendment Act 2013, rights of victims stand duly recognized and that the instant crime having been investigated by the CBI, Union of India in its capacity as *parens patriae* was entitled to approach this Court under Article 32. It was submitted that since private individuals, namely the convicts were parties to this *lis*, a suit under Article 131 would not be a proper remedy. We find considerable force in the submissions of the learned Solicitor General. Having entertained the petition, issued notices to various State Governments, entertained applications for impleadment and granted interim orders, it would not be appropriate at this stage to consider such preliminary submissions. At this juncture, the following passage from the judgment of the Constitution Bench in ***Mohd. Aslam alias Bhure*** v. ***Union of India and others***[7] would guide us:-

> **"10.** On several occasions this Court has treated letters, telegrams or postcards or news reports as writ petitions. In such petitions, on the basis of pleadings that emerge in the case after notice to different parties, relief has been given or refused. Therefore, this Court would not approach matters where public interest is involved in a technical or a narrow manner. Particularly, when this Court has entertained this petition, issued notice to different parties, new parties have been impleaded and interim order has also been granted, it would not be appropriate for this Court to dispose of the petition on that ground."

In the circumstances, we reject the preliminary submissions and proceed

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(2003)4 SCC 1

to consider the questions referred to us.

DISCUSSION

12. We have heard Mr. Ranjit Kumar, learned Solicitor General, assisted by Ms. V. Mohana, learned Senior Advocate for Union of India. The submissions on behalf of the State Governments were led by Mr. Rakesh Dwivedi, learned Senior Advocate who appeared for the States of Tamil Nadu and West Bengal, Mr. Ram Jethmalani, learned Senior Advocate and Mr. Yug Mohit Chaudhary, learned Advocate appeared for respondents – convicts, namely, A-2, A-3, A-18, A-9, A-10 and A-16. We have also heard Mr. Ravi Kumar Verma, learned Advocate General for Karnataka, Mr. A.N.S. Nadkarni, learned Advocate General for Goa, Mr. V. Giri, learned Senior Advocate for State of Kerala, Mr. Gaurav Bhatia, learned Additional Advocate General for State of Uttar Pradesh, Mr. T.R. Andhyarujina, learned Senior Advocate for one of the intervenors and other learned counsel appearing for other State Governments, Union Territories and other intervenors. We are grateful for the assistance rendered by the learned Counsel.

13. The Challenge raised in the instant matter is principally to the competence of the State Government in proposing to remit or commute sentences of life imprisonment of the respondents-convicts and the contention is that either the State Government has no requisite power or that such power stands excluded. The questions referred for our consideration in the Referral

Order raise issues concerning power of remission and commutation and as to which is the "appropriate Government" entitled to exercise such power and as regards the extent and ambit of such power. It would therefore be convenient to deal with questions 3, 4 and 5 as stated in Paras 52.3, 52.4 and 52.5 at the outset.

Re: Question Nos.3, 4 and 5 as stated in para Nos.52.3, 52.4 and 52.5 of the Referral Order

> **52.3.** Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?
>
> **52.4.** Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission?
>
> **52.5.** Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

14. Powers to grant pardon and to suspend, remit or commute sentences are conferred by Articles 72 and 161 of the Constitution upon the President and the Governor. Articles 72 and 161 are quoted here for ready reference:

"**72**. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.-

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence-

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

"**161**. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases.-The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

15. Before we turn to the matters in issue, a word about the nature of power under Articles 72 and 161 of the Constitution. In ***K.M. Nanavati*** v. ***State of Bombay***[8] it was observed by Constitution Bench of this Court, "……. Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty may lie…….".

In ***Kehar Singh and another*** v. ***Union of India and another***[9] Constitution Bench of this Court quoted with approval the following passage from U.S. v. Benz [75 Lawyers Ed. 354, 358]

"The judicial power and the executive power over sentences are

(1961) 1 SCR 497 at 516
(1989) 1 SCC 204 at 213

readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."

The Constitution Bench further observed:

> **"**It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court."

In ***Epuru Sudhakar and another*** v. ***Government of Andhra Pradesh and others***[10] Pasayat J. speaking for the Court observed:-

> **"16**. The philosophy underlying the pardon power is that "every civilised country recognises, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy.
>
> **17.** The rationale of the pardon power has been felicitously enunciated by the celebrated Holmes, J. of the United States' Supreme Court in *Biddle* v. *Perovich* [71 L Ed 1161: 274 US480(1927] in these words (L Ed at p. 1163):"*A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.*"

(2006) 8 SCC 161

In his concurring judgment Kapadia J. (as the learned Chief Justice then was) stated:

> **"65.** Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.
>
> **66.** Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is *ipso facto* immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty.

> Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future."

16. The power conferred upon the President under Article 72 is under three heads. The Governor on the other hand is conferred power under a sole head i.e. in respect of sentence for an offence against any law relating to the matter to which the executive power of the State extends. Apart from similar such power in favour of the President in relation to matter to which the executive power of the Union extends, the President is additionally empowered on two counts. He is given exclusive power in all cases where punishment or sentence is by a Court Martial. He is also conferred power in all cases where the sentence is a sentence of death. Thus, in respect of cases of sentence of death, the power in favour of the President is regardless whether it is a matter to which the executive power of the Union extends. Therefore a person convicted of any offence and sentenced to death sentence under any law relating to a matter to which the executive power of the State extends, can approach either the Governor by virtue of Article 161 or the President in terms of Article 72(1)(c) or both. To this limited extent there is definitely an overlap and powers stand conferred concurrently upon the President and the Governor.

17. Articles 73 and 162 of the Constitution delineate the extent of executive powers of the Union and the State respectively. Said Articles 73 and 162 are as

under:-

"**73**. Extent of executive power of the Union-(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer of authority thereof could exercise immediately before the commencement of this Constitution.

162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof. "

18. As regards clause (b) of Article 73(1) there is no dispute that in such matters the executive power of the Union is absolute. The area of debate is with respect to clause (a) of Article 73(1) and the Proviso to Article 73(1) and the inter-relation with Article 162. Clause (a) of Article 73(1) states that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Parliament has exclusive power in respect

of legislative heads mentioned in List I of the 7th Schedule whereas in respect of the entries in the Concurrent List namely List III of the 7th Schedule, both Parliament and the State have power to legislate in accordance with the scheme of the Constitution. The Proviso to Article 73(1) however states, subject to the saving clause therein, that the executive power so referred to in sub-clause (a) shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. The expression "also" is significant. Under the Constitution the State has exclusive power to make laws with respect to List II of the 7th Schedule and has also concurrent power with respect to entries in Concurrent List namely List III of the Constitution. The Proviso thus deals with situations where the matter relates to or is with respect to subject where both Parliament and the Legislature of the State are empowered to make laws under the Concurrent List. Subject to the saving clause mentioned in the Proviso, it is thus mandated that with respect to matters which are in the Concurrent List namely where the Legislature of the State has also power to make laws, the executive power of the Union shall not extend. The saving clause in the Proviso deals with two exceptions namely, where it is so otherwise expressly provided in the Constitution or in any law made by Parliament. In other words, only in those cases where it is so expressly provided in the Constitution itself or in any law made by Parliament, the executive power of the Union will be available. But for such express provision either in the Constitution or in the law made by Parliament which is in the nature of an

exception, the general principle which must govern is that the executive power under sub-clause (a) of Article 73 shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. In the absence of such express provision either in the Constitution or in the law made by Parliament, the normal rule is that the executive power of the Union shall not extend in a State to matters with respect to which the legislature of the State has also power to make laws.

19. It will be instructive at this stage to see the debates on the point in the Constituent Assembly. The proceedings dated 30th December, 1948 in the Constituent Assembly[11] show that while draft Article 60 which corresponds to present Article 73 was being discussed, an Hon'ble Member voiced his concern in following words:

> "**B. Pocker Sahib Bahadur** (Madras : Muslim): Mr. Vice-President, this clause as it stands is sure to convert the Federation into an entirely unitary form of Government. This is a matter of very grave importance. Sir, we have been going on under the idea, and it is professed, that the character of the Constitution which we are framing is a federal one. I submit, Sir, if this article, which gives even executive powers with reference to the subjects in the Concurrent List to the Central Government, is to be passed as it is, then there will be no justification at all in calling this Constitution a federal one. It will be a misnomer to call it so. It will be simply a camouflage to call this Constitution a federal one with provisions like this. It is said that it is necessary to give legislative powers to the Centre with regard to certain subjects mentioned in the Concurrent List, but it is quite another thing, Sir, to give even the executive powers with reference to them to the Centre. These provisions will have the effect of practically leaving the provinces with absolutely nothing. Even in the Concurrent List there is a large number of subjects which ought not to have found place in it.

[11] Constituent Assembly Debate Vol. 7 Page 1129

We shall have to deal with them when the time comes. But this clause gives even executive powers to the Centre with reference to the subjects which are detailed in the Concurrent List.……."

After considerable debate on the point the clarification by Hon'ble Member Dr. B.R. Ambedkar is noteworthy. His view was as under:

"The Honourable Dr. B.R. Ambedkar (Bombay : General): Mr. Vice-President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so I think I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to execute laws which relate to what is called the Concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the Provincial or State Legislature, shall ordinarily apply to the Province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing a law which relates to the Concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the Concurrent List is concerned will rest with the units, the Provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of a Concurrent law shall be with the centre."

The first proposition as stated by Dr. Ambedkar was that generally the authority to execute laws which relate to subjects in the Concurrent field, whether the law was passed by the Central Legislature or by the State Legislature, was ordinarily to be with the State. The second proposition pertaining to the Proviso was quite eloquent in that if in any particular case

Parliament thinks the execution ought to be retained by the Centre, Parliament shall have the power to do so and that save and except such express provision, in all cases, the authority to execute insofar as the Concurrent List is concerned shall rest with the States.

20. In ***Rai Sahib Ram Jawaya Kapur and others*** v. ***State of Punjab***[12] this Court while dealing with Article 162 of the Constitution, observed as under:-

> "….Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. "(Emphasis added)

21. The same principle as regards the extent of Executive Power of the Union and the State as stated in Articles 73 and 162 of the Constitution finds echo in Section 55A of the Indian Penal Code which defines appropriate Government as under:

> "**55A. Definition of "appropriate Government"**. -- In Sections 54 and 55 the expression "appropriate Government" means:-
> (a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

[12] 1955 (2) SCR 225

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced."

22. At this stage we may quote Sections 432 to 435 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) :-

> **"432. Power to suspend or remit sentences.** (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
>
> (2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the. presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.
>
> (3) If any condition on which a sentence has been suspended or remitted is, In the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.
>
> (4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.
>
> (5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:
>
> Provided that in the case of any sentence (other than a sentence of

fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail ; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine ;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine ;

(d) a sentence of simple imprisonment, for fine.

433A. Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in section 432,

where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

434. Concurrent power of Central Government in case of death sentences. The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.

435. State Government to act after consultation with Central Government in certain cases. (1) The powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence Is for an offence-

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends."

23. As regards definition of appropriate Government, Section 432(7) of Cr.P.C. adopts a slightly different approach. It defines Central Government to be the appropriate Government in cases where the sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. In that sense it goes by the same principle as in Article 73 of the Constitution and Section 55A of the IPC. The residuary area is then left for the State Government and it further states that in cases other than those where the Central Government is an appropriate Government, the Government of the State within which the offender is sentenced shall be the appropriate Government. In other words, it carries the same essence and is not in any way different from the principle in Article 73 read with Article 162 on one hand and Section 55A of the IPC on the other. The specification as to the State where the offender is sentenced serves an entirely different purpose and helps in finding amongst more than one State Governments which is the appropriate Government as found in ***State of Madhya Pradesh*** v. ***Ratan Singh and others***[13]***, State of Madhya Pradesh*** v. ***Ajit Singh and others***[14]***, Hanumant Dass*** v. ***Vinay Kumar and others***[15]***and Govt. of A.P. and others*** v. ***M.T. Khan***[16]. According to this provision, even if an offence is committed in State A but if the trial takes place and the sentence is passed in State B, it is the latter State which

(1976) 3 SCC 470
(1976) 3 SCC 616

(1982) 2 SCC 177
(2004) 1 SCC 616

shall be the appropriate Government.

24. There is one more provision namely Section 435(2) of Cr. P.C. which needs to be considered at this stage. It is possible that in a given case the accused may be convicted and sentenced for different offences, in respect of some of which the executive power of the Union may extend and to the rest the executive power of the State may extend. Since the executive power either of the Union or the State is offence specific, both shall be appropriate Governments in respect of respective offence or offences to which the executive power of the respective government extends. For instance, an offender may be sentenced for an offence punishable under an enactment relatable to subject under List I of the Constitution and additionally under the Indian Penal Code. Such eventuality is taken care of by sub-section (2) of Section 435 and it is stipulated that even if the State Government in its capacity as an appropriate Government in relation to an offence to which the executive power of the State Government extends, were to order suspension, remission or commutation of sentence in respect of such offence, the order of the State Government shall not have effect unless an appropriate order of suspension, remission or commutation is also passed by the Central Government in relation to the offence(s) with respect to which executive power of the Union extends. Relevant to note that it is not with respect to a specific offence that both the Central Government and State Government have concurrent power but if the offender is sentenced on two different counts, both could be the appropriate

governments in respect of that offence to which the respective executive power extends.

25. It was submitted on behalf of the petitioner that if the Executive Power is co-extensive with the Legislative Power and the law making power of the State must yield to the Legislative Power of the Union in respect of a subject in the Concurrent List, reading of these two principles would inevitably lead to the conclusion that the executive power of the Union takes primacy over that of the State thereby making it i.e. the Central Government the appropriate Government under Section 432(7) of Cr. P.C. It was further submitted that it was Parliament which made law contained in Cr.P.C. in exercise of power relatable to Entry 1 and 2 of List III and that the provisions in the IPC (existing law under Article 13) and under the Cr. P.C., both relatable to the powers of Parliament, which provide for "appropriate Government" as prescribed in Section 55A of the IPC and 432(7) of the Cr.P.C. without any validity enacted conflicting or amending law by the State, would clearly show that it is the Union which has the primacy. In our considered view, that is not the correct way to approach the issue. For the purposes of Article 73(1) it is not material whether there is Union law holding the field but what is crucial is that such law made by Parliament must make an express provision or there must be such express provision in the Constitution itself as regards executive power of the Union, in the absence of which the general principle as stated above must apply. If the submission that since the IPC and Cr. P.C. are relatable to the powers of

Parliament, it is the executive power of the Union which must extend to aspects covered by these legislations is to be accepted, the logical sequitor would be that for every offence under IPC the appropriate Government shall be the Central Government. This is not only against the express language of Article 73(1) but would completely overburden the Central Government.

26. In the instant case as the order passed by this Court in ***State*** v. ***Nalini and others2***, the respondents-convicts were acquitted of the offences punishable under Section 3(3), 3(4) and 5 of the TADA. Their conviction under various central laws like Explosive Substances Act, Passport Act, Foreigners Act and Wireless Telegraphy Act were all for lesser terms which sentences, as on the date, stand undergone. Consequently, there is no reason or occasion to seek any remission in or commutation of sentences on those counts. The only sentence remaining is one under Section 302 IPC which is life imprisonment. It was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that Section 302 IPC falls in Chapter XVI of the IPC relating to offences affecting the human body. In his submission, Sections 299 to 377 IPC involve matters directly related to "public order" which are covered by Entry 1 List II. It being in the exclusive executive domain of the State Government, the State Government would be the appropriate Government. It was further submitted that assuming Sections 302 read with Section 120B IPC are relatable to Entry 1 of List III being part of the Indian Penal Code itself, then the issue may arise whether Central Government or the State Government shall be the appropriate

Government and resort has to be taken to provisions of Articles 73 and 162 of the Constitution to resolve the issue.

27. At this stage it would be useful to consider the decision of this Court in ***G.V. Ramanaiah*** v. ***The Superintendent of Central Jail Rajahmundry and others.***[17]**.** In that case the appellant was convicted of offences punishable under Section 489-A to 489-D of IPC and sentenced to imprisonment for 10 years. On a question whether the State Government would be competent to remit the sentence of the appellant, this Court observed as under:

> **"9**. The question is to be considered in the light of the above criterion. Thus considered, it will resolve itself into the issue: Are the provisions of Sections 489-A to 489-D of the Penal Code, under which the petitioner was convicted, a law relating to a matter to which the legislative power of the State or the Union extends?
>
> **10**. These four Sections were added to the Penal Code under the caption, "Of Currency Notes and Bank Notes", by Currency Notes Forgery Act, 1899, in order to make better provisions for the protection of Currency and Bank Notes against forgery. It is not disputed; as was done before the High Court in the application under Section 491(1), Criminal Procedure Code, that this bunch of Sections is a law by itself. "Currency, coinage and legal tender" are matters, which are expressly included in Entry No. 36 of the Union List in the Seventh Schedule of the Constitution. Entry No. 93 of the Union List in the same Schedule specifically confers on the Parliament the power to legislate with regard to "offences against laws with respect to any of the matters in the Union List". Read together, these entries put it beyond doubt that Currency Notes and Bank Notes, to which the offences under Sections 489-A to 489-D relate, are matters which are exclusively within the legislative competence of the Union Legislature. It follows therefrom that the offences for which the petitioner has been convicted, are offences relating to a matter to which the executive power of the Union extends, and the "appropriate Government" competent to remit the

[17] (1974) 3 SCC 531

sentence of the petitioner, would be the Central Government and not the State Government."

This Court went on to observe that the Indian Penal Code is a compilation of penal laws, providing for offences relating to a variety of matters, referable to the various entries in the different lists of the 7th Schedule to the Constitution and that many of the offences in the Penal Code related to matters which are specifically covered by entries in the Union list. Since the offences in question pertained to subject matter in the Union list, this Court concluded that the Central Government was the appropriate Government competent to remit the sentence of the appellant. The decision in ***G.V. Ramanaiah*** thus clearly lays down that it is the offence, the sentence in respect of which is sought to be commuted or remitted, which determines the question as to which Government is the appropriate Government.

28. In ***Zameer Ahmed Latifur Rehman Sheikh*** v. ***State of Maharashtra and others***[18] challenge was raised to the competence of the State Legislature to enact Maharashtra Control of Organised Crime Act, 1999. While rejecting the challenge, it was observed by this Court as under:-

> **"48.** From the ratio of the judgments on the point of public order referred to by us earlier, it is clear that anything that affects public peace or tranquillity within the State or the Province would also affect public order and the State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order. Even if the said part of MCOCA incidentally encroaches upon a field under Entry 1 of the Union List, the same cannot

(2010) 5 SCC 246

be held to be ultra vires in view of the doctrine of pith and substance as in essence the said part relates to maintenance of public order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List. Therefore, we are of the considered view that it is within the legislative competence of the State of Maharashtra to enact such a provision under Entries 1 and 2 of List II read with Entries 1, 2 and 12 of List III of the Seventh Schedule of the Constitution."

While considering the ambit of expression "public order" as appearing in Entry 1 List II of the 7th Schedule to the Constitution this Court referred to earlier decisions on the point and arrived at the aforesaid conclusion. Similarly in ***People's Union for Civil Liberties and another*** v. ***Union of India***[19] the validity of Prevention of Terrorism Act, 2002 and in ***Kartar Singh*** v. ***State of Punjab***[20] validity of TADA were questioned. In both the cases it was observed that the Entry "public order" in List II empowers the State to enact the legislation relating to public order or security insofar as it affects or relates to a particular State and that the term has to be confined to disorder of lesser gravity having impact within the boundaries of the State and that activity of more serious nature which threatens the security and integrity of the country as a whole would not be within the field assigned to Entry 1 of List II. In both these cases the validity of Central enactments were under challenge on the ground that they in pith and substance were relatable to the subject under Entry 1 of List II. In both the cases the challenges were negatived as the legislations in question dealt with "terrorism" in contra-distinction to the normal issues of

(2004) 9 SCC 580
(1994) 3 SCC 569

"public order".

29. We are however concerned in the present case with offence under Section 302 IPC simplicitor. The respondents-convicts stand acquitted insofar as offences under the TADA are concerned. We find force in the submissions of Mr. Rakesh Dwivedi, learned Senior Advocate that the offence under Section 302 IPC is directly related to "public order" under Entry 1 of List II of the 7th Schedule to the Constitution and is in the exclusive domain of the State Government. In our view the offence in question is within the exclusive domain of the State Government and it is the executive power of the State which must extend to such offence. Even if it is accepted for the sake of argument that the offence under Section 302 IPC is referable to Entry 1 of List III, in accordance with the principles as discussed hereinabove, it is the executive power of the State Government alone which must extend, in the absence of any specific provision in the Constitution or in the law made by Parliament. Consequently, the State Government is the appropriate Government in respect of the offence in question in the present matter. It may be relevant to note that right from ***K.M. Nanavati*** v. ***State of Bombay*** (supra)8 in matters concerning offences under Section 302 IPC it is the Governor under Article 161 or the State Government as appropriate Government under the Cr.P.C. who have been exercising appropriate powers.

30. In the light of the aforesaid discussion our answers to questions 3, 4 and 5

as stated in paragraph 52.3, 52.4 and 52.5 are as under:

Our answer to Question 52.3 in Para 52.3 is:-

> **Question 52.3**. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive?

Answer: The executive powers of the Union and the State normally operate in different fields. The fields are well demarcated. Keeping in view our discussion in relation to Articles 73 and 162 of the Constitution, Section 55A of the IPC and Section 432 (7) of Cr.P.C. it is only in respect of sentence of death, even when the offence in question is referable to the executive power of the State, that both the Central and State Governments have concurrent power under Section 434 of Cr.P.C. If a convict is sentenced under more than one offences, one or some relating to the executive power of the State Government and the other relating to the Executive Power of the Union, Section 435(2) provides a clear answer. Except the matters referred herein above, Section 432 (7) of Cr. P.C. does not give primacy to the executive power of the Union.

Our Answer to Question posed in Para 52.4. is:-

> **Question 52.4.** Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission?

Answer: In respect of matters in list III of the 7th Schedule to the Constitution, ordinarily the executive power of the State alone must extend. To this general principle there are two exceptions as stated in Proviso to Articles 73(1) of the

Constitution. In the absence of any express provision in the Constitution itself or in any law made by Parliament, it is the executive power of the State which alone must extend.

Our Answer to Question posed in Para 52.5. is:-

> **Question 52.5.** Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

Answer: There can possibly be two appropriate Governments in a situation contemplated under Section 435 (2) of Cr.P.C.. Additionally, in respect of cases of death sentence, even when the offence is one to which the executive power of the State extends, Central Government can also be appropriate Government as stated in Section 434 of Cr.P.C.. Except these two cases as dealt with in Section 434 and 435 (2) of Cr.P.C. there cannot be two appropriate Governments.

Re: Question No.6 as stated in para 52.6 of the Referral Order

> **52.6.** Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not?

31. We now turn to the exercise of power of remission under Section 432(1) of Cr.P.C.. Remissions are of two kinds. The first category is of remissions under the relevant Jail Manual which depend upon the good conduct or behavior of a convict while undergoing sentence awarded to him. These are generally referred to as 'earned remissions' and are not referable to Section 432

of Cr.P.C. but have their genesis in the Jail Manual or any such Guidelines holding the field. In **Shraddananda(2)6** this aspect was explained thus:

> **"80.** From the Prisons Acts and the Rules it appears that for good conduct and for doing certain duties, etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an undertrial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life imprisonment, being for the rest of life, is by nature indeterminate."

The exercise of power in granting remission under Section 432 is done in a particular or specific case whereby the execution of the sentence is suspended or the whole or any part of the punishment itself is remitted. The effect of exercise of such power was succinctly put by this Court in ***Maru Ram etc. etc.*** v. ***Union of India & Another***[21] in following words:-

> "……. In the first place, an order of remission does not wipe out the offence it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power of grant remission is executive power and cannot have the effect of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court……..
> **……..** Though, therefore, the effect of an order of remission

(1981)1 SCC 106

is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched."

32. The difference between earned remissions "for good behaviour" and the remission of sentence under Section 432 is clear. The first depends upon the Jail Manual or the Policy in question and normally accrues and accumulates to the credit of the prisoner without there being any specific order by the appropriate Government in an individual case while the one under Section 432 requires specific assessment in an individual matter and is case specific. Could such exercise be undertaken under Section 432 by the appropriate Government on its own, without there being any application by or on behalf of the prisoner? This issue has already been dealt with in following cases by this Court.

A]. In ***Sangeet and another.*** v**. *State of Haryana*[22]**,** it was observed in paras 59, 61 and 62 as under:-

> **"59.** There does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 CrPC. But it does appear to us that sub-section (2) to sub-section (5) of Section 432 CrPC lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in *Samjuben Gordhanbhai Koli* v. *State of Gujarat* when it was observed that since remission can only be granted by the executive authorities, the appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 CrPC.
>
> **61.** It appears to us that an exercise of power by the

(2013)2 SCC 452

appropriate Government under sub-section (1) of Section 432 Cr.P.C. cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 Cr.P.C. cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable inasmuch as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

62. It must be remembered in this context that it was held in *State of Haryana* v. *Mohinder Singh* that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 Cr.P.C does provide this check on the possible misuse of power by the appropriate Government."

B] In ***Mohinder Singh*** v. ***State of Punjab***[23] the observations in para 27 were to the following effect:

"27. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be

(2013)3 SCC 294

possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in *Sangeet* v. *State of Haryana*, there is a misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years' or 20 years' imprisonment. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code."

C] In ***Yakub Abdul Razak Memon*** v. ***State of Maharashtra through CBI, Bombay***[24], it was observed in paras 921 and 922 as under:

"921. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be automatic or claimed as a right for the simple reason, that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court, in various decisions, has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government.

922. As rightly observed by this Court in *Sangeet* v. *State of Haryana*, there is misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years' imprisonment. A convict

(2013) 13 SCC 1

> undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code, which in turn is subject to the procedural checks mentioned in the said provision and to further substantive check in Section 433-A of the Code."

33. Relying on the aforesaid decisions of this Court, it was submitted by the learned Solicitor General that there cannot be suo motu exercise of power under Section 432 and that even when the power is to be exercised on an application made by or on behalf of the prisoner, opinion of the Presiding Judge of the Court before or by which the conviction was confirmed, must be sought. In the submission of Mr. Rakesh Dwivedi, learned Senior Advocate, power under Section 432(1) can be exercised suo motu and that Section 432(2) applies only when an application is made and not where power is exercised *suo motu.*

34. We find force in the submission of the learned Solicitor General. By exercise of power of remission, the appropriate Government is enabled to wipe out that part of the sentence which has not been served out and over-ride a judicially pronounced sentence. The decision to grant remission must, therefore, be well informed, reasonable and fair to all concerned. The procedure prescribed in Section 432(2) is designed to achieve this purpose. The power exercisable under Section 432(1) is an enabling provision and must be in accord with the procedure under Section 432(2).

Thus, our answer to question posed in para 52.6 is:-

> **Question 52.6.** Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the

same section is mandatory or not?

Answer: That suo motu exercise of power of remission under Section 432(1) is not permissible and exercise of power under Section 432(1) must be in accordance with the procedure under Section 432(2) of Cr.P.C.

Re: Question No. 7 as stated in Para 52.7 of the Referral Order:

> **52.7.** Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

35. Section 435(1) of Cr.P.C. sets out three categories under clauses (a), (b) and (c) thereof and states inter alia that the powers conferred by Sections 432 and 433 of Cr.P.C. upon the State Government shall not be exercised except after consultation with the Central Government. The language used in this provision and the expressions "… shall not be exercised" and "except after consultation", signify the mandatory nature of the provision. Consultation with the Central Government must, therefore, be mandatorily undertaken before the State Government in its capacity as appropriate Government intends to exercise powers under Sections 432 and 433. This is an instance of express provision in a law made by Parliament as referred to in proviso to Article 73(1) of the Constitution. The question is whether such consultation stipulated in Section 435(1) implies concurrence on part of the Central Government as regards the action proposed by the State Government. Relying on the decisions of this Court in ***L&T McNeil Ltd.*** v. ***Govt. of Tamil Nadu[25], State of U.P. & another***

(2001) 3 SCC 170

v. ***Johri Mal***[26]***, State of Uttar Pradesh and others*** v. ***Rakesh Kumar Keshari and another***[27]***, Justice Chandrashekaraiah (Retd.)*** v. ***Janekere C. Krishna and others***[28] Mr. Rakesh Dwivedi, learned Senior Advocate submitted that the term consultation as appearing in Section 435 ought not to be equated with concurrence and that the action on part of the State of Tamil Nadu in seeking views of the Central Government as regards the proposed action did satisfy the requirement under Section 435. On the other hand, the learned Solicitor General relied upon ***Supreme Court Advocates-on-Record Association and others*** v. ***Union of India***[29] and ***State of Gujarat and another*** v. ***Justice R.A. Mehta(Retd.) and others***[30] to submit that the consultation referred to in the provision must mean concurrence on part of the Central Government. In his submission without such concurrence, no action could be undertaken.

36. Speaking for the majority in ***Supreme Court Advocates-on-Record Association*** (supra) J.S. Verma, J (as the learned Chief Justice then was) considered the effect of the phrase "consultation with the Chief Justice of India " appearing in Article 222 of the Constitution . The observations in paragraphs 438 to 441 are quoted hereunder:

> **"438.** The debate on primacy is intended to determine who amongst the constitutional functionaries involved in the integrated process of appointments is best equipped to discharge the greater burden attached to the role of primacy, of making the proper choice; and this debate is not to

(2004) 4 SCC 714
(2011) 5 SCC 341
(2013) 3 SCC 117
(1993)4 SCC 441
(2013) 3 SCC 1

determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate. The task before us has to be performed with this perception.

439. The primacy of one constitutional functionary qua the others, who together participate in the performance of this function assumes significance only when they cannot reach an agreed conclusion. The debate is academic when a decision is reached by agreement taking into account the opinion of everyone participating together in the process, as primarily intended. The situation of a difference at the end, raising the question of primacy, is best avoided by each constitutional functionary remembering that all of them are participants in a joint venture, the aim of which is to find out and select the most suitable candidate for appointment, after assessing the comparative merit of all those available. This exercise must be performed as a pious duty to discharge the constitutional obligation imposed collectively on the highest functionaries drawn from the executive and the judiciary, in view of the great significance of these appointments. The common purpose to be achieved, points in the direction that emphasis has to be on the importance of the purpose and not on the comparative importance of the participants working together to achieve the purpose. Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector.

440. The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate.

441. For this reason, it must be seen who is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. In other words, primacy should be in him who qualifies to be treated as the 'expert' in the field. Comparatively greater weight to his opinion may then be attached."

The principle which emerges is that while construing the term

'consultation' it must be seen who is the best equipped and likely to be more correct in his view for achieving the purpose and performing the tasks satisfactorily and greater weight to his opinion may then be attached.

While considering the phrase "after consultation of the Chief Justice of the High Court", this Court in ***State of Gujarat*** v. ***R.A. Mehta(supra)*** stated the principles thus:

> **"32.** Thus, in view of the above, the meaning of "*consultation*" varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, consultation means a free and fair discussion on a particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has *primacy* of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean *concurrence*. The court must examine the fact situation in a given case to determine whether the process of consultation as required under the particular situation did in fact stand complete."

It is thus clear that the meaning of consultation varies from case to case depending upon the fact situation and the context of the statute as well as the object it seeks to achieve.

37. In the light of the aforesaid principles, we now consider the object that sub-clauses (a), (b) and (c) of Section 435(1) of the Cr.P.C. seek to achieve. Clause (a) deals with cases which are investigated by the Delhi Special Police Establishment i.e. the Central Bureau of Investigation or by any other agency empowered to make investigation into an offence under any Central Act.

The investigation by CBI in a matter may arise as a result of express consent or approval by the concerned State Government under Sections 5 and 6 of the Delhi Special Police Establishment Act or as a result of directions by a Superior Court in exercise of its writ jurisdiction in terms of the law laid down by this Court in ***State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others***[31]. For instance, in the present case the investigation into the crime in question i.e. Crime No. 3 of 1991 was handed over to the CBI on the next day itself. The entire investigation was done by the CBI who thereafter carried the prosecution right up to this Court.

38. In a case where the investigation is thus handed over to the CBI, entire carriage of the proceedings including decisions as to who shall be the public prosecutor, how the prosecution be conducted and whether appeal be filed or not are all taken by the CBI and at no stage the concerned State Government has any role to play. It has been laid down by this Court in ***Lalu Prasad Yadav and another*** v. ***State of Bihar and another***[32] that in matters where investigation was handed over to the CBI, it is the CBI alone which is competent to decide whether appeal be filed or not and the State Government cannot even challenge the order of acquittal on its own. In such cases could the State Government then seek to exercise powers under Sections 432 and 433 on its own?

(2010) 3 SCC 571
(2010) 5 SCC 1

39. Further, in certain cases investigation is transferred to the CBI under express orders of the Superior Court. There are number of such examples and the cases could be of trans-border ramifications such as stamp papers scam or chit fund scam where the offence may have been committed in more than one States or it could be cases where the role and conduct of the concerned State Government was such that in order to have transparency in the entirety of the matter, the Superior Court deemed it proper to transfer the investigation to the CBI. It would not then be appropriate to allow the same State Government to exercise power under Sections 432 and 433 on its own and in such matters, the opinion of the Central Government must have a decisive status. In cases where the investigation was so conducted by the CBI or any such Central Investigating Agency, the Central Government would be better equipped and likely to be more correct in its view. Considering the context of the provision, in our view comparatively greater weight ought to be attached to the opinion of the Central Government which through CBI or other Central Investigating Agency was in-charge of the investigation and had complete carriage of the proceedings.

40. The other two clauses, namely, clauses (b) and (c) of Section 435 deal with offences pertaining to destruction of any property belonging to the Central Government or where the offence was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty. Here again, it would be the Central Government which would be better equipped and more correct in taking the appropriate view which could

achieve the purpose satisfactorily. In such cases, the question whether the prisoner ought to be given the benefit under Section 432 or 433 must be that of the Central Government. Merely because the State Government happens to be the appropriate Government in respect of such offences, if the prisoner were to be granted benefit under Section 432 or 433 by the State Government on its own, it would in fact defeat the very purpose.

Our Answer to Question post in Para 52.7 is:-

> **Question 52.7.** Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

Answer: In the premises as aforesaid, in our view the expression "consultation" ought to be read as concurrence and primacy must be accorded to the opinion of the Central Government in matters covered under clauses (a), (b) and (c) of Section 435(1) of the Cr.P.C.

Re: Question No.2 as stated in para 52.2 of the Referral Order

> **52.2.** Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case?

41. As regards this question, the submissions of the learned Solicitor General were two-fold. According to him the Governor while exercising power under Article 161 of the Constitution, having declined remission in or commutation of sentences awarded to the respondents-convicts, second or subsequent exercise

of executive power under Section 432/433 by the State Government was not permissible and it would amount to an over-ruling or nullification of the exercise of constitutional power vested in the Governor. In his submission, the statutory power under Section 432/433 Cr.P.C. could not be exercised in a manner that would be in conflict with the decision taken by the constitutional functionary under Article 161 of the Constitution. It was his further submission that Sections 432 and 433 of Cr.P.C. only prescribe a procedure for remission, while the source of substantive power of remission is in the Constitution. According to him Sections 432 and 433, Cr.P.C. are purely procedural and in aid of constitutional power under Article 72 of 161. He further submitted that as laid down in ***Maru Ram*** (supra), while exercising powers under Articles 72 and 161, the President or the Governor act on the aid and advice of the Council of Ministers and thus the Council of Ministers, that is to say the executive having already considered the matter and rejected the petition, a subsequent exercise by the same executive is impermissible. On the other hand, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that there was nothing in the statute which would bar or prohibit exercise of power on the second or subsequent occasion and in fact Section 433A of Cr.P.C. itself gives an indication that such exercise is permissible. It was further submitted that the power conferred upon an authority can be exercised successively from time to time as occasion requires.

42. We would first deal with the submission of the learned Solicitor General

that the provisions of Section 432/433 Cr.P.C. are purely procedural and in aid of the constitutional power. This Court had an occasion to deal with the issue, though in a slightly different context, in ***Maru Ram*** (supra). We may quote paragraphs 58 and 59 of the decision, which are as under:

> "58. ……..What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(*a*) suffers eclipse. Since Sections 432 and 433(*a*) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because it detracts from the operation of Sections 432 and 433(*a*) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submissions of counsel in this behalf.
>
> **59.** It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(*a*) is within the legislative power of Parliament."

43. The submission that Sections 432 and 433 are a statutory expression and modus operandi of the constitutional power was not accepted in ***Maru Ram*** (supra). In fact this Court went on to observe that though these two powers, one constitutional and the other statutory, are co-extensive, the source is different, the substance is different and the strength is different. This Court saw

the two powers as far from being identical. The conclusion in para 72(4) in ***Maru*** Ram (supra) was as under:

> "**72.** (*4*) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like."

It is thus well settled that though similar, the powers under Section 432/433 Cr.P.C. on one hand and those under Article 72 and 161 on the other, are distinct and different. Though they flow along the same bed and in same direction, the source and substance is different. We therefore reject the submission of the learned Solicitor General.

44. Section 433A of Cr.P.C. inter alia states, "…… where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life", such person shall not be released from prison unless he had served at least 14 years of imprisonment. It thus contemplates an earlier exercise of power of commuting the sentence under Section 433 Cr.P.C. It may be relevant to note that under Section 433 a sentence of death can be commuted for any other punishment including imprisonment for life. A prisoner having thus been granted a benefit under Section 433 Cr.P.C. can certainly be granted further benefit of remitting the remainder part of the life sentence, subject of course to statutory minimum period of 14 years of actual imprisonment. We therefore accept the submission of Mr. Rakesh Dwivedi, learned Senior

Advocate that there is nothing in the statute which either expressly or impliedly bars second or subsequent exercise of power. In fact Section 433A contemplates such subsequent exercise of power. At this stage, the observations in ***G. Krishta Goud and J. Bhoomaiah*** v. ***State of Andhra Pradesh and others***[33] in the context of constitutional power of clemency are relevant:

> "**10**. …… The rejection of one clemency petition does not exhaust the power of the President or the Governor."

This principle was re-iterated in para 7 of the decision in ***Krishnan and others v. State of Haryana and others***[34] as follows:-

> "In fact, Articles 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the authorities concerned to exercise such power even after rejection of one clemency petition and even in the changed circumstances."

45. In ***State of Haryana and others*** v. ***Jagdish***[35]it was observed by this Court as under:

> "**46.** At the time of considering the case of premature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances."

In ***Kehar Singh*** v. ***Union of India*** (supra) it was observed, "…….. the power under Article 72 is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to

case, in which the merits and reasons of States may be profoundly assisted by prevailing occasion and passing of time". Having regard to its wide amplitude and the status of the functions to be discharged thereunder, it was found unnecessary to spell out any specific guidelines for exercise of such power. The observations made in the context of power under Article 72 will also be relevant as regards exercise under Section 432/433 Cr.P.C.

In ***State (Govt. of NCT of Delhi***) v. ***Prem Ram***[36] it was observed thus:

> "**14.** The powers conferred upon the appropriate Government under Section 433 have to be exercised reasonably and rationally keeping in view the reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest."

46. We see no hindrance or prohibition in second or subsequent exercise of power under Section 432/433 Cr.P.C. As stated above, such exercise is in fact contemplated under Section 433A. An exercise of such power may be required and called for depending upon exigencies and fact situation. A person may be on the death bed and as such the appropriate Government may deem fit to grant remission so that he may breathe his last in the comfort and company of his relations. Situations could be different. It would be difficult to put the matter in any straight jacket or make it subject to any guidelines, as was found in ***Kehar Singh***. The aspects whether "the convict had lost his potentiality in committing the crime and whether there was any fruitful purpose of confining the convict any more" as stated in ***State of*** Haryana v. Jagdish (supra) could

(2003) 7 SCC 121

possibly yield different assessment after certain period and can never be static. Every case will depend on its individual facts and circumstances. In any case, if the repeated exercise is not for any genuine or bona fide reasons, the matter can be corrected by way of judicial review. Further, in the light of our decision as aforesaid, in any case an approach would be required to be made under Section 432(2) Cr.P.C. to the concerned court which would also result in having an adequate check.

47. In the instant case, A-1 Nalini and other convicts A-2, A-3 and A-18 who were awarded death sentence had initially preferred mercy petition under Article 161 of the Constitution. The petition preferred by A-1 Nalini was allowed, while those of other three were rejected. Those three convicts then preferred mercy petition under Article 72 of the Constitution which was rejected after considerable delay. On account of such delay in disposal of the matters, this Court commuted the sentence of those three convicts to that of life imprisonment. The other convicts namely A-9, A-10 and A-16 had not preferred any petition under Article 161 against their life imprisonment. Thus the Governor while exercising power under Article 161 on the earlier occasion had considered the cases of only three of the convicts and that too when they were facing death sentence. The cases of other three were not even before the Governor. In the changed scenario namely the death sentence having been commuted to that of the imprisonment for life under the orders of this Court, the approach would not be on the same set of circumstances. Each of the convicts

having undergone about 23 years of actual imprisonment, there is definitely change in circumstances. An earlier exercise of power under Article 72 or 161 may certainly have taken into account the gravity of the offence, the effect of such offence on the society in general and the victims in particular, the age, capacity and conduct of the offenders and the possibility of any retribution. Such assessment would naturally have been as on the day it was made. It is possible that with the passage of time the very same assessment could be of a different nature. It will therefore be incorrect and unjust to rule out even an assessment on the subsequent occasion.

48. While commuting the death sentence to that of imprisonment for life, on account of delay in disposal of the mercy petition, this Court in its jurisdiction under Article 32 concentrates purely on the factum of delay in disposal of such mercy petition as laid down by this Court in ***Shatrughan Chauhan and another*** v. ***Union of India and others***[37]. The merits of the matter are not required and cannot be gone into. The commutation by this Court in exercise of power under Article 32 is therefore completely of a different nature. On the other hand, the consideration under Section 432/433 is of a different dimension altogether.

Our Answer to Question posed in Para 52.2 is :-

> **Question 52.2.** Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or

by this Court in its constitutional power under Article 32 as in this case?

Answer: In the circumstances, in our view it is permissible to the appropriate Government to exercise the power of remission under Section 432/433 Cr.P.C. even after the exercise of power by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32.

Re: Question No.1 as stated in para 52.1 of the Referral Order

49. Question no. 1 as formulated in the Referral Order comprises of two sub-questions, as set out hereunder:

(a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission? And

(b) Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda(2)6***, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Re: Sub-question (a) of question No.1 in Para 52.1

(a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?

50. In ***Gopal Vinayak Godse*** v. ***The State of Maharashtra and others***[38]**,** the

(1961) 3 SCR 440

petitioner was convicted on 10.02.1949 and given sentences including one for transportation for life. According to him, he had earned remissions to the tune of 2893 days upto 30.09.1960 and if such earned remissions were added, his actual term of imprisonment would exceed 20 years and therefore he prayed that he be set at liberty forthwith. Repelling these submissions, it was observed by the Constitution Bench of this Court that in order to get the benefit of earned remissions the sentence of imprisonment must be for a definite and ascertainable period, from and out of which the earned remissions could be deducted. However, transportation for life or life imprisonment meant that the prisoner was bound in law to serve the entire life term i.e. the remainder of his life in prison. Viewed thus, unless and until his sentence was commuted or remitted by an appropriate authority under the relevant provisions, the prisoner could not claim any benefit. It was observed:

"…….. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death."

51. In ***Maru Ram*** (supra) while considering the effect of Section 433A of Cr.P.C. this Court summed up the issue as under:

> "…Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant-release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept

bearing on the nature of the sentence which has been highlighted in Godse's case Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment a la Section 55 I. P. C. On the basis of a rule which did make that equation, Godse sought his release through a writ petition under Article 52 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Article 72 or 161 of the Constitution. Godse (supra) is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life"

Conclusion No.6 in ***Maru Ram*** was to the following effect:

"We follow Godse's case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government."

52. Section 53 of the IPC envisages different kinds of punishments while Section 45 of the IPC defines the word 'life' as the life of a human being unless the contrary appears from the context. The life of a human being is till he is alive that is to say till his last breath, which by very nature is one of indefinite

duration. In the light of the law laid down in Godse and Maru Ram, which law has consistently been followed the sentence of life imprisonment as contemplated under Section 53 read with Section 45 of the IPC means imprisonment for rest of the life or the remainder of life of the convict. The terminal point of the sentence is the last breath of the convict and unless the appropriate Government commutes the punishment or remits the sentence such terminal point would not change at all. The life imprisonment thus means imprisonment for rest of the life of the prisoner.

53. In paras 27 and 38 of the decision in ***State of Haryana*** v**.** ***Mahender Singh and others***[39] , this Court observed:-

> "27. It is true that no convict has a fundamental right of remission or shortening of sentences. It is also true that the State in exercise of its executive power of remission must consider each individual case keeping in view the relevant factors. The power of the State to issue general instructions, so that no discrimination is made, is also permissible in law.
>
> 38. A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, he in view of the policy decision itself must be held to have a right to be considered therefor. Whether by reason of a statutory rule or otherwise if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally. (*State of Mysore* v. *H. Srinivasmurthy*)"

54. The convict undergoing the life imprisonment can always apply to the

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[39] 2007(13) SCC 606

concerned authority for obtaining remission either under Articles 72 or 161 of the Constitution or under Section 432 Cr.P.C. and the authority would be obliged to consider the same reasonably. This was settled in the case of ***Godse*** which view has since then been followed consistently in ***State of Haryana v. Mahender Singh*** *(supra)*, **State of Haryana Vs. Jagdish** (supra)**, Sangeet Vs. State of Haryana** *(supra)* **and Laxman Naskar Vs. Union of India and others**[40] . The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in Godse. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner.

Our Answer to sub question (a) of Question in Para 52.1 is:

> (a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission?

Answer: The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either under Articles 72 of 161 of the Constitution or under Section 432 Cr. P.C. and the authority would be obliged to consider the same

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(2000) 2 SCC 595

reasonably.

Re: sub-question (b) of Question No.1 in Para 52.1

> (b) Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda(2)6***, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

55. In ***Swamy Shraddananda(1)4*** the appellant was convicted for the offence of murder and given death sentence, which conviction and sentence was under appeal in this Court. A Bench of two learned Judges of this Court affirmed the conviction of the appellant but differed on the question of sentence to be imposed. **Sinha J.** was of the view that instead of death sentence, life imprisonment would serve the ends of justice. He however, directed that the appellant would not be released from the prison till the end of his life. **Katju J.** was of the view that the appellant deserved death sentence. The matter therefore came up before a Bench of three learned Judges. While dealing with the question of sentence to be imposed, this Court was hesitant in endorsing the death penalty awarded by the trial court and confirmed by the High Court. Paragraph nos. 55 and 56 of the judgment in ***Swamy Shraddananda(2)6*** may be quoted here:

> **"55.** We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The

absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court. The hangman's noose is thus taken off the appellant's neck.

56. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment *when awarded as a substitute for death penalty* would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in *Dalbir Singh* v. *State of Punjab*. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753)

"*14*. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, *at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large*. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

We think that it is time that the course suggested in *Dalbir Singh* should receive a formal recognition by the Court."

56. The discussion in aforesaid paragraph 56 shows the concern that weighed with this Court was the standardization rendering the sentence of life imprisonment in practice as equal to imprisonment for a period of no more than fourteen years. Relying on ***Dalbir Singh*** & ***others*** v. ***State of Punjab***[41] which in turn had considered ***Rajendra Prasad*** v. ***State of U.P.***[42]**,** it was observed that the Court must in appropriate cases put the punishment of life imprisonment awarded as a substitute for death penalty, beyond any remission and direct it to be carried out as directed by the Court. Paragraphs 91 to 93 of the decision in ***Shraddananda(2)*** which gives rise to sub-question (b) of the first question in the Referral Order were as under:

> **"91.** The legal position as enunciated in *Pandit Kishori Lal*, *Gopal Vinayak Godse*, *Maru Ram*, *Ratan Singh* and *Shri Bhagwan* and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.
>
> **92.** The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the

(1979) 3 SCC 745
(1979) 3 SCC 646

same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* besides being in accord with the modern trends in penology."

57. Finally, in paragraph 95 of its Judgment in ***Shraddananda(2)6*** this Court substituted the death sentence given to the appellant to that of imprisonment for life and directed that he would not be released from the prison till the rest of his life. While doing so, this Court made it clear that it was not dealing with powers of the President and the Governor under Article 72 and 161 of the Constitution but only with provisions of commutation, remission etc. as contained in the Cr.P.C. and the Prison Acts, as would be evident from paragraph 77 of the judgment which was to the following effect:-

"77. This takes us to the issue of computation and remission, etc. of sentences. The provisions in regard to computation, remission,

> suspension, etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the States respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission, etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the rules framed by the different States."

58. The decision in ***Shraddananda(2)6*** is premised on the following:

(a) The life imprisonment, though in theory is till the rest of the life or the remainder of life of the prisoner, in practice it is equal to imprisonment for a period of no more than 14 years.

(b) Though in a given case, in the assessment of the Court the case may fall short of the "rarest of rare" category to justify award of death sentence, it may strongly feel that a sentence of life imprisonment which normally works out to a term of fourteen years may be grossly disproportionate and inadequate.

(c) If the options are limited only to these two punishments the Court may feel tempted and find itself nudged into endorsing the death penalty, which course would be disastrous.

(d) The Court may therefore take recourse to the expanded option namely the hiatus between imprisonment for fourteen years and the death sentence, if the facts of the case justify.

(e) The unsound way in which remissions are granted in cases of life

imprisonment makes out a strong case to make a special category for the very few cases where the death penalty is substituted for imprisonment of life.

(f) While awarding life imprisonment the Court may specify that the prisoner must actually undergo minimum sentence of period in excess of fourteen years or that he shall not be released till the rest of his life and/or put such sentence beyond the application of remission.

The view so taken in ***Shraddananda(2)6*** has been followed in some of the later Bench decisions of this Court. It is the correctness of this view and more particularly whether it is within the powers of the Court to put the sentence of life imprisonment so awarded beyond application of remissions, which is presently in question.

59. We must at the outset state that while commuting the death sentence to that of imprisonment for life, this Court in ***V. Sreedhar*** v. ***Union of India*** (supra)***5*** had not put any fetters or restrictions on the power of commutation and/or remission. In fact paragraph 32 of the decision expressly mentions that the sentence so awarded is subject to any remission granted by the Appropriate Government under Section 432 of Cr.P.C. Strictly speaking, sub-question (b) of the first question does not arise for consideration insofar as the present writ petition is concerned and that precisely was the submission of Mr. Rakesh Dwivedi, learned Senior Advocate. However since the question has been referred for our decision we proceed to deal with said sub-question (b) of

question No.1. Further a doubt has been expressed in ***Sangeet*** v. ***State of Haryana*** (supra) regarding correctness of the decision in ***Shraddananda(2)6*** in following words:

> **"55.** A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in *Swamy Shraddananda* and several other cases, by giving a sentence in a capital offence of 20 years' or 30 years' imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason."

We therefore deal with the question.

60. The decision of this Court in ***Maru Ram (Supra)*** refers to the background which preceded the introduction of Section 433 A in Cr. P.C. The Joint Committee which went into the Indian Penal Code (Amendment) Bill had suggested that a long enough minimum sentence should be suffered by both classes of lifers namely, those guilty of offence where death sentence was one of the alternatives and where the death sentence was commuted to imprisonment for life. Paragraph 5 of the decision in ***Maru Ram*** sets out the

objects and reasons, relevant notes on clauses and the recommendations and was to the following effect:

> **"5.** The Objects and Reasons throw light on the "why" of this new provision:
> "The Code of Criminal Procedure, 1973 came into force on the 1st day of April, 1974. The working of the new Code has been carefully watched and in the light of the experience, it has been found necessary to make a few changes for removing certain difficulties and doubts. The notes on clauses explain in brief the reasons for the amendments."
>
> The notes on clauses give the further explanation:-
> "*Clause 33.—S*ection 432 contains provision relating to powers of the appropriate Government to suspend or remit sentences. The Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, had suggested the insertion of a proviso to Section 57 of the Indian Penal Code to the effect that a person who has been sentenced to death and whose death sentence has been commuted into that of life imprisonment and persons who have been sentenced to life imprisonment for a capital offence should undergo actual imprisonment of 14 years in jail. Since this particular matter relates more appropriately to the Criminal Procedure Code, a new section is being inserted to cover the proviso inserted by the Joint Committee."
>
> This takes us to the Joint Committee's recommendation on Section 57 of the Penal Code that being the inspiration for clause 33. For the sake of completeness, we may quote that recommendation:
> "Section 57 of the Code as proposed to be amended had provided that in calculating fractions of terms of punishment, imprisonment for life should be reckoned as equivalent to rigorous imprisonment for twenty years. In this connection attention of the Committee was brought to the aspect that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years. The Committee feels that such a convict should not be released unless he has served at least fourteen years of imprisonment."

Thus, as against the then prevalent practice or experience where murderers sentenced or commuted to life imprisonment, were being released at the end of 5-6 years, period of 14 years of actual imprisonment was considered sufficient.

61. **Shraddananda(2)6** referred to earlier decision of this Court in ***Dalbir Singh and others v. State of Punjab*** *(supra)*. In that decision, taking cue from English Legislation on abolition of death penalty, a suggestion was made in following words:-

> **"14.** The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in *Rajendra Prasad case*. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder."

62. Committee of Reforms on Criminal Justice System under the Chairmanship of Dr. Justice Malimath in its report submitted in the year 2003 recommended suitable amendments to introduce a punishment higher than life imprisonment and lesser than death penalty, similar to that which exists in USA namely "Imprisonment for life without commutation or remission". The

relevant paragraphs of Malimath Committee Report namely paragraphs 14.7.1 and 14.7.2 were as under:-

"**ALTERNATIVE TO DEATH PENALTY**

14.7.1 Section 53 of the IPC enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of imprisonment for life. At present there is no sentence that can be awarded higher than imprisonment for life and lower than death penalty. In USA a higher punishment called "Imprisonment for life without commutation or remission" is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of rare cases, the Committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 be suitably amended to include "Imprisonment for life without commutation or remission" as one of the punishments.

14.7.2 Wherever imprisonment for life is one of the penalties prescribed under the IPC, the following alternative punishment be added namely "Imprisonment for life without commutation or remission". Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of "Imprisonment for life without remission or commutation" is awarded. This however cannot affect the Power of Pardon etc of the President and the Governor under Articles 72 and 161 respectively."

63. In its report submitted in January 2013, Committee on Amendment to Criminal Law under the chairmanship of Justice J.S. Verma made following recommendations on life imprisonment:-

> "**On Life Imprisonment**
>
> **13**. Before making our recommendation on this subject, we would like to briefly examine the meaning of the expression "life" in the term "life imprisonment", which has attracted considerable judicial attention.
>
> **14**. *Mohd. Munna v. Union of India* reported in 2005 (7) SCC 417 reiterates the well settled judicial opinion that a sentence of imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convict's natural life. This opinion was recently restated in ***Rameshbhai Chandubhai Rathode v. State of Gujarat*** reported in 2011(2) SCC 764, and State of U.P. v. Sanjay Kumar reported in 2012(8) SCC 537, where the Supreme Court affirmed that life imprisonment cannot be equivalent to imprisonment for 14 or 20 years, and that it actually means (and has always meant) imprisonment for the whole natural life of the convict.
>
> **15**. We therefore recommend a legislative clarification that life imprisonment must always mean imprisonment "for 'the entire natural life of the convict'."

Pursuant to these recommendations, certain Sections were added in the IPC while other Sections were substantially amended by Criminal Law Amendment Act of 2013 (Act 13 of 2013). As a result Sections 370(6), 376-A, 376-D and 376-E now prescribe a punishment of "with imprisonment for life which shall mean imprisonment for the remainder of that persons natural life". Thus what was implicit in the sentence for imprisonment of life as laid down in Godse and followed since then has now been made explicit by the Parliament in

certain Sections of the IPC. However, none of the amendments reflected the introduction of punishment suggested by Malimath Committee.

64. Thus despite recommendations of Justice Malimath Committee to introduce a punishment higher than life imprisonment and lesser than death penalty similar to the one which exists in USA, Parliament has chosen not to act in terms of recommendations for last 12 years. In this backdrop, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that in Shraddananda(2)[6] this court in fact carved out and created a new form of punishment and resorted to making a legislation on the point. It was further submitted that Section 433A of Cr.P.C. prescribes minimum actual imprisonment which must be undergone in cases of life imprisonment on two counts, where death sentence is one of the alternatives or where death sentence is commuted to imprisonment for life. Even the prisoner who at one point of time was awarded a death sentence is entitled, upon his death sentence being commuted to life imprisonment, to be considered under Section 433A. In his submission, it would not be within the powers of the court to put the sentence of life imprisonment in such cases beyond application of remissions, in the teeth of the Statute. Mr. T.R. Andhyarujina, learned Senior Advocate appearing for one of the intervenors submitted that what is within the domain of the judiciary is power to grant or award sentence as prescribed and when it comes to its execution the domain is that of the executive. In his submission howsoever strong be the temptation on account of gravity of the crime, there could be no

trenching into the power of the executive. He submitted that it is not for the judiciary to say that there could be no commutation at all, which would be violative of the concept of separation of powers. Reliance was placed on Section 32A of NDPS Act to contend that wherever the Parliament intended that there be no remissions in respect of any offence, it has chosen to say so in specific terms.

65. In a recent decision of this Court in ***Vikram Singh*** @ Vicky & ***another v. Union of India and others***[43]**,** while considering challenge to the award of death sentence for an offence under Section 364A of the IPC this Court considered various decisions on the issue of punishment. It considered some American decisions holding that fixing of prison terms for specific crimes involves a substantive penalogical judgment which is properly within the province of legislatures and not courts and that the responsibility for making fundamental choices and implementing them lies with the legislature. In the end, the conclusions (b), (c) and (d) as summed up by this Court were as under:

> "(b) Prescribing punishment is the function of the legislature and not the Courts.
>
> (c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that the necessary to meet those needs.
>
> (d) Court show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences."

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66. Section 302 IPC prescribes two punishments, the maxima being the death sentence and the minima to be life sentence. **Shraddananada(2)**[6] proceeds on the footing that the court may in certain cases take recourse to the expanded option namely the hiatus between imprisonment for 14 years and the death sentence, if the facts of the case so justify. The hiatus thus contemplated is between the minima i.e. 14 years and the maxima being the death sentence. In fact going by the punishment prescribed in the statute there is no such hiatus between the life imprisonment and the death sentence. There is nothing that can stand in between these two punishments as life imprisonment, going by the law laid down in Godse's case is till the end of one's life. What **Shraddananda(2)**[6] has done is to go by the practical experience of the life imprisonment getting reduced to imprisonment for a period of not more that 14 years and assess that level to be the minima and then consider a hiatus between that level and the death sentence. In our view this assumption is not correct. What happens on the practical front cannot be made basis for creating a sentence by the Courts. That part belongs specifically to the legislature. If the experience in practice shows that remissions are granted in unsound manner, the matter can be corrected in exercise of judicial review. In any case in the light of our discussion in answer to Question in Para 52.6, in cases of remissions under Section 432/433 of Cr.P.C. an approach will necessarily have to be made to the Court, which will afford sufficient check and balance.

67. It may be relevant to note at this state that in England and Wales, the

mandatory life sentence for murder is contained in Section 1(1) of the Murder (Abolition of the Death Penalty) Act, 1965. The Criminal Justice Act, 2003 empowers a trial judge, in passing a mandatory life sentence, to determine the minimum term which the prisoner must serve before he is eligible for early release on licence. The statute allows the trial judge to decide that because of the seriousness of the offence, the prisoner should not be eligible for early release (in effect to make a "whole life order" that is to say till the end of his life.

In effect, the recommendations of Malimath Committee were on similar lines to add a new form of punishment which could similarly empower the Courts to impose such punishment and state that the prisoner would not be entitled to remissions. Section 32A of the NDPS Act is also an example in that behalf.

What is crucial to note is the specific empowerment under the Statute by which a prisoner could be denied early release or remissions.

It ma

68. Shraddananda (2)[6] does not proceed on the ground that upon interpretation of the concerned provision such as Section 302 of the IPC, such punishment is available for the court to impose. If that be so it would be available to even the first court i.e. Sessions Court to impose such sentence and put the matter beyond any remissions. In a given case the matter would not go

before the superior court and it is possible that there may not be any further assessment by the superior court. If on the other hand one were to say that the power could be traceable to the power of confirmation in a death sentence which is available to the High Court under Chapter XXVIII of Cr.P.C., even the High Court while considering death reference could pass only such sentence as is available in law. Could the power then be traced to Article 142 of the Constitution?

69. In ***Prem Chand Garg and another v. Excise Commissioner, U.P. and others***[44], Constitution Bench of this Court observed:-

> "….The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws…."(emphasis added)

In ***Supreme Court Bar Association*** *v.* ***Union of India & another***[45] while dealing with exercise of powers under Article 142 of Constitution, it was observed :-

> **"47.** The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are *complementary* to those powers which are *specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very

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1998 (4) SCC 409

wide amplitude and are in the nature of *supplementary* powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, *to prevent injustice* in the process of litigation and *to do complete justice between the parties*. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary *whenever it is just and equitable to do so* and in particular to ensure the observance of the due process of law, *to do complete justice between the parties*, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., *to do complete justice between the parties*. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties."(emphasis added)

70. Further, in theory it is possible to say that even in cases where court were to find that the offence belonged to the category of "rarest of rare" and deserved death penalty, such death convicts can still be granted benefit under Section 432/433 of Cr.P.C. In fact, Section 433A contemplates such a situation. On the

other hand, if the court were to find that the case did not belong to the "rarest of rare" category and were to put the matter beyond any remissions, the prisoner in the latter category would stand being denied the benefit which even the prisoner of the level of a death convict could possibly be granted under Section 432/433 of the Cr.P.C. The one who in the opinion of the Court deserved death sentence can thus get the benefit but the one whose case fell short to meet the criteria of "rarest of rare" and the Court was hesitant to grant death sentence, would languish in Jail for entirety of his life, without any remission. If absolute 'irrevocability of death sentence' weighs with the Court in not awarding death sentence, can the life imprisonment ordered in the alternative be so directed that the prospects of remissions on any count stand revoked for such prisoner. In our view, it cannot be so ordered.

71. We completely share the concern as expressed in ***Shraddananda(2)6*** that at times remissions are granted in extremely unsound manner but in our view that by itself would not and ought not to nudge a judge into endorsing a death penalty. If the offence in question falls in the category of the "rarest of rare" the consequence may be inevitable. But that cannot be a justification to create a new form of punishment putting the matter completely beyond remission. Parliament having stipulated mandatory minimum actual imprisonment at the level of 14 years, in law a prisoner would be entitled to apply for remission under the statute. If his case is made out, it is for the executive to consider and pass appropriate orders. Such orders would inter alia consider not only the

gravity of the crime but also other circumstances including whether the prisoner has now been de-sensitized and is ready to be assimilated in the society. It would not be proper to prohibit such consideration by the executive. While doing so and putting the matter beyond remissions, the court would in fact be creating a new punishment. This would mean- though a model such a Section 32A was available before the Legislature and despite recommendation by Malimath Committee, no such punishment was brought on the Statute yet the Court would create such punishment and enforce it in an individual case. In our view, that would not be permissible.

72. In ***Pravasi Bhalai Sangathan*** v. ***Union of India and others*** [46], while emphasizing that the court cannot rewrite, recast or reframe the legislation it was observed as under:-

> "**20.** Thus, it is evident that the legislature had already provided sufficient and effective remedy for prosecution of the authors who indulge in such activities. In spite of the above, the petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the Judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised public eyebrows time and again."

2014(11) SCC 477

Similarly in ***Sushil Kumar Sharma*** v. ***Union of India and others***[47], it was observed that if the provision of law is misused and subjected to the abuse, it is for the legislation to amend modify or repeal it, if deemed necessary.

73. The power under Section 432/433 Cr.P.C. and the one exercisable under Articles 72 and 161 of the Constitution, as laid down in ***Maru Ram*** (supra) are streams flowing in the same bed. Both seek to achieve salutary purpose. As observed in ***Kehar Singh*** (supra) in Clemency jurisdiction it is permissible to examine whether the case deserves the grant of relief and cut short the sentence in exercise of executive power which abridges the enforcement of a judgment. Clemency jurisdiction would normally be exercised in the exigencies of the case and fact situation as obtaining when the occasion to exercise the power arises. Any order putting the punishment beyond remission will prohibit exercise of statutory power designed to achieve same purpose under Section 432/433 Cr.P.C.. In our view Courts cannot and ought not deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner would be condemned to live in the prison till the last breath without there being even a ray of hope to come out. This stark reality will not be conducive to reformation of the person and will in fact push him into a dark hole without there being semblance of the light at the end of the tunnel.

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[47] (2005) 6 SCC 281

74. As stated in ***Prem Chand Garg*** (supra) an order in exercise of power under Article 142 of the Constitution of India must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. In ***A.R. Antulay*** v. ***R.S. Naik***[48]a direction by which the petitioner was denied a statutory right of appeal was recalled. A fortiorari, a statutory right of approaching the authority under Section 432/433 Cr.P.C. which authority can, as laid down in ***Kehar Singh*** (supra) and ***Epuru Sudhakar*** (supra) eliminate the effect of conviction, cannot be denied under the orders of the Court.

75. The law on the point of life imprisonment as laid down in Godse's case (supra) is clear that life imprisonment means till the end of one's life and that by very nature the sentence is indeterminable. Any fixed term sentence characterized as minimum which must be undergone before any remission could be considered, cannot affect the character of life imprisonment but such direction goes and restricts the exercise of power of remission before the expiry of such stipulated period. In essence, any such direction would increase or expand the statutory period prescribed under Section 433A of Cr.P.C. Any such stipulation of mandatory minimum period inconsistent with the one in Section 433A, in our view, would not be within the powers of the Court.

Our answer to Sub Question (b) of Question in Para 52.1 is:

(1988) 2 SCC 602

Question b: Whether as per the principles enunciated in paragraphs 91 to 93 of ***Swamy Shraddananda(2)6***, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Answer. In our view, it would not be open to the Court to make any special category of sentence in substitution of death penalty and put that category beyond application of remission, nor would it be permissible to stipulate any mandatory period of actual imprisonment inconsistent with the one prescribed under Section 433A of Cr. P.C.

76. Reference answered accordingly.

W. P (CRL.) Nos.185, 150, 66 OF 2014 & Crl. Appeal NO.1215 OF 2011

These Writ Petitions and Criminal Appeal are disposed of in terms of the decision in Writ Petition (Criminal) No.48 of 2014.

77. Our conclusions in respect of Questions referred in the Referral Order, except in respect of sub question (b) of Question in Para 52.1 of the Referral Order, are in conformity with those in the draft judgment of Hon'ble Kalifulla J. Since our view in respect of sub question (b) of Question in Para 52.1 of the Referral Order is not in agreement with that of Hon'ble Kalifulla J., while placing our view we have dealt with other questions as well.

……..…….J.
(Abhay Manohar Sapre)

……..…….J.
(Uday Umesh Lalit)

New Delhi,
December 2, 2015

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (Crl.) No. 48 OF 2014

Union of India .....Petitioner(s)

VERSUS

V. Sriharan @ Murugan & Ors. .....Respondent(s)

With

Writ Petition (Crl.) No.185/2014
Writ Petition (Crl.) No.150/2014
Writ Petition (Crl.) No.66/2014
Criminal Appeal No.1215/2011

Abhay Manohar Sapre, J.

1. I have had the benefit of reading the elaborate, well considered and scholarly written two separate draft opinions proposed to be pronounced by my learned Brothers Justice Fakkir Mohamed Ibrahim Kalifulla and Justice Uday Umesh Lalit.

2. Having gone through the opinions of both the learned Brothers very carefully and minutely, with respect, I am in agreement with the reasoning and the conclusion arrived at by my Brother Justice Uday Umesh Lalit in answering the reference.

3. Since I agree with the line of reasoning and the conclusion

arrived at by my Brother Justice Uday Umesh Lalit while answering the questions referred to this Bench, I do not consider it necessary to give my separate reasoning nor do I wish to add anything more to what has been said by Brother Lalit J. in his opinion.

4. In my view, it is only when some issues are not dealt with or though dealt with but requires some elaboration, the same can be supplemented while concurring. I, however, do not find any scope to meet such eventuality in this case and therefore no useful purpose would be served in writing an elaborate concurring opinion.

.....J.
[ABHAY MANOHAR SAPRE]

New Delhi;
December 02, 2015.

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (CRL.)NO.48 OF 2014

UNION OF INDIA … PETITIONER(S)

VERSUS

V. SRIHARAN @ MURUGAN AND ORS. ... RESPONDENT(S)

WITH

WRIT PETITION (CRL.) NO.185 OF 2014

WITH

WRIT PETITION (CRL.) NO.150 OF 2014

WITH

WRIT PETITION (CRL.) NO.66 OF 2014

AND WITH

CRIMINAL APPEAL NO.1215 OF 2011

O R D E R

Now that we have answered the Reference in the matters, the matters will now be listed before an appropriate three learned Judges' Bench for appropriate

orders and directions in the light of the majority Judgment of this Court.

.....CJI
(H.L. DATTU)

….....J.
(FAKKIR MOHAMED IBRAHIM KALIFULLA)

.....J.
(PINAKI CHANDRA GHOSE)

….....J.
(ABHAY MANOHAR SAPRE)

….....J.
(UDAY UMESH LALIT)

NEW DELHI,
DECEMBER 02, 2015.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. 13 OF 2015

Supreme Court Advocates-on-Record -
Association and another ... Petitioner(s)

versus

Union of India ... Respondent(s)

With

WRIT PETITION (C) NO. 14 OF 2015
WRIT PETITION (C) NO. 18 OF 2015
WRIT PETITION (C) NO. 23 OF 2015
WRIT PETITION (C) NO. 24 OF 2015
WRIT PETITION (C) NO. 70 OF 2015
WRIT PETITION (C) NO. 83 OF 2015
WRIT PETITION (C) NO. 108 OF 2015
WRIT PETITION (C) NO. 124 OF 2015
WRIT PETITION (C) NO. 209 OF 2015
WRIT PETITION (C) NO. 309 OF 2015
WRIT PETITION (C) NO. 310 OF 2015
WRIT PETITION (C) NO. 323 OF 2015
WRIT PETITION (C) NO. 341 OF 2015
TRANSFER PETITION(C) NO. 391 OF 2015
TRANSFER PETITION (C) NO. 971 OF 2015

J U D G M E N T

Jagdish Singh Khehar, J.

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THE RECUSAL ORDER

1. In this Court one gets used to writing common orders, for orders are written either on behalf of the Bench, or on behalf of the Court. Mostly, dissents are written in the first person. Even though, this is not an order in the nature of a dissent, yet it needs to be written in the first person. While endorsing the opinion expressed by J. Chelameswar, J., adjudicating upon the prayer for my recusal, from hearing the matters in hand, reasons for my continuation on the Bench, also need to be expressed by me. Not for advocating any principle of law, but for laying down certain principles of conduct.

2. This order is in the nature of a prelude – a precursor, to the determination of the main controversy. It has been necessitated, for deciding an objection, about the present composition of the Bench. As already noted above, J. Chelameswar, J. has rendered the decision on the objection. The events which followed the order of J. Chelameswar, J., are also of some significance. In my considered view, they too need to be narrated, for only then, the entire matter can be considered to have been fully expressed, as it ought to be. I also need to record reasons, why my continuation on the reconstituted Bench, was the only course open to me. And therefore, my side of its understanding, dealing with the perception, of the other side of the Bench.

3(i) A three-Judge Bench was originally constituted for hearing these matters. The Bench comprised of Anil R. Dave, J. Chelameswar and Madan B. Lokur, JJ.. At that juncture, Anil R. Dave, J. was a part of the

1+2 collegium, as also, the 1+4 collegium. The above combination heard the matter, on its first listing on 11.3.2015. Notice returnable for 17.3.2015 was issued on the first date of hearing. Simultaneously, hearing in Y. Krishnan v. Union of India and others, Writ Petition (MD) No.69 of 2015, pending before the High Court of Madras (at its Madurai Bench), wherein the same issues were being considered as the ones raised in the bunch of cases in hand, was stayed till further orders.

(ii) On the following date, i.e., 17.3.2015 Mr. Fali S. Nariman, Senior Advocate, in Supreme Court Advocates-on-Record Association v. Union of India (Writ Petition (C) No.13 of 2015), Mr. Anil B. Divan, Senior Advocate, in Bar Association of India v. Union of India (Writ Petition (C) No.108 of 2015), Mr. Prashant Bhushan, Advocate, in Centre for Public Interest Litigation v. Union of India (Writ Petition (C) No.83 of 2015) and Mr. Santosh Paul, Advocate, in Change India v. Union of India (Writ Petition (C) No.70 of 2015), representing the petitioners were heard. Mr. Mukul Rohatgi, Attorney General for India, advanced submissions in response. The matter was shown as part-heard, and posted for further hearing on 18.3.2015.

(iii) The proceedings recorded by this Court on 18.3.2015 reveal, that Mr. Santosh Paul, (in Writ Petition (C) No.70 of 2015) was heard again on 18.3.2015, whereupon, Mr. Mukul Rohatgi and Mr. Ranjit Kumar, Solicitor General of India, also made their submissions. Thereafter, Mr. Dushyant A. Dave, Senior Advocate – and the President of Supreme

Court Bar Association, addressed the Bench, as an intervener. Whereafter, the Court rose for the day. On 18.3.2015, the matter was adjourned for hearing to the following day, i.e., for 19.3.2015.

(iv) The order passed on 19.3.2015 reveals, that submissions were advanced on that date, by Mr. Dushyant A. Dave, Mr. Mukul Rohatgi, Mr. T.R. Andhyarujina, Senior Advocate, and Mr. Mathews J. Nedumpara. When Mr. Fali S. Nariman was still addressing the Bench, the Court rose for the day, by recording *inter alia,* "The matters remained Part-heard." Further hearing in the cases, was deferred to 24.3.2015.

(v) On 24.3.2015, Mr. Fali S. Nariman and Mr. Anil B. Divan, were again heard. Additionally, Mr. Mukul Rohatgi concluded his submissions. On the conclusion of hearing, judgment was reserved. On 24.3.2015, a separate order was also passed in Writ Petition (C) No.124 of 2015 (Mathews J. Nedumpara v. Supreme Court of India, through Secretary General and others). It read as under:

"The application filed by Mr. Mathews J. Nedumpara to argue in person before the Court is rejected. The name of Mr. Robin Mazumdar, AOR, who was earlier appearing for him, be shown in the Cause List."

(vi) On 7.4.2015, the following order came to be passed by the three-Judge Bench presided by Anil R. Dave, J.:

"1. In this group of petitions, validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointment Commission Act, 2014 (hereinafter referred to as `the Act') has been challenged. The challenge is on the ground that by virtue of the aforestated amendment and enactment of the Act, basic structure of the Constitution of India has been altered and therefore, they should be set aside.

2. We have heard the learned counsel appearing for the parties and the parties appearing in-person at length.

3. It has been mainly submitted for the petitioners that all these petitions should be referred to a Bench of Five Judges as per the provisions of Article 145(3) of the Constitution of India for the reason that substantial questions of law with regard to interpretation of the Constitution of India are involved in these petitions. It has been further submitted that till all these petitions are finally disposed of, by way of an interim relief it should be directed that the Act should not be brought into force and the present system with regard to appointment of Judges should be continued.

4. Sum and substance of the submissions of the counsel opposing the petition is that all these petitions are premature for the reason that the Act has not come into force till today and till the Act comes into force, cause of action can not be said to have arisen. In the circumstances, according to the learned counsel, the petitions should be rejected.

5. The learned counsel as well as parties in-person have relied upon several judgments to substantiate their cases.

6. Looking at the facts of the case, we are of the view that these petitions involve substantial questions of law as to the interpretation of the Constitution of India and therefore, we direct the Registry to place all the matters of this group before Hon'ble the Chief Justice of India so that they can be placed before a larger Bench for its consideration.

7. As we are not deciding the cases on merits, we do not think it appropriate to discuss the submissions made by the learned counsel and the parties in-person.

8. It would be open to the petitioners to make a prayer for interim relief before the larger bench as we do not think it appropriate to grant any interim relief at this stage."

4. During the hearing of the cases, Anil R. Dave, J. did not participate in any collegium proceedings.

5. Based on the order passed by the three-Judge Bench on 7.4.2015, Hon'ble the Chief Justice of India, constituted a five-Judge Bench, comprising of Anil R. Dave, Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ.

6. On 13.4.2015 the Constitution (Ninety-ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014,

were notified in the Gazette of India (Extraordinary). Both the above enactments, were brought into force with effect from 13.4.2015. Accordingly, on 13.4.2015 Anil R. Dave, J. became an *ex officio* Member of the National Judicial Appointments Commission, on account of being the second senior most Judge after the Chief Justice of India, under the mandate of Article 124A (1)(b).

7. When the matter came up for hearing for the first time, before the five-Judge Bench on 15.4.2015, it passed the following order:

"List the matters before a Bench of which one of us (Anil R. Dave, J.) is not a member."

It is, therefore, that Hon'ble the Chief Justice of India, reconstituted the Bench with myself, J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh Kumar Goel, JJ., to hear this group of cases.

8. When the reconstituted Bench commenced hearing on 21.4.2015, Mr. Fali S. Nariman made a prayer for my recusal from the Bench, which was seconded by Mr. Mathews J. Nedumpara (petitioner-in-person in Writ Petition (C) No.124 of 2015), the latter advanced submissions, even though he had been barred from doing so, by an earlier order dated 24.3.2015 (extracted above). For me, to preside over the Bench seemed to be imprudent, when some of the stakeholders desired otherwise. Strong views were however expressed by quite a few learned counsel, who opposed the prayer. It was submitted, that a prayer for recusal had earlier been made, with reference to Anil R. Dave, J. It was pointed out, that the above prayer had resulted in his having exercised the option to

step aside (– on 15.4.2015). Some learned counsel went to the extent of asserting, that the recusal of Anil R. Dave, J. was not only unfair, but was also motivated. It was also suggested, that the Bench should be reconstituted, by requesting Anil R. Dave, J. to preside over the Bench. The above sequence of facts reveals, that the recusal by Anil R. Dave, J. was not at his own, but in deference to a similar prayer made to him. Logically, if he had heard these cases when he was the presiding Judge of the three-Judge Bench, he would have heard it, when the Bench strength was increased, wherein, he was still the presiding Judge.

9(i) Mr. Fali S. Nariman strongly refuted the impression sought to be created, that he had ever required Anil R. Dave, J. to recuse. In order to support his assertion, he pointed out, that he had made the following request in writing on 15.4.2015:

"The provisions of the Constitution (Ninety-Ninth Amendment) Act, 2014 and of the National Judicial Appointments Commission Act, 2014 have been brought into force from April 13, 2015. As a consequence, the Presiding Judge on this Bench, the Hon'ble Mr. Justice Anil R. Dave, has now become (not out of choice but by force of Statute) a member *ex officio* of the National Judicial Appointments Commission, whose constitutional validity has been challenged.

It is respectfully submitted that it would be appropriate if it is declared at the outset – by an order of this Hon'ble Court – that the Presiding Judge on this Bench will take no part whatever in the proceedings of the National Judicial Appointments Commission."

Learned senior counsel pointed out, that he had merely requested the then presiding Judge (Anil R. Dave, J.) not to take any part in the proceedings of the National Judicial Appointments Commission, during

the hearing of these matters. He asserted, that he had never asked Anil R. Dave, J. not to hear the matters pending before the Bench.

(ii) The submission made in writing by Mr. Mathews J. Nedumpara for the recusal of Anil R. Dave, J. was in the following words:

"….. VI. Though Hon'ble Shri Justice Anil R. Dave, who heads the Three-Judge Bench in the instant case, is a Judge revered and respected by the legal fraternity and the public at large, a Judge of the highest integrity, ability and impartiality, still the doctrine of *nemo iudex in sua causa* or *nemo debet esse judex in propria causa* – no one can be judge in his own cause – would require His Lordship to recuse himself even at this stage since in the eye of the 120 billion ordinary citizens of this country, the instant case is all about a law whereunder the exclusive power of appointment invested in the Judges case is taken away and is invested in the fair body which could lead to displeasure of the Judges and, therefore, the Supreme Court itself deciding a case involving the power of appointment of Judges of the Supreme Court will not evince public credibility. The question then arises is as to who could decide it. The doctrine of necessity leaves no other option then the Supreme Court itself deciding the question. But in that case, it could be by Judges who are not part of the collegium as of today or, if an NJAC is to be constituted today, could be a member thereof. With utmost respect, Hon'ble Shri Justice Dave is a member of the collegium; His Lordship will be a member of the NJAC if it is constituted today. Therefore, there is a manifest conflict of interest.

VII. Referendum. In Australia, a Constitutional Amendment was brought in, limiting the retirement age of Judges to 70 years. Instead of the Judges deciding the correctness of the said decision, the validity of the amendment was left to be decided by a referendum, and 80% of the population supported the amendment. Therefore, the only body who could decide whether the NJAC as envisaged is acceptable or not is the people of this country upon a referendum.

VIII. The judgment in *Judges-2*, which made the rewriting of the Constitution, is void ab initio. The said case was decided without notice to the pubic at large. Only the views of the government and Advocates on record and a few others were heard. In the instant case, the public at large ought to be afforded an opportunity to be heard; at least the major political parties, and the case should be referred to Constitutional Bench. The constitutionality of the Acts ought to be decided, brushing aside the feeble, nay, apologetical plea of the learned Attorney General that the Acts have been brought into force and their validity cannot be challenged, and failing to come forward and state in candid terms that the Acts are the will of the people, spoken through their elected representatives and

that too without any division, unanimous. The plea of the Advocates on Record Association that the notification bringing into force the said Acts be stayed be rejected forthwith; so too its demand that the collegium system, which has ceased to be in existence, be allowed to be continued and appointments to the august office of Judges of High Courts and Supreme Court on its recommendation, for to do so would mean that Judges of the High Courts who are currently Chief Justices because they were appointed at a young age in preference over others will be appointed as Judges of the Supreme Court and if that is allowed to happen, it may lead to a situation where the Supreme Court tomorrow will literally be packed with sons and sons-in-law of former Judges. There are at least three Chief Justices of High Courts who are sons of former Judges of the Supreme Court. The Petitioner is no privy to any confidential information, not even gossips. Still he believes that if the implementation of the NJAC is stayed, three sons of former Judges of the Supreme Court could be appointed as Judges of the Supreme Court. The Petitioner has absolutely nothing personal against any of those Judges; the issue is not at all about any individual. The Petitioner readily concedes, and it is a pleasure to do so, that few of them are highly competent and richly deserving to be appointed.

IX. Equality before law and equal protection of law in the matter of public employment. The office of the Judge of the High Court and Supreme Court, though high constitutional office, is still in the realm of public employment, to which every person eligible ought to be given an opportunity to occupy, he being selected on a transparent, just, fair and non-arbitrary system. The Petitioner reiterates that he could be least deserving to be appointed when considered along with others of more meritorious than him, but the fact that since he satisfies all the basic eligibility criteria prescribed under Articles 124A, as amended, and 217, he is entitled to seek a declaration at the hands of this Hon'ble Court that an open selection be made by advertisement of vacancies or such other appropriate mechanism.

X. Judicial review versus democracy. Judicial review is only to prevent unjust laws to be enacted and the rights of the minorities, whatever colour they could be in terms of religion, race, views they hold, by a legislation which enjoys brutal majority and an of the executive which is tyrannical. It is no way intended to substitute the voice of the people by the voice of the high judiciary.

XI. Article 124A, as amended, is deficient only in one respect. The collegium contemplated thereunder is still fully loaded in favour of the high judiciary. Three out of the six members are Judges. In that sense it is failing to meet to be just and democratic. But the Parliament has in its wisdom enacted so and if there is a complaint, the forum is to generate public opinion and seek greater democracy. The Petitioner is currently not interested in that; he is happy with the Acts as enacted and the principal relief which he seeks in the instant petition is the immediate

coming into force of the said Acts by appropriate notification and a mandamus to that effect at the hands of this Hon'ble Court."

10. When my recusal from the reconstituted Bench was sought on 21.4.2015, I had expressed unequivocally, that I had no desire to hear the matters. Yet, keeping in view the reasons expressed in writing by Mr. Fali S. Nariman, with reference to Anil R. Dave, J. I had disclosed in open Court, that I had already sent a communication to Hon'ble the Chief Justice of India, that I would not participate in the proceedings of the 1+4 collegium (of which I was, a member), till the disposal of these matters. Yet, the objection was pressed. It needs to be recorded that Anil R. Dave, J. was a member of the 1+2 collegium, as well as, the 1+4 collegium from the day the hearing in these matters commenced. Surprisingly, on that account, his recusal was never sought, and he had continued to hear the matters, when he was so placed (from 11.3.2015 to 7.4.2015). But for my being a member of the 1+4 collegium, a prayer had been made for my recusal.

11. It was, and still is, my personal view, which I do not wish to thrust either on Mr. Fali S. Nariman, or on Mr. Mathews J. Nedumpara, that Anil R. Dave, J. was amongst the most suited, to preside over the reconstituted Bench. As noticed above, he was a part of the 1+2 collegium, as also, the 1+4 collegium, under the 'collegium system'; he would continue to discharge the same responsibilities, as an *ex officio* Member of the National Judicial Appointments Commission, in the 'Commission system', under the constitutional amendment enforced with

effect from 13.4.2015. Therefore, irrespective of the system which would survive the adjudicatory process, Anil R. Dave, J. would participate in the selection, appointment and transfer of Judges of the higher judiciary. He would, therefore, not be affected by the determination of the present controversy, one way or the other.

12. The prayer for my recusal from the Bench was pressed by Mr. Fali S. Nariman, Senior Advocate, in writing, as under:

"8. In the present case the Presiding Judge, (the Hon'ble Mr. Justice J.S. Khehar) by reason of judgments reported in the Second Judges case Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, (reaffirmed by unanimously by a Bench of 9 Judges in the Third Judges case Special Reference No.1 of 1998, Re. (1998 7 SCC 739), is at present a member of the Collegium of five Hon'ble Judges which recommends judicial appointments to the Higher Judiciary, which will now come under the ambit of the National Judicial Appointments Commission set up under the aegis of the Constitution (Ninety-ninth Amendment) Act, 2014 read with National Judicial Appointments Commission Act No.40 of 2014 – if valid; but the constitutional validity of these enactments has been directly challenged in these proceedings.
The position of the Presiding Judge on this Bench hearing these cases of constitutional challenge is not consistent with (and apparently conflicts with) his position as a member of the 'collegium'; and is likely to be seen as such; always bearing in mind that if the Constitution Amendment and the statute pertaining thereto are held constitutionally valid and are upheld, the present presiding Judge would no longer be part of the Collegium – the Collegium it must be acknowledged exercises significant constitutional power.
9. In other words would it be inappropriate for the Hon'ble Presiding Judge to continue to sit on a Bench that adjudicates whether the Collegium system, (as it is in place for the past two decades and is stated (in the writ petitions) to be a part of the basic structure of the Constitution), should continue or not continue. The impression in peoples mind would be that it is inappropriate if not unfair if a sitting member of a Collegium sits in judgment over a scheme that seeks to replace it. This is apart from a consideration as to whether or not the judgment is (or is not) ultimately declared invalid or void: whether in the first instance or by Review or in a Curative Petition."

The above prayer for my recusal was supported by Mr. Mathews J. Nedumpara, petitioner-in-person, in writing, as under:

".....Hon'ble Shri Justice J.S. Khehar, the presiding Judge, a Judge whom the Petitioner holds in high esteem and respect, a Judge known for his uprightness, impartiality and erudition, the Petitioner is afraid to say, ought not to preside over the Constitution Bench deciding the constitutional validity or otherwise of the Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 ("the said Acts", for short). His Lordship will be a member of the collegium if this Hon'ble Court were to hold that the said Acts are unconstitutional or to stay the operation of the said Acts, for, if the operation of the Acts is stayed, it is likely to be construed that the collegium system continues to be in force by virtue of such stay order. Though Hon'ble Shri Justice J.S. Khehar is not a member of the National Judicial Appointments Commission, for, if the NJAC is to be constituted today, it will be consisting of the Hon'ble Chief Justice of India and two seniormost Judges of this Hon'ble Court. With the retirement of Hon'ble Shri H.L. Dattu, Chief Justice of India, His Lordship Hon'ble Shri Justice J.S. Khehar will become a member of the collegium. Therefore, an ordinary man, nay, an informed onlooker, an expression found acceptance at the hands of this Hon'ble Court on the question of judicial recusal, will consider that justice would not have been done if a Bench of this Hon'ble Court headed by Hon'ble Shri Justice J.S. Khehar were to hear the above case. For a not so informed onlooker, the layman, the *aam aadmi,* this Hon'ble Court hearing the Writ Petitions challenging the aforesaid Acts is nothing but a fox being on the jury at a goose's trial. The Petitioner believes that the Noble heart of his Lordships Justice Khehar could unwittingly be influenced by the nonconscious, subconscious, unconscious bias, his Lordships having been placed himself in a position of conflict of interest.

3. This Hon'ble Court itself hearing the case involving the power of appointment of Judges between the collegium and the Government, nay, the executive, will not evince any public confidence, except the designated senior lawyers who seem to be supporting the collegium system. The collegium system does not have any confidence in the ordinary lawyers who are often unfairly treated nor the ordinary litigants, the *Daridra Narayanas*, to borrow an expression from legendary Justice Krishna Iyer, who considered that the higher judiciary, and the Supreme Court in particular, is beyond the reach of the ordinary man. An ordinary lawyer finds it difficult to get even an entry into the Supreme Court premises. This is the stark reality, though many prefer to pretend not to notice it. Therefore, the Petitioner with utmost respect, while literally worshipping the majesty of this Hon'ble Court, so too the Hon'ble presiding Judge of this Hon'ble Court, in all humility, with an apology, if

the Petitioner has erred in making this plea, seeks recusal by Hon'ble Shri Justice J.S. Khehar from hearing the above case."

13. As a Judge presiding over the reconstituted Bench, I found myself in an awkward predicament. I had no personal desire to participate in the hearing of these matters. I was a part of the Bench, because of my nomination to it, by Hon'ble the Chief Justice of India. My recusal from the Bench at the asking of Mr. Fali S. Nariman, whom I hold in great esteem, did not need a second thought. It is not as if the prayer made by Mr. Mathews J. Nedumpara, was inconsequential.

14. But then, this was the second occasion when proceedings in a matter would have been deferred, just because, Hon'ble the Chief Justice of India, in the first instance, had nominated Anil R. Dave, J. on the Bench, and thereafter, had substituted him by nominating me to the Bench. It was therefore felt, that reasons ought to be recorded, after hearing learned counsel, at least for the guidance of Hon'ble the Chief Justice of India, so that His Lordship may not make another nomination to the Bench, which may be similarly objected to. This, coupled with the submissions advanced by Mr. Mukul Rohatgi, Mr. Harish N. Salve and Mr. K.K. Venugopal, that parameters should be laid down, led to a hearing, on the issue of recusal.

15. On the basis of the submissions advanced by the learned counsel, the Bench examined the prayer, whether I should remain on the reconstituted Bench, despite my being a member of the 1+4 collegium. The Bench, unanimously concluded, that there was no conflict of

interest, and no other justifiable reason in law, for me to recuse from the hearing of these matters. On 22.4.2015, the Bench passed the following short order, which was pronounced by J. Chelameswar, J.:

"A preliminary objection, whether Justice Jagdish Singh Khehar should preside over this Bench, by virtue of his being the fourth senior most Judge of this Court, also happens to be a member of the collegium, was raised by the petitioners. Elaborate submissions were made by the learned counsel for the petitioners and the respondents. After hearing all the learned counsel, we are of the unanimous opinion that we do not see any reason in law requiring Justice Jagdish Singh Khehar to recuse himself from hearing the matter. Reasons will follow."

16. After the order was pronounced, I disclosed to my colleagues on the Bench, that I was still undecided whether I should remain on the Bench, for I was toying with the idea of recusal, because a prayer to that effect, had been made in the face of the Court. My colleagues on the Bench, would have nothing of it. They were unequivocal in their protestation.

17. Despite the factual position noticed above, I wish to record, that it is not their persuasion or exhortation, which made me take a final call on the matter. The decision to remain a member of the reconstituted Bench was mine, and mine alone. The choice that I made, was not of the heart, but that of the head. The choice was made by posing two questions to myself. Firstly, whether a Judge hearing a matter should recuse, even though the prayer for recusal is found to be unjustified and unwarranted? Secondly, whether I would stand true to the oath of my office, if I recused from hearing the matters?

18. The reason that was pointed out against me, for seeking my recusal was, that I was a part of the 1+4 collegium. But that, should have been a

disqualification for Anil R. Dave, J. as well. When he commenced hearing of the matters, and till 7.4.2015, he suffered the same alleged disqualification. Yet, the objection raised against me, was not raised against him. When confronted, Mr. Fali S. Nariman vociferously contested, that he had not sought the recusal of Anil R. Dave, J.. He supported his assertion with proof. One wonders, why did he not seek the recusal of Anil R. Dave, J.? There is no doubt about the fact, that I have been a member of the 1+4 collegium, and it is likely that I would also shortly become a Member of the NJAC, if the present challenge raised by the petitioners was not to succeed. I would therefore remain a part of the selection procedure, irrespective of the process which prevails. That however is the position with reference to four of us (on the instant five-Judge Bench). Besides me, my colleagues on the Bench – J. Chelameswar, Madan B. Lokur and Kurian Joseph, JJ. would in due course be a part of the collegium (if the writ-petitioners before this Court were to succeed), or alternatively, would be a part of the NJAC (if the writ-petitioners were to fail). In such eventuality, the averment of conflict of interest, ought to have been raised not only against me, but also against my three colleagues. But, that was not the manner in which the issue has been canvassed. In my considered view, the prayer for my recusal is not well founded. If I were to accede to the prayer for my recusal, I would be initiating a wrong practice, and laying down a wrong precedent. A Judge may recuse at his own, from a case entrusted to him

by the Chief Justice. That would be a matter of his own choosing. But recusal at the asking of a litigating party, unless justified, must never to be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before he assumes his office, takes an oath to discharge his duties without fear or favour. He would breach his oath of office, if he accepts a prayer for recusal, unless justified. It is my duty to discharge my responsibility with absolute earnestness and sincerity. It is my duty to abide by my oath of office, to uphold the Constitution and the laws. My decision to continue to be a part of the Bench, flows from the oath which I took, at the time of my elevation to this Court.

.....J.
(Jagdish Singh Khehar)

New Delhi;
October 16, 2015.

THE REFERENCE ORDER

I. THE CHALLENGE:

1. The question which has arisen for consideration, in the present set of cases, pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 (hereinafter referred to as, the Constitution (99th Amendment) Act), as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act).

2. During the course of hearing on the merits of the controversy, which pertains to the selection and appointment of Judges to the higher judiciary (i.e., Chief Justices and Judges of the High Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, it emerged that learned counsel for the respondents, were *inter alia* relying on the judgment rendered in S.P. Gupta v. Union of India[1], (hereinafter referred to as, the First Judges case); whereas, the learned counsel for the petitioners were *inter alia* relying on the judgment in Supreme Court Advocates-on-Record Association v. Union of India[2] (hereinafter referred to as, the Second Judges case), and the judgment in Re: Special Reference No.1 of 1998[3], (hereinafter referred to as, the Third Judges case).

3. *Per se,* the stance adopted by learned counsel for the respondents in placing reliance on the judgment in the First Judges case, was not

[1] 1981 (Supp) SCC 87
[2] (1993) 4 SCC 441
[3] (1998) 7 SCC 739

open to them. This, for the simple reason, that the judgment rendered in the First Judges case, had been overruled by a larger Bench, in the Second Judges case. And furthermore, the exposition of law declared in the Second Judges case, was reaffirmed by the Third Judges case.

4. Visualizing, that the position adopted by the respondents, was not legally permissible, the Attorney General, the Solicitor General, and other learned counsel representing the respondents, adopted the only course open to them, namely, to seek reconsideration of the decisions rendered by this Court in the Second and Third Judges cases. For the above objective it was asserted, that various vital aspects of the matter, had not been brought to the notice of this Court, when the controversy raised in the Second Judges case was canvassed. It was contended that, had the controversy raised in the Second Judges case, been examined in the right perspective, this Court would not have recorded the conclusions expressed therein, by the majority. It was submitted, that till the respondents were not permitted to air their submissions, with reference to the unacceptability of the judgments rendered in the Second and Third Judges cases, it would not be in the fitness of matters, for this Court to dispose of the present controversy, by placing reliance on the said judgments.

5. Keeping in mind the importance and the sensitivity of the controversy being debated, as also, the vehemence with which learned counsel representing the respondents, pressed for a re-examination of

the judgments rendered by this Court, in the Second and Third Judges cases, we permitted them, to detail the basis of their assertions.

6. Before embarking on the issue, namely, whether the judgments rendered by this Court in the Second and Third Judges cases, needed to be revisited, we propose first of all, to determine whether or not it would be justified for us, in the peculiar facts and circumstances of this case, keeping in view the technical parameters laid down by this Court, to undertake the task. In case, we conclude negatively, and hold that the prayer seeking a review of the two judgments was not justified, that would render a quietus to the matter. However, even if the proposition canvassed at the behest of the respondents is not accepted, we would still examine the submissions canvassed at their behest, as in a matter of such extreme importance and sensitivity, it may not be proper to reject a prayer for review, on a mere technicality. We shall then endeavour to determine, whether the submissions canvassed at the hands of the respondents, demonstrate clear and compelling reasons, for a review of the conclusions recorded in the Second and Third Judges cases. We shall also venture to examine, whether the respondents have been able to *prima facie* show, that the earlier judgments could be seen as manifestly incorrect. For such preliminary adjudication, we are satisfied, that the present bench-strength satisfies the postulated requirement, expressed in the proviso under Article 145(3).

7. Consequent upon the above examination, if the judgments rendered in the Second and Third Judges cases, are shown to *prima facie* require a re-look, we would then delve on the merits of the main controversy, without permitting the petitioners to place reliance on either of the aforesaid two judgments.

8. In case, we do not accept the submissions advanced at the hands of the petitioners on merits, with reference to the main controversy, that too in a sense would conclude the matter, as the earlier regime governed by the Second and Third Judges cases, would become a historical event, of the past, as the new scheme contemplated under the impugned Constitution (99th Amendment) Act, along with the NJAC Act, would replace the earlier dispensation. In the above eventuality, the question of re-examination of the Second and Third Judges cases would be only academic, and therefore uncalled for.

9. However, if we accept the submissions advanced at the hands of the learned counsel for the petitioners, resulting in the revival of the earlier process, and simultaneously conclude in favour of the respondents, that the Second and Third Judges cases need a re-look, we would be obliged to refer this matter to a nine-Judge Bench (or even, to a larger Bench), for re-examining the judgments rendered in the Second and Third Judges cases.

II. <u>THE BACKGROUND TO THE CHALLENGE:</u>

10. Judges to the Supreme Court of India and High Courts of States, are appointed under Articles 124 and 217 respectively. Additional Judges and acting Judges for High Courts are appointed under Articles 224 and 224A. The transfer of High Court Judges and Chief Justices, of one High Court to another, is made under Article 222. For the controversy in hand, it is essential to extract the original Articles 124 and 217, hereunder:

"124. Establishment and constitution of Supreme Court. (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:
Provided further that—
(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office in the manner provided in clause (4).
(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.
(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—
(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
(b) has been for at least ten years an advocate of a High Court or of two or more such courts in succession; or
(c) is, in the opinion of the President, a distinguished jurist.
Explanation I.—In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.
Explanation II.—In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district Judge after he became an advocate shall be included.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India."

"217. Appointment and conditions of the office of a Judge of a High Court.— (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years:

Provided that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession;

Explanation.— For the purposes of this clause —

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of

a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;
(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;
(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.
(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."

11. The true effect and intent of the provisions of the Constitution, and all other legislative enactments made by the Parliament, and the State legislatures, are understood in the manner they are interpreted and declared by the Supreme Court, under Article 141. The manner in which Articles 124 and 217 were interpreted by this Court, emerges principally from three-Constitution Bench judgments of this Court, which are now under pointed consideration. The first judgment was rendered, by a seven-Judge Bench, by a majority of 4:3, in the First Judges case on 30.12.1981. The correctness of the First Judges case was doubted by a three-Judge Bench in Subhash Sharma v. Union of India[4], which opined that the majority view, in the First Judges case, should be considered by a larger Bench. The Chief Justice of India constituted a nine-Judge Bench, to examine two questions. Firstly, whether the opinion of the Chief Justice of India in regard to the appointment of Judges to the

[4] 1991 Supp (1) SCC 574

Supreme Court and to the High Courts, as well as, transfer of Chief Justices and Judges of High Courts, was entitled to primacy? And secondly, whether the fixation of the judge-strength in High Courts, was justiciable? By a majority of 7:2, a nine-Judge Bench of this Court, in the Second Judges case, overruled the judgment in the First Judges case. The instant judgment was rendered on 6.10.1993. Consequent upon doubts having arisen with the Union of India, about the interpretation of the Second Judges case, the President of India, in exercise of his power under Article 143, referred nine questions to the Supreme Court, for its opinion. A nine-Judge Bench answered the reference unanimously, on 28.10.1998.

12. After the judgment of this Court in the Second Judges case was rendered in 1993, and the advisory opinion of this Court was tendered to the President of India in 1998, the term "consultation" in Articles 124(2) and 217(1), relating to appointment (as well as, transfer) of Judges of the higher judiciary, commenced to be interpreted as vesting primacy in the matter, with the judiciary. This according to the respondents, had resulted in the term "consultation" being understood as "concurrence" (in matters governed by Articles 124, 217 and 222). The Union of India, then framed a Memorandum of Procedure on 30.6.1999, for the appointment of Judges and Chief Justices to the High Courts and the Supreme Court, in consonance with the above two judgments. And

appointments came to be made thereafter, in consonance with the Memorandum of Procedure.

13. As per the position expressed before us, a feeling came to be entertained, that a Commission for selection and appointment, as also for transfer, of Judges of the higher judiciary should be constituted, which would replace the prevailing procedure, for appointment of Judges and Chief Justices of the High Courts and the Supreme Court of India, contemplated under Articles 124(2) and 217(1). It was felt, that the proposed Commission should be broad based. In that, the Commission should comprise of members of the judiciary, the executive and eminent/important persons from public life. In the above manner, it was proposed to introduce transparency in the selection process.

14. To achieve the purported objective, Articles 124 and 217 were *inter alia* amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (99th Amendment) Act, by following the procedure contemplated under Article 368(2), more particularly, the proviso thereunder. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015 (consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1). Simultaneously therewith, the Parliament enacted the NJAC Act, which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015 (by its notification in the Gazette of India

(Extraordinary) Part II, Section 1). The above constitutional amendment and the legislative enactment, are subject matter of challenge through a bunch of petitions, which are collectively being heard by us. In order to effectively understand the true purport of the challenge raised by the petitioners, and the nuances of the legal and constitutional issues involved, it is imperative to have a bird's eye view of the First Judges case, upon which reliance has been placed by the learned counsel for the respondents, in their attempt to seek a review of the Second and Third Judges cases.

The First Judges case - 1981 Supp SCC 87.

15. The Union Law Minister addressed a letter dated 18.3.1981 to the Governor of Punjab and to Chief Ministers of all other States. The addressees were *inter alia* informed, that "...one third of the Judges of High Court, should as far as possible be from outside the State in which the High Court is situated...". Through the above letter, the addressees were requested to "...(a) obtain from all additional Judges working in the High Courts... their consent to be appointed as permanent Judges in any other High Court in the country..." The above noted letter required, that the concerned appointees "...be required to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and (b) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along

with a similar preference for three High Courts...". The Union Law Minister, in the above letter clarified, that furnishing of their consent or indication of their preference, would not imply any commitment, at the behest of the Government, to accommodate them in accordance with their preferences. In response, quite a few additional Judges, gave their consent to be appointed outside their parent State.

(i) Iqbal Chagla (and the other petitioners) felt, that the letter dated 18.3.1981 was a direct attack on the "independence of the judiciary", and an uninhibited assault on a vital/basic feature of the Constitution. A series of Advocates' Associations in Bombay passed resolutions, condemning the letter dated 18.3.1981, as being subversive of "judicial independence". They demanded the withdrawal of the letter. Since that was not done, a writ petition was filed by the above Associations in the Bombay High Court, challenging the letter dated 18.3.1981. An interim order was passed by the High Court, restraining the Union Law Minister and the Government from implementing the letter dated 18.3.1981. A Letters Patent Appeal preferred against the above interim order, came to be dismissed by a Division Bench of the High Court. The above interim order, was assailed before this Court. While the matter was pending before this Court, the Union Law Minister and the Government of India, filed a transfer petition under Article 139A. The transfer petition was allowed, and the writ petition filed in the Bombay High Court, was transferred to the Supreme Court.

(ii) A second petition was filed by V.M. Tarkunde, in the High Court of Delhi. It raised a challenge to the constitutional validity of the letter dated 18.3.1981. One additional ground was raised with reference to the three additional Judges of the Delhi High Court, namely, O.N. Vohra, S.N. Kumar and S.B. Wad, JJ., whose term was expiring on 6.3.1981. Rather than being appointed for a further term of two years, their appointment was extended for three months, from 7.3.1981. These short term appointments were assailed, as being unjustified under Article 224, besides being subversive of the "independence of the judiciary". This writ petition was also transferred for hearing to the Supreme Court. So far as the circular letter dated 18.3.1981 is concerned, the Supreme Court, on an oral prayer made by the petitioner, directed that any additional Judge who did not wish to respond to the circular letter may not do so, and that, he would neither be refused extension nor permanent appointment, on the ground that he had not sent a reply to the letter dated 18.3.1981. Thereafter, the appointment of S.B. Wad, J., was continued, as an additional Judge for a period of one year from 7.6.1981, but O.N. Vohra and S.N. Kumar, JJ., were not continued beyond 7.6.1981.

(iii & iv). A third writ petition, was filed by J.L. Kalra and others, who were practicing Advocates, in the Delhi High Court. And a fourth writ petition was filed by S.P. Gupta, a practicing Advocate, of the Allahabad High Court. The third and fourth writ petitions were for substantially the same reliefs, as the earlier two petitions.

(v) A fifth writ petition, was filed by Lily Thomas. She challenged a transfer order dated 19.1.1981, whereby the Chief Justice of the High Court of Madras was transferred as the Chief Justice of the High Court of Kerala. The above order had been passed by the President, under Article 222(1), after consultation with the Chief Justice of India. Likewise, the transfer of the Chief Justice of the High Court of Patna to the Madras High Court was challenged by asserting, that the power of transfer under Article 222(1) was limited to Judges of the High Courts, and did not extend to Chief Justices. Alternatively, it was contended, that transfers could only be made with the consent of the concerned Judge, and only in public interest, and after full and effective consultation with the Chief Justice of India.

(vi & vii) A sixth writ petition was filed by A. Rajappa, principally challenging the order dated 19.1.1981, whereby some Chief Justices had been transferred. One additional submission was raised in this petition, namely, that the transfer of the Chief Justices had been made without the prior consultation of the Governors of the concerned States, and further, that the said transfers were not in public interest, and therefore, violated the procedural requirements contained in Article 217(1). The seventh writ petition was filed by P. Subramanian, on the same grounds, as the petition filed by A. Rajappa.

(viii) An eighth writ petition was filed by D.N. Pandey and Thakur Ramapati Sinha, practicing Advocates, of the Patna High Court. In this

petition, Justice K.B.N. Singh, the Chief Justice of the Patna High Court was impleaded as respondent no.3. On a prayer made by respondent no.3, he was transposed as petitioner no.3. As petitioner no.3, Justice K.B.N. Singh filed a detailed affidavit asserting, that his transfer had been made as a matter of punishment, and further, that it had been made on irrelevant and on insufficient grounds, and not in public interest. And further that, it was not preceded by a full and effective consultation with the Chief Justice of India.

It is therefore apparent, that the above mentioned petitions related to two different sets of cases. Firstly, the issue pertaining to the initial appointment of Judges, and the extension of the term of appointment of additional Judges, on the expiry of their original term. And secondly, the transfer of Judges and Chief Justices from one High Court to another.

16. The opinions recorded in the First Judges case, insofar as they are relevant to the present controversy, are being summarized herein:

P.N. Bhagwati, J. (as he then was):

(i) On the subject of independence of the judiciary, it was opined, that "…The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the entire Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State

within the limits of the law and thereby making the rule of law meaningful and effective…The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive, and therefore, it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution. "…It was felt, that the concept of "independence of the judiciary" was not limited only to the independence from executive pressure or influence, but it was a much wider concept, which took within its sweep, independence from many other pressures and prejudices. It had many dimensions, namely, fearlessness of other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. It was held, that the principle of "independence of the judiciary" had to be kept in mind, while interpreting the provisions of the Constitution (paragraph 27).

(ii). On the subject of appointment of High Court Judges, it was opined, that just like Supreme Court Judges, who are appointed under Article 124 by the President (which in effect and substance meant the Central Government), likewise, the power of appointment of High Court Judges under Article 217, was to be exercised by the Central Government. Such power, it was held, was exercisable only "…after consultation with the Chief Justice of India, the Governor of the State, and, the Chief Justice of the High Court…" It was concluded, that it was clear on a plain reading

of the above two Articles, that the Chief Justice of India, the Chief Justice of the High Court, and such other Judges of the High Court and of the Supreme Court (as the Central Government may deem necessary to consult), were constitutional functionaries, having a consultative role, and the power of appointments rested solely and exclusively in the decision of the Central Government. It was pointed out, that the above power was not an unfettered power, in the sense, that the Central Government could not act arbitrarily, without consulting the constitutional functionaries specified in the two Articles. The Central Government was to act, only after consulting the constitutional functionaries, and that, the consultation had to be full and effective (paragraph 29).

(iii). On the question of the meaning of the term "consultation" expressed in Article 124(2) and Article 217(1), it was held, that this question was no longer *res integra*, as the issue stood concluded by the decision of the Supreme Court in Union of India v. Sankalchand Himatlal Sheth[5], wherein its meaning was determined with reference to Article 222(1). But, since it was the common ground between the parties, that the term "consultation" used in Article 222(1) had the same meaning, which it had in Articles 124(2) and 217(1), it was held that, "…therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels

[5] (1977) 4 SCC 193

or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system..." It was further concluded, that the above observation in the Sankalchand Himatlal Sheth case[5] would apply with equal force to determine the scope and meaning of the term "consultation" within the meaning of Articles 124(2) and 217(1). Each of the constitutional functionaries, required to be consulted under these two Articles, must have for his consideration, full and identical facts bearing upon appointment or non-appointment of the person concerned, and the opinion of each of them taken on identical material, must be considered by the Central Government, before it takes a decision, whether or not to appoint the person concerned as a Judge. It was open to the Central Government to take its own decision, in regard to the appointment or non-appointment of a Judge to a High Court or the Supreme Court, after taking into account and giving due weight to, the opinions expressed. It was also observed, that the only ground on which such a decision could be assailed was, that the action was based on *mala fides* or irrelevant considerations. In case of a difference of opinion amongst the constitutional functionaries, who were to be consulted, it was felt, that it was for the Central Government to decide, whose opinion should be accepted. The contention raised on behalf of the petitioners, that in the

consultative process, primacy should be that of the Chief Justice of India, since he was the head of the Indian judiciary and *pater familias* of the judicial fraternity, was rejected for the reason, that each of the constitutional functionaries was entitled to equal weightage. With reference to appointment of Judges of the Supreme Court, it was held, that the Chief Justice of India was required to be consulted, but the Central Government was not bound to act in accordance with the opinion of the Chief Justice of India, even though, his opinion was entitled to great weight. It was therefore held, that the ultimate power of appointment, rested with the Central Government (paragraph 30).

(iv). On the issue of appointment of Judges of the Supreme Court, it was concluded, that consultation with the Chief Justice of India was a mandatory requirement. But while making an appointment, consultation could extend to such other Judges of the Supreme Court, and of the High Courts, as the Central Government may deem necessary. In response to the submission, where only the Chief Justice of India was consulted (i.e., when consultation did not extend to other Judges of the Supreme Court, or of the High Courts), whether the opinion tendered by the Chief Justice of India should be treated as binding, it was opined, that there was bound to be consultation, with one or more of the Judges of the Supreme Court and of the High Courts, before exercising the power of appointment conferred under Article 124(2). It was felt, that consultation with the

Chief Justice of India alone, with reference to the appointment of Judges to the Supreme Court, was not a very satisfactory mode of appointment, because wisdom and experience demanded, that no power should rest in a single individual howsoever high and great he may be, and howsoever honest and well-meaning. It was suggested, that it would be more appropriate if a collegium would make the recommendations to the President, with regard to appointments to the higher judiciary, and the recommending authority should be more broad based. If the collegium was comprised of persons who had knowledge of persons, who may be fit for appointment to the Bench, and possessed the qualities required for such appointment, it would go a long way towards securing the right kind of Judges, who would be truly independent (paragraph 31).

(v) It was held, that the appointment of an additional Judge, must be made by following the procedure postulated in Article 217(1). Accordingly, when the term of an additional Judge expired, and he ceased to be a Judge, his reappointment could only be made by once again adopting the procedure set out in Article 217(1). The contention, that an additional Judge must automatically and without any further consideration be appointed as an additional Judge for a further term, or, as a permanent Judge, was rejected (paragraphs 38 to 44).

(vi) On the question of validity of the letter of the Union Law Minister dated 18.3.1981, it was opined, that the same did not violate any legal or constitutional provision. It was felt, that the advance consent sought to

be obtained through the letter dated 18.3.1981, from additional Judges or Judges prior to their permanent appointment, would have no meaning, so far as the Chief Justice of India was concerned, because irrespective of the fact, whether the additional Judge had given his consent or not, the Chief Justice of India would have to consider, whether it would be in public interest to allow the additional Judge to be appointed as a permanent Judge in another High Court (paragraph 54).

(vii) After having determined the merits of the individual claim raised by S.N. Kumar, J., (who was discontinued by the Central Government, while he was holding the position of additional Judge), it was concluded, that it would be proper if the Union of India could find a way, to place the letter dated 7.5.1981 addressed by the Chief Justice of Delhi High Court to the Law Minister, before the Chief Justice of India, and elicit his opinion with reference to that letter. And thereupon consider, whether S.N. Kumar, J., should be reappointed as additional Judge.

(viii) With reference to K.B.N. Singh, CJ., it was opined that there was a clear abdication by the Central Government of its constitutional functions, and therefore, his transfer from the Patna High Court to the Madras High Court was held as unconstitutional and void.

A.C. Gupta, J.:

(i). On the subject of the "independence of the judiciary", it was opined, that the same did not mean freedom of Judges to act arbitrarily. It only meant, that Judges must be free, while discharging their judicial

functions. In order to maintain "independence of the judiciary", it was felt, that Judges had to be protected against interference, direct or indirect. It was concluded, that the constitutional provisions should not be construed in a manner, that would tend to undermine the concept of "independence of the judiciary" (paragraph 119).

(ii) On the question, whether, on the expiry of the term of office of an additional Judge of a High Court, it was permissible to drop him by not giving him another term, though the volume of work, pending in the High Court, required the services of another Judge? It was opined, that the tenure of an additional Judge, was only dependent on the arrears of work, or the temporary increase in the business of a High Court. And since an additional Judge was not on probation, his performance could not be considered to determine, whether he was fit for appointment as a permanent Judge. Therefore, it was concluded, that if the volume of work pending in the High Court justified the appointment of an additional Judge, there could be no reason, why the concerned additional Judge should not be appointed for another term. The submission that the two years' period mentioned in Article 224, depicted the upper limit of the tenure, and that the President was competent to appoint an additional Judge, for any shorter period, was rejected. Since the fitness of a Judge, had been considered at the time of his initial appointment, therefore, while determining whether he should be reappointed, under Article 217(1), it was opined, that the scope of inquiry was limited, to

whether the volume of work pending in the High Court, necessitated his continuation.

(iii). Referring to the opinion expressed by the Chief Justice of the High Court, in connection with S.N. Kumar, J., it was opined, that when allegations were levelled against a Judge with respect to the discharge of his duties, the only reasonable course open, which would not undermine the "independence of the judiciary" was, to proceed with an inquiry into the allegations and remove the Judge, if the allegations were found to be true (in accordance with the procedure laid down under Article 124(4) and (5) read with Article 218). It was felt that, dropping an additional Judge, at the end of his initial term of office, on the ground that there were allegations against him, without properly ascertaining the truth of the allegations, was destructive of the "independence of the judiciary" (paragraph 123).

(iv). With reference to the non-continuation of S.N. Kumar, J., an additional Judge of the Delhi High Court, it was observed, that the letter of the Chief Justice of the Delhi High Court dated 7.5.1981, addressed to the Law Minister, was not disclosed to the Chief Justice of India. As the relevant material was withheld from the Chief Justice of India, it was concluded, that there was no full and effective "consultation", as contemplated by Article 217(1). And therefore, the decision not to extend the term of office of S.N. Kumar, J., as additional Judge of the Delhi High

Court, though the volume of pending work in the High Court required the services of an additional Judge, was invalid.

(v). On the question, whether the opinion of the Chief Justice of India would have primacy, in case of a difference of opinion between the Chief Justice of a High Court and the Chief Justice of India, the view expressed was, that the President should accept the opinion of the Chief Justice of India, unless such opinion suffered from any obvious infirmity. And that, the President could not act as an umpire, and choose between the two opinions (paragraph 134).

(vi). Referring to the judgment in the Sankalchand Himatlal Sheth case[5], wherein it was concluded, that mass transfers were not contemplated under Article 222(1), it was opined, that the President could transfer a Judge from one High Court to another, only after consultation with the Chief Justice of India. And that, the Chief Justice of India must consider in each case, whether the proposed transfer was in public interest (paragraph 138).

(vii). With reference to the transfer of K.B.N. Singh, CJ., from the Patna High Court to the Madras High Court, it was opined, that even if the above transfer had been made for administrative reasons, and in public interest, it was likely to cause some injury to the transferee, and it would only be fair to consider the possibility of transferring him, where he would face least difficulties, namely, where the language difficulty would not be acute.

S. Murtaza Fazal Ali, J.:

(i) On the issue, whether the transfer of a High Court Judge under Article 222 required the consent of the Judge proposed to be transferred, it was opined, that a non-consensual transfer, would not amount to punishment, nor would it involve any stigma. It was accordingly concluded, that a transfer made after complying with Article 222, would not mar or erode the "independence of the judiciary" (paragraph 345).

(ii). With reference to appointing Chief Justices of High Courts from outside the State, and for having 1/3rd Judges in every High Court from outside the State, it was expressed, that Article 222 conferred an express power with the President, to transfer a Judge (which includes, Chief Justice) from one State to another. In determining as to how this power had to be exercised, it was felt, that the President undoubtedly possessed an implied power to lay down the norms, the principles, the conditions and the circumstances, under which the said power was to be exercised. A declaration by the President regarding the nature and terms of the policy (which virtually meant a declaration by the Council of Ministers) was quite sufficient, and absolutely legal and constitutional (paragraph 410).

(iii). On the subject of validity of the letter of the Union Law Minister dated 18.3.1981, it was held, that the same did not in any way tarnish the image of Judges, or mar the "independence of the judiciary" (paragraph 433).

(iv). On the question of appointment of additional Judges, and the interpretation of Article 217, the opinion expressed by P.N. Bhagwati and E.S. Venkataramiah, JJ. were adopted (paragraph 434).

(v). Insofar as the interpretation of Article 224 was concerned, the opinion of P.N. Bhagwati and D.A. Desai, JJ. were accepted, (paragraph 537). And accordingly, their conclusion about the continuation of S.N. Kumar, J., as an additional Judge, after the expiry of his term of appointment, was endorsed.

(vi). On analyzing the decision rendered in the Sankalchand Himatlal Sheth case[5], *inter alia,* the following necessary concomitants of an effective consultation between the President and the Chief Justice of India were drawn. That the consultation, must be full and effective, and must precede the actual transfer of the Judge. If consultation with the Chief Justice of India had not taken place, before transferring a Judge, it was held, that the transfer would be unconstitutional. All relevant data and necessary facts, must be provided to the Chief Justice of India, so that, he could arrive at a proper conclusion. Only after the above process was fully complied with, the consultation would be considered full and effective. It was felt, that the Chief Justice of India owed a duty, both to the President and to the Judge proposed to be transferred, to consider every relevant fact, before tendering his opinion to the President. Before giving his opinion the Chief Justice of India, could informally ascertain from the Judge, if there was any personal difficulty, or any humanitarian

ground, on which his transfer should not be made. And only after having done so, the Chief Justice of India, could forward his opinion to the President. Applying the above facets of the consultation process, with respect to the validity of the order dated 19.1.1981, by which K.B.N. Singh, CJ., was transferred, it was held, that the consultation process contemplated under Article 222, had been breached, rendering the order passed by the President invalid (paragraph 589).

V.D. Tulzapurkar, J.:

(i). Insofar as the question of "independence of the judiciary" is concerned, it was asserted that all the Judges, who had expressed their opinions in the matter, had emphasized, that the framers of the Constitution had taken the utmost pains, to secure the "independence of the Judges" of the higher judiciary. To support the above contention, several provisions of the Constitution were referred to. It was also pointed out, that the Attorney General representing the Union of India, had not dispute the above proposition (paragraph 639).

(ii). With reference to additional Judges recruited under Article 224(1), from the fraternity of practicing Advocates, it was pointed out, that an undertaking was taken from them at the time of their initial appointment, that if and when a permanent judgeship of that Court was offered to them, they would not decline the same. And additionally, the Chief Justice of the Bombay High Court would require them to furnish a further undertaking, that if they decline to accept such permanent

judgeship (though offered), or if they resigned from the office of the additional judgeship, they would not practice before the Bombay High Court, or any court or tribunal subordinate to it. Based on the aforesaid undertakings, the contention advanced was, that a legitimate expectancy, and an enforceable right to continue in office, came to be conferred on the additional Judges recruited from the Bar. It was felt, that it was impossible to construe Article 224(1), as conferring upon the appointing authority, any absolute power or discretion in the matter of appointment of additional Judges to a High Court (paragraphs 622 and 624).

(iii) All submissions made on behalf of the respondents, that granting extension to an additional Judge, or making him a permanent Judge was akin to a fresh appointment, were rejected. It was concluded, that extension to an additional Judge, or making him permanent, did not require re-determination of his suitability under Article 217(1) (paragraph 628).

(iv). While dealing with the question of continuation of an additional Judge, in situations where there were facts disclosing suspected misbehaviour and/or reported lack of integrity, the view expressed was, that while considering the question of continuation of a sitting additional Judge, on the expiry of his initial term, the test of suitability contemplated within the consultative process under Article 217(1) should not be evoked — at least till a proper mechanism, having a legal sanction, was provided for holding an inquiry, against the Judge

concerned, with reference to any suspected misbehavior and/or lack of integrity (paragraph 628).

(v) On the scope of consideration, for continuation as a sitting additional Judge (on the expiry of a Judge's initial term), it was opined, that the consultative process should be confined only to see, whether the preconditions mentioned in Article 224(1) existed or not, or whether, pendency of work justified continuation or not. It was held, that the test of suitability contemplated within the consultative process under Article 217(1), could not and should not, be resorted to (paragraph 629).

(vi). On the question of primacy of the Chief Justice of India, with reference to Article 217(1), the view expressed was, that the scheme envisaged therein, by implication and intent, clearly gave primacy to the advice tendered by the Chief Justice of India. It was however sought to be clarified, that giving primacy to the advice of the Chief Justice of India, in the matter of appointment of Judges of the High Court, should not be construed as a power to veto any proposal. And that, if the advice of the Chief Justice of India, had proceeded on extraneous or non germane considerations, the same would be subject to judicial review, just as the President's final decision, if he were to disregard the advice of the Chief Justice of India, but for justified and cogent reasons. Interpreting Article 217(1) in the above manner, it was felt, would go a long way in preserving the "independence of the judiciary" (paragraph 632).

(vii) With regard to the scope of 'consultation', contemplated under Article 222(1), the conclusion(s) drawn by the majority view, in the Sankalchand Himatlal Sheth case[5], were endorsed.

(viii). Insofar as, the issue of taking the consent of the concerned Judge, prior to his transfer is concerned, based on the decision rendered in the Sankalchand Himatlal Sheth case[5], it was felt, that transfers could be made without obtaining the consent of the concerned Judge. And accordingly it was held, that non-consensual transfers, were within the purview of Article 222(1) (paragraphs 645 and 646).

(ix) With reference to the letter written by the Union Law Minister dated 18.3.1981, it was asserted, that even a policy transfer, without fixing the requisite mechanism or modality of procedure, would not ensure complete insulation against executive interference. Conversely it was felt, that a selective transfer in an appropriate case, for strictly objective reasons, and in public interest, could be non-punitive. It was therefore concluded, that each case of transfer, whether based on policy, or for individual reasons, would have to be judged on the facts and circumstances of its own, for deciding, whether it was punitive (paragraph 649).

(x) It was concluded, that by requiring a sitting additional Judge, to give his consent for being appointed to another High Court, virtually amounted to seeking his consent for his transfer from his own High Court to another High Court, falling within the ambit of Article 222(1).

Referring to the judgment rendered in the Sankalchand Himatlal Sheth case[5], it was felt, that the circular letter dated 18.3.1981 was an attempt to circumvent the safeguards and the stringent conditions expressed in the above judgment (paragraph 652). And further, that the circular letter clearly exuded an odour of executive dominance and arrogance, intended to have coercive effects on the minds of sitting additional Judges, by implying a threat to them, that if they did not furnish their consent to be shifted elsewhere, they would neither be continued nor made permanent. The above letter, was held to be amounting to, executive interference with the "independence of the judiciary", and thus illegal, unconstitutional and void. Any consent obtained thereunder, was also held to be void (paragraph 654).

(xi) It was also concluded that, the advice of the Chief Justice of India, would be robbed of its real efficacy, in the face of such pre-obtained consent, and it would have to be regarded as having been issued malafide and for a collateral purpose, namely, to bypass Article 222(1) and to confront the Chief Justice of India, with a *fait accompli*, and as such, the same was liable to be declared as illegal and unconstitutional (paragraph 655).

(xii) The above circular letter dated 18.3.1981, was also held to be violative of Article 14, since invidious discrimination was writ large on the face of the circular letter. For this additional reason, the letter of the

Union Law Minister dated 18.3.1981, it was felt, was liable to be struck down (paragraphs 659 and 660).

(xiii) On the subject of non-continuation of S.N. Kumar, J., it was held, that it was abundantly clear from the correspondence and notings, that further details and concrete facts and materials relating to his integrity, though specifically asked for by the Chief Justice of India, were not furnished, and the letter dated 7.5.1981, which contained such details and concrete facts and materials, were kept away from him, leading to the inference, that facts which were taken into consideration by the Union Law Minister and the Chief Justice of Delhi High Court (which provided the basis to the appointing authority, not to extend the appointment of S.N. Kumar, J.), were not placed before the Chief Justice of India, and therefore, there was neither full nor effective consultation, between the President and the Chief Justice of India, as required by Article 217(1). It was accordingly concluded, that the decision against S.N. Kumar, J., stood vitiated by legal *mala fides*, and as such, was liable to be held void and *non est,* and his case had to be sent back to the President, for reconsideration and passing appropriate orders, after the requisite consultation was undertaken afresh (paragraphs 664 and 666 to 668).

(xiv) With respect to the validity of the transfer of K.B.N. Singh, CJ., it was felt, that in the absence of any connivance or complicity, since no unfair play was involved in the procedure followed by the Chief Justice of

India, it was liable to be concluded, that the impugned transfer had been made in public interest, and not by way of punishment. The above transfer was accordingly held to be valid (paragraph 680).

D.A. Desai, J.:

(i) After noticing, that the President under Article 74, acts on the advice of the Council of Ministers, and that, while acting under Article 217(3), the President performs functions of grave importance. It was felt, that it could not be said that while exercising the power of appointment of Judges to the higher judiciary, the President was performing either judicial or quasi judicial functions. The function of appointment of Judges was declared as an executive function, and as such, it was held, that Article 74 would come into operation. And therefore concluded, that the President would have to act, on the advice of the Council of Ministers, in the matter of appointment of Judges under Article 217 (paragraph 715). And therefore it came to be held, that the ultimate power of appointment under Article 217, "unquestionably" rested with the President.

(ii) It was pointed out, that before exercising the power of appointment of a Judge (other than the Chief Justice of a High Court), the President was under a constitutional obligation, to consult the three constitutional functionaries, mentioned in Article 217 (paragraphs 718 and 719). And that the aforementioned three constitutional functionaries were at par with one another. They were coordinate authorities, without any relative

hierarchy, and as such, the opinion of the Chief Justice of India could not be given primacy on the issue of appointment of Judges of High Courts (paragraphs 724, 726 and 728).

(iii) It was also concluded, that on the expiry of the original term of appointment of an additional Judge under Article 224, the continuation of the concerned Judge, would envisage the re-adoption of the procedure contained in Article 217 (paragraphs 736 and 745).

(iv) It was felt, that there was no gainsaying, that a practice which had been followed for over 25 years, namely, that an additional Judge was always considered for a fresh tenure, if there was no permanent vacancy, and if there was such a vacancy, he was considered for appointment as a permanent Judge. It was held, that the contention of the Attorney General, that such additional Judge had no priority, preference, weightage or right to be considered, and that, he was on par with any other person, who could be brought from the market, would amount to disregarding the constitutional scheme, and must be rejected (paragraph 759). It was held, that when a Judge was appointed for a term of two years, as an additional Judge, it was sufficient to contemplate, that his appointment was not as a permanent Judge. And therefore, if a permanent vacancy arose, the additional Judge could not enforce his appointment against the permanent vacancy (paragraph 762).

(v) It was also concluded, that the term of an additional Judge could not be extended for three months or six months, since such short term

appointments, were wholly inconsistent and contrary to the clear intendment of Article 224, and also, unbecoming of the dignity of a High Court Judge (paragraphs 763 and 764).

(vi) On the subject of extension of the term of an additional Judge, it was felt, that it was not open to the constitutional functionaries, to sit tight over a proposal, without expressing their opinion on the merits of the proposal, and by sheer inaction, to kill a proposal. It was accordingly opined, that when the term of an additional Judge was about to expire, it was obligatory on the Chief Justice of the High Court, to initiate the proposal for completing the process of consultation, before the period of initial appointment expired (paragraph 772).

(vii) With reference to the non-extension of the tenure of S.N. Kumar, J., it was felt, that when two high constitutional functionaries, namely, the Chief Justice of the Delhi High Court and the Chief Justice of India, had met with a specific reference to his doubtful integrity, the act of not showing the letter dated 7.5.1981 to the Chief Justice of India, would not detract from the fullness of the consultation, as required by Article 217. Accordingly, it was held, that there was a full and effective consultation, on all relevant points, including those set out in the letter dated 7.5.1981. And the claim of the concerned Judge for continuation, was liable to be rejected. It was however suggested, that the Government of India could even now, show the letter dated 7.5.1981 to the Chief Justice of India, and request him to give his comments. After receiving his

comments, the Government of India could decide afresh, whether S.N. Kumar, J., should be re-appointed as an additional Judge of the Delhi High Court. It was however clarified, that the proposed reconsideration, should not be treated as a direction, but a mere suggestion.

(viii) On the question, whether the consent of the concerned Judge should be obtained prior to his transfer under Article 222(1), it was concluded, that the requirement of seeking a prior consent, as a prerequisite for exercising the power of transfer under Article 222(1), deserved to be rejected (paragraph 813). It was however observed, that the above power of transfer under Article 222(1) could not be exercised in the absence of public interest, merely on the basis of whim, caprice or fancy of the executive, or its desire to bend a Judge to its own way of thinking. Three safeguards, namely, full and effective consultation with the Chief Justice of India, the exercise of power only aimed at public interest, and judicial review — in case the power was exercised contrary to the mandate of law, were suggested to insulate the "independence of the judiciary", against an attempt by the executive to control it (paragraphs 813 to 815).

(ix) It was also concluded, that the transfer of an individual Judge, for something improper in his behavior, or conduct, would certainly cast a slur or attach a stigma, and would leave an indelible mark on his character. Even the High Court to which he was transferred would shun him, and the consumers of justice would have little or no faith in his

judicial integrity. Accordingly it was concluded, that a transfer on account of any complaint or grievance against a Judge, referable to his conduct or behaviour, was impermissible under Article 222(1).

(x) On the question of transfer of K.B.N. Singh, CJ., it was felt, that his order of transfer was vitiated for want of effective consultation, and his selective transfer would cast a slur or stigma on him. It was felt, that the transfer did not appear to be in public interest. The order of transfer dated 20.12.1980 was accordingly, considered to be vitiated, and as such, was declared void.

R.S. Pathak, J. (as he then was):

(i) With reference to the issue of "independence of the judiciary", it was observed, that while the administration of justice drew its legal sanction from the Constitution, its credibility rested in the faith of the people. Indispensable to such faith, was the "independence of the judiciary". An independent and impartial judiciary, it was felt, gives character and content to the constitutional milieu (paragraph 874).

(ii) On the subject of appointment of Judges to High Courts, it was essential for the President, to consult the Governor of the State, the Chief Justice of India and the Chief Justice of the concerned High Court. It was pointed out, that three distinct constitutional functionaries were involved in the consultative process, and each had a distinct role to play (paragraph 887). In a case where the Chief Justice of the High Court and the Chief Justice of India, were agreed on a recommendation, it was

within reason to hold, that the President would ordinarily accept the recommendation, unless there were strong and cogent reasons, for not doing so (paragraph 889). It was however pointed out, that the President was not always obliged to agree, with a recommendation, wherein the Chief Justice of the High Court and the Chief Justice of India, had concurred. In this behalf, it was observed, that even though, during the Constituent Assembly debates, a proposal was made, that the appointment of a Judge should require the "concurrence" of the Chief Justice of India, and the above proposal was endorsed by the Law Commission of India, yet the proposal had fallen through, and as such, the Constitution as it presently exists, contemplated "consultation" and not "concurrence" (paragraph 890).

(iii) On the question, as to whether the Chief Justice of India had primacy, over the recommendation made by the Chief Justice of the High Court, it was felt, that the Chief Justice of India did not sit in appellate judgment, over the advice tendered by the Chief Justice of the High Court. It was pointed out, that the advice tendered by the Chief Justice of India, emerged after taking into account, not only the primary material before him, but also, the assessment made by the Chief Justice of the High Court. And therefore, when he rendered his advice, the assessment of the Chief Justice of the High Court, must be deemed to have been considered by him. It was pointed out, that from the constitutional scheme, it appeared, that in matters concerning the High Courts, there

was a close consultative relationship, between the President and the Chief Justice of India. In that capacity, the Chief Justice of India functioned, as a constitutional check, on the exercise of arbitrary power, and was the protector of the "independence of the judiciary" (paragraph 891).

(iv) On the subject of appointment of Judges to the High Courts, it was concluded, that the appointment of an additional Judge, like the appointment of a permanent Judge, must be made in the manner prescribed in Article 217(1). Accordingly, it was felt, that there was no reason to suspect, that a person found fit for appointment as an additional Judge, and had already gained proficiency and experience, would not be appointed as a Judge for a further period, in order that the work may be disposed of (paragraph 893).

(v) It was also opined, that the judiciary by judicial verdict, could not decide, how many permanent Judges were required for a High Court. And if a Court was not competent to do that, it could not issue a direction to the Government, that additional Judges should be appointed as permanent Judges (paragraph 895). Accordingly it was felt, that there was no doubt whatever, that the provision of Article 217(1) would come into play, when an additional Judge was to be considered for further appointment as an additional Judge, or was to be considered for appointment as a permanent Judge (paragraph 897).

(vi) With reference to the non-continuation of S.N. Kumar, J., it was pointed out, that the allegations contained in the letter dated 7.5.1981 strongly influenced the decision of the Government. Since the aforesaid letter was not brought to the notice of the Chief Justice of India, it was inevitable to conclude, that the process of consultation with the Chief Justice of India was not full and effective, and the withholding of important and relevant material from the Chief Justice of India, vitiated the process. It was accordingly held, that the non-continuation of the term of S.N. Kumar, J., was in violation of the mandatory constitutional requirements contained in Article 217(1). It was felt, that the issue pertaining to the continuation of S.N. Kumar, J., needed to be reconsidered, and a decision needed to be taken, only after full and effective consultation (paragraph 904).

(vii) On the issue of transfer of Judges under Article 222(1), it was concluded, that the consent of the concerned Judge was not one of the mandated requirements (paragraph 913). It was pointed out, that the transfer of a Judge, could be made only in public interest, and that no Judge could be transferred, on the ground of misbehaviour or incapacity. The question of invoking Article 222(1), for purposes of punishing a Judge, was clearly ruled out (paragraphs 917 and 918). It was clarified, that the Judge proposed to be transferred, did not have a right of hearing. And that, the scope and degree of inquiry by the Chief Justice of India, fell within his exclusive discretion. All that was necessary was,

that the Judge should know why his transfer was proposed, so that he would be able to acquaint the Chief Justice of India, why he should not be so transferred. It was further clarified, that the process of consultation envisaged under Article 222(1) required, that all the material in possession of the President must be placed before the Chief Justice of India (paragraph 919).

(viii) It was held that, it was open to the Judge, who was subjected to transfer, to seek judicial review, by contesting his transfer on the ground that it violated Article 222(1) (paragraph 920).

(ix) It was also felt, that the power to transfer a Judge from one High Court to another, could constitute a threat, to the sense of independence and impartiality of the Judge, and accordingly, it was held, that the said power should be exercised sparingly, and only for very strong reasons (paragraph 921).

(x) On the validity of the transfer of K.B.N. Singh, CJ., it was concluded, that the considerations on which the transfer had been made, could be regarded as falling within the expression "public interest", and therefore, the order of transfer did not violate Article 222(1).

(xi) Insofar as the validity of the letter of the Union Law Minister dated 18.3.1981 is concerned, it was observed, that neither the proposal nor the consent given thereto, had any legal status. In the above view, it was held, that the circular letter could not be acted upon, and any consent given pursuant thereto, was not binding.

E.S. Venkataramiah, J. (as he then was):

(i) With reference to the "independence of the judiciary", it was opined, that the same was one of the central values on which the Constitution was based. It was pointed out, that in all countries, where the rule of law prevailed, and the power to adjudicate upon disputes between a man and a man, and a man and the State, and a State and another State, and a State and the Centre, was entrusted to a judicial body, it was natural that such body should be assigned a status, free from capricious or whimsical interference from outside, so that it could act, without fear and in consonance with judicial conscience (paragraph 1068).

(ii) Referring to Article 217(1) it was asserted, that each of the three functionaries mentioned therein, had to be consulted before a Judge of a High Court could be appointed. It was pointed out, that each of the consultees, had a distinct and separate role to play. Given the distinct roles assigned to them, which may to some extent be overlapping, it could not be said, that the Chief Justice of India occupied a position of primacy, amongst the three consultees (paragraph 1019).

(iii) The power of appointment of a Judge of a High Court was considered to be an executive power (paragraph 1023). Accordingly, while making an appointment of a High Court Judge, the President was bound to act, on the advice of his Council of Ministers, and at the same time, giving due regard to the opinions expressed by those who were required to be consulted under Article 217(1). Despite the above, it was

felt, that there was no scope for holding, that either the Council of Ministers could not advise the President, or the opinion of the Chief Justice of India was binding on the President. Although, it was felt, that such opinion should be given due respect and regard (paragraph 1032). It was held, that the above method was intrinsic in the matter of appointment of Judges, as in that way, Judges may be called people's Judges. If the appointments of Judges were to be made on the basis of the recommendations of Judges only, then they will be Judges' Judges, and such appointments may not fit into the scheme of popular democracy (paragraph 1042).

(iv) It was held, that the Constitution did not prescribe different modes of appointment for permanent Judges, additional Judges, or acting Judges. All of them were required to be appointed by the same process, namely, in the manner contemplated under Article 217(1) (paragraph 1061). The appointment of almost all High Court Judges initially as additional Judges under Article 224(1), and later on as permanent Judges under Article 217(1), was not conducive to the independence of judiciary (paragraph 1067). It was held, that the Constitution did not confer any right upon an additional Judge, to claim as of right, that he should be appointed again, either as a permanent Judge, or as an additional Judge. Accordingly, it was held, that there was no such enforceable right (paragraph 1074).

(v) Despite the above, it was observed, that in the absence of cogent reasons for not appointing an additional Judge, the appointment of somebody else in his place, would be an unreasonable and a perverse act, which would entitle the additional Judge, to move a Court for appropriate relief, in the peculiar circumstances (paragraph 1086). It was held, that having regard to the high office, to which the appointment was made, and the association of high dignitaries, who had to be consulted before any such appointment was made, the application of principles of natural justice, as of right, was ruled out (paragraph 1087).

(vi) With reference to Article 222, it was opined, that the consent of the Judge being transferred, was not a prerequisite before passing an order of transfer (paragraphs 1097 and 1099). It was held, that the transfer of a Judge of a High Court to another High Court, could not be construed as a fresh appointment, in the High Court to which the Judge was transferred. An order of transfer made under Article 222, it was held, was liable to be struck down by a Court, if it could be shown, that it had been made for an extraneous reason, i.e., on a ground falling outside the scope of Article 222. Under Article 222, a Judge could be transferred, when the transfer served public interest. It was held, that the President had no power to transfer a High Court Judge, for reasons not bearing on public interest, or arising out of whim, caprice or fancy of the executive, or because of the executive desire to bend a Judge to its own way of thinking (paragraphs 1097, 1099 and 1132).

(vii) It was held, that Article 222 cannot be resorted to on the ground of alleged misbehaviour or incapacity of a Judge (paragraph 1139).

(viii) Based on the opinion expressed by several expert bodies, it was opined, that any transfer of a Judge of a High Court under Article 222, in order to implement the policy of appointing Chief Justice of every High Court from outside the concerned State, and of having at least 1/3rd of Judges of every High Court from outside the State, would not be unconstitutional (paragraph 1164).

(ix) The letter of the Union Minister of Law dated 18.3.1981, was found to be valid. All contentions raised against the validity thereof were rejected (paragraph 1239).

(x) The decision of the President not to issue a fresh order of appointment to S.N. Kumar, J., on the expiry of his term as an additional Judge of the Delhi High Court, was held to be justified (paragraph 1128).

(xi) The transfer of K.B.N. Singh, CJ., was held to have been made strictly in consonance with the procedure indicated in the Sankalchand Himatlal Sheth case[5]. It was accordingly concluded, that there was no ground to hold, that the above transfer was not considered by the Chief Justice of India, in a fair and reasonable way. On the facts and circumstances of the case, it was concluded that it was not possible to hold that the above transfer was either illegal or void (paragraphs 1252 and 1257).

The Second Judges Case - (1993) 4 SCC 441:

17. For the purpose of adjudication of the present issue, namely, whether the judgment rendered by this Court in the Second Judges case needs to be re-examined, it is not necessary to delineate the views expressed by the individual Judges, as the conclusions drawn by them are *per se* not subject matter of challenge. The limited challenge being, that vital aspects of the matter, which needed to have been considered were not canvassed, and therefore, could not be taken into consideration in the process of decision making. In the above perspective, we consider it just and proper to extract hereunder, only the conclusions drawn by the majority view:

"(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.
(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a .High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.
(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.
(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.
(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the

Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.
(6) Appointment to the office of the Chief Justice of India should be of the seniormost Judge of the Supreme Court considered fit to hold the office.
(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court judges/Chief Justices.
(8) Consent of the transferred Judge/Chief Justice is not required for either the first of any subsequent transfer from one High Court to another.
(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.
(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in any one.
(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.
(12) The initial appointment of Judge can be made to a High Court other than that for which the proposal was initiated.
(13) Fixation of Judge-strength in the High Courts is justiciable, but only to the extent and in the manner indicated.
(14) The majority opinion in S.P. Gupta v. Union of India (1982) 2 SCR 365: AIR 1982 SC 149, in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us."

The Third Judges case - (1998) 7 SCC 739:

18. For exactly the same reasons as have been noticed with reference to the Second Judges case, it is not necessary to dwell into the unanimous view expressed in the Third Judges case. The concession of the Attorney General for India, as was expressly recorded in paragraph 11 of the Third Judges case, needs to be extracted to highlight the fact, that the then Attorney General had conceded, that the opinion recorded by the

majority in the Second Judges case, had been accepted by the Union of India and, as such, would be binding on it. Paragraph 11 is accordingly reproduced hereunder:

"11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."

19. It is likewise necessary to extract herein, only the final summary of conclusions expressed in the Third Judges case, which are placed below:

"1. The expression "consultation with the Chief justice of India" in Articles 217(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of Indian does not constitute "consultation" within the meaning of the said Articles.
2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.
3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with two seniormost puisne Judges of the Supreme Court.
4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.
5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.
7. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.
8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.
9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India."

III. MOTION BY THE RESPONDENTS, FOR THE REVIEW OF THE SECOND AND THIRD JUDGES CASES:

20. It was the contention of the learned Attorney General, that in the submissions advanced at the hands of the learned counsel representing the petitioners, for adjudication of the merits of the controversy, emphatic reliance had been placed on the judgments rendered by this Court in the Second and Third Judges cases. It was the contention of the learned Attorney General, that the conclusions drawn in the above judgments, needed a reconsideration by way of a fresh scrutiny, to determine, whether the conclusions recorded therein, could withstand the original provisions of the Constitution, viewed in the background of the debates in the Constituent Assembly.

21. In order to record the facts truthfully, it was emphasized, that the submissions advanced by him, could not be canvassed on behalf of the Union of India as in the Third Judges case, the Union had consciously accepted as binding the judgment rendered in the Second Judges case.

Despite the above, the Attorney General was emphatic, that the Union of India could not be debarred from seeking reconsideration of the judgment rendered by this Court in the Second Judges case. In order to dissuade the learned Attorney General from the course he insisted to pursue, it was suggested, that the determination by this Court in the Second Judges case would not prejudice the claim of the Union of India, if the Union could establish, that the "basic structure" of the Constitution, namely, the "independence of the judiciary" would not stand compromised by the Constitution (99th Amendment) Act. Despite the instant suggestion, the Attorney General pleaded, that he be allowed to establish, that the determination rendered by the nine-Judge Bench in the Second Judges case, was not sustainable in law. At his insistence, we allowed him to advance his submissions. Needless to mention, that if the Attorney General was successful in persuading us, that the said judgment did not *prima facie* lay down the correct legal/constitutional position, the matter would have to be examined by a Constitution Bench, with a strength of nine or more Judges of this Court, only if, we would additionally uphold the challenge to the impugned constitutional amendment, and strike down the same, failing which the new regime would replace the erstwhile system.

22. First and foremost, our attention was drawn to Article 124 of the Constitution, as it existed, prior to the present amendment. It was submitted that Article 124 contemplated, that the Supreme Court would

comprise of the Chief Justice of India, and not more than seven other Judges (unless, the Parliament by law, prescribed a larger number). It was submitted, that clause (2) of Article 124 vested the power of appointment of Judges of the Supreme Court, with the President. The proviso under Article 124(2) postulated a mandatory "consultation" with the Chief Justice of India. Appointments contemplated under Article 124, also required a non-mandatory "consultation" with such other Judges of the Supreme Court and High Courts, as the President may deem necessary. It was accordingly submitted, that the consultation contemplated under Article 124(2), at the hands of the President was wide enough to include, not only the collegium of Judges, in terms of the judgment rendered by this Court in the Second Judges case, but each and every single Judge on the strength of the Supreme Court, and also the Judges of the High Courts of the States, as the President may choose to consult. It was submitted, that only a limited role assigned to the Chief Justice of India, had been altered by the judgment in the Second Judges case, into an all pervasive decision taken by the Chief Justice of India, in consultation with a collegium of Judges. It was pointed out, that the term "consultation" expressed in Article 124 with reference to the Chief Justice of India, had been interpreted to mean "concurrence". And accordingly, the President has been held to be bound, by the recommendation made to him, by the Chief Justice of India and his collegium of Judges. It was contended, that the above determination,

was wholly extraneous to the plain reading of the language engaged in Article 124 (in its original format). It was asserted, that there was never any question of "concurrence", as Article 124 merely contemplated "consultation". It was contended, that the above "consultation" had been made mandatory and binding, on the President even in a situation where, the opinion expressed by the Chief Justice and the collegium of Judges, was not acceptable to the President. It was asserted, that it was not understandable, how this addition came to be made to the plain and simple language engaged in framing Article 124. It was submitted, that once primacy is given to the Chief Justice of India (i.e., to the collegium of Judges, contemplated under the Second and Third Judges cases), then there was an implied exclusion of "consultation", with the other Judges of the Supreme Court, and also, with the Judges of the High Courts, even though, there was an express provision, empowering the President to make up his mind, after consulting the other Judges of the Supreme Court and the Judges of the High Courts, as he may choose.

23. The Attorney General further contended, that the interpretation placed on Article 124 in the Second Judges case, was an absolutely unsustainable interpretation, specially when examined, with reference to the following illustration. That even if all the Judges of the Supreme Court, recommend a name, to which the Chief Justice of India alone, was not agreeable, the said recommendee could not be appointed as a Judge.

This illustration, it was submitted, placed absolute power in the hands of one person – the Chief Justice of India.

24. The learned Attorney General, then invited the Court's attention to Article 125, so as to contend, that the salary payable to the Judges of the Supreme Court has to be determined by the Parliament by law, and until such determination was made, the emoluments payable to a Judge would be such, as were specified in the Second Schedule. It was submitted, that the Parliament was given an express role to determine even the salary of Judges, which is a condition of service of the Judges of the Supreme Court. He also pointed to Article 126, which contemplates, the appointment of one of the Judges of the Supreme Court, to discharge the functions of Chief Justice of India, on account of his absence or otherwise, or when the Chief Justice of India, was unable to perform the duties of his office. The Court's attention was also drawn to Article 127, to point out, that in a situation where the available Judges of the Supreme Court, could not satisfy the quorum of the Bench, required to adjudicate upon a controversy, the Chief Justice of India could continue the proceedings of the case, by including therein, a Judge of a High Court (who was qualified for appointment as a Judge of the Supreme Court), in order to make up the quorum, with the previous consent of the President of India. It was submitted, that the role of the President of India was manifestly inter-twined with administration of justice, by allowing the President to appoint a Judge of the High Court, as a Judge of the

Supreme Court on '*ad hoc*' basis. Reference was then made to Article 128, whereby the Chief Justice of India, with the previous approval of the President, could require a retired Judge of the Supreme Court, or a person who has held office as a Judge of a High Court, and was duly qualified for appointment as a Judge of the Supreme Court, to sit and act as a Judge of the Supreme Court. It was pointed out, that this was yet another instance, where the President's noticeable role in the functioning of the higher judiciary, was contemplated by the Constitution itself. The Court's attention was then drawn to Article 130, whereunder, even though the seat of the Supreme Court was to be at Delhi, it could be moved to any other place in India, if so desired by the Chief Justice of India, with the approval of the President. Yet again, depicting the active role assigned to the President, in the functioning of the higher judiciary. Likewise, the Court's attention was invited to Articles 133 and 134, providing for an appellate remedy in civil and criminal matters respectively, to the Supreme Court, leaving it open to the Parliament to vary the scope of the Courts' appellate jurisdiction. Insofar as Article 137 is concerned, it was pointed out, that the power of review of the judgments or orders passed by the Supreme Court, was subject to the provisions of any law made by the Parliament, or any rules that may be made under Article 145. With reference to Article 138, it was contended, that the jurisdiction of the Supreme Court, could be extended to matters falling in the Union List, as the Parliament may choose to confer. Similar

reference was made to clause (2) of Article 138, wherein further jurisdiction could be entrusted to the Supreme Court, when agreed to, by the Government of India and by any State Government, if the Parliament by law so provides. Based on the above, it was contended, that Article 138 was yet another provision, which indicated a participatory role of the Parliament, in the activities of the Supreme Court. Likewise, this Court's attention was drawn to Article 139, whereby the Parliament could confer, by law, the power to issue directions, orders or writs, in addition to the framework demarcated through Article 32(2). This, according to the learned Attorney General, indicated another participatory role of the Parliament in the activities of the Supreme Court. Pointing to Article 140, it was submitted, that the Parliament could by law confer upon the Supreme Court supplemental powers, in addition to the powers vested with it by the Constitution, as may appear to the Parliament to be necessary or desirable, to enable the Supreme Court to exercise its jurisdiction more effectively. It was submitted, that one Article after the other, including Article 140, indicated a collective and participatory role of the President and the Parliament, in the activities of the Supreme Court. Having read out Article 142(2), it was asserted, that even on the subject of securing the attendance of any person, and the discovery or production of any documents, or the investigation or punishment of any contempt of itself, the jurisdiction of the Supreme Court was subject to the law made by the Parliament. The learned Attorney General, also

referred to Article 145, whereunder, it was open to the Parliament to enact law framed by the Parliament, for regulating generally the practice and procedure of the Supreme Court. In the absence of any such law, the Supreme Court had the liberty to make rules for regulating the practice and procedure of the Court, with the approval of the President. It was submitted, that even on elementary issues like procedure, the Parliament and/or the President were assigned a role by the Constitution, in activities strictly in the judicial domain. With reference to the activities of the Supreme Court, the Court's attention was also drawn to Article 146, which envisages that appointments of officers and servants of the Supreme Court, were to be made by the Chief Justice of India. It was pointed out, that the authority conferred under Article 146, was subservient to the right of the President, to frame rules requiring future appointments to any office connected to the Supreme Court, to be made, only in consultation with the Union Pubic Service Commission. The aforesaid right of appointing officers and servants to the Supreme Court, is also clearly subservient to the right of the Parliament, to make provisions by enacting law on the above subject. In the absence of a legislation, at the hands of the Parliament, the conditions of service of officers and servants of the Supreme Court would be such, as may be prescribed by rules framed, by the Chief Justice of India. The rules framed by the Chief Justice, are subject to the approval by the President, with reference to salaries, allowances, leave and pension.

25. With reference to the appointments made to the High Courts, the Court's attention was invited to Article 217, whereunder, the authority of appointing a Judge to a High Court was vested with the President. The President alone, was authorized to make such appointments, after "consultation" with the Chief Justice of India, the Governor of the State, and the Chief Justice of the concerned High Court. The Court's attention was also drawn to Article 221, whereunder, the power to determine the salary payable to a Judge, was to be determined by law to be enacted by the Parliament. Till any such law was framed by the Parliament, High Court Judges would be entitled to such salaries, as were specified in the Second Schedule. The allowances payable to Judges of the High Court, as also, the right in respect of leave of absence and pension, were also left to the wisdom of Parliament, to be determined by law. And until such determination, Judges of the High Courts were entitled to allowances and rights, as were indicated in the Second Schedule. The Court's attention was also drawn to Article 222, wherein, the President was authorized, after "consulting" the Chief Justice of India, to transfer a Judge from one High Court to another. Inviting the Court's attention to the provisions referred to in the foregoing two paragraphs contained in Part V, Chapter IV – The Union Judiciary, and Part VI, Chapter V – The High Courts in the States, it was asserted, that the role of the President, and also, that of the Parliament was thoughtfully interwoven in various salient aspects, pertaining to the higher judiciary. Exclusion of the executive and the

legislature, in the manner expressed through the Second Judges case, in the matter of appointment of Judges to the higher judiciary, as also, transfer of Judges and Chief Justices of one High Court to another, was clearly against the spirit of the Constitution.

26. It was submitted, that the method of appointment of Judges to the higher judiciary, was not the "be all" or the "end all", of the independence of the judiciary. The question of independence of the judiciary would arise, with reference to a Judge, only after his appointment as a Judge of the higher judiciary. It was submitted, that this Court had repeatedly placed reliance on the debates in the Constituent Assembly, so as to bring out the intention of the framers of the Constitution, with reference to constitutional provisions. In this behalf, he placed reliance on T.M.A. Pai Foundation v. State of Karnataka[6], Re: Special Reference No.1 of 2002[7], and also on S.R. Chaudhuri v. State of Punjab[8]. The following observations in the last cited judgment were highlighted:

"33. Constitutional provisions are required to be understood and interpreted with an object-oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a "privilege" that extends *only* for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a

[6] (2002) 8 SCC 481
[7] (2002) 8 SCC 237
[8] (2001) 7 SCC 126

document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months."

For the same purpose, he referred to Indra Sawhney v. Union of India[9], and drew the Court's attention to the opinion expressed therein:

"217. Further, it is clear for the afore-mentioned reasons that the executive while making the division or sub-classification has not properly applied its mind to various factors, indicated above which may ultimately defeat the very purpose of the division or sub-classification. In that view, para 2(*i*) not only becomes constitutionally invalid but also suffers from the vice of non-application of mind and arbitrariness.

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772. We may now turn to Constituent Assembly debates with a view to ascertain the original intent underlying the use of words "backward class of citizens". At the outset we must clarify that we are not taking these debates or even the speeches of Dr Ambedkar as conclusive on the meaning of the expression "backward classes". We are referring to these debates as furnishing the context in which and the objective to achieve which this phrase was put in clause (4). We are aware that what is said during these debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. The speech of Dr Ambedkar on this aspect, however, stands on a different footing. He was not only the Chairman of the Drafting Committee which inserted the expression "backward" in draft Article 10(3) [it was not there in the original draft Article 10(3)], he was virtually piloting the draft Article. In his speech, he explains the reason behind draft clause (3) as also the reason for which the Drafting Committee added the expression "backward" in the clause. In this situation, we fail to understand how can anyone ignore his speech while trying to ascertain the meaning of the said expression. That the debates in Constituent Assembly can be relied upon as an aid to interpretation of a constitutional provision is borne out by a series of decisions of this Court. [See Madhu Limaye, in re, AIR 1969 SC 1014, Golak Nath v. State of Punjab, AIR 1967 SC 1643 (Subba Rao, CJ); opinion of Sikri, CJ, in Union of India v. H.S. Dhillon (1971) 2 SCC 779 and the several opinions in Kesavananda Bharati (1973) 4 SCC 225, where the relevance of these debates is pointed out, emphasing at the same time, the extent to which and the purpose for which they can be referred to.] Since the expression "backward" or "backward class of citizens" is not defined in the Constitution, reference to such debates is

[9] 1992 Supp (3) SCC 217

permissible to ascertain, at any rate, the context, background and objective behind them. Particularly, where the Court wants to ascertain the 'original intent' such reference may be unavoidable."

Reliance was also placed on Kesavananda Bharati v. State of Kerala[10],

and this Court's attention was invited to the following:

"1088. Before I refer to the proceedings of the Constituent Assembly, I must first consider the question whether the Constituent Assembly Debates can be looked into by the Court for construing these provisions. The Advocate-General of Maharashtra says until the decision of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur and others v. Union of India, (1971) 1 SCC 85 - commonly known as Privy Purses case - debates and proceedings were held not to be admissible. Nonetheless counsel on either side made copious reference to them. In dealing with the interpretation of ordinary legislation, the widely held view is that while it is not permissible to refer to the debates as an aid to construction, the various stages through which the draft passed, the amendments proposed to it either to add or delete any part of it, the purpose for which the attempt was made and the reason for its rejection may throw light on the intention of the framers or draftsmen. The speeches in the legislatures are said to afford no guide because members who speak in favour or against a particular provision or amendment only indicate their understanding of the provision which would not be admissible as an aid for construing the provision. The members speak and express views which differ from one another, and there is no way of ascertaining what views are held by those who do not speak. It is, therefore, difficult to get a resultant of the views in a debate except for the ultimate result that a particular provision or its amendment has been adopted or rejected, and in any case none of these can be looked into as an aid to construction except that the legislative history of the provision can be referred to for finding out the mischief sought to be remedied or the purpose for which it is enacted, if they are relevant. But in Travancore Cochin and others v. Bombay Company Ltd., AIR 1952 SC 366, the Golaknath case (supra), the Privy Purses case (supra), and Union of India v. H.S. Dhillon, (1971) 2 SCC 779, there are dicta against referring to the speeches in the Constituent Assembly and in the last mentioned case they were referred to as supporting the conclusion already arrived at. In Golaknath case (supra), as well as Privy Purses case (supra), the speeches were referred to though it was said not for interpreting a provision but for either examining the transcendental character of Fundamental Rights or for the circumstances which necessitated the giving of guarantees to the rulers. For whatever purpose speeches in the Constituent Assembly were looked at though it was

[10] (1973) 4 SCC 225

always claimed that these are not admissible except when the meaning was ambiguous or where the meaning was clear for further support of the conclusion arrived at. In either case they were looked into. Speaking for myself, why should we not look into them boldly for ascertaining what was the intention of our framers and how they translated that intention? What is the rationale for treating them as forbidden or forbidding material. The Court in a constitutional matter, where the intent of the framers of the Constitution as embodied in the written document is to be ascertained, should look into the proceedings, the relevant data including any speech which may throw light on ascertaining it. It can reject them as unhelpful, if they throw no light or throw only dim light in which nothing can be discerned. Unlike a statute, a Constitution is a working instrument of Government, it is drafted by people who wanted it to be a national instrument to subserve successive generations. The Assembly constituted Committees of able men of high calibre, learning and wide experience, and it had an able adviser, Shri B.N. Rau to assist it. A memorandum was prepared by Shri B.N. Rau which was circulated to the public of every shade of opinion, to professional bodies, to legislators, to public bodies and a host of others and was given the widest publicity. When criticism, comments and suggestions were received, a draft was prepared in the light of these which was submitted to the Constituent Assembly, and introduced with a speech by the sponsor Dr Ambedkar. The assembly thereupon constituted three Committees: (1) Union Powers Committee; (2) Provincial Powers Committee; and (3) Committee on the Fundamental Rights and Minorities Committee. The deliberations and the recommendations of these Committees, the proceedings of the Drafting Committee, and the speech of Dr Ambedkar introducing the draft so prepared along with the report of these Committees are all valuable material. The objectives of the Assembly, the manner in which they met any criticism, the resultant decisions taken thereupon, amendments proposed, speeches in favour or against them and their ultimate adoption or rejection will be helpful in throwing light on the particular matter in issue. In proceedings of a legislature on an ordinary draft bill, as I said earlier, there may be a partisan and heated debate, which often times may not throw any light on the issues which come before the Court but the proceedings in a .Constituent Assembly have no such partisan nuances and their only concern is to give the national a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an interplay of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly. Be that as it may, all I intend to do for the present is to examine the stages through which the draft passed and whether and what attempts were made to introduce

words or expressions or delete any that were already there and for what purpose. If these proceedings are examined from this point of view, do they throw any light on or support the view taken by me?"

For the same proposition, reliance was also placed on Samsher Singh v. State of Punjab[11], and on Manoj Narula v. Union of India[12].

27. Having emphasized, that Constituent Assembly debates, had been adopted as a means to understand the true intent and import of the provisions of the Constitution, reference was made in *extenso* to the Constituent Assembly debates, with reference to the provisions (more particularly, to Article 124) which are subject matter of the present consideration. It was pointed out, that after the constitution of the Constituent Assembly, the issue of judicial appointments and salaries was taken up by an *ad hoc* committee on the Supreme Court. The committee comprised of S. Varadachariar (a former Judge of the Federal Court), B.L. Mitter (a former Advocate General of the Federal Court), in addition to some noted jurists – Alladi Krishnaswamy Ayyar, K.M. Munshi and B.N. Rau (Constitutional Adviser to the Constituent Assembly of India). The *ad hoc* committee presented its report to the Constituent Assembly on 21.5.1947. With reference to judicial independence, it modified the consultative proposal suggested in the Sapru Committee report, by recommending a panel of 11 persons, nominated by the President, in consultation with the Chief Justice of India. Alternatively, it was suggested, that the panel would recommend

[11] (1974) 2 SCC 831
[12] (2014) 9 SCC 1

three candidates, and the President in consultation with the Chief Justice of India, would choose one of the three. It was suggested, that the panel would take its decision(s) by 2/3rd majority. To ensure independence, it was recommended, that the panel should have a tenure of ten years. Based on the above report, it was submitted, that the proposal suggested a wider participation of a collegium of Judges, politicians and law officers, in addition to the President and the Chief Justice of India, in the matter of appointment of Judges to the higher judiciary. Learned Attorney General went on to inform the Court, that on the basis of the above report, B.N. Rau prepared a memorandum dated 30.5.1947, wherein he made his own suggestions. The above suggestions related to Judges of the Supreme Court, as also, of High Courts. The Court was also informed, that the Union Constitution Committee presented its report to the Constituent Assembly on 4.7.1947, also pertaining to appointments to the higher judiciary. Yet another memorandum, on the Principles of a Model Provincial Constitution was prepared by the Constitutional Adviser on 13.5.1947, relating to appointments to the higher judiciary, which was adopted by the Provincial Constitution Committee. Reliance was placed by the Attorney General, on the speech delivered by Sardar Vallabhbhai Patel on 15.7.1947, wherein he expressed the following views:

"The committee have given special attention to the appointment of judges of the High Court. This is considered to be very important by the committee and as the judiciary should be above suspicion and should be above party influences, it was agreed that the appointment of High Court

judges should be made by the President of the Union in consultation with the Chief Justice of the Supreme Court, the Chief Justice of the Provincial High Court and the Governor with the advice of the Ministry of the Province concerned. So there are many checks provided to ensure fair appointments to the High Court."

The Court was informed, that the first draft of the new constitution prepared by B.N. Rau was presented to the Constituent Assembly in October 1947, wherein, it was expressed that Judges of the Supreme Court, would be appointed by the President, in consultation with the sitting Judges of the Supreme Court, and Judges of High Courts in consultation with the Chief Justice of India, except in the matter of appointment of the Chief Justice of India himself. It was suggested, that this was the immediate precursor to Article 124(2) of the Constitution, as it was originally framed.

28. It was pointed out, that in the above report prepared by the Constitutional Adviser, the following passage related to the judiciary:

"Regarding the removal of judges, he (Justice Frankfurter, Judge, Supreme Court of the United States of America) drew attention to a provision which had just been proposed in New York State – the provision has since been approved and which had the support of most of the judges and lawyers in this country. The provision is reproduced below:
9-a (1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims… (types of judges) may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judges of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division…
(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard…

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be held before a court on the judiciary…
(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by the presiding justice of any appellate division…"

It was submitted, that the above suggestion of vesting the power of impeachment, in-house by the judiciary itself, as recommended by Justice Frankfurter, was rejected. It was pointed out, that the second draft of the Constitution was placed before the Constituent Assembly on 21.2.1948. Articles 103 and 193 of the above draft, pertained to appointments of Judges to the Supreme Court and High Courts. It was submitted, that several public comments were received, with reference to the second draft. In this behalf, a memorandum was also received, from the Judges of the Federal Court and the Chief Justices of the High Courts which, *inter alia,* expressed as under:

"It seems desirable to insert a provision in these articles (Draft Articles 103(2) and 193(2) to the effect that no person should be appointed a judge of the Supreme Court or of a High Court who has at any time accepted the post of a Minister in the Union of India or in any State. This is intended to prevent a person who has accepted office of a Minister from exercising his influence in order to become a judge at any time. It is the unanimous view of the judges that a member of the Indian Civil Service should not be a permanent Chief Justice of any High Court. Suitable provision should be made in the article for this."

It was submitted, that in response to the above memorandum, B.N. Rau made the following observations:

"It is unnecessary to put these prohibitions into the Constitution. The Attorney-General in England is invariably one of the Ministers of the Crown and often even a Cabinet Minister; he is often appointed a judge afterwards (The Lord Chancellor is, of course, both a Cabinet Minister and the head of the judiciary). In India, Sapru and Sircar were Law

Members, or Law Ministers, as they would be called in future; no one would suggest that men of this type should be ineligible for appointment as judges afterwards…
Merit should be the only criterion for these high appointments; no constitutional ban should stand in the way of merit being recognized."

It was asserted, that in the memorandum submitted by the Judges of the Federal Court and the Chief Justices of the High Courts, the following suggestions were made:

"It is therefore suggested that Article 193(1) may be worded in the following or other suitable manner:
Every Judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India…
We do not think it is necessary to make any provision in the Constitution for the possibility of the Chief Justice of India refusing to concur in an appointment proposed by the President. Both are officers of the highest responsibility and so far no case of such refusal has arisen although a convention now exists that such appointments should be made after referring the matter to the Chief Justice of India and obtaining his concurrence. If per chance such a situation were ever to arise it could of course be met by the President making a different proposal, and no express provision need, it seems to us, be made in that behalf.
The foregoing applies *mutatis mutandi*s to the appointment of the Judges of the Supreme Court, and article 103(2) may also be suitably modified. In this connection it is not appreciated why a constitutional obligation should be cast on the President to consult any Judge or Judges of the Supreme Court or of the High Court in the States before appointing a Judge of the Supreme Court. There is nothing to prevent the President from consulting them whenever he deems it necessary to do so."

It was pointed out, that none of the above proposals were accepted. Reference was also made to the Editor of the Indian Law Review and the Members of the Calcutta Bar Association, who made the following suggestions:

"That in clause (4) of Article 103 the words "and voting" should be deleted, as they consider that in an important issue as the one

contemplated in this clause, opportunity should be as much minimized as practicable for the legislators for remaining neutral."

to which, the response of B.N. Rau was as under:

"In the Constitutions of Canada, Australia, South Africa and Ireland, a bare majority of the members present and voting suffices for the presentation of the address for removal of a judge. Article 103(4) requires a two-thirds majority of those present and voting. It is hardly necessary to tighten it further by deleting the words "and voting".

With reference to the suggestions regarding non-reduction of salaries of Judges, the Constitutional Adviser made the following comments:

"The constitutional safeguard against the reduction of salary of the Chief Justice and the judges of a High Court below the minimum has been prescribed in article 197 so as to prevent the Legislatures of the States from reducing the salaries below a reasonable figure. It is hardly necessary to put such a check on the power of Parliament to fix the salaries of the judges of the Supreme Court."

The suggestions made by Pittabhi Sitaramayya and others, with reference to officers, and servants and the expenses of the Supreme Court, were also highlighted. They are extracted hereunder:

"That in article 122, for the words "the Chief Justice of India in consultation with the President" the words "the President in consultation with the Chief Justice of India" be substituted."

The response of the Constitutional Adviser was as follows:

"The provision for the fixation of the salaries, allowances and pensions of the officers and servants of the Supreme Court by the Chief Justice of India in consultation with the President contained in clause (1) of article 122 is based on the existing provision contained in section 242(4) of the Government of India Act, 1935, as adapted. The Drafting Committee considered such a provision to be necessary to ensure the independence of the judiciary, the safeguarding of which was so much stressed by the Federal Court and the High Courts in their comments on the Draft Constitution."

29. It was pointed out, that the second draft of the Constitution, was introduced in the Constituent Assembly on 4.11.1948. The Court's attention was drawn to the discussions, with reference to appointments to the higher judiciary, including the suggestion of B. Pocker Sahib, who proposed an alternative to Article 103(2). Reference was also made to the proposal made by Mahboob Ali Baig Sahib, guarding against party influences, that may be brought to the fore, with reference to appointment of Judges. It was submitted, that the above suggestion was rejected by the Chairman of the Drafting Committee, who felt that it would be dangerous to enable the Chief Justice to veto the appointment of a Judge to the higher judiciary. The opinion of T.T. Krishnamachari was also to the following effect:

"[T]he independence of the Judiciary should be maintained and that the Judiciary should not feel that they are subject to favours that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interests of the Executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this House or of the framers of this Constitution that they want to crate specially favoured bodies which in themselves becomes an Imperium in Imperio, completely independent of the Executive and the legislature and operating as a sort of superior body to the general body politic".

30. The proposals and the decision taken thereon, were brought to our notice, specially the observations made by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar, Ananthasayanam Ayyangar, and finally Dr. B.R. Ambedkar. Dr. B.R. Ambedkar had stated thus:

"Finally, BR Ambedkar said:
Mr. President, Sir, I would just like to make a few observations in order to clear the position. Sir, there is no doubt that the House in general, has agreed that the independence of the Judiciary from the Executive should be made as clear and definite as we could make it by law. At the same time, there is the fear that in the name of the independence of the Judiciary, we might be creating, what my Friend Mr. T.T. Krishnamachari very aptly called an *"Imperium in Imperio"*. We do not want to create an *Imperium in Imperio*, and at the same time we want to give the Judiciary ample independence so that it can act without fear or favour of the Executive. My friends, if they will carefully examine the provisions of the new amendment which I have proposed in place of the original article 122, will find that the new article proposes to steer a middle course. It refuses to create an *Imperium in Imperio*, and I think it gives the Judiciary as much independence as is necessary for the purpose of administering justice without fear or favour."

31. Having extensively brought to our notice, the nature of the debates before the Constituent Assembly, and the decisions taken thereon, the learned Attorney General ventured to demonstrate, that the participation of the executive in the matter of appointment of high constitutional functionaries, "could not – and did not", impinge upon their independence, in the discharge of their duties. Illustratively, reliance was placed on Part IV Chapter V of the Constitution, comprising of 4 Articles of the Constitution (Articles 148 to 151), dealing with the Comptroller and Auditor-General of India. It was submitted, that duties and powers of the Comptroller and Auditor-General of India, delineated in Article 149, revealed, that the position of the Comptroller and Auditor-General of India, was no less in importance vis-a-vis the Judges of the higher judiciary. Pointing out to Article 148, it was his contention, that the appointment of the Comptroller and Auditor-General of India is made by the President. His removal under clause (1) of Article 148 could only,

in the like manner, be made on the like grounds as a Judge of the Supreme Court of India. Just like a Judge of the Supreme Court, his salary and other conditions of service were to be determined by Parliament by law, and until they were so determined, they were to be as expressed in the Second Schedule. Further more, just like a Judge of the Supreme Court, neither the salary of the Comptroller and Auditor-General, nor his rights in respect of leave of absence, pension or age of retirement, could be varied to his disadvantage, after his appointment. In a similar fashion, as in the case of the Supreme Court, persons serving in the Indian Audit and Accounts Department, were to be subject to such conditions of service, as were determined by law made by Parliament, and till such legislative enactment was made, their conditions of service were determinable by the President, by framing rules, in consultation with the Comptroller and Auditor-General of India. Based on the above, it was contended, that even though the appointment of the Comptroller and Auditor-General of India, was exclusively vested with the executive, there had never been an adverse murmur with reference to his being influenced by the executive. The inference sought to be drawn was, that the manner of "appointment" is irrelevant, to the question of independence. Independence of an authority, according to the learned Attorney General, emerged from the protection of the conditions of the incumbent's service, after the appointment had been made.

32. In the like manner, our attention was drawn to Part XV of the Constitution, pertaining to elections. It was submitted, that Article 324 vested the superintendence, direction and control of elections to the Parliament, and the Legislatures of every State, and election to the offices of President and Vice-President, with the Election Commission. The Election Commission in terms of Article 324(2) was comprised of the Chief Election Commissioner, and such number of other Election Commissioners as the President may from time to time fix. It was submitted, that the appointment of the Chief Election Commissioner, and the other Election Commissioners, was to be made by the President, and was subject to the provisions of law made by Parliament. It was further pointed out, that under Article 324(5), the conditions of service and the tenure of the office of the Election Commissioners (and the Regional Commissioners) is regulated in the manner, as the President may by rules determine. Of course, subject to, enactment of law by Parliament. So as to depict similarity with the matter under consideration, it was contended, that the proviso under Article 324(5) was explicit to the effect, that the Chief Election Commissioner could not be removed from his office, except in like manner, and on like grounds, as a Judge of the Supreme Court. And further more, that the conditions of service of the Chief Election Commissioner, could not be varied to his disadvantage, after his appointment. It was contended, that the Indian experience had been, that the Chief Election Commissioner, and the other Election

Commissioners, had functioned with absolute independence, and that, their functioning remained unaffected, despite the fact that their appointment had been made, by the executive. It was submitted, that impartiality/independence emerged from the protection of the conditions of service of the incumbent after his appointment, and not by the method or manner of his appointment.

33. It was also the contention of the learned Attorney General, that implicit in the scheme of the Constitution, was a system of checks and balances, wherein the different constitutional functionaries participate in various processes of selection, appointment, etc., so as to ensure, that the constitutional functionaries did not exceed, the functions/responsibilities assigned to them. To substantiate the above contention, reliance was placed on the Kesavananda Bharati case[10], wherein this Court observed as under:

"577. We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word. This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process; (per Bose, J., in Bidi Supply Co. v. Union of India, AIR 1956 SC 479). The observations of Patanjali Sastri, C.J., in State of Madras v. V.G. Row, AIR 1952 SC 196, which have become locus classicus need alone be repeated in this connection. Judicial review is undertaken by the courts "not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution". The respondents have also contended that to let the court have judicial review over constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in Commonwealth of Australia v. Bank of New South Wales 1950 AC 235 at 310:

"The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but

between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament."

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation to a degree as was found in Ranasinghe's case. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated, the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution (per Haldane, L.C. in Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. 1914 AC 237 and Ex Parte Walsh & Johnson; In re Yates, (1925) 37 CLR 36 at p.58. The function of interpretation of a Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the Legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the respondents have contested the proposition that the validity of a constitutional amendment can be the subject of review by this Court. The Advocate-General of Maharashtra has characterised judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21 and the affirmation in Article 141 that judges declare but not make law. To this may be added the none too .rigid amendatory process which authorises amendment by means of 2/3 majority and the additional requirement of ratification."

The Court's attention was also invited to the observations recorded in

Bhim Singh v. Union of India[13]:

"77. Another contention raised by the petitioners is that the Scheme violates the principle of separation of powers under the Constitution. The concept of separation of powers, even though not found in any particular constitutional provision, is inherent in the polity the Constitution has adopted. The aim of separation of powers is to achieve the maximum extent of accountability of each branch of the Government.

[13] (2010) 5 SCC 538

78. While understanding this concept, two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible, nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability.

79. In Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549, this Court held that: (AIR p. 556, para 12)

"12. ...The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law."

80. In Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225, and later in Indira Nehru Gandhi v. Raj Narain (1976) 3 SCC 321, this Court declared separation of powers to be a part of the basic structure of the Constitution. In Kesavananda Bharati case Shelat and Grover, JJs. in SCC para 577 observed the precise nature of the concept as follows: (SCC p. 452)

"577. ... There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in Ranasinghe case. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances."

and conclusion no.5, which is reproduced as under:

".....

(5) Indian Constitution does not recognise strict separation of powers. The constitutional principle of separation of powers will only be violated if an essential function of one branch is taken over by another branch, leading to a removal of checks and balances."

Last of all, the learned Attorney General placed reliance on State of U.P. v. Jeet S. Bisht[14], wherein this Court held:

"78. Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times."

34. The learned Attorney General emphasized, that there was a very serious and sharp cleavage of opinion on the subject, which is being canvassed before this Court. Relying on the judgment rendered by in the Sankalchand Himatlal Sheth case[5], he pointed out, that in the aforesaid judgment, this Court had arrived at the conclusion, that the term "consultation" could not be deemed to be "concurrence", with reference to Article 222. In conjunction with the above, he invited our attention to the judgment in the Samsher Singh case[11], wherein a seven-Judge Bench, which was dealing with a controversy relating to Judges of subordinate courts, and the impact of Article 311, had examined the question whether the President was to act in his individual capacity, i.e., at his own discretion; or he was liable to act on the aid and advice of the Council of Ministers, as mandated under Article 74. Reliance was placed

[14] (2007) 6 SCC 586

on the following observations from the aforesaid judgment:

"149. In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

35. It was submitted, that the aforesaid observations as were recorded in the Samsher Singh case[11], were relied upon in the Second Judges case. This Court, it was pointed out, had clarified that the observations recorded in paragraph 149 in the Samsher Singh case[11], were merely in the nature of an *obiter.* It was submitted, that the aforesaid observations in the Samsher Singh case[11], were also noticed in paragraph 383 (at page 665), wherein it was sought to be concluded, that the President, for all practical purposes, should be construed, as the concerned Minister or the Council of Ministers. Having noticed the constitutional provisions regarding "consultation" with the judiciary, this Court had expressed, that the Government was bound by such counsel. Reference was then made to the judgment of this Court in the First Judges case, wherein it

was held, that "consultation" did not include "concurrence", and further, that the power of appointment of Judges under Article 124, was vested with the President, and also, that the President could override the views of the consultees. Last of all, to substantiate his submission(s) pertaining to the cleavage of opinion, reliance was placed on the Kesavananda Bharati case[10], wherein a thirteen-Judge Bench of this Court, had held, with reference to the power of amendment under Article 368, that the concept of "basic structure", was a limitation, to the otherwise plenary power of amendment of the Constitution.

36. In his effort to persuade us, to refer the instant matter, to a nine-Judge Bench (or, to a still larger Bench), the learned Attorney General placed reliance on Suraz India Trust v. Union of India[15], and invited our attention to the following:

"3. Shri A.K. Ganguli, learned Senior Advocate, has submitted that the method of appointment of a Supreme Court Judge is mentioned in Article 124(2) of the Constitution of India which states:

"124. (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

It may be noted that there is no mention:

(i) Of any Collegium in Article 124(2).

(ii) The word used in Article 124(2) is "consultation", and not "concurrence".

(iii) The President of India while appointing a Supreme Court Judge can consult any Judge of the Supreme Court or even the High Court as he deems necessary for the purpose, and is not bound to consult only the five seniormost Judges of the Supreme Court.

[15] (2012) 13 SCC 497

4. That by the judicial verdicts in the aforesaid two cases, Article 124(2) has been practically amended, although amendment to the Constitution can only be done by Parliament in accordance with the procedure laid down in Article 368 of the Constitution of India.

5. That under Article 124(2) while appointing a Supreme Court Judge, the President of India has to consult the Chief Justice of India, but he may also consult any other Supreme Court Judge and not merely the four seniormost Judges. Also, the President of India can even consult a High Court Judge, whereas, according to the aforesaid two decisions the President of India cannot consult any Supreme Court Judge other than the four seniormost Judges of the Supreme Court, and he cannot consult any High Court Judge at all.

6. Shri Ganguli submits that the matter is required to be considered by a larger Bench as the petition raises the following issues of constitutional importance:

(1) Whether the aforesaid two verdicts viz. the seven-Judge Bench and nine-Judge Bench decisions of this Court referred to above really amount to amending Article 124(2) of the Constitution?

(2) Whether there is any "Collegium" system for appointing the Supreme Court or High Court Judges in the Constitution?

(3) Whether the Constitution can be amended by a judicial verdict or can it only be amended by Parliament in accordance with Article 368?

(4) Whether the constitutional scheme was that the Supreme Court and High Court Judges can be appointed by mutual discussions and mutual consensus between the judiciary and the executive; or whether the judiciary can alone appoint Judges of the Supreme Court and High Courts?

(5) Whether the word "consultation" in Article 224 means "concurrence"?

(6) Whether by judicial interpretation words in the Constitution can be made redundant, as appears to have been done in the aforesaid two decisions which have made consultation with the High Court Judges redundant while appointing a Supreme Court Judge despite the fact that it is permissible on the clear language of Article 124(2)?

(7) Whether the clear language of Article 124(2) can be altered by judicial verdicts and instead of allowing the President of India to consult such Judges of the Supreme Court as he deems necessary (including even junior Judges) only the Chief Justice of India and four seniormost Judges of the Supreme Court can alone be consulted while appointing a Supreme Court Judge?

(8) Whether there was any convention that the President is bound by the advice of the Chief Justice of India, and whether any such convention (assuming there was one) can prevail over the clear language of Article 124(2)?

(9) Whether the opinion of the Chief Justice of India has any primacy in the aforesaid appointments?

(10) Whether the aforesaid two decisions should be overruled by a larger Bench?

7. Mr G.E. Vahanvati, learned Attorney General for India, supports the petitioner contending that the aforesaid judgments require reconsideration. However, he also submits:

(a) A writ petition under Article 32 is not maintainable at the behest of a trust as the trust cannot claim violation of any of its fundamental rights;

(b) The petitioner has no locus standi to seek review of the judgments of this Court. In fact, a petition under Article 32 of the Constitution does not lie to challenge the correctness of a judicial order; and

(c) A Bench of two Judges cannot examine the correctness of the judgment of a nine-Judge Bench.

(d) A Bench of two Judges cannot refer the matter to the larger Bench of nine Judges or more, directly.

xxxx xxxx xxxx

11. However, Mr Ganguli dealing with the issue of locus standi of the Trust has submitted that the petition may not be maintainable but it should be entertained because it raises a large number of substantial questions of law. In order to fortify his submission he places reliance upon a recent Constitution Bench judgment of this Court in B.P. Singhal v. Union of India (2010) 6 SCC 331 wherein while dealing with the issue of removal of Governors, this Court held as under: (SCC p. 346, para 15)

."15. The petitioner has no locus to maintain the petition in regard to the prayers claiming relief for the benefit of the individual Governors. At all events, such prayers no longer survive on account of passage of time. However, with regard to the general question of public importance referred to the Constitution Bench, touching upon the scope of Article 156(1) and the limitations upon the doctrine of pleasure, the petitioner has the necessary locus."

Thus, Mr Ganguli submits that considering the gravity of the issues involved herein, the matter should be entertained.

12. While dealing with the issue of reference to the larger Bench, Mr Ganguli has placed a very heavy reliance on the recent order of this Court dated 30-3-2011 in Mineral Area Development Authority v. SAIL (2011) 4 SCC 450, wherein considering the issue of interpretation of the constitutional provisions and validity of the Act involved therein, a three-Judge Bench presided over by the Hon'ble Chief Justice has referred the matter to a nine-Judge Bench.

13. At this juncture, Mr Ganguli as well as Mr Vahanvati have submitted that even at the stage of preliminary hearing for admission of the petition, the matter requires to be heard by a larger Bench as this matter has earlier been dealt with by a three-Judge Bench and involves very complicated legal issues.

14. In view of the above, we place the matter before the Hon'ble the Chief Justice for appropriate directions."

It was pointed out, that when the above matter was placed before a three-Judge Bench of this Court, the same was dismissed on the ground of *locus standi.* Yet, since the above order was passed in the absence of the petitioner trust, an application had been moved for recall of the above order. It was his assertion, that whether or not a recall order was passed with reference to the questions raised, it was apparent, that a Bench of this Court has already expressed the view, that the conclusions drawn in the Second and Third Judges cases, need a relook.

37. Finally, to support the above suggestions, the Court's attention was drawn to the observations recorded by H.M. Seervai in the 4th edition of his book "Constitutional Law of India" wherein, with reference to the Second Judges case, very strong and adverse views were expressed. The aforesaid views are contained in paragraphs 25.448 to 25.497. For reasons of brevity, it is not possible for us to extract the same herein. Suffice it to state, that the submissions advanced by the learned Attorney General, as have been detailed in the foregoing paragraphs, were more or less, in accord with the views expressed by H.M. Seervai.

38. In order to contend, that it was open to this Court, to make a reference for reconsideration of the matters already adjudicated upon, the learned Attorney General, invited our attention to Jindal Stainless Limited v. State of Haryana[16].

"6. In Keshav Mills Co. Ltd. v. CIT AIR 1965 SC 1636…(AIR pp.1643-44, para 23) a Constitution Bench of this Court enacted the circumstances in

[16] (2010) 4 SCC 595

which a reference to the larger Bench would lie. It was held that in revisiting and revising its earlier decision, this Court should ask itself whether in the interest of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised? Whether on the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision bearing on the point not noticed? What was the impact of the error in the previous decision on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief?

7. According to the judgment in Keshav Mills case these and other relevant considerations must be born in mind whenever this Court is called upon to exercise its jurisdiction to review and revisit its earlier decisions. Of course, in Keshav Mills case a caution was sounded to the effect that frequent exercise of this Court of its power to revisit its earlier decisions may incidentally tend to make the law uncertain and introduce confusion which must be avoided. But, that is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error.

8. In conclusion, in Keshav Mills case, this Court observed that it is not possible to lay down any principles which should govern the approach of the Court in dealing with the question of revisiting its earlier decision. It would ultimately depend upon several relevant considerations.

9. In Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673..., a Constitution Bench of this Court observed that, in case of doubt, a smaller Bench can invite attention of Chief Justice and request for the matter being placed for hearing before a Bench larger than the one whose decision is being doubted."

39. With the above noted submissions, learned Attorney General for India concluded his address, for the review of the judgments in the Second and Third Judges cases.

40. Mr. K.K. Venugopal, learned senior counsel, commenced his submissions by highlighting the main features of the Constitution (67th Amendment) Bill, 1990. He invited our attention, to the proposed amendments of Articles 124, 217, 222 and 231, and more particularly, to the inserstion of Part XIIIA in the Constitution, under the heading

"National Judicial Commission". Article 307A was proposed as the singular Article in Part XIIIA. Based on the constitution of the National Judicial Commission, it was asserted, that the above Bill, had been introduced, to negate the effect of the judgment of this Court in the First Judges case. It was submitted, that when the aforesaid Bill was introduced in the Parliament, the Supreme Court Bar Association, of which Mr. Venugopal himself was the then President, organized a seminar on 1.9.1990, for the purpose of debating the pros and cons of the Constitution (67th Amendment) Bill, 1990. It was submitted, that a large number of speakers had taken part in the debate and had made important suggestions. The above suggestions, drafted as a resolution of the seminar, were placed before the House, and were passed either unanimously or with an overwhelming majority. It was submitted, that the aforesaid resolutions were forwarded to the Chief Justice of India, through a covering letter dated 5.10.1990. It was pointed out, that resolutions were also passed, at the conclusion of the Chief Justices' Conference, held between 31.8.1990 and 2.9.1990, wherein also, the provisions of the Constitution (67th Amendment) Bill, 1990, were deliberated upon. It was submitted, that he had made a compilation of the resolutions passed at the Chief Justices Conference, and the conclusions drawn in the Second Judges case, which would give a bird's eye view, of the views expressed. The compilation to which learned counsel drew our attention, is being extracted hereunder:

"…(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.
(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a .High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.
(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated, has primacy.
(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.
(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention. …"

Based on the aforesaid compilation, it was contended, that the judgment rendered in the Second Judges case, completely obliterated three salient features of Article 124. Firstly, under the original Article 124, the main voice was that of the President. It was submitted, that the voice of the President was totally choked in the Second Judges case. Secondly, Article 124, as it was originally framed, vested the executive with primacy, in respect of the appointments to the higher judiciary, whereas the position was reversed by the Second Judges case, by vesting primacy with the

judiciary. Thirdly, the role of the Chief Justice of India, which was originally, that of a mere consultee, was "turned over its head", by the decision in the Second Judges case. Now, the collegium of Judges, headed by the Chief Justice of India, has been vested with the final determinative authority for making appointments to the higher judiciary. And the President is liable to "concur", with the recommendations made. Based on the above assertions, it was the submission of the learned counsel, that by wholly misconstruing Article 124, the Supreme Court had assumed the entire power of appointment. And the voice of the executive had been completely stifled. It was submitted, that the judiciary had performed a legislative function, while interpreting Article 124. It was asserted, that originally the founding fathers had the power to frame the provisions of the Constitution, and thereafter, the Parliament had the power to amend the Constitution in terms of Article 368. It was submitted, that the role assigned to the Constituent Assembly, as also to the Parliament, has been performed by this Court in the Second Judges case. It was submitted, that all this had been done in the name of "judicial independence". The above logic was sought to be seriously contested by asserting, that judicial independence could not stand by itself, there was something like judicial accountability also, which had to be kept in mind.

41. It was also contended, that the judiciary had taken upon itself, the exclusive role of making appointments to the higher judiciary, without

taking into consideration any of the stakeholders. It is submitted, that the judiciary is meant for the litigating community, and therefore, the litigating community was liable to be vested with some role in the matter of appointments to the higher judiciary. Likewise, it was pointed out, that there were about ten lakhs lawyers in this country. They also had not been given any say in the matter. Even the Bar Associations, which have the ability to represent the lawyers' fraternity, had been excluded from any role in the process of appointments. It was highlighted, that under the old system, all the above stakeholders, had an opportunity to make representations to the executive, in the matter of appointments to the higher judiciary. But, that role has now been totally excluded, by the interpretation placed on Article 124, by the Second Judges case. The Court's attention was drawn to conclusion no.14 drawn in the summary of conclusions (recorded in paragraph 486, in the Second Judges case) that the majority opinion in the First Judges case, insofar as, it had taken a contrary view, relating to primacy of the role of the Chief Justice of India, in matters of appointments and transfers, and the justiciability of these matters, as well as, in relation to judge-strength, did not commend itself as being the correct view. Accordingly it was concluded, that the relevant provisions of the Constitution including the constitutional scheme must now be construed, understood and implemented, in the manner indicated in the conclusions drawn in the Second Judges case. The above determination, according to learned

counsel, was absolutely misconceived, as the same totally negated the effect of Article 74, which required the President to act only on the aid and advice of the Council of Ministers. According to learned counsel, the President would now have to act as per the dictate of the Chief Justice of India and the collegium of Judges. It was submitted, that it was impermissible in law, for a party to make a decision in its own favour. This, according to learned counsel, is exactly what the Supreme Court had done in the Second Judges case. It was contented, that the impugned constitutional amendment was an effort at the behest of the Parliament, to correct the above historical aberration. Learned counsel concluded, by asserting, that there were two Houses of Parliament under the Constitution, but the Supreme Court in the Second Judges case, had acted as a third House of Parliament, namely, as the House of corrections. In the background of the aforesaid factual position, it was submitted, that when the Union of India and the States which ratified the Constitution (99th Amendment) Act, seek reconsideration of the Second Judges case, was it too much, that the Union and the States were asking for?

42. Following the submissions noticed hereinabove, we heard Mr. K. Parasaran, Senior Advocate, who also supported the prayer made by the learned Attorney General. It was submitted, that the appointment of Judges had nothing to do with "independence of the Judge" concerned, or the judicial institution as a whole. It was submitted, that subsequent

to their appointment to the higher judiciary, the conditions of service of Judges of the High Court and the Supreme Court were securely protected. Thereafter, the independence of the Judges depended on their judicial conscience, and the executive has no role to play therein.

43. It was asserted, that the Judges who expressed the majority view, in the Second Judges case, entertained a preconceived notion about the "basic structure", even before hearing commenced, in the Second Judges case. In this behalf, he placed reliance on the resolutions passed at the conclusion of the Chief Justices' Conference, held between 31.8.1990 and 2.9.1990. It was asserted, that the controversy had not been adjudicated on the basis of an independent assessment, of the views expressed in the Constituent Assembly debates (with reference to the text of Article 124). It was submitted, that the interpretation rendered on Article 124, expressly ignored, not only the simple language indicating the procedure for appointment of Judges, but also the surrounding constitutional provisions. According to learned senior counsel, the judiciary had encroached into the executive power of appointment of Judges. This amounted to encroaching into a constitutional power, reserved for the executive, by the Constitution. It was asserted, that the power of amendment of the Constitution, vested in the Parliament under Article 368, was only aimed at keeping the Constitution in constant repair. It was submitted, that the aforesaid power vested with the Parliament, could not have been exercised by the Supreme Court, by substituting the

procedure of appointment of Judges, in the manner the Supreme Court felt. It was submitted, that in the Second Judges case, as also, the Third Judges case, the Supreme Court had violated the "basic structure", by impinging upon legislative power. It was contended, that it was imperative for this Court to have a re-look at the two judgments, so as to determine, whether there had been a trespass by the judiciary, into the legislative domain. And, if this Court arrives at the conclusion, that such was the case, it should strike down its earlier determination. It was further submitted, that the majesty of the Constitution, must be maintained and preserved at all costs, and there should be no hesitation in revisiting any earlier judgment, so as to correct an erroneous decision. With the aforesaid observations, learned counsel commended the Bench, to accept the prayer made by the learned Attorney General, and to make a reference for reconsideration of the judgments rendered by this Court, in the Second and Third Judges cases, to a Bench with an appropriate strength.

44. Mr. Ravindra Srivastava, Senior Advocate, also supported the submissions for reference to a larger Bench. It was submitted, that the conclusions drawn by this Court in the Second Judges case, and the Third Judges case, were liable to be described as doubtful, because a large number of salient facts, had not been taken into consideration, when the same were decided. It was the contention of the learned counsel, that the submissions advanced on behalf of the petitioners, on

merits, could not be supported by the text of the constitutional provisions, and that, the petitioners' reliance squarely based on the majority judgment in the Second Judges case, as was further explained in the Third Judges case, was seriously flawed. It was submitted, that the thrust of the submissions advanced on behalf of the petitioners on merits had been, not only that the consultation with the Chief Justice of India was mandatory, but the opinion of the collegium of Judges was binding on the executive. It was asserted, that neither of the above requirements emerged from the plain reading of Article 124. It was asserted, that the basis of the learned counsel representing the petitioners, to assail the impugned constitutional amendment, as also the NJAC Act, was squarely premised on the above determination. It was asserted, that the conclusion of primacy of the judiciary, in the matter of appointment of Judges in the higher judiciary, could not be supported by any text of the original constitutional provisions. It was, accordingly suggested, that it was absolutely imperative to correct the majority view expressed in the Second Judges case.

45. According to the learned counsel, the primary objection raised, at the behest of the petitioners, opposing the reconsideration of the decision rendered in the Second Judges case, was based on the observations recorded in paragraph 10 of the Third Judges case, wherein the statement of the then Attorney General for India, had been recorded, that the Union of India was not seeking a review or reconsideration of the

judgment in the Second Judges case. It was submitted, that the aforesaid statement, could not bar the plea of reconsideration, for all times to come. It was further submitted, that the above statement would not bind the Parliament. It was contended, that the statement to the effect, that the Union of India, was not seeking a review or reconsideration of the Second Judges case, should not be understood to mean, that it was impliedly conceded, that the Second Judges case had been correctly decided. It was pointed out, that the advisory jurisdiction under Article 143, which had been invoked by the Presidential Reference made on 23.7.1998, requiring this Court to render the Third Judges case, was neither appellate nor revisionary in nature. In this behalf, learned counsel placed reliance on Re: Cauvery Water Disputes Tribunal[17], wherein it was held, that an order passed by the Supreme Court, could be reviewed only when its jurisdiction was invoked under Article 137 of the Constitution (read with Rule 1 of Order 40 of the Supreme Court Rules, 1946). And that, a review of the judgment rendered by the Supreme Court, in the Second Judges case, could not be sought through a Presidential Reference made under Article 143. In fact, this Court in the above judgment, had gone on to conclude, that if the power of review was to be read in Article 143, it would be a serious inroad into the "independence of the judiciary". It was therefore submitted, that the statement of the then Attorney General, during the course of hearing of

[17] 1993 Supp (1) SCC 96(II)

the Third Judges case, could not be treated as binding, for all times to come, so as to deprive the executive and the legislature from even seeking a review of the judgments rendered. It was therefore contended, that it was implicit while discharging its duty, that this Court was obliged to correct the errors of law, which may have been committed in the past. Learned counsel contended, that a perusal of the judgment of this Court in the Subhash Sharma case[4], clearly brought out, that no formal request was made to this Court for reconsideration of the legal position declared by this Court in the First Judges case. Yet, this Court, on its own motion, examined the correctness of the First Judges case, and *suo motu*, made a reference of the matter, to a nine-Judge Bench, to reconsider the law declared in the First Judges case.

46. While pointing to the reasons for reconsideration of the law laid down by this Court in the Second Judges case (read with the Third Judges case), learned senior counsel, asserted, that the essence of Article 124, had been completely ignored by the majority view. Learned senior counsel, accordingly, invited our attention to the scheme of Article 124(2) and canvassed and summarized the following salient features emerging therefrom:

"i. The authority to appoint Judges of the higher judiciary was vested in the President.
ii. The above power of appointment by the President, was subject to only one condition, namely, 'consultation'.
iii. The above consultation was a two-fold – one which in the opinion of the President may be deemed necessary, and the other which was mandatory.

iv. The mandatory consultation was with the Chief Justice of India. The consultation which the President may have 'if deemed necessary for the purpose, was with judges of the Supreme Court and also of the High Courts in the states, as may be felt appropriate.

v. There was no limitation on the power, scope and ambit of the President to engage in consultation, he may not only with the judges of the Supreme Court, but may also consult judges of High Courts as he may deem necessary, for this purpose.

vi. There was also no limitation on the President's power of consultation. He could consult as many judges of the Supreme Court and High Courts which he deemed necessary for the purpose.

vii. Having regard to the object and purpose of the appointment of a judge of the Supreme Court, and that, such appointment was to the highest judicial office in the Republic, was clearly intended to be broad-based, interactive, informative and meaningful, so that, the appointment was made of the most suitable candidate.

viii. This aspect of the power of consultation of the President, as had been provided had been completely ignored in the majority judgment in Second Judges' case. And the focus has been confined only to the consultation, with the Chief Justice of India.

ix. The interpretation of the consultative process, and the procedure laid down, in the majority judgement in the Second Judges case, that the President's power of consultation, was all-pervasive had been 'circumscribed', having been so held expressly in paragraph 458 (by Justice J.S. Verma) in the Second Judges' case.

x. The majority judgment has focused only on the requirement of consultation by the President with the Chief Justice of India which is requirement of proviso, ignoring the substantive part.

xi. The collegium system had been evolved, for consultation with the Chief Justice of India on the interpretation, that for purposes of consultation with the Chief Justice of India, the CJI alone as an individual would not matter, but would mean in plurality i.e. his collegium. But this is an interpretation only of the proviso and not of the substantive part of Article 124(2).

xii The collegium system was evolved for consultation with the CJI and his colleagues in particular in fixed numbers as laid down in the judgment.

xiii. The whole provision for consultation by the President of India with the judges of the Supreme Court and the High Court, had thus been stultified, in ignorance of the substantive part of Article 124(2), and as such, one was constrained to question the majority judgment as being '*per incuriam*'."

47. According to learned senior counsel, a perusal of the judgment in the Subhash Sharma case[4] would reveal, that reconsideration of the

judgments in the First Judges case, was only on two issues. Firstly, the status and importance of consultation, and the primacy of the position of the Chief Justice of India. And secondly, the justiceability of fixation, of the judge-strength of a Court. It was asserted, that no other issue was referred for reconsideration. This assertion was sought to be supported with the following observations, noticed in the Subhash Sharma case[4]:

"49. .....Similarly, the writ application filed by Subhash Sharma for the reasons indicated above may also be disposed of without further directions. As and when necessary the matter can be brought before the court. As in our opinion the correctness of the majority view in S.P. Gupta case [(1981) Supp. SCC 87] should be considered by a larger bench we direct the papers of W.P. No.1303 of 1987 to be placed before the learned Chief Justice for constituting a bench of nine Judges to examine the two questions we have referred to above, namely, the position of the Chief Justice of India with reference to primacy and, secondly, justiciability of fixation of Judge strength."

It was asserted, that there was no scope or occasion for the Bench hearing the Second Judges case, to rewrite the Constitution, on the subject of appointment of Judges to the higher judiciary. It was submitted, that the observations recorded in the Second Judges case, in addition to the above mentioned two issues, were liable to be regarded as *obiter dicta*. In the Second Judges case, the *ratio decidendi*, according to learned counsel, was limited to the declaration of the legal position, only on the two issues, referred to the larger Bench for consideration. Thus viewed, it was asserted, that all other conclusions recorded in the Second Judges case, on issues other than the two questions referred for reconsideration, cannot legitimately be described as binding law under Article 141. To support the above contention, reliance was placed on

Kerala State Science and Technology Museum v. Rambal Co.[18], wherein this Court held as under:

"8. It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to. (See Kesho Nath Khurana v. Union of India [(1981) Supp. SCC 38], Samaresh Chandra Bose v. District Magistrate, Burdwan [(1972) 2 SCC 476] and K.C.P. Ltd. v. State Trading Corpn. of India [(1995) Supp. (3) SCC 466]."

48. Learned senior counsel submitted, that in the Second Judges case, this Court assigned an innovative meaning to the words "Chief Justice of India", by holding that the term "Chief Justice of India" in Article 124, included a plurality of Judges, and not the individual Chief Justice of India. This, according to learned counsel, was against the plain meaning and text of Article 124. Learned counsel, went on to add, that this Court in the Second Judges case, had laid down an inviolable rule of seniority, for appointment of Chief Justice of India. It also laid down, the rules and the norms, for transfer of Judges and Chief Justices, from one High Court to another. It also concluded, that any transfer of a Judge or Chief Justice of a High Court, made on the recommendation of the Chief Justice of India, would be deemed to be non-punitive. In sum and substance, learned counsel contended, that the Second Judges case, laid down a new structure, in substitution to the role assigned to the Chief Justice of India. The conclusions recorded in the Second Judges case, according to learned counsel, could not be described as a mere judicial

[18] (2006) 6 SCC 258

interpretation. It was asserted, that the same was nothing short of judicial activism (or, judicial legislation).

49. Learned senior counsel then invited the Court's attention, to the principles laid down for reconsideration, or review of a previous judgment. For this he pointedly invited the Court's attention to Bengal Immunity Co. Ltd. v. State of Bihar[19], Maganlal Chhaganlal (P) Ltd. v. Municipal Corpn. of Greater Bombay[20], and Union of India v. Raghubir Singh[21]. Learned counsel also referred to Pradeep Kumar Biswas v. Indian Institute of Chemical Biology[22], wherein it was observed:

"61. Should Sabhajit Tewary (1975) 1 SCC 485 ... still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and
"[t]here is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public." [Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661, 672] (AIR p. 672, para 15)
Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake."

It was pointed out, that in the Second Judges case, S. Ratnavel Pandian, J. had observed as follows:

"17. So it falls upon the superior courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential features and basic principles which lie at the root of Indian democracy. However, in this process, our main objective should be to make the Constitution quite understandable

[19] (1955) 6 SCR 603
[20] (1974) 2 SCC 402
[21] (1989) 2 SCC 754
[22] (2002) 5 SCC 111

by stripping away the mystique and enigma that permeates and surrounds it and by clearly focussing on the reality of the working of the constitutional system and scheme so as to make the justice delivery system more effective and resilient. Although frequent overruling of decisions will make the law uncertain and later decisions unpredictable and this Court would not normally like to reopen the issues which are concluded, it is by now well settled by a line of judicial pronouncements that it is emphatically the province and essential duty of the superior courts to review or reconsider their earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown along with the passage of time. This power squarely and directly falls within the rubric of judicial review or reconsideration."

It was submitted, that Kuldip Singh, J., in the Second Judges case, had recorded as follows:

"320. It is no doubt correct that the rule of stare decisis brings about consistency and uniformity but at the same time it is not inflexible. Whether it is to be followed in a given case or not is a question entirely within the discretion of this Court. On a number of occasions this Court has been called upon to reconsider a question already decided. The Court has in appropriate cases overruled its earlier decisions. The process of trial and error, lessons of experience and force of better reasoning make this Court wiser in its judicial functioning. In cases involving vital constitutional issues this Court must feel to bring its opinions into agreement with experience and with the facts newly ascertained. Stare decisis has less relevance in constitutional cases where, save for constitutional amendments, this Court is the only body able to make needed changes. Re-examination and reconsideration are among the normal processes of intelligent living. We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice."

Based on the above, learned counsel summarized his assertions as follows. Firstly, the real constitutional question, requiring re-examination, was in the context of appointment of Judges to the higher judiciary, was the interpretation of Article 74. Because the Second

Judges case, had made a serious inroad into the power of the President which was bound to be exercised in consonance with Article 74. It was contended, that the functioning of the President, in the absence of the aid and advice of the Council of Ministers, could not just be imagined under the scheme of the Constitution. And therefore, the substitution of the participatory role of the Council of Ministers (or, the Minister concerned), with that of the Chief Justice of India in conjunction with his collegium, was just unthinkable. And secondly, that the First Judges case, was wrongly overruled, and the correct law for appointment of Judges, vis-à-vis the role of the executive, was correctly laid down in the First Judges case, by duly preserving the "independence of the judiciary". It was submitted, that reference to a larger Bench was inevitable, because it was not open to the respondents, to canvass the above submission, before a five-Judge Bench."

50. Mr. Harish N. Salve and Mr. T.R. Andhyarujina, learned senior counsel, addressed the Court separately. Their submissions were however similar. It was their contention, that a Constitutional Court revisits constitutional issues, from time to time. This, according to learned counsel, has to be done because the Constitution is a living document, and needed to be reinvented, to keep pace with the change of times. It was submitted, that this may not be true for other branches of law, wherein judgments are not revisited, because the Courts were expected to clearly and unambiguously follow the principle of *stare*

decisis, with reference to laws dealing with private rights. Insofar as the controversy in hand is concerned, it was submitted, that the conclusions recorded by this Court in the Second and Third Judges cases, indicated doubtful conclusions, because a large number of salient facts (as have been recorded above), had not been taken into consideration. It was submitted, that expediency in a controversy like the one in hand, should be in favour of the growth of law. It was submitted, that in their view this was one such case, wherein the issue determined by this Court in the Second and Third Judges cases, needed to be re-examined by making a reference to a larger Bench. Learned counsel pointed out, that the submissions made in the different petitions filed before this Court, were not supported by the text of any constitutional provision, but only relied on the legal position declared by this Court, in the above two cases. In such an important controversy, according to learned counsel, this Court should not be hesitant in revisiting its earlier judgments. Mr. Andhyarujina posed a query, namely, can we decide the controversy raised in the present case, without the reconsideration of the judgments in the Second and Third Judges cases? He answered the same through another query, how can appointments of Judges be by Judges? The above position was again posed differently, by putting forth a further query, can primacy rest with the Chief Justice of India in the matter of appointment of Judges to the higher judiciary?

51. Mr. Ajit Kumar Sinha, learned Senior Advocate, in support of his contention, that the matter needed to be heard by a larger Bench, placed reliance on Mineral Area Development Authority v. Steel Authority of India[23], and invited our attention to question no.5 of the reference made by this Court:

"5. Whether the majority decision in State of W.B. v. Kesoram Industries Ltd. [(2004) 10 SCC 201] could be read as departing from the law laid down in the seven-Judge Bench decision in India Cement Ltd. v. State of T.N. [(1990) 1 SCC 12)?"

It was pointed out, that the above question came to be framed because in State of West Bengal v. Kesoram Industries Ltd.[24], this Court by a majority of 4:1 had clarified the judgment rendered by a seven-Judge Bench of this Court in India Cement Ltd. v. State of Tamil Nadu[25]. This Court had to frame the above question, and refer the matter to a nine-Judge Bench. Learned counsel, then placed reliance on Sub-Committee of Judicial Accountability v. Union of India[26], wherein this Court had observed as under:

"5. Even if the prayer is examined as if it were an independent substantive proceeding, the tests apposite to such a situation would also not render the grant of this relief permissible. The considerations against grant of this prayer are obvious and compelling. Indeed, no co-ordinate bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another co-ordinate bench....."

In view of the above, it was contended, that this Court while examining the merits of the controversy in hand, was bound to rely on the

[23] (2011) 4 SCC 450
[24] (2004) 10 SCC 201
[25] (1990) 1 SCC 12
[26] (1992) 4 SCC 97

judgments in the Second and Third Judges cases, to record its conclusions. Referring to the factual position narrated above, it was submitted, that this Court would not be in a position to effectively adjudicate on the issues canvassed, till the matter was referred to a nine-Judge Bench (or even, a still larger Bench).

52. Mr. Ranjit Kumar, learned Solicitor General of India submitted, that he would support the claim for reference to a larger Bench, by relying upon two judgments, and say no more. First and foremost, he placed reliance on the Bengal Immunity Co. Ltd. case[19], which it was pointed out, had considered the judgment in State of Bombay v. United Motors (India) Ltd.[27]. The matter, it was submitted, came to be referred to a seven-Judge Bench, to decide whether the judgment needed to be reconsidered. This process, according to learned Solicitor General, need to be adopted in the present controversy as well, so as to take a fresh call on the previous judgments. Learned Solicitor General then placed reliance on Keshav Mills Co. Ltd. v. Commissioner of Income-tax, Bombay North[28], wherein a seven-Judge Bench held as under:

"In dealing with the question as to whether the earlier decisions of this Court in the New Jehangir Mills case, (1960) 1 SCR 249 and the Petlad Co. Ltd. case, (1963) Supp. SCR 871, should be reconsidered and revised by us, we ought to be clear as to the approach which should be adopted in such cases. Mr. Palkhivala has not disputed the fact that, in a proper case, this Court has inherent jurisdiction to reconsider and revise its earlier decisions, and so, the abstract question as to whether such a power vests in this Court or not need not detain us. In exercising this inherent power, however, this would naturally like to impose certain reasonable limitations and would be reluctant to entertain pleas for the

[27] (1953) SCR 1069
[28] (1965) 2 SCR 908

reconsideration and revision of its earlier decisions, unless it is satisfied that there are compelling and substantial reasons to do so. It is general judicial experience that in matters of law involving question of constructing statutory or constitutional provisions, two views are often reasonably possible and when judicial approach has to make a choice between the two reasonably possible views, the process of decision-making is often very difficult and delicate. When this Court hears appeals against decisions of the High Courts and is required to consider the propriety or correctness of the view taken by the High Courts on any point of law, it would be open to this Court to hold that though the view taken by the High Court is reasonably possible, the alternative view which is also reasonably possible is better and should be preferred. In such a case, the choice is between the view taken by the High Court whose judgment is under appeal, and the alternative view which appears to this Court to be more reasonable; and in accepting its own view in preference to that of the High Court, this Court would be discharging its duty as a Court of Appeal. But different considerations must inevitably arise where a previous decision of this Court has taken a particular view as to the construction of a statutory provision as, for instance, s. 66(4) of the Act. When it is urged that the view already taken by this Court should be reviewed and revised, it may not necessarily be an adequate reason for such review and revision to hold that though the earlier view is a reasonably possible view, the alternative view which is pressed on the subsequent occasion is more reasonable. In reviewing and revising its earlier decision, this Court should ask itself whether in interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, under Art. 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations: — What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent

aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.

..... The principle of stare decisis, no doubt, cannot be pressed into service in cases where the jurisdiction of this Court to reconsider and revise its earlier decisions is invoked; but nevertheless, the normal principle that judgments pronounced by this Court would be final, cannot be ignored, and unless considerations of a substantial and compelling character make it necessary to do so, this Court should and would be reluctant to review and revise its earlier decisions. That, broadly stated, is the approach which we propose to adopt in dealing with the point made by the learned Attorney-General that the earlier decisions of this Court in the New Jehangir Mills case, (1960) 1 SCR 249 and the Petlad Co. Ltd. case, (1963) Supp. 1 SCR 871, should be reconsidered and revised.

Let us then consider the question of construing s. 66(4) of the Act. Before we do so, it is necessary to read sub-section (1), (2) and (4) of s. 66. Section 66(1) reads thus: —

"Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33, the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court." ....."

Based on the above, it was asserted, on the basis of the factual and legal position projected by the learned Attorney General, that the position declared by this Court in the Second Judges case, as also, in the Third Judges case, was clearly erroneous. It was submitted, that the procedure

evolved by this Court for appointment of Judges to the higher judiciary having miserably failed, not because of any defect in the independence of the procedure prescribed, but because of the "intra-dependence of the Judges", who took part in discharging the responsibilities vested in the collegium of Judges, certainly required a re-examination.

53. It is apparent from the submissions advanced at the hands of the learned counsel representing the Union of India and the different State Governments, that rather than choosing to respond to the assertions made with reference to the constitutional validity of the Constitution (99th Amendment) Act, 2014 and the NJAC Act, had collectively canvassed, that the present five-Judge Bench should refer the present controversy for adjudication to a Bench of nine or more Judges, which could effectively revisit, if necessary, the judgments rendered by this Court in the Second and Third Judges cases. In view of the aforesaid consideration, we are of the view, that the observations recorded by this Court, in the Suraz India Trust case[15], as also, the fact that the same is pending before this Court, is immaterial. Consequent upon the instant determination by us, the above matter will be liable to be disposed of, in terms of the instant judgment.

IV. OBJECTION BY THE PETITIONERS, TO THE MOTION FOR REVIEW:

54. Mr. Fali S. Nariman, disagreed with the suggestion that the controversy in hand, needed to be decided by a larger Bench. It was his pointed submission, that the issue canvassed had been improperly

pressed, by overlooking certain salient features, which had necessarily to be taken into consideration, before a prayer for reference to a larger Bench could be agitated. It was submitted, that all the learned counsel representing the respondents had overlooked the fact, that the interpretation of Article 124 of the Constitution, was rendered in the first instance, by a seven-Judge Bench in the First Judges case. It was pointed out, that the law declared by this Court in the First Judges case, having been doubted, the matter was referred for reconsideration, before the nine-Judge Bench, which delivered the judgment in the Second Judges case. It was pointed out, that the prayer for revisitation, which is being made at the behest of the learned counsel representing the Union of India and the different participating States, was clearly unacceptable, because the legal position declared by this Court in the First Judges case had already been revisited in the Second Judges case by a larger Constitution Bench. Not only that, it was asserted, that when certain doubts arose about the implementation of the judgment in the Second Judges case, a Presidential Reference was made under Article 143, resulting in the re-examination of the matter, at the hands of yet another nine-Judge Bench, where the Union of India clearly expressed its stand in paragraph 11 as under:

"11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference."

It was submitted, that thereupon, the matter was again examined and the declared legal position in the Second Judges case, was reiterated and confirmed, by the judgment rendered in the Third Judges case. Premised on the aforesaid factual position, learned counsel raised a poser, namely, how many times, can this Court revisit the same question? It was asserted, that just because such a prayer seems to be the only way out, for those representing the respondents, the same need not be accepted.

55. Learned senior counsel pointed out, that the legal position with reference to appointments to the higher judiciary came to be examined and declared, for the first time, in the First Judges case, in 1981. It was submitted, that the aforesaid determination would not have been rendered, had this Court's attention been drawn to the Samsher Singh case[11], during the course of hearing, in the First Judges case. It was submitted, that the position declared by this Court in the First Judges case needed to be revisited, was realized during the hearing of the case in the Subhash Sharma case[4]. While examining the justification of the conclusions drawn by this Court, in the First Judges case, the matter was placed for consideration, before a nine-Judge Bench. It was submitted, that all the issues, which have now been raised at the hands of learned senior counsel representing the respondents, were canvassed before the Bench hearing the Second Judges case. This Court, in the Second Judges case, clearly arrived at the conclusion, that the earlier judgment rendered in the First Judges case, did not lay down the correct

law. It was submitted, that the legal position had been declared in the Second Judges case, by a majority of 7:2.

56. It was submitted, that the minority view, in the Second Judges case, was expressed by A.M. Ahmadi and M.M. Punchhi, JJ., (as they then were). Learned senior counsel, referred to the observations recorded in the Second Judges case by M.M. Punchhi, J.:

"500. Thus S.P. Gupta case, as I view it, in so far as it goes to permit the Executive trudging the express views of disapproval or non-recommendation made by the Chief Justice of India, and for that matter when appointing a High Court Judge the views of the Chief Justice of the High Court, is an act of impermissible deprival, violating the spirit of the Constitution, which cannot he approved, as it gives an unjust and unwarranted additional power to the Executive, not originally conceived of. Resting of such power with the Executive would be wholly inappropriate and in the nature of arbitrary power. The constitutional provisions conceives, as it does, plurality and mutuality, but only amongst the constitutional functionaries and not at all in the extra-constitutional ones in replacement of the legitimate ones. The two functionaries can be likened to the children of the cradle, intimately connected to their common mother — the Constitution. They recognise each other through that connection. There is thus more an obligation towards the tree which bore the fruit rather than to the fruit directly. Watering the fruit alone is pointless ignoring the roots of the tree. The view that the two functionaries must keep distances from each other is counter-productive. The relationship between the two needs to be maintained with more consideration.

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503. A centuries old Baconian example given to describe the plight of a litigant coming to a court of law comes to my mind. It was described that when the sheep ran for shelter to the bush to save itself from rain and hail, it found itself deprived of its fleece when coming out. Same fate for the institution of the Chief Justice of India. Here it results simply and purely in change of dominance. In the post - S.P. Gupta period, the Central Government i.e. the Law Minister and the Prime Minister were found to be in a dominant position and could even appoint a Judge in the higher judiciary despite his being disapproved or not recommended by the Chief Justice of India and likewise by the Chief Justice of a State High Court. Exception perhaps could be made only when the Chief Justice was not emphatic of his disapproval and was non-committed. His stance could in certain circumstance be then treated, as implied consent.

These would of course be rare cases. Now in place of the aforesaid two executive heads come in dominant position, the first and the second puisne, even when disagreeing with the Chief Justice of India. A similar position would emerge when appointing a Chief Justice or a Judge of the High Court. Thus in my considered view the position of the institution of the Chief Justice being singular and unique in character under the Constitution is not capable of being disturbed. It escaped S.P. Gupta case, though in a truncated form, and not to have become totally extinct, as is being done now. Correction was required in that regard in S.P. Gupta, but not effacement."

Pointing to the opinion extracted above, it was asserted, that the action of the executive to put off the recommendation made by the Chief Justice of India (disapproving the appointment of a person, as a Judge of the High Court) would amount to an act of deprival, "violating the sprit of the Constitution". Inasmuch as, the above demeanour/expression, would give an unjust and unwarranted power to the executive, which was not intended by the framers of the Constitution. The Court went on to hold, that the vesting of such power with the executive, would be wholly inappropriate, and in the nature of arbitrary power. It was also noted, that after this Court rendered its decision in the First Judges case, the Law Minister and the Prime Minister were found to be in such a dominant position, that they could appoint a Judge to the higher judiciary, despite his being disapproved (or, even when he was not recommended at all) by the Chief Justice of India (and likewise, by the Chief Justice of the High Court). Thus, in the view of M.M. Punchhi, J., these details had escaped the notice of the authors of the First Judges case, and corrections were required, in that regard, in the said judgment. Accordingly, it was the contention of the learned senior counsel, that one

of the minority Judges had also expressed the same sentiments as had been recorded by the majority, on the subject of primacy of the judiciary in matters regulated under Articles 124, 217 and 222.

57. It was submitted, that the issue in hand was examined threadbare by revisiting the judgment rendered in the First Judges case, when this Court reviewed the matter through the Second Judges case. It was submitted, that during the determination of the Third Judges case, the then Attorney General for India had made a statement to the Bench, that the Union of India, was not seeking a review or reconsideration of the judgment in the Second Judges case. Even though, the opinion tendered by this Court, consequent upon a reference made to the Supreme Court by the President of India under Article 143, is not binding, yet a statement was made by Attorney General for India, that the Union of India had accepted as binding, the answers of this Court to the questions set out in the reference. All this, according to learned counsel, stands recorded in paragraph 11 of the judgment rendered in the Third Judges case. According to learned senior counsel, it was clearly beyond the purview of the Union of India, to seek a revisit of the Second and Third Judges cases.

58. Besides the position expressed in the foregoing paragraphs, even according to the legal position declared by this Court, it was not open to the Union of India and the State Governments, to require this Court to examine the correctness of the judgments rendered in the Second and

Third Judges cases. It was submitted, that such a course could only be adopted, when it was established beyond all reasonable doubt, that the previous judgments were erroneous. Insofar as the instant aspect of the matter is concerned, learned counsel placed reliance on Lt. Col. Khajoor Singh v. Union of India[29] (Bench of 7 Judges), wherefrom learned counsel highlighted the following:

"We have given our earnest consideration to the language of Art. 226 and the two decisions of this Court referred to above. We are of opinion that unless there are clear and compelling reasons, which cannot be denied, we should not depart from the interpretation given in these two cases and indeed from any interpretation given in an earlier judgment of this Court, unless there is a fair amount of unanimity that the earlier decisions are manifestly wrong. This Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue."

Reference was also made to the Keshav Mills Co. Ltd. case[28], wherein a seven-Judge Bench of this Court held as under:

"It must be conceded that the view for which the learned Attorney-General contends is a reasonably possible view, though we must hasten to add that the view which has been taken by this Court in its earlier decisions is also reasonably possible. The said earlier view has been followed by this Court on several occasions and has regulated the procedure in reference proceedings in the High Courts in this country ever since the decision of this Court in the New Jehangir Mills, (1960) 1 SCR 249, was pronounced on May 12, 1959. Besides, it is somewhat remarkable that no reported decision has been cited before us where the question about the construction of s. 66(4) was considered and decided in favour of the Attorney-General's contention. Having carefully weighed the pros and cons of the controversy which have been pressed before us on the present occasion, we are not satisfied that a case has been made out to review and revise our decisions in the case of the New Jehangir Mills and the case of the Petlad Co. Ltd. (1963) Supp. 1 SCR 871. That is why we think that the contention raised by Mr. Palkhivala must be upheld. In the result, the order passed by the High Court is set aside and the matter is sent back to the High Court with a direction that the High

[29] (1961) 2 SCR 828

Court should deal with it in the light of the two relevant decisions in the New Jehangir Mills and the Petlad Co. Ltd."

While referring to Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh[30], our attention was drawn to the following observations recorded by the five-Judge Bench:

"28. We are somewhat surprised that the argument about the invalidity of the Act on the score that it is with respect to a controlled industry' dies hard, despite the lethal decision of this Court in Ch. Tika Ramji case [1956] SCR 393. Enlightened litigative policy in the country must accept as final the pronouncements of this Court by a Constitution Bench unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. Stare decisis is not a ritual of convenience but a rule with limited exceptions, Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this Court to brief ephemerality which recalls the opinion expressed by Justice Roberts of the U.S. Supreme Court in Smith v. Allwright 321 U.S. 649 at 669 (1944) "that adjudications of the Court were rapidly gravitating 'into the same class as a restricted railroad ticket, good for this day and train only'"."

Learned counsel while relying upon Gannon Dunkerley and Co. v. State of Rajasthan[31] (Bench of 5 Judges), referred to the following:

"28. .....We are not inclined to agree. The principles governing reconsideration of an earlier decision are settled by the various decisions of this Court. It has been laid down: "This Court should not, accept when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue." (See: Lt. Col. Khajoor Singh vs. The Union of India, (1961) 2 SCR 828). In Keshav Mills Co. Ltd. vs. CIT, (1965) 2 SCR 908, it has been observed: (SCR pp. 921-22)
".....but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified."

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[30] (1980) 1 SCC 223
[31] (1993) 1 SCC 364

30. Having regard to the observations referred to above and the stand of the parties during the course of arguments before us, we do not consider it appropriate to reopen the issues which are covered by the decision in Builders' Association case...."

Having referred to the above judgments, it was submitted, that it was clearly misconceived for the learned counsel for the respondents, to seek a reference of the controversy, to a larger Bench for the re-examination of the decisions rendered by this Court in the Second and Third Judges cases.

59. Yet another basis for asserting, that the prayer made at the behest of the learned counsel representing the respondents for revisiting the judgments rendered by this Court in the Second and Third Judges cases, was canvassed on the ground that the observations recorded by this Court in the Samsher Singh case[11] (in paragraph 149) could neither be understood as stray observations, nor be treated as *obiter dicta*. The reasons expressed by the learned senior counsel on the above issue were as follows:

"(i) In the other case relating to the independence of the judiciary (re transfer of High Court Judges) – UOI vs. Sankal Chand Seth, (1977) 4 SCC 193 (5J) – as to whether a Judge of a High Court can be transferred to another High Court without his consent, it was decided by majority that he could be: the majority consisted of Justice Chandrachud, Justice Krishna Iyer and Justice Murtaza Fazal Ali.
(ii) The judgment of Justice Krishna Iyer (on behalf of himself and Justice Murtaza Fazal Ali in Sankal Chand Seth – [with which Bhagwati, J. said he was "entirely in agreement"] reads as follows (paras 115-116):
"115. The next point for consideration in this appeal is as to the nature, ambit and scope of consultation, as appearing in Article 222(1) of the Constitution, with the Chief Justice of India. The consultation, in order to fulfil its normative function in Article 222(1), must be a real, substantial and effective consultation based on full and proper materials placed before the Chief Justice by the Government. Before giving his opinion the

Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the Judge concerned if he has any real personal difficulty or any humanitarian ground on which his transfer may not be directed. Such grounds may be of a wide range including his health or extreme family factors. It is not necessary for the Chief Justice to issue formal notice to the Judge concerned but it is sufficient — although it is not obligatory — if he ascertains these facts either from the Chief Justice of the High Court or from his own colleagues or through any other means which the Chief Justice thinks safe, fair and reasonable. Where a proposal of transfer of a Judge is made the Government must forward every possible material to the Chief Justice so that he is in a position to give an effective opinion. Secondly, although the opinion of the Chief Justice of India may not be binding on the Government it is entitled to great weight and is normally to be accepted by the Government because the power under Article 222 cannot be exercised whimsically or arbitrarily. In the case of Chandramouleshwar Prasad v. Patna High Court, (1969) 3 SCC 36, while interpreting the word "consultation" as appearing in Article 233 of the Constitution this Court observed as follows:

“Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion....We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the prosper the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation.

In Samsher Singh's case, AIR 1974 SC 2192, one of us has struck the same chord. It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the Court that a case was made out for not accepting the advice of the Chief Justice of India. It seems to us that the word, 'consultation' has been used in Article 222 as a matter of constitutional courtesy in view of the fact that two very high dignitaries are concerned in the matter, namely, the President and the Chief Justice of India. Of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.”

(iii) Justice Chandrachud (in the course of his judgment) agreeing – in paragraph 41 of Sankalchand Seth followed Shamsher Singh (para 149).”

Based on the aforesaid, it was the assertion of the learned senior counsel that even if the contention advanced by the counsel for the respondents was to be accepted, namely, that the decisions rendered by this Court in the above two cases were required to be re-examined, by a reference to a larger Bench, still the observations recorded in paragraph 149 in the Samsher Singh case[11] would continue to hold the field, as the review of the same had not been sought.

V. THE CONSIDERATION:

I.

60. In the scheme of the Constitution, the Union judiciary has been dealt in Chapter IV of Part V, and the High Courts in the States, as well as, the Subordinate-courts have been dealt with in Chapters V and VI respectively, of Part VI. The provisions of Parts V and VI of the Constitution, with reference to the Union and the States judiciaries including Subordinate-courts, have arisen for interpretative determination by this Court, on several occasions. We may chronologically notice the determination rendered by this Court, with reference to the above Parts, especially those dealing with the executive participation, in the matters relating to the Union judiciary, the High Courts in the States, and the Subordinate-courts. During the course of hearing, our attention was invited to the following:

(i) Samsher Singh v. State of Punjab, (1974) 2 SCC 831 – rendered by a five-Judge Bench,

(ii) Union of India v. Sankalchand Himatlal Sheth (1977) 4 SCC 193 - rendered by a five-Judge Bench,

(iii) S.P. Gupta v. Union of India, 1981 Supp SCC 87 – rendered by a seven-Judge Bench,

(iv) Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 – rendered by a nine-Judge Bench, and

(v) Re: Special Reference No.1 of 1998, (1998) 7 SCC 739 – rendered by a nine-Judge Bench.

This Court on no less than five occasions, has examined the controversy which we are presently dealing with, through Constitution Benches. In the Samsher Singh case[11], it was concluded, that in all conceivable cases, consultation with the highest dignitary in the Indian judiciary – the Chief Justice of India, will and should be accepted by the Government of India, in matters relatable to the Chapters and Parts of the Constitution referred to above. In case, it was not so accepted, the Court would have an opportunity to examine, whether any other extraneous circumstances had entered into the verdict of the concerned Minister or the Council of Ministers (headed by the Prime Minister), whose views had prevailed in ignoring the counsel given by the Chief Justice of India. This Court accordingly concluded, that in practice, the last word must belong to the Chief Justice of India. The above position was also further clarified, that rejection of the advice tendered by the Chief Justice of India, would ordinarily be regarded as prompted by oblique considerations, vitiating the order. In a sense of understanding, this Court in the Samsher Singh case[11], is seen to have read the term "consultation" expressed in Articles 124 and 217 as conferring primacy to the opinion tendered by the Chief

Justice. When the matter came to be examined in the Sankalchand Himatlal Sheth case[5], with reference to Article 222, another Constitution Bench of this Court, reiterated the conclusion drawn in the Samsher Singh case[11], by holding, that in all conceivable cases, "consultation" with the Chief Justice of India, should be accepted, by the Government of India. And further, that in the event of any departure, it would be open to a court to examine whether, any other circumstances had entered into the verdict of the executive. More importantly, this Court expressly recorded an ardent hope, that the exposition recorded in the Samsher Singh case[11], would not fall on deaf ears. No doubt can be entertained, that yet again, this Court read the term "consultation" as an expression, conveying primacy in the matter under consideration, to the view expressed by the Chief Justice. The solitary departure from the above interpretation, was recorded by this Court in the First Judges case, wherein it came to be concluded, that the meaning of the term "consultation" could not be understood as "concurrence". In other words, it was held, that the opinion tendered by the Chief Justice of India, would not be binding on the executive. The function of appointment of Judges to the higher judiciary, was described as an executive function, and it was held by the majority, that the ultimate power of appointment, unquestionably rested with the President. The opinion expressed by this Court in the First Judges case, was doubted in the Subhash Sharma case[4], which led to the matter being re-examined in the Second Judges

case, at the hands of a nine-Judge Bench, which while setting aside the judgment rendered in the First Judges case, expressed its opinion in consonance with the judgments rendered in the Samsher Singh case[11] and the Sankalchand Himatlal Sheth case[5]. This Court expressly concluded, in the Second Judges case, that the term "consultation" expressed in Articles 124, 217 and 222 had to be read as vesting primacy with the opinion expressed by the Chief Justice of India, based on a participatory consultative process. In other words, in matters involving Articles 124, 217 and 222, primacy with reference to the ultimate power of appointment (or transfer) was held, to be vesting with the judiciary. The above position came to be reconsidered in the Third Judges case, by a nine-Judge Bench, wherein the then learned Attorney General for India, made a statement, that the Union of India was not seeking a review, or reconsideration of the judgment in the Second Judges case, and further, that the Union of India had accepted the said judgment, and would treat the decision of this Court in the Second Judges case as binding. It is therefore apparent, that the judiciary would have primacy in matters regulated by Articles 124, 217 and 222, was conceded, by the Union of India, in the Third Judges case.

61. We have also delineated hereinabove, the views of the Judges recorded in the First Judges case, which was rendered by a majority of 4:3. Not only, that the margin was extremely narrow, but also, the views expressed by the Judges were at substantial variance, on all the issues

canvassed before the Court. The primary reason for recording the view of each of the Judges in the First Judges case hereinbefore, was to demonstrate differences in the deductions, inferences and the eventual outcome. As against the above, on a reconsideration of the matters by a larger Bench in the Second Judges case, the decision was rendered by a majority of 7:2. Not only was the position clearly expressed, there was hardly any variance, on the issues canvassed. So was the position with the Third Judges case, which was a unanimous and unambiguous exposition of the controversy. We, therefore, find ourselves not inclined to accept the prayer for a review of the Second and Third Judges cases.

62. Having given pointed and thoughtful consideration to the proposition canvassed at the hands of the learned counsel for the respondents, we are constrained to conclude, that the issue of primacy of the judiciary, in the matter of appointment and transfer of Judges of the higher judiciary, having been repeatedly examined, the prayer for a re-look/reconsideration of the same, is just not made out. This Court having already devoted so much time to the same issue, should ordinarily not agree to re-examine the matter yet again, and spend more time for an issue, already well thrashed out. But time has not been the constraint, while hearing the present cases, for we have allowed a free debate, and have taken upon ourselves the task of examining the issues canvassed. Yet, the remedy of review must have some limitations. Mr. Fali S. Nariman, learned senior counsel, is right, in his submission, that the

power of review was exercised and stood expended when the First Judges case was reviewed by a larger Bench in the Second Judges case. And for sure, it was wholly unjustified for the Union of India, which had conceded during the course of hearing of the Third Judges case, that it had accepted as binding, the decision rendered in the Second Judges case, to try and reagitate the matter all over again. The matter having been revisited, and the position having been conceded by the Union of India, it does not lie in the mouth of the Union of India, to seek reconsideration of the judicial declaration, in the Second and Third Judges cases. Therefore, as a proposition of law, we are not inclined to accept the prayer of the Union of India and the other respondents, for a re-look or review of the judgments rendered in the Second and Third Judges cases. All the same, as we have indicated at the beginning of this order, because the matter is of extreme importance and sensitivity, we will still examine the merits of the submissions advanced by learned counsel.

II.

63. The most forceful submission advanced by the learned Attorney General, was premised on the Constituent Assembly debates. In this behalf, our attention was invited to the views expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar, Ananthasayanam Ayyangar and Dr. B.R. Ambedkar. It was pointed out by the learned Attorney General, that the Members of the Constituent

Assembly feared, that the process of selection and appointment of Judges to the higher judiciary should not be exclusively vested with the judiciary. The process of appointment of Judges by Judges, it was contended, was described as *Imperium in Imperio,* during the Constituent Assembly debates. In responding to the above observations, Dr. B.R. Ambedkar while referring to the contents of Article 122 (which was renumbered as Article 124 in the Constitution), had assured the Members of the Constituent Assembly, that the drafted Article had adopted the middle course, while refusing to create an *Imperium in Imperio,* in such a manner, that the "independence of the judiciary" would be fully preserved. The exact text of the response of Dr. B.R. Ambedkar, has been extracted in paragraph 30 above.

64. It was the contention of the learned Attorney General, that despite the clear intent expressed during the Constituent Assembly debates, not to create an *Imperium in Imperio*, the Second and Third Judges cases had done just that. It was submitted, that in the process of selection and appointment of Judges to the higher judiciary, being followed since 1993, Judges alone had been appointing Judges. It was also contended, that the Constitution contemplates a system of checks and balances, where each pillar of governance is controlled by checks and balances, exercised by the other two pillars. It was repeatedly emphasized, that in the present system of selection and appointment of Judges to the higher judiciary, the executive has no role whatsoever. It was accordingly the contention of

the respondents, that the manner in which Articles 124, 217 and 222 had been interpreted in the Second and Third Judges cases, fell foul of the intent of the Constituent Assembly. This, according to the learned counsel for the respondents, was reason enough, to revisit and correct, the view expressed in the Second and Third Judges cases.

65. It is not possible for us to accept the contention advanced at the hands of the learned counsel for the respondents. Consequent upon the pronouncement of the judgments in the Second and Third Judges cases, a Memorandum of Procedure for Appointment of Judges and Chief Justices to the Higher Judiciary was drawn by the Ministry of Law, Justice and Company Affairs on 30.6.1999. The Memorandum of Procedure aforementioned, is available on the website of the above Ministry. The above Memorandum of Procedure has been examined by us. In our considered view, the Memorandum of Procedure provides for a participatory role, to the judiciary as well as the political-executive. Each of the above components are responsible for contributing information, material and data, with reference to the individual under consideration. While the judicial contribution is responsible for evaluating the individual's professional ability, the political-executive is tasked with the obligation to provide details about the individual's character and antecedents. Our analysis of the Memorandum of Procedure reveals, that the same contemplates *inter alia* the following steps for selection of High Court Judges:

Step 1: The Chief Justice of the concerned High Court has the responsibility of communicating, to the Chief Minister of the State concerned, names of persons to be selected for appointment. Details are furnished to the Chief Minister, in terms of the format appended to the memorandum. Additionally, if the Chief Minister desires to recommend name(s) of person(s) for such appointment, he must forward the same to the Chief Justice for his consideration.

Step 2: Before forwarding his recommendations to the Chief Minister, the Chief Justice must consult his senior colleagues comprised in the High Court collegium, regarding the suitability of the names proposed. The entire consultation must be in writing, and these opinions must be sent to the Chief Minister along with the Chief Justice's recommendation.

Step 3: Copies of recommendations made by the Chief Justice of the High Court, to the Chief Minister of the concerned State, require to be endorsed, to the Union Minister of Law and Justice, to the Governor of the concerned State, and to the Chief Justice of India.

Step 4: Consequent upon the consideration of the names proposed by the Chief Justice, the Governor of the concerned State, as advised by the Chief Minister, would forward his recommendation along with the entire set of papers, to the Union Minister for Law and Justice.

Step 5: The Union Minister for Law and Justice would, at his own, consider the recommendations placed before him, in the light of the reports, as may be available to the Government, in respect of the names

under consideration. The proposed names, would be subject to scrutiny at the hands of the Intelligence Bureau, through the Union Ministry of Home Affairs. The Intelligence Bureau would opine on the integrity of the individuals under consideration.

Step 6: The entire material, as is available with the Union Minister for Law and Justice, would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would, in consultation with his senior colleagues comprised in the Supreme Court collegium, form his opinion with regard to the persons recommended for appointment.

Step 7: Based on the material made available, and additionally the views of Judges of the Supreme Court (who were conversant with the affairs of the concerned High Court), the Chief Justice of India in consultation with his collegium of Judges, would forward his recommendation, to the Union Minister for Law and Justice. The above noted views of Judges of the Supreme Court, conversant with the affairs of the High Court, were to be obtained in writing, and are to be part of the compilation incorporating the recommendation.

Step 8: The Union Minister for Law and Justice would then put up the recommendation made by the Chief Justice of India, to the Prime Minister, who would examine the entire matter in consultation with the Union Minister for Law and Justice, and advise the President, in the matter of the proposed appointments.

66. We shall venture to delineate the actual consideration at the hands of the executive, in the process of selection and appointment of High Court Judges, in terms of the Memorandum of Procedure, as well as, the actual prevailing practice.

67. Steps 1 to 3 of the Memorandum of Procedure reveal, that names of persons to be selected for appointment are forwarded to the Chief Minister and the Governor of the concerned State. On receipt of the names, the Chief Minister discharges the onerous responsibility to determine the suitability of the recommended candidate(s). Specially the suitability of the candidate(s), pertaining to integrity, social behaviour, political involvement and the like. Needless to mention, that the Chief Minister of the concerned State, has adequate machinery for providing such inputs. It would also be relevant to mention, that the consideration at the hands of the Governor of the concerned State, is also not an empty formality. For it is the Governor, through whom the file processed by the Chief Minister, is forwarded to the Union Minister for Law and Justice. There have been occasions, when Governors of the concerned State, have recorded their own impressions on the suitability of a recommended candidate, in sharp contrast with the opinion expressed by the Chief Minister. Whether or not the Governors participate in the above exercise, is quite a separate matter. All that needs to be recorded is, that there are instances where Governors have actively participated in the process of selection of Judges to High Courts, by providing necessary inputs.

Record also bears testimony to the fact, that the opinion expressed by the Governor, had finally prevailed on a few occasions.

68. The participation of the executive, with reference to the consideration of a candidate recommended by the Chief Justice of High Court, continues further at the level of the Government of India. The matter of suitability of a candidate, is also independently examined at the hands of the Union of Minister for Law and Justice. The Ministry of Law and Justice has a standard procedure of seeking inputs through the Union Ministry of Home Affairs. Such inputs are made available by the Union Ministry for Home Affairs, by having the integrity, social behaviour, political involvement and the like, examined through the Intelligence Bureau. After the receipt of such inputs, and the examination of the proposal at the hands of the Union Minister for Law and Justice, the file proceeds to the Chief Justice of India, along with the details received from the quarters referred to above.

69. After the Chief Justice of India, in consultation with his collegium of Judges recommends the concerned candidate for elevation to the High Court, the file is processed for a third time, by the executive. On this occasion, at the level of the Prime Minister of India. During the course of the instant consideration also, the participation of the executive is not an empty formality. Based on the inputs available to the Prime Minister, it is open to the executive, to yet again return the file to the Chief Justice of India, for a reconsideration of the proposal, by enclosing material which

may have escaped the notice of the Chief Justice of India and his collegium of Judges. There have been occasions, when the file returned to the Chief Justice of India for reconsideration, has resulted in a revision of the view earlier taken, by the Chief Justice of India and his collegium of Judges. It is therefore clear, that there is a complete comity of purpose between the judiciary and the political-executive in the matter of selection and appointment of High Court Judges. And between them, there is clear transparency also. As views are exchanged in writing, views and counter-views, are in black and white. Nothing happens secretly, without the knowledge of the participating constitutional functionaries.

70. It is not necessary for us to delineate the participation of the judiciary in the process of selection and appointment of Judges to the High Courts. The same is apparent from the steps contemplated in the Memorandum of Procedure, as have been recorded above. Suffice it to state, that it does not lie in the mouth of the respondents to contend, that there is no executive participation in the process of selection and appointment of Judges to High Courts.

71. The Memorandum of Procedure, for selection of Supreme Court Judges, provides for a similar participatory role to the judiciary and the political-executive. The same is not being analysed herein, for reasons of brevity. Suffice it to state, that the same is also a joint exercise, with a similar approach.

72. For the reasons recorded by us hereinabove, it is not possible for us to accept, that in the procedure contemplated under the Second and Third Judges cases, Judges at their own select Judges to the higher judiciary, or that, the system of *Imperium in Imperio* has been created for appointment of Judges to the higher judiciary. It is also not possible for us to accept, that the judgment in the Second Judges case, has interfered with the process of selection and appointment of Judges to the higher judiciary, by curtailing the participatory role of the executive, in the constitutional scheme of checks and balances, in view of the role of the executive fully described above. We find no merit in the instant contention advanced at the hands of the respondents.

III.

73. The learned Attorney General placed emphatic reliance on the Constituent Assembly debates. It was sought to be asserted, that for an apposite understanding of the provisions of the Constitution, it was imperative to refer to the Constituent Assembly debates, which had led to formulating and composing of the concerned Article(s). Reliance was accordingly placed on the debates, which had led to the drafting of Article 124. It was submitted, that the conclusions drawn by this Court, in the Second Judges case, overlooked the fact, that what had been expressly canvassed and raised by various Members of the Constituent Assembly, and rejected on due consideration, had been adopted by the judgment in the Second Judges case. It was, therefore, the contention of the learned

Attorney General, that the judgments rendered in the Second and Third Judges cases recorded a view, diagonally opposite the intent and resolve of the Constituent Assembly.

74. For reasons of brevity, it is not essential for us to extract herein the amendments sought by some of the eminent Members of the Constituent Assembly in the draft provision (to which our attention was drawn). At this stage, we need only to refer to paragraph 772 (already extracted above), from the Indra Sawhney case[9], in order to record, that it is not essential to refer to individual views of the Members, and that, the view expressed at the end of the debate by Dr. B.R. Ambedkar, would be sufficient to understand what had prevailed, and why. Suffice it to state, that during the course of the Constituent Assembly debates, it was expressly proposed that the term "consultation" engaged in Articles 124 and 217, be substituted by the word "concurrence". The proposed amendment was however rejected by Dr. B.R. Ambedkar. Despite the above, this Court in the Second and Third Judges cases had interpreted the word "consultation" in clause (2) of Article 124, and clause (1) of Article 217, as vesting primacy in the judiciary, something that was expressly rejected, during the Constituent Assembly debate. And therefore, the contention advanced on behalf of the respondents was, that this Court had interpreted the above provisions, by turning the Constituent Assembly's intent and resolve, on its head. It was submitted,

that the erroneous interpretation recorded in the Second Judges case, was writ large, even on a cursory examination of the debates.

75. We are of the view, that it would suffice, for examining the above contention, to extract herein a relevant part of the response of Dr. B.R. Ambedkar, to the above noted amendments, in the provisions noted above:

"Now, Sir, with regard to the numerous amendments that have been moved, to this article, there are really three issues that have been raised. The first is, how are the Judges of the Supreme Court to be appointed? Now, grouping the different amendments which are related to this particular matter, I find three different proposals. The first proposal is that the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. That is one view. The other view is that the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and the third suggestion is that they should be appointed in consultation with the Council of States. With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, offices of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States. It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be

consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.
With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent, person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition."

The first paragraph extracted hereinabove reveals, that there were three proposals on the issue of appointment of Judges to the Supreme Court. The first proposal was, that the Judges of the Supreme Court should not be appointed by the President in "consultation" with the Chief Justice of India, but should be appointed with the "concurrence" of the Chief Justice of India. The second proposal was, that like in the United States, appointments of Judges to the Supreme Court, should be made by the President, subject to confirmation by the Parliament, through a two-thirds majority. The third proposal was, that Judges of the Supreme Court, should be appointed by the President in "consultation" with the Rajya Sabha.

76. The response of Dr. B.R. Ambedkar to all the suggestions needs a very close examination, inasmuch as, even though rightfully pointed out by the Attorney General, and the learned counsel representing the respondents, all the issues which arise for consideration in the present controversy, were touched upon in the above response. Before dwelling

upon the issue, which strictly pertained to the appointment of Judges, Dr. B.R. Ambedkar expressed in unequivocal terms, that the unanimous opinion of the Constituent Assembly was, that "our judiciary must be independent of the executive". The same sentiment was expressed by Dr. B.R. Ambedkar while responding to K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Anathasayanam Ayyangar (extracted in paragraph 30 above) wherein he emphasized, that "…there is no doubt that the House in general, has agreed that the independence of the Judiciary, from the Executive should be made as clear and definite as we could make it by law…" The above assertion made while debating the issue of appointment of Judges to the Supreme Court, effectively acknowledges, that the appointment of Judges to the higher judiciary, has a direct nexus to the issue of "independence of the judiciary". It therefore, does not lie in the mouth of the respondents to assert, that the subject of "appointment" would not fall within the domain/realm of "independence of the judiciary".

77. While responding to the second and third proposals referred to above, Dr. B.R. Ambedkar, cited the manner of appointment of Judges in Great Britain, and pointed out, that in the United Kingdom appointments were made by the Crown, without any kind of limitation, and as such, fell within the exclusive domain of the executive. Referring to the system adopted in the United States, he noted, that Judges of the Supreme Court in the United States, could only be appointed with the

"concurrence" of the Senate. Suffice it to state, that the latter reference was to a process of appointment which fell within the domain of the legislature (because the Senate is a legislative chamber in the bicameral legislature of the United States, which together with the U.S. House of Representatives, make up the U.S. Congress). It is important to notice, that he rejected both the systems, where appointments to the higher judiciary were made by the executive, as well as, by the legislature. Dr. B.R. Ambedkar therefore, very clearly concluded the issue by expressing, that it would be improper to leave the appointments of Judges to the Supreme Court, to be made by the President – the executive (i.e., on the aid and advice of the Council of Ministers, headed by the Prime Minister). In the words of Dr. B.R. Ambedkar, it would be dangerous to leave such appointments in the hands of the executive of the day, without any kind of reservation and limitation. We are therefore satisfied, that the word "consultation" expressed in Articles 124 and 217, was contemplated by the Constituent Assembly, to curtail the free will of the executive. If that was the true intent, the word "consultation" could never be assigned its ordinary dictionary meaning. And Article 124 (or Article 217) could never be meant to be read with Article 74. It is therefore not possible for us to accept, that the main voice in the matter of selection and appointment of Judges to the higher judiciary was that of the President (expressed in the manner contemplated under Article 74). Nor is it possible to accept that primacy in the instant matter rested with the executive. Nor that, the

judiciary has been assigned a role in the matter, which was not contemplated by the provisions of the Constitution. It is misconceived for the respondents to assert, that the determination of this Court in the Second and Third Judges cases was not interpretative in nature, but was factually legislative. Dr. B.R. Ambedkar, therefore rejected, for the same reasons, the proposal that appointments of Judges to the Supreme Court should be made by the legislature. But the reason he expressed in this behalf was most apt, namely, the procedure of appointing Judges, by seeking a vote of approval by one or the other (or both) House(s) of Parliament would be cumbersome. More importantly, Dr. B.R. Ambedkar was suspicious and distrustful of the possibility of the appointments being directed and impacted by "political pressure" and "political consideration", if the legislature was involved. We are therefore satisfied, that when the Constituent Assembly used the term "consultation", in the above provisions, its intent was to limit the participatory role of the political-executive in the matter of appointments of Judges to the higher judiciary.

78. It was the view of Dr. B.R. Ambedkar, that the draft article had adopted a middle course, by not making the President – the executive "the supreme and absolute authority in the matter of making appointments" of Judges. And also, by keeping out the legislators for their obvious political inclinations and biases, which render them unsuitable for shouldering the responsibility. We are therefore of the

view, that the judgments in the Second and Third Judges cases cannot be blamed, for not assigning a dictionary meaning to the term "consultation". If the real purpose sought to be achieved by the term "consultation" was to shield the selection and appointment of Judges to the higher judiciary, from executive and political involvement, certainly the term "consultation" was meant to be understood as something more than a mere "consultation".

79. It is clear from the observations of Dr. B.R. Ambedkar, that the President – the executive was required by the provisions of the draft article, to consult "...persons, who were *ex hypothesi,* well qualified to give proper advice on the matter of appointment of Judges to the Supreme Court." The response of Dr. B.R. Ambedkar in a singular paragraph (extracted above), leaves no room for any doubt that Article 124, in the manner it was debated, was clearly meant to propound, that the matter of "appointments of Judges was an integral part of the "independence of the judiciary". The process contemplated for appointment of Judges, would therefore have to be understood, to be such, as would be guarded/shielded from political pressure and political considerations.

80. The paragraph following the one, that has been interpreted in the foregoing paragraphs, also leaves no room for any doubt, that the Constituent Assembly did not desire to confer the Chief Justice of India, with a veto power to make appointments of Judges. It is therefore that a

consultative process was contemplated under Article 124, as it was originally drafted. The same mandated consultation not only with the Chief Justice of India, but with other Judges of the Supreme Court and the High Courts. Viewed closely, the judgments in the Second and Third Judges cases, were rendered in a manner as would give complete effect to the observations made by Dr. B.R. Ambedkar with reference to Article 124 (as originally incorporated). It is clearly erroneous for the respondents to contend, that the consultative process postulated between the President with the other Judges of the Supreme Court or the High Courts in the States, at the discretion of the President, had been done away with by the Second and Third Judges cases. Nothing of the sort. It has been, and is still open to the President, in his unfettered wisdom, to the consultation indicated in Article 124. Additionally, it is open to the President, to rely on the same, during the course of the mandatory "consultation" with the Chief Justice of India. The above, further demonstrates the executive role in the selection of Judges to the higher judiciary, quite contrary to the submission advanced on behalf of the respondents. We are satisfied, that the entire discussion and logic expressed during the debates of the Constituent Assembly, could be given effect to, by reading the term "consultation" as vesting primacy with the judiciary, on the matter being debated. We are also of the view, that the above debates support the conclusions drawn in the judgments of which review is being sought. For the reasons recorded hereinabove,

we find no merit in the submissions advanced by the learned counsel for the respondents based on the Constituent Assembly debates.

IV.

81. The consideration in hand, also has a historic perspective. We would venture to examine the same, from experiences gained, after the Constitution became operational i.e., after the people of this country came to govern themselves, in terms of the defined lines, and the distinctiveness of functioning, set forth by the arrangement and allocation of responsibilities, expressed in the Constitution. In this behalf, it would be relevant to highlight the discussion which took place in Parliament, when the Fourteenth Report of the Law Commission on Judicial Reform (1958) was tabled for discussion, in the Rajya Sabha on 24-25.11.1959. Replying to the debate on 24.11.1959, Govind Ballabh Pant, the then Union Home Minister's remarks, as stand officially recorded, were *inter alia* as under:

"Sir, so far as appointments to the Supreme Court go, since 1950 when the Constitution was brought into force, nineteen Judges have been appointed and everyone of them was so appointed on the recommendation of the Chief Justice of the Supreme Court. I do not know if any other alternative can be devised for this purpose. The Chief Justice of the Supreme Court is, I think, rightly deemed and believed to be familiar with the merits of his own colleagues and also of the Judges and advocates who hold leading positions in different States. So we have followed the advice of the most competent, dependable and eminent person who could guide us in this matter.

Similarly, Sir, so far as High Courts are concerned, since 1950, 211 appointments have been made and out of these except one, i.e., 210 out of 211 were made on the advice, with the consent and concurrence of the Chief Justice of India. And out of the 211, 196 proposals which were accepted by Government had the support of all persons who were connected with this matter. As Hon. Members are aware, under, I think,

article 217, the Chief Justice of the High Court; the Chief Minister of the State concerned and the Governor first deal with these matters. Then they come to the Home Ministry and are referred by the Ministry to the Chief Justice of India and whatever suggestions or comments he makes are taken into consideration and if necessary, a reference is again made to the Chief Minister and the High Court. But as I said, these 196 appointments were made in accordance with the unanimous advice of the Chief Justice of the High Court, the Chief Minister of the State, the Governor and the Chief Justice of India..."

The remarks made by Ashoke Kumar Sen, the then Union Law Minister on 25.11.1959, during the course of the debate pertaining to the Law Commission Report, also need a reference:

".....it is my duty to point out to the honourable House again, as I did in the Lok Sabha when the Law Commission first sent an interim report – call it an interim report or some report before the final one – pointing out that Judges have been appointed on extraneous considerations, we gave them the facts and figures concerning all the appointments made since 1950. We drew their pointed attention to the fact that, as the Home Minister pointed out yesterday, except in the case of one Judge out of the 176 odd Judges appointed since 1950, all were appointed on the advice of the Chief Justice. With regard to the one there was difference of opinion between the local Chief Justice and the Chief Justice of India and the Government accepted the advice of the local Chief Justice rather than the Chief Justice of India. But it was not their nominee. We should have expected the Law Commission, in all fairness, to have dealt with the communication from the Government giving facts of all the appointments not only of the High Courts but of the Supreme Court. I am not saying that they were obliged to do so, but it is only a fair thing to do, namely, when you bring certain accusation in a solemn document like the Law Commission's Report, you should deal with all the arguments for and against. We should have expected in all fairness that these facts ought to have been dealt with. Unfortunately, no facts are set out so that it is impossible to deal with. If it was said that this had been the case with A, this had been the case with B or C, it would have been easy for us to deal with them. Especially when we had given all the facts concerning the appointment of each and every Judge since 1950."

82. If one were to draw an inference, from the factual numbers indicated in the statements of the Home Minister and the Law Minister, and the inferences drawn therefrom, it is more than apparent, that the

understanding of those in-charge of working the provisions of the Constitution, relating to the appointment of Judges to the higher judiciary, was that, the advice of the Chief Justice of India was to be, and was actually invariably accepted, by the President (or whosoever, exercised the power of appointment).

83. Historically again, from the perspective of judicial declarations, the practice adopted on the issue in hand, came to be so understood, in the Samsher Singh case[11], wherein this Court through a seven-Judge Bench held as under:

"In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

84. Ever since 1974, when the above judgment was rendered, the above declaration, has held the field, as the above judgment has neither been reviewed nor set aside. It cannot be overlooked, that the observations extracted from the Samsher Singh case[11], were reaffirmed

by another five-Judge Bench, in the Sankalchand Himatlal Sheth case[5], as under:

"This then, in my judgment, is the true meaning and content of consultation as envisaged by Article 222(1) of the Constitution. After an effective consultation with the Chief Justice of India, it is open to the President to arrive at a proper decision of the question whether a Judge should be transferred to another High Court because, what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer. But it is necessary to reiterate what Bhagwati and Krishna Iyer, JJ., said in Shamsher Singh (supra) that in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India and that the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India: "In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." (page 873). It is hoped that these words will not fall on deaf ears and since normalcy has now been restored, the differences, if any, between the executive and the judiciary will be resolved by mutual deliberation, each party treating the views of the other with respect and consideration."

85. Even in the First Judges case, P.N. Bhagwati, J., corrected his own order through a corrigendum, whereby his order, *inter alia*, came to be recorded, as under:

"Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all three constitutional functionaries, it would have great weight and if an appointment is made by the Central Government in defiance of such unanimous opinion, it may prima facie be vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. The same position would obtain if an appointment is made by the Central Government contrary to the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India."

From the above extract, it is apparent, that the observations recorded by this Court in paragraph 149 in the Samsher Singh case[11], were endorsed

in the Sankalchand Himatlal Sheth case[5], and were also adopted in the First Judges case. The position came to be expressed emphatically in the Second and Third Judges cases, by reading the term "consultation" as vesting primacy with the judiciary, in the matter of appointments of Judges to the higher judiciary. This time around, at the hands of two different nine-Judge Benches, which reiterated the position expressed in the Samsher Singh case[11].

86. The above sequence reveals, that the executive while giving effect to the procedure, for appointment of Judges to the higher judiciary (and also, in the matter of transfer of Chief Justices and Judges from one High Court, to another), while acknowledging the participation of the other constitutional functionaries (referred to in Articles 124, 217 and 222), adopted a procedure, wherein primacy in the decision making process, was consciously entrusted with the judiciary. This position was followed, from the very beginning, after the promulgation of the Constitution, by the executive, at its own. Insofar as the legislature is concerned, it is apparent, that the issue came up for discussion, in a responsive manner when the Fourteenth Report of the Law Commission on Judicial Reforms (1958), was discussed by the Parliament, as far back as in 1959, just a few years after the country came to be governed by the Constitution. It is apparent, that when the two Houses of the Parliament, reflected *inter alia* on Articles 124, 217 and 222, in the matter of appointment of Judges to the higher judiciary, the unanimous feeling which emerged was, that "...

the advice of the most competent dependent and eminent person…" – the Chief Justice of India, had been followed rightfully. Two aspects of the parliamentary discussion, which were kept in mind when the issue was deliberated, need to be highlighted. First, that the President meant (for all practical purposes), the concerned Minister, or the Council of Ministers headed by the Prime Minister. And second, that the provisions in question envisaged only a participatory role, of the other constitutional authorities. Therefore, the above affirmation, to the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, was consciously recorded, after having appreciated the gamut of the other participating constitutional authorities. In the matter of judicial determination, the issue was examined by a Constitution Bench of the Supreme Court as far back, as in 1974 in the Samsher Singh case[11], wherein keeping in mind the cardinal principle – the "independence of the judiciary", it was concluded, that consultation with the highest dignitary in the judiciary – the Chief Justice of India, in practice meant, that the last word must belong to the Chief Justice of India i.e., the primacy in the matter of appointment of Judges to the higher judiciary, must rest with the judiciary. The above position was maintained in the Sankalchand Himatlal Sheth case[5] in 1977, by a five-Judge Bench, only to be altered in the First Judges case, by a seven-Judge Bench in 1981, wherein it was held, that the term "consultation" could not be read as "concurrence". The position expounded even in this case by P.N.

Bhagwati, J. (as he then was), extracted above, must necessarily also be kept in mind. The earlier position was restored in 1993 by a nine-Judge Bench in the Second Judges case (which overruled the First Judges case). The position was again reaffirmed by a nine-Judge Bench, through the Third Judges case. Historically, therefore, all the three wings of governance, have uniformally maintained, that while making appointments of Judges to the higher judiciary, "independence of the judiciary" was accepted as an integral component of the spirit of the Constitution, and thereby, the term "consultation" used in the provisions under consideration, had to be understood as vesting primacy with the judiciary, with reference to the subjects contemplated under Articles 124, 217 and 222. In view of the above historical exposition, there is really no legitimate reason for the respondents to seek a review of the judgments in the Second and Third Judges cases.

V.

87. Whilst dwelling on the subject of the intention expressed by the Members of the Constituent Assembly, it is considered just and expedient, also to take into consideration the views expressed in respect of the adoption of "separation of powers" in the Constitution. When the draft prepared by the Constituent Assembly came up for debate, Dr. B.R. Ambedkar proposed an amendment of Article 39A. It would be relevant to mention, that the aforesaid amendment, on being adopted, was incorporated as Article 50 in the Constitution (as originally enacted). It is

also necessary to notice, that the Government had already commenced to function, with Jawaharlal Nehru as the Prime Minister, when the draft of the Constitution was being debated before the Constituent Assembly. His participation in the debates of the Constituent Assembly, therefore, was not only in his capacity as a Member of the Constituent Assembly, but also, as a representative of the Government of India. It is necessary to extract hereunder, the views expressed by Jawaharlal Nehru, Bakshi Tek Chand and Loknath Misra, in the above debates, relating to "separation of powers". Relevant extracts are being reproduced hereunder:

"The Honourable Pandit Jawaharlal Nehru (United Provinces: General): .....Coming to this particular matter, the honourable speaker, Pandit Kunzru, who has just spoken and opposed the amendment of Dr. Ambedkar seems to me; if I may say so with all respect to him, to have gone off the track completely, and to suspect a sinister motive on the part of Government about this business. Government as such is not concerned with this business, but it is true that some members of Government do feel rather strongly about it and would like this House fully to consider the particular view point that Dr. Ambedkar has placed before the House today. I may say straight off that so far as the Government is concerned, it is entirely in favour of the separation of judicial and executive functions (Cheers). I may further say that the sooner it is brought about the better (Hear, hear) and I am told that some of our Provincial Governments are actually taking steps to that end now. If anyone asked me, if anyone suggested the period of three years or some other period, my first reaction would have been that this period is too long. Why should we wait so long for this? It might be brought about, if not all over India, in a large part of India, much sooner than that. At the same time, it is obvious that India at the present moment, specially during the transitional period, is a very mixed country politically, judicially, economically and in many ways, and any fixed rule of thumb to be applied to every area may be disadvantageous and difficult in regard to certain areas. On the one hand, that rule will really prevent progress in one area, and on the other hand, it may upset the apple-cart in some other area. Therefore, a certain flexibility is desirable. Generally speaking, I would have said that in any such directive of policy, it may

not be legal, but any directive of policy in a Constitution must have a powerful effect. In any such directive, there should not be any detail or time-limit etc. It is a directive of what the State wants, and your putting in any kind of time-limit therefore rather lowers it from that high status of a State policy and brings it down to the level of a legislative measure, which it is not in that sense. I would have preferred no time-limit to be there, but speaking more practically, any time-limit in this, as Dr. Ambedkar pointed out, is apt on the one hand to delay this very process in large parts of the country, probably the greater part of the country; on the other hand, in some parts where practically speaking it may be very difficult to bring about, it may produce enormous confusion. I think, therefore, that Dr. Ambedkar's amendment, far from lessening the significance or the importance of this highly desirable change that we wish to bring about, places it on a high level before the country. And I do not see myself how any Provincial or other Government can forget this Directive or delay it much. After all, whatever is going to be done in the future will largely depend upon the sentiment of the people and the future Assemblies and Parliaments that will meet. But so far as this Constitution is concerned, it gives a strong opinion in favour of this change and it gives it in a way so as to make it possible to bring it about in areas where it can be brought about - the provinces, etc. - and in case of difficulty in any particular State, etc., it does not bind them down. I submit, therefore, that this amendment of Dr. Ambedkar should be accepted. (Cheers)."

"Dr. Bakshi Tek Chand (East Punjab: General): Mr. Vice-President, Sir, I rise to lend my whole hearted support to the amendment which has been moved by Dr. Ambedkar today. The question of the separation of executive and judicial functions is not only as old as the Congress itself, but indeed it is much older. It was in the year 1852 when public opinion in Bengal began to express itself in an organised form that the matter was first mooted. That was more than thirty years before the Congress came into existence. After the Mutiny, the movement gained momentum and in the early seventies, in Bengal, under the leadership of Kisto Das Pal and Ram Gopal Ghosh, who were the leaders of public opinion in those days, definite proposals with regard to the separation of judicial and executive functions were put forward. Subsequently, the late Man Mohan Ghosh took up this matter and he and Babu Surendranath Bannerji year in and year out raised this question in all public meetings. When the Congress first met in the session in Bombay in 1885, this reform in the administration was put in the forefront of its programme. Later on, not only politicians of all schools of thought, but even retired officers who had actually spent their lives in the administration, took up the matter and lent their support to it. I very well remember the Lucknow Congress of 1899 when Romesh Chunder Dutt, who had just retired from the Indian Civil Service, presided. He devoted a large part of his presidential address to this subject and created a good deal of

enthusiasm for it. Not only that: even retired High Court Judges and Englishmen like Sir Arthur Hobhouse and Sir Arthur Wilson, both of whom subsequently became members of the Judicial Committee of the Privy Council, lent their support to this and they jointly with many eminent Indians submitted a representation to the Secretary of State for India to give immediate effect to this reform.

In the year 1912, when the Public Service Commission was appointed, Mr. Abdur Rahim, who was a Judge of the Madras High Court and was for many years the President of the Central Legislature, appended a long Minute of Dissent and therein he devoted several pages to this question.

Therefore, Sir, the matter has been before the country for nearly a century and it is time that it is given effect to immediately. One of the Honourable Members who spoke yesterday, observed that this matter was of great importance when we had a foreign Government but now the position has changed, and it may not be necessary to give effect to it. Well, an effective reply to this has been given by the Honourable the Prime Minister today. He has expressly stated that it is the policy of the Government, and it is their intention to see that this reform is given immediate effect to.

xxxx xxxx xxxx

I am glad to hear that he confirms it. This gives the quietus to these two objections which have been raised, that because of the changed circumstances, because we have attained freedom, it is no longer necessary and that the financial burden will be so heavy that it might crush provincial Governments. Both these objections are hollow.

One word more I have to say in this connection and that is, that with the advent of democracy and freedom, the necessity of this reform has become all the greater. Formerly it was only the district magistrate and a few members of the bureaucratic Government from whom interference with the judiciary was apprehended, but now, I am very sorry to say that even the Ministers in some provinces and members of political parties have begun to interfere with the free administration of justice. Those of you, who may be reading news paper reports of judicial decisions lately, must have been struck with this type of interference which has been under review in the various High Courts lately. In one province we found that in a case pending in a Criminal Court, the Ministry sent for the record and passed an order directing the trying Magistrate to stay proceedings in the case. This was something absolutely unheard of. The matter eventually went up to the High Court and the learned Chief Justice and another Judge had to pass very strong remarks against such executive interference with the administration of justice.

In another province a case was being tried against a member of the Legislative Assembly and a directive went from the District Magistrate to the Magistrate trying the case not to proceed with it further and to release the man. The Magistrate who was a member of the Judicial Service and was officiating as a Magistrate had the strength to resist this

demand. He had all those letters put on the record and eventually the matter went up to the High Court and the Chief Justice of the Calcutta High Court made very strong remarks about this matter.
Again in the Punjab, a case has recently occurred in which a Judge of the High Court, Mr. Justice Achu Ram, heard a habeas corpus petition and delivered a judgment of 164 pages at the conclusion of which he observed that the action taken by the District Magistrate and the Superintendent of Police against a member of the Congress Party was mala fide and was the result of a personal vendetta. These were his remarks.
In these circumstances, I submit that with the change of circumstances and with the advent of freedom and the introduction of democracy, it has become all the more necessary to bring about the separation of the judiciary from the executive at the earliest possible opportunity."

88. A perusal of the statements made before the Constituent Assembly, which resulted in the adoption of Article 50 of the Constitution reveals, that the first Prime Minister of this country, was entirely in favour of the separation of judicial and executive "functions". On the subject of separation, it was pointed out, that it was a directive which the Government itself wanted. The statement of Dr. Bakshi Tek Chand in the Constituent Assembly projects the position, that the idea of separating the judiciary from the executive was mooted for the first time as far back as in 1852, and that thereafter, the political leadership and also public opinion, were directed towards ensuring separation of judicial and executive functioning. He pointed out, that "year in and year out", the late Man Mohan Ghosh and Bapu Surendranath Banerji had raised the instant question, in all public meetings. And when the Congress first met in Bombay in 1885, the matter of separating the judiciary from the executive, was placed above all other issues under consideration. Thereafter, not only the politicians of all schools of thought, but even

retired officers, who had actually spent their lives in administration, had supported the issue of "separation of powers". He also highlighted, that in 1899, Romesh Chunder Dutt had devoted a large part of his presidential address to the issue. And that, retired High Court Judges and Englishmen like Sir Arthur Hobhouse and Sir Arthur Wilson (both of whom, subsequently became Members of the Judicial Committee of the Privy Council), also supported the above reform. The debate, it was pointed out, had been on going, to accept the principle of "separation of powers", whereby, the judiciary would be kept apart from the executive. He also pointed to instances, indicating interference by Ministers and members of the administration, which necessitated a complete separation of powers between the judiciary and the executive. Loknath Misra fully supported the above amendment, as a matter of principle. It is, therefore, imperative to conclude that the framers of the Constitution while drafting Article 50 of the Constitution, were clear and unanimous in their view, that there need to be a judiciary, separated from the influences of the executive.

89. Based on the consideration recorded in the immediately preceding paragraphs also, it seems to us, that the necessity of making a detailed reference to the Constituent Assembly debates in the Second Judges case, may well have been regarded, as of no serious consequence, whether it was on the subject of appointment of Judges to the higher judiciary, as a component of "independence of the judiciary", or, on the

subject of "separation of powers", whereby the judiciary was sought to be kept apart, and separate, from the executive. This Court having concluded, that the principle of "separation of powers" was expressly ingrained in the Constitution, which removes the executive from any role in the judiciary, the right of the executive to have the final word in the appointment of Judges to the higher judiciary, was clearly ruled out. And therefore, this Court on a harmonious construction of the provisions of the Constitution, in the Second and Third Judges cases, rightfully held, that primacy in the above matter, vested with the judiciary, leading to the inference, that the term "consultation" in the provisions under reference, should be understood as giving primacy to the view expressed by the judiciary, through the Chief Justice of India.

VI.

90. It is imperative to deal with another important submission advanced by the learned Attorney General, namely, that the issue of "independence of the judiciary" has nothing to do with the process of "appointment" of Judges to the higher judiciary. It was submitted, that the question of independence of a Judge arises, only after a Judge has been appointed (to the higher judiciary), for it is only then, that he is to be shielded from the executive/political pressures and influences. It was sought to be elaborated, that Judges of the higher judiciary, immediately after their appointment were so well shielded, that there could be no

occasion of the "independence of the judiciary" being compromised, in any manner, either at the hands of the executive, or of the legislature.

91. Whilst advancing the instant contention, it was the pointed assertion of the learned Attorney General, that neither of the judgments rendered in the Second and Third Judges cases had held, that the "selection and appointment" of Judges, to the higher judiciary, would fall within the purview of "independence of the judiciary". It was therefore his contention, that it was wrongful to assume, on the basis of the above two judgments, that the question of "appointment" of Judges to the higher judiciary would constitute a component of the "basic structure" of the Constitution. It was the contention of the learned Attorney General, that the Parliament, in its wisdom, had now amended the Constitution, admittedly altering the process of "selection and appointment" of Judges to the higher judiciary (including their transfer). It was further contended, that the process contemplated through the Constitution (99th Amendment) Act, coupled with the NJAC Act, was such, that it cannot be considered to have interfered with, or impinged upon, the "independence of the judiciary", and thus viewed, it would not be rightful to conclude, that the impugned constitutional amendment, as also the NJAC Act, were *per se* violative of the "basic structure".

92. We may preface our consideration by noticing, that every two years since 1985, a conference of Supreme Court Chief Justices from the Asia Pacific region, has been held by the Judicial Section of the Law

Association for Asia and the Pacific. Since its inception, the conference has served as a useful forum for sharing information and discussing issues of mutual concern among Chief Justices of the region. At its 6th Conference held in Beijing in 1997, 20 Chief Justices adopted a joint Statement of Principles of the "Independence of the Judiciary". This statement was further refined during the 7th Conference of Chief Justices held in Manila, wherein it was signed by 32 Chief Justices from the Asia Pacific region. The Beijing Statement of Principles of the "Independence of the Judiciary" separately deals with appointment of Judges. The position expressed in the above statement with reference to "appointment" of Judges is extracted hereunder:

"Appointment of Judges
11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.
12.The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.
13. In the selection of judges there must no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, expect that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the judiciary is a career service; in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, difference procedures and safeguards may be adopted to ensure the proper appointment of judges.
15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the

purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience."

Therefore to contend, that the subject of "appointment" is irrelevant to the question of the "independence of the judiciary", must be considered as a misunderstanding of a well recognized position.

93. Whilst dealing with the instant contention, we will also examine if this Court in the Second and Third Judges cases, had actually dealt with the issue, whether "appointment" of Judges to the higher judiciary, was (or, was not) an essential component of the principle of "independence of the judiciary"? Insofar as the instant aspect of the matter is concerned, reference in the first instance, may be made to the Second Judges case, wherein S. Ratnavel Pandian, J., while recording his concurring opinion, supporting the majority view, observed as under:

"47. The above arguments, that the independence of judiciary is satisfactorily secured by the constitutional safeguard of the office that a judge holds and guarantees of the service conditions alone and not beyond that, are in our considered opinion, untenable. In fact we are unable even to conceive such an argument for the reason to be presently stated."

In addition to the above extract, it is necessary to refer to the following observations of Kuldip Singh, J.:

"335. Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical...."

From the above it is clear, that the issue canvassed by the learned Attorney General, was finally answered by the nine-Judge Bench, which disposed of the Second Judges case by holding, that if the power of "appointment" of Judges, was left to the executive, the same would breach the principle of the "independence of the judiciary". And also conversely, that providing safeguards after the appointment of a Judge to the higher judiciary, would not be sufficient to secure "independence of the judiciary". In the above view of the matter, it is necessary to conclude, that the "manner of selection and appointment" of Judges to the higher judiciary, is an integral component of "independence of the judiciary". The contentions advanced on behalf of the Union of India, indicating the participation of the President and the Parliament, in the affairs of the judiciary, would have no bearing on the controversy in hand, which primarily relates to the issue of "appointment" of Judges to the higher judiciary. And, extends to transfer of Chief Justices and Judges from one High Court, to another. The fact that there were sufficient safeguards, to secure the independence of Judges of the higher judiciary after their "appointment", and therefore, there was no need to postulate, that in the matter of "appointment" also, primacy need not be in the hands of the judiciary, is also not acceptable. It is quite another matter, whether the manner of selection and appointment of Judges, introduced through the Constitution (99th Amendment) Act coupled with the NJAC Act, can indeed be considered to be violative of "independence

of the judiciary". This aspect, shall be examined and determined independently, while examining the merits of the challenge raised by the petitioners.

VII.

94. A perusal of the provisions of the Constitution reveals, that in addition to the appointment of the Chief Justice of India and Judges of the Supreme Court, under Article 124, the President has also been vested with the authority to appoint Judges and Chief Justices of High Courts under Article 217. In both the above provisions, the mandate for the President, *inter alia* is, that the Chief Justice of India "shall always be consulted", (the first proviso, under Article 124(2), as originally enacted), and with reference to Judges of the High Court, the language engaged in Article 217 was, that the President would appoint Judges of High Courts "after consultation with the Chief Justice of India" (per sub-Article (1) of Article 217).

95. To understand the term "consultation" engaged in Articles 124 and 217, it is essential to contrast the above two provisions, with other Articles of the Constitution, whereunder also, the President is mandated to appoint different constitutional authorities. Reference in this behalf may be made to the appointment of the Comptroller and Auditor-General of India, under Article 148. The said provision vests the authority of the above appointment with the President, without any consultative process. The position is exactly similar with reference to appointment of

Governors of States, under Article 155. The said provision also contemplates appointments, without any consultative process. The President is also vested with the authority, to appoint the Chairman and four Members of the Finance Commission, under Article 280. Herein also, the power is exclusively vested with the President, without any consultative process. The power of appointment of Chairman and other Members of the Union Public Service Commission, is also vested with the President under Article 316. The aforesaid appointment also does not contemplate any deliberation, with any other authority. Under Article 324, the power of appointment of Chief Election Commissioner and Election Commissioners is vested with the President exclusively. Likewise, is the case of appointment of Chairperson, Vice-Chairperson and Members of the National Commission for Scheduled Castes under Article 338, and Chairperson, Vice-Chairperson and other Members of the National Commission for Scheduled Tribes under Article 338A. Under the above stated provisions, the President has the exclusive authority to make appointments, without any deliberation with any other authority. Under Article 344, the President is also vested with the authority to appoint Chairman and other Members to the Commission of Parliament on Official Languages. The instant provision also does not provide for any consultative process before such appointment. The same position emerges from Article 350B, whereunder the President is to

appoint a Special Officer for Linguistic Minorities. Herein too, there is no contemplation of any prior consultation.

96. It is apparent that the Council of Ministers, with the Prime Minister as its head, is to "aid and advise" the President in the exercise of his functions. This position is not disputed by the learned counsel representing the respondents. Interpreted in the above manner, according to the learned Attorney General, in exercising his responsibilities under Articles 124, 217, 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, the President is only a figurative authority, whereas truthfully, the authority actually vests in the Council of Ministers headed by the Prime Minister. And as such, for all intents and purposes, the authority vested in the President for appointing different constitutional authorities, truly means that the power of such appointment is vested in the executive.

97. If one were to understand the words, as they were expressed in Article 74, in our considered view, it would be difficult to conclude, that "aid and advice" can be treated synonymous with a binding "direction", an irrevocable "command" or a conclusive "mandate". Surely, the term "aid and advice" cannot individually be construed as an imperative dictate, which had to be obeyed under all circumstances. In common parlance, a process of "consultation" is really the process of "aid and advice". The only distinction being, that "consultation" is obtained, whereas "aid and advice" may be tendered. On a plain readingtherefore,

neither of the two ("aid and advice" and "consultation") can be understood to convey, that they can be of a binding nature. We are of the view, that the above expressions were used, keeping in mind the exalted position which the President occupies (as the first citizen, of the country). As the first citizen, it would have been discourteous to provide, that he was to discharge his functions in consonance with the directions, command, or mandate of the executive. Since, both the expressions ("aid and advice" and "consultation"), deserve the same interpretation, if any one of them is considered to be mandatory and binding, the same import with reference to the other must follow. Through the Constitution (Forty-second Amendment) Act, 1976, Article 74 came to be amended, and with the insertion of the words "shall ... act in accordance with such advice", the President came to be bound, to exercise his functions, in consonance with the "aid and advice" tendered to him, by the Council of Ministers headed by the Prime Minister. The instant amendment, in our view, has to be considered as clarificatory in character, merely reiterating the manner in which the original provision ought to have been understood.

98. If "aid and advice" can be binding and mandatory, surely also, the term "consultation", referred to in Articles 124 and 217, could lead to the same exposition. The President of India, being the first citizen of the country, is entitled to respectability. Articles 124 and 217, were undoubtedly couched in polite language, as a matter of constitutional courtesy, extended to the first citizen of the country. It is important to

notice, that the first proviso under Article 124(2) clearly mandates, that the Chief Justice of India "shall always" be consulted. It was a reverse obligation, distinguishable from Article 74. Herein, the President was obliged to consult the Chief Justice of India, in all matters of appointment of Judges to the Supreme Court. The process of "consultation" contemplated therein, has to be meaningfully understood. If it was not to be so, the above provision could have been similarly worded as those relating to the appointment of the Comptroller and Auditor-General of India, Governors of States, Chairman and Members of the Finance Commission, Chairman and Members of the Union Public Service Commission, Chief Election Commissioner and Election Commissioners, Chairperson and Vice Chairperson and Members of the National Commission for Scheduled Castes, as also, those of the National Commission for Scheduled Tribes. This contrast between Articles 124 and 217 on the one hand, and the absence of any "consultation", with reference to the appointments contemplated under Articles 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, leaves no room for any doubt, that the above "consultation" was not a simplicitor "consultation". And since, the highest functionary in the judicial hierarchy was obliged to be consulted, a similar respectability needed to be bestowed on him. What would be the worth of the mandatory "consultation", with the Chief Justice of India, if his advice could be rejected, without any justification? It was therefore, concluded by this Court, that in all conceivable cases,

consultation with the highest dignitary in the judiciary – the Chief Justice of India, will and should be accepted. And, in case it was not so acceptd, it would be permissible to examine whether such non acceptance was prompted by any oblique consideration. Rightfully therefore, the term "consultation" used in Articles 124 and 217, as they were originally enacted meant, that primacy had to be given to the opinion tendered by the Chief Justice of India, on the issues for which the President was obliged to seek such "consultation". The submission advanced on behalf of the respondents, cannot be accepted, also for the reason, that the interpretation placed by them on the term "consultation", would result in an interpretation of Articles 124 and 217, as at par with Articles 148, 155, 280, 316, 324, 338, 338A, 344 and 350B, wherein the term "consultation" had not been used. Such an interpretation, would be clearly unacceptable. Since the manner of appointment of Judges to the higher judiciary, is in contrast with that of the constitutional authorities referred to by the learned Attorney General, the submission advanced on behalf of the respondents with reference to the other constitutional authorities cannot have a bearing on the present controversy.

99. We would unhesitatingly accept and acknowledge the submission made by the learned Attorney General, as has been noticed hereinabove, but only limited to situations of appointment contemplated under various Articles of the Constitution, where the power of appointment is

exclusively vested with the President. As such, there is no room for any doubt that the provisions of the Constitution, with reference to the appointment of Judges to the higher judiciary, contemplated that the "aid and advice" (– the "consultation") tendered by the Chief Justice of India, was entitled to primacy, on matters regulated under Articles 124 and 217 (as also, under Article 222).

VIII.

100. In continuation with the conclusions drawn in the foregoing analysis, the matter can be examined from another perspective as well. The term "consultation" (in connection with, appointments of Judges to the higher judiciary) has also been adopted in Article 233 on the subject of appointment of District Judges. Under Article 233, the power of appointment is vested with the Governor of the concerned State, who is empowered to make appointments (including promotions) of District Judges. This Court, through a five-Judge Bench, in Registrar (Admn.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy[32], has held, that recommendations made by the High Court in the consultative process envisaged under Article 233, is binding on the Governor. In the face of the aforestated binding precedent, on a controversy, which is startlingly similar to the one in hand, and has never been questioned, it is quite ununderstandable how the Union of India, desires to persuade this

[32] (1999) 7 SCC 725

Court, to now examine the term "consultation" differently with reference to Articles 124 and 217, without assailing the meaning given to the aforesaid term, with reference to a matter also governing the judiciary.

VI. CONCLUSION:

101. Based on the conclusions drawn hereinabove, while considering the submissions advanced by the learned counsel for the rival parties, as have been recorded in "V – The Consideration", we are of the view, that the prayer made at the hands of the learned counsel for the respondents, for revisiting or reviewing the judgments rendered by this Court, in the Second and Third Judges cases, cannot be acceded to. The prayer is, accordingly, hereby declined.

.....J.
(Jagdish Singh Khehar)

New Delhi;
October 16, 2015.

THE ORDER ON MERITS

I. PREFACE:

1. It is essential to begin the instant order by a foreword, in the nature of an explanation. For, it would reduce the bulk of the instant order, and obviate the necessity to deal with issues which have been considered and dealt with, while hearing the present set of cases.

2. The question which arises for consideration in the present set of cases pertains to the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 [hereinafter referred to as the Constitution (99th Amendment) Act], as also, that of the National Judicial Appointments Commission Act, 2014 (hereinafter referred to as, the NJAC Act). The core issue that arises for consideration, relates to the validity of the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices and Judges of the High Courts and the Supreme Court), and transfer of Chief Justices and Judges of one High Court, to another.

3. This is the third order in the series of orders passed by us, while adjudicating upon the present controversy. The first order, dealt with the prayer made at the Bar, for the "recusal" of one of us (J.S. Khehar, J.) from hearing the present set of cases. As and when a reference is made to the above first order, it would be adverted to as the "Recusal Order". The second order, considered the prayer made by the learned Attorney General and some learned counsel representing the respondents, seeking a "reference" of the present controversy, to a nine-Judge Bench (or seven,

to a further larger Bench) for re-examining the judgment rendered in Supreme Court Advocates-on-Record Association v. Union of India[2] (hereinafter referred to as, the Second Judges case), and the advisory opinion in Re: Special Reference No.1 of 1998[3] (hereinafter referred to, as the Third Judges case), for the alleged object of restoring and re-establishing, the declaration of the legal position, expounded by this Court in S.P. Gupta v. Union of India[1] (hereinafter referred to as, the First Judges case). As and when a reference is made to the above second order, it would be mentioned as the "Reference Order".

4. We would, therefore, not examine the issues dealt with in the Recusal Order and/or in the Reference Order, even though they may arise for consideration yet again, in the process of disposal of the present controversy on merits. As and when a reference is made to the instant third order, examining the "merits" of the controversy, it would be adverted to as the "Order on Merits".

II. PETITIONERS' CONTENTIONS, ON MERITS:

5. On the subject of amending the Constitution based on the procedure provided for in Article 368, it was submitted by Mr. Fali S. Nariman, Senior Advocate, that the power of amendment of the Constitution is not a plenary power. It was pointed out, that the above power was limited, inasmuch as, the power of amendment did not include the power of amending the "core" or the "basic structure" of the Constitution. In this behalf, learned counsel placed reliance on Minerva

Mills Ltd. v. Union of India[33], wherein majority view was expressed through Y.V. Chandrachud, CJ., as under:

"17. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."

In the above judgment, the minority view was recorded by P.N. Bhagwati, J., (as he then was), as under:

"88. That takes us to clause (5) of Article 368. This clause opens with the words "for the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368. It is difficult to appreciate the meaning of the opening words "for the removal of doubts" because the majority decision in Kesavananda Bharati case : AIR 1973 SC 1461 clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament and in Indira Gandhi case : [1976] 2 SCR 341, all the judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329-A(4) was to be judged. Therefore, after the decisions in Kesavananda Bharati case and Indira Gandhi case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and clause (5) could not remove the doubt which did not exist. What clause (5), really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament

[33] (1980) 3 SCC 625

cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which the validity of this clause can be successfully assailed. This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold clause (5) of Article 368, to be unconstitutional and void."

With reference to the same proposition, learned counsel placed reliance on Kihoto Hollohan v. Zachillhu[34]. It was submitted, that the acceptance of the principle of "basic structure" of the Constitution, resulted in limiting the amending power postulated in Article 368.

6. According to the learned counsel, it is now accepted, that "independence of the judiciary", "rule of law", "judicial review" and "separation of powers" are components of the "basic structure" of the Constitution. In the above view of the matter, provisions relating to appointment of Judges to the higher judiciary, would have to be such, that the above principles would remain unscathed and intact. It was submitted, that any action which would have the result of making appointment of the Judges to the Supreme Court, and to the High Courts, subservient to an agency other than the judiciary itself, namely, by allowing the executive or the legislature to participate in their

[34] 1992 Supp (2) SCC 651

selection and appointment, would render the judiciary subservient to such authority, and thereby, impinge on the "independence of the judiciary".

7. Learned counsel invited the Court's attention to the 1st Law Commission Report on "Reform of Judicial Administration" (14th Report of the Law Commission of India, chaired by M.C. Setalvad), wherein it was debated, that by enacting Articles 124 and 217, the framers of the Constitution had endeavoured to put the Judges of the Supreme Court "above executive control". Paragraph 4 of the said Report is being extracted hereunder:

"(Appointment and removal of Judges)
4. Realizing the importance of safeguarding the independence of the judiciary, the Constitution has provided that a Judge of the Supreme Court shall be appointed by the President in consultation with the Chief Justice of India and after consultation with such of the other Judges of the Supreme Court and the High Courts as he may deem necessary. He holds office till he attains the age of 65 years and is irremovable except on the presentation of an address by each House of Parliament passed by a specified majority on the ground of proved misbehaviour or incapacity. Thus has the Constitution endeavoured to put Judges of the Supreme Court above executive control."

8. It was submitted, that "independence of the judiciary" had been held to mean and include, insulation of the higher judiciary from executive and legislative control. In this behalf, reference was made to Union of India v. Sankalchand Himatlal Sheth[5], wherein this Court had observed:

"50. Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great Judges in the past. In England too, from where we have inherited

our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural . and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise. But this has been accomplished after a long fight culminating in the Act of Settlement, 1688. Prior to the enactment of that Act, a Judge in England held tenure at the pleasure of the Crown and the Sovereign could dismiss a Judge at his discretion, if the Judge did not deliver judgments to his liking. No less illustrious a Judge than Lord Coke was dismissed by Charles I for his glorious and courageous refusal to obey the King's writ *de non procedendo rege inconsulto* commanding him to step or to delay proceedings in his Court. The Act of Settlement, 1688 put it out of the power of the Sovereign to dismiss a Judge at pleasure by substituting 'tenure during good behaviour' for 'tenure at pleasure'. The Judge could then say, as did Lord Bowen so eloquently:

These are not days in which any English Judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted, and unsuspected. There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice.

The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and the High Courts. Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab, (1974) 2 SCC 831, can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control. I shall briefly refer to these provisions to show how great was the anxiety of the constitution-makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end."

In continuation of the instant submission, learned counsel placed reliance on the Second Judges case, and drew our attention to the following observations recorded by S. Ratnavel Pandian, J.:

"54. Having regard to the importance of this concept the Framers of our Constitution having before them the views of the Federal Court and of the High Court have said in a memorandum:
"We have assumed that it is recognised on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive ... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independent and efficient judiciary has been steadily kept in view. (vide B. Shiva Rao: The Framing of India's Constitution, Volume I-B, p. 196)
55. In this context, we may make it clear by borrowing the inimitable words of Justice Krishna Iyer, "Independence of the judiciary is not genuflexion, nor is it opposition of Government". Vide Mainstream – November 22, 1980 and at one point of time Justice Krishna Iyer characterised this concept as a "Constitutional Religion".
56. Indisputably, this concept of independence of judiciary which is inextricably linked and connected with the constitutional process related to the functioning of judiciary is a "fixed-star" in our constitutional consultation and its voice centres around the philosophy of the Constitution. The basic postulate of this concept is to have a more effective judicial system with its full vigour and vitality so as to secure and strengthen the imperative confidence of the people in the administration of justice. It is only with the object of successfully achieving this principle and salvaging much of the problems concerning the present judicial system, it is inter alia, contended that in the matter of appointment of Judges to the High Courts and Supreme Court 'primacy' to the opinion of the CJI which is only a facet of this concept, should be accorded so that the independence of judiciary is firmly secured and protected and the hyperbolic executive intrusion to impose its own selectee on the superior judiciary is effectively controlled and curbed."

And from the same judgment, reference was made to the following observations of Kuldip Singh, J.:

"335. Then the question which comes up for consideration is, can there be an independent judiciary when the power of appointment of judges vests in the executive? To say yes, would be illogical. The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the Framers of the Constitution could have never intended to give this power to the executive. Even otherwise the Governments - Central or the State - are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex Court. The executive – in one form or the other - is the largest single litigant before the courts. In this view of the matter the judiciary being the mediator - between the people and the executive - the Framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the executive. This Court in S.P. Gupta v. Union of India, 1981 Supp SCC 87 proceeded on the assumption that the independence of judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with broader facets of the two concepts - 'independence of judiciary' and 'judicial review' - which are interlinked."

Based on the above conclusions, it was submitted, that "independence of the judiciary" could be maintained, only if appointments of Judges to the higher judiciary, were made by according primacy to the opinion of the Chief Justice, based on the decision of a collegium of Judges. Only then, the executive and legislative intrusion, could be effectively controlled and curbed.

9. Learned counsel, then ventured to make a reference to the frequently quoted speech of Dr. B.R. Ambedkar (in the Constituent Assembly on 24.5.1949). It was submitted, that the above speech was duly considered in the Second Judges case, wherein this Court concluded as under:

"389. Having held that the primacy in the matter of appointment of Judges to the superior courts vests with the judiciary, the crucial question which arises for consideration is whether the Chief Justice of India, under the Constitution, acts as a "persona designata" or as the leader - spokesman for the judiciary.

390. The constitutional scheme does not give primacy to any individual. Article 124(2) provides consultation with the Chief Justice of India, Judges of the Supreme Court and Judges of the High Courts. Likewise Article 217(1) talks of Chief Justice of India and the Chief Justice of the High Court. Plurality of consultations has been clearly indicated by the Framers of the Constitution. On first reading one gets the impression as if the Judges of the Supreme Court and High Courts have not been included in the process of consultation under Article 217(1) but on a closer scrutiny of the constitutional scheme one finds that this was not the intention of the Framers of the Constitution. There is no justification, whatsoever, for excluding the puisne Judges of the Supreme Court and of the High Court from the "consultee zone" under Article 217(1) of the Constitution.

391. According to Mr Nariman it would not be a strained construction to construe the expressions "Chief Justice of India" and "Chief Justice of the High Courts" in the sense of the collectivity of Judges, the Supreme Court as represented by the Chief Justice of India and all the High Courts (of the States concerned) as represented by the Chief Justice of the High Court. A bare reading of Articles 124(2) and 217(1) makes it clear that the Framers of the Constitution did not intend to leave the final word, in the matter of appointment of Judges to the superior Courts, in the hands of any individual howsoever high he is placed in the constitutional hierarchy. Collective wisdom of the consultees is the sine qua non for such appointments. Dr B.R. Ambedkar in his speech dated May 24, 1949 in the Constituent Assembly explaining the scope of the draft articles pertaining to the appointment of Judges to the Supreme Court …

xxx xxx xxx

392. Dr Ambedkar did not see any difficulty in the smooth operation of the constitutional provisions concerning the appointment of Judges to the superior Courts. Having entrusted the work to high constitutional functionaries the Framers of the Constitution felt assured that such appointments would always be made by consensus. It is the functioning of the Constitution during the past more than four decades which has brought the necessity of considering the question of primacy in the matter of such appointments. Once we hold that the primacy lies with the judiciary, then it is the judiciary as collectivity which has the primal say and not any individual, not even the Chief Justice of India. If we interpret the expression "the Chief Justice of India" as a "persona designata" then it would amount "to allow the Chief Justice practically veto upon the appointment of Judges" which the Framers of the Constitution in the words of Dr Ambedkar never intended to do. We are,

therefore, of the view that the expressions "the Chief Justice of India" and the "Chief Justice of the High Court" in Articles 124(2) and 217(1) of the Constitution mean the said judicial functionaries as representatives of their respective courts."

In conjunction with the observations extracted hereinabove, the Court's attention was also invited to the following further conclusions:

"466. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in ,the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the Chief Justice of India does, and is expected to function so that the final opinion expressed by him is not merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.

467. In view of the primacy of judiciary in this process, the question next, is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.

468. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for

adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be he the Chief Justice of India or the Prime Minister."

10. It was the emphatic contention of the learned counsel, that the conclusions recorded by this Court in the Second Judges case, had been accepted by the executive and the legislature. It was acknowledged, that in the matter of appointment of Judges to the higher judiciary, primacy would vest with the judiciary, and further that, the opinion of the judiciary would have an element of plurality. This assertion was sought to be further established, by placing reliance on the Third Judges case. It was submitted, that the conclusions of the majority judgment, in the Second Judges case, were reproduced in paragraph 9 of the Third Judges case, and thereupon, this Court recorded the statement of the then Attorney General, that through the Presidential Reference, the Union of India was not seeking, a review or reconsideration, of the judgment in the Second Judges case. And that, the Union of India had accepted the above majority judgment, as binding. In this context, paragraphs 10 to 12 of the Third Judges case, which were relied upon, are being reproduced below:

"10. We have heard the learned Attorney General, learned counsel for the interveners and some of the High Courts and the Advocates General of some States.

11. We record at the outset the statements of the Attorney General that (1) the Union of India is not seeking a review or reconsideration of the judgment in the Second Judges case (1993) 4 SCC 441 and that (2) the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

12. The majority view in the Second Judges case (1993) 4 SCC 441 is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon."

11. Learned counsel invited the Court's attention, to the third conclusion drawn in Madras Bar Association v. Union of India[35], which is placed below:

"136.(iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted."

Learned counsel then asserted, that the "basic structure" of the Constitution would stand violated if, in amending the Constitution and/or enacting legislation, Parliament does not ensure, that the body newly created, conformed with the salient characteristics and the standards of the body sought to be substituted. It was asserted, that the salient features of the existing process of appointment of Judges to the higher judiciary, which had stood the test of time, could validly and

[35] (2014) 10 SCC 1

constitutionally be replaced, but while substituting the prevailing procedure, the salient characteristics which existed earlier, had to be preserved. By placing reliance on Articles 124 and 217, it was asserted, that the above provisions, as originally enacted, were explained by decisions of this Court, starting from 1974 in Samsher Singh v. State of Punjab[11], followed by the Sankalchand Himatlal Sheth case[5] in 1977, and the Second Judges case in 1993, and finally endorsed in 1998 by the Third Judges case. It was submitted, that four Constitution Benches of the Supreme Court, had only affirmed the practice followed by the executive since 1950 (when the people of this country, agreed to be governed by the Constitution). It was pointed out, that the process of appointment of Judges to the higher judiciary, had continued to remain a participatory consultative process, wherein the initiation of the proposal for appointment of a Judge to the Supreme Court, was by the Chief Justice of India; and in the case of appointment of Judges to High Courts, by the Chief Justice of the concerned High Court. And that, for transfer of a Judge/Chief Justice of a High Court, to another High Court, the proposal was initiated by the Chief Justice of India. It was contended, that in the process of taking a decision on the above matters (of appointment and transfer), the opinion of the judiciary was symbolized through the Chief Justice of India, and the same was based on the decision of a collegium of Judges, since 1993 – when the Second Judges case was decided. The only exception to the above rule, according

to learned counsel, was when the executive, based on stated strong cogent reasons (disclosed to the Chief Justice of India), felt otherwise. However, if the stated reasons, as were disclosed to the Chief Justice of India, were not accepted, the decision of a collegium of Judges on reiteration, would result in the proposed appointment/transfer. This, according to learned counsel, constituted the earlier procedure under Articles 124 and 217. The aforesaid procedure, was considered as sufficient, to preserve the "independence of the judiciary".

12. According to learned counsel, it needed to be determined, whether the NJAC now set up, had the same or similar characteristics, in the matter of appointments/transfers, which would preserve the "independence of the judiciary"? Answering the query, learned counsel was emphatic, that the primacy of the judiciary, had been totally eroded through the impugned constitutional amendment. For the above, learned counsel invited our attention to Article 124A inserted by the Constitution (99th Amendment) Act. It was submitted, that the NJAC contemplated under Article 124A would comprise of six Members, namely, the Chief Justice of India, two senior Judges of the Supreme Court (next to the Chief Justice), the Union Minister in charge of Law and Justice, and two "eminent persons". It was submitted, that the judges component, which had the primacy (and in a manner of understanding – unanimity), under the erstwhile procedure, had now been reduced to half-strength, in the selecting body – the NJAC. It was pointed out, that the Chief Justice of

India, would now have an equivalent voting right, as the other Members of the NJAC. It was submitted, that even though the Chief Justice of India would be the Chairman of the NJAC, he has no casting vote, in the event of a tie. It was submitted, that under the substituted procedure, even if the Chief Justice of India, and the two other senior Judges of the Supreme Court (next to the Chief Justice of India), supported the appointment/transfer of an individual, the same could be negatived, by any two Members of the NJAC. Even by the two "eminent persons" who may have no direct or indirect nexus with the process of administration of justice. It was therefore submitted, that the primacy vested with the Chief Justice of India had been fully and completely eroded.

13. With reference to the subject of primacy of the judiciary, it was asserted, that under the system sought to be substituted, the proposal for appointment of Judges to the Supreme Court, could only have been initiated by the Chief Justice of India. And likewise, the proposal for transfer of a Judge or the Chief Justice of a High Court, could only have been initiated by the Chief Justice of India. And likewise, the proposal for appointment of a Judge to a High Court, could only have been initiated by the Chief Justice of the concerned High Court. In order to demonstrate the changed position, learned counsel placed reliance on Article 124B introduced by the Constitution (99th Amendment) Act, whereunder, the authority to initiate the process, had now been vested with the NJAC. Under the new dispensation, the NJAC alone would

recommend persons for appointment as Judges to the higher judiciary. It was also apparent, according to learned counsel, that the NJAC has now been bestowed with the exclusive responsibility to recommend transfers of Chief Justices and Judges of High Courts. Having described the aforesaid alteration as a total subversion of the prevailing procedure, which had stood the test of time, and had secured the independence of the process of appointment and transfer of Judges of the higher judiciary, it was pointed out, that the Parliament had not disclosed the reasons, why the primacy of the Chief Justice of India and the other senior Judges, had to be dispensed with. Or for that matter, why the prevailing procedure needed to be altered. It was further the contention of learned counsel, that the non-disclosure of reasons, must inevitably lead to the inference, that there were no such reasons.

14. Dr. Rajeev Dhavan, learned senior counsel, also advanced submissions, with reference to the "basic structure", and the scope of amending the provisions of the Constitution. Dwelling upon the power of Parliament to amend the Constitution, it was submitted, that this Court in Kesavananda Bharati v. State of Kerala[10], had declared, that the "basic structure" of the Constitution, was not susceptible or amenable to amendment. Inviting our attention to Article 368, it was submitted, that the power vested with the Parliament to amend the Constitution, contemplated the extension of the constituent power, which was exercised by the Constituent Assembly, while framing the Constitution.

It was pointed out, that in exercise of the above power, the Parliament had been permitted to discharge the same role as the Constituent Assembly. The provisions of the Constitution, it was asserted, could be amended, to keep pace with developments in the civil society, so long as the amendment was not in violation of the "basic structure" of the Constitution. It was submitted, that it was not enough, in the facts and circumstances of the present case, to determine the validity of the constitutional amendment in question, by limiting the examination to a determination, whether or not the "independence of the judiciary" stood breached, on a plain reading of the provisions sought to be amended. It was asserted, that it was imperative to take into consideration, judgments rendered by this Court, on the subject. It was asserted, that this Court was liable to examine the declared position of law, in the First, Second and Third Judges cases, insofar as the present controversy was concerned. According to learned counsel, if the enactments under challenge, were found to be in breach of the "basic structure" of the Constitution, as declared in the above judgments, the impugned constitutional amendment, as also, the legislation under reference, would undoubtedly be constitutionally invalid.

15. In the above context, learned counsel pointed out, that with reference to an amendment to the fundamental right(s), enshrined in Part III of the Constitution, guidelines were laid down by this Court in M. Nagaraj v. Union of India[36], as also, in the Kihoto Hollohan case[34]. It was

[36] (2006) 8 SCC 212

submitted, that the change through the impugned amendment to the Constitution, (and by the NJAC Act) was not a peripheral change, but was a substantial one, which was also seemingly irreversible. And therefore, according to learned counsel, its validity would have to be determined, on the basis of the width and the identity tests. It was submitted, that the width and the identity tests were different from the tests applicable for determining the validity of ordinary parliamentary legislation, or a constitutional amendment relating to fundamental rights. The manner of working out the width and the identity tests, it was submitted, had been laid down in the M. Nagaraj case[36], wherein this Court held:

"9. On behalf of the respondents, the following arguments were advanced. The power of amendment under Article 368 is a "constituent" power and not a "constituted power"; that, that there are no implied limitations on the constituent power under Article 368; that, the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure. In such process of amendment, if it destroys the basic feature of the Constitution, the amendment will be unconstitutional. The Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368. Such change of the law so declared by the Supreme Court will not merely for that reason alone violate the basic structure of the Constitution or amount to usurpation of judicial power. This is how the Constitution becomes dynamic. Law has to change. It requires amendments to the Constitution according to the needs of time and needs of society. It is an ongoing process of judicial and constituent powers, both contributing to change of law with the final say in the judiciary to pronounce on the validity of such change of law effected by the constituent power by examining whether such amendments violate

the basic structure of the Constitution. On every occasion when a constitutional matter comes before the Court, the meaning of the provisions of the Constitution will call for interpretation, but every interpretation of the article does not become a basic feature of the Constitution. That, there are no implied limitations on the power of Parliament under Article 368 when it seeks to amend the Constitution. However, an amendment will be invalid, if it interferes with or undermines the basic structure. The validity of the amendment is not to be decided on the touchstone of Article 13 but only on the basis of violation of the basic features of the Constitution."

16. It was submitted, that whilst the Parliament had the power to amend the Constitution; the legislature (– or the executive), had no power to either interpret the Constitution, or to determine the validity of an amendment to the provisions of the Constitution. The power to determine the validity of a constitutional amendment, according to learned counsel, exclusively rests with the higher judiciary. Every amendment had to be tested on the touchstone of "basic structure" – as declared by the judiciary. It was submitted, that the aforesaid power vested with the judiciary, could not be withdrawn or revoked. This, according to learned counsel, constituted the fundamental judicial power, and was no less significant/weighty than the legislative power of Parliament. The importance of the power of judicial review vested with the higher judiciary (to examine the validity of executive and legislative actions), bestowed superiority to the judiciary over the other two pillars of governance. This position, it was pointed out, was critical to balance the power surrendered by the civil society, in favour of the political and the executive sovereignty.

17. In order to determine the validity of the submissions advanced on behalf of the petitioners, we were informed, that the interpretation placed by the Supreme Court on Articles 124 and 217 (as they existed, prior to the impugned amendment), would have to be kept in mind. It was submitted, that the term "consultation" with reference to Article 124, had been understood as conferring primacy with the judiciary. Therefore, while examining the impugned constitutional amendment to Article 124, it was imperative for this Court, to understand the term "consultation" in Article 124, and to read it as, conferring primacy in the matter of appointment of Judges, with the judiciary. Under Article 124, according to learned counsel, the President was not required to merely "consult" the Chief Justice of India, but the executive was to accede to the view expressed by the Chief Justice of India. Insofar as the term "Chief Justice of India" is concerned, it was submitted, that the same had also been understood to mean, not the individual opinion of the Chief Justice of India, but the opinion of the judiciary symbolized through the Chief Justice of India. Accordingly, it was emphasized, that the individual opinion of the Chief Justice (with reference to Articles 124 and 217) was understood as the institutional opinion of the judiciary. Accordingly, whilst examining the impugned constitutional amendment, under the width and the identity test(s), the above declared legal position, had to be kept in mind while determining, whether or not the impugned

constitutional amendment, and the impugned legislative enactment, had breached the "basic structure" of the Constitution.

18. It was contended, that the judgment in the Second Judges case, should be accepted as the touchstone, by which the validity of the impugned constitutional amendment (and the NJAC Act), must be examined. It was submitted, that the power exercised by the Parliament under Article 368, in giving effect to the impugned constitutional amendment (and by enacting the NJAC Act), will have to be tested in a manner, that will allow an organic adaptation to the changing times, and at the same time ensure, that the "basic structure" of the Constitution was not violated. Relying on the M. Nagaraj case[36], the Court's attention was drawn to the following observations:

"18. The key issue, which arises for determination in this case is–whether by virtue of the impugned constitutional amendments, the power of Parliament is so enlarged so as to obliterate any or all of the constitutional limitations and requirements?

Standards of judicial review of constitutional amendments

19. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather .than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."

Learned senior counsel, also drew the Court's attention to similar observations recorded in the Second Judges case.

19. Learned counsel was emphatic, that the impugned constitutional amendment (and the provisions of the NJAC Act), if approved, would remain in place for ten..., twenty..., thirty or even forty years, and therefore, need to be viewed closely and objectively. The provisions will have to be interpreted in a manner, that the "independence of the judiciary" would not be compromised. It was submitted, that if the impugned provisions were to be declared as constitutionally valid, there would be no means hereafter, to restore the "independence of the judiciary".

20. According to learned counsel, the question was of the purity of the justice delivery system. The question was about the maintenance of judicial standards. All these questions emerged from the fountainhead, namely, the manner of appointment of Judges to the higher judiciary. The provisions of Article 124, it was pointed out, as it existed prior to the impugned amendment, had provided for a system of trusteeship, wherein institutional predominance of the judiciary was the hallmark. It was submitted, that the aforesaid trusteeship should not be permitted to be shared by those, whose rival claims arose for consideration before Courts of law. The judicial responsibility in the matter of appointment of Judges, according to learned counsel, being the most important trusteeship, could not be permitted to be shared, with either the executive or the legislature.

21. Referring to the amendment itself, it was contended, that merely changing the basis of the legislation, would not be the correct test to evaluate the actions of the Parliament, in the present controversy. It was likewise submitted, that reasonableness and proportionality were also not the correct test(s) to be applied. According to learned counsel, in order to determine the validity of the impugned constitutional amendment (and the NJAC Act), the Union of India and the ratifying States will have to bear the onus of satisfactorily establishing, that the amended provisions, could under no circumstances, be used (actually misused) to subvert the "independence of the judiciary". Placing reliance on the M. Nagaraj case[36], the Court's attention was invited to the following observations:

"22. The question which arises before us is regarding the nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure. The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings.

23. .....In S.R. Bommai (1994) 3 SCC 1 the Court clearly based its conclusion not so much on violation of particular constitutional provisions but on this generalised ground i.e. evidence of a pattern of action directed against the principle of secularism. Therefore, it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to

amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.

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25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

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30. Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance.

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35. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged."

22. Referring to the position expressed by this Court, learned counsel submitted, that the overarching principle for this Court, was to first keep in its mind, the exact nature of the amendment contemplated through the Constitution (99th Amendment) Act. And the second step was, to determine how fundamental the amended provision was. For this,

reliance was again placed on the M. Nagaraj case[36], and our attention was drawn to the following conclusions:

"102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is—whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this .Court in Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684..., Ajit Singh Januja v. State of Punjab, (1996) 2 SCC 715..., Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209... and Indra

Sawhney v. Union of India, 1992 Supp (3) SCC 217... were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets— "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality."

Yet again referring to the width and the identity tests, learned counsel emphasized, that it was imperative for this Court, in the facts and circumstances of the present case, to examine whether the power of amendment exercised by the Parliament, was so wide as to make it excessive. For the above, reference was made to the Madras Bar Association case[35], wherein this Court recorded the following conclusions:

"134.(i) Parliament has the power to enact legislation and to vest adjudicatory functions earlier vested in the High Court with an alternative court/tribunal. Exercise of such power by Parliament would not per se violate the "basic structure" of the Constitution.

135.(ii) Recognised constitutional conventions pertaining to the Westminster model do not debar the legislating authority from enacting legislation to vest adjudicatory functions earlier vested in a superior court with an alternative court/tribunal. Exercise of such power by Parliament would per se not violate any constitutional convention.

136.(iii) The "basic structure" of the Constitution will stand violated if while enacting legislation pertaining to transfer of judicial power,

Parliament does not ensure that the newly created court/tribunal conforms with the salient characteristics and standards of the court sought to be substituted.

137.(iv) Constitutional conventions pertaining to the Constitutions styled on the Westminster model will also stand breached, if while enacting legislation, pertaining to transfer of judicial power, conventions and salient characteristics of the court sought to be replaced are not incorporated in the court/tribunal sought to be created.

138.(v) The prayer made in Writ Petition (C) No. 621 of 2007 is declined. Company Secretaries are held ineligible for representing a party to an appeal before NTT.

139.(vi) Examined on the touchstone of Conclusions (iii) and (iv) (contained in paras 136 and 137, above) Sections 5, 6, 7, 8 and 13 of the NTT Act (to the extent indicated hereinabove), are held to be unconstitutional. Since the aforesaid provisions constitute the edifice of the NTT Act, and without these provisions the remaining provisions are rendered ineffective and inconsequential, the entire enactment is declared unconstitutional."

Based on the above, it was asserted, that this Court had now clearly laid down, that on issues pertaining to the transfer of judicial power, the salient characteristics, standards and conventions of judicial power, could not be breached. It was also submitted, that evaluated by the aforesaid standards, it would clearly emerge, that the "independence of the judiciary" had been seriously compromised, through the impugned constitutional amendment (and the NJAC Act).

23. It was the submission of Mr. Ram Jethmalani, learned Senior Advocate, that the defect in the judgment rendered by this Court in the First Judges case, was that, Article 50 of the Constitution had not been appropriately highlighted, for consideration. It was submitted, that importance of Article 50 read with Articles 12 and 36, came to be examined in the Second Judges case, wherein the majority view, was as follows:

"80. From the above deliberation, it is clear that Article 50 was referred to in various decisions by the eminent Judges of this Court while discussing the principle of independence of the judiciary. We may cite Article 36 which falls under Part IV (Directive Principles of State Policy) and which reads thus:

."36. In this Part, unless the context otherwise requires, 'the State' has the same meaning as in Part III."

81. According to this article, the definition of the expression "the State" in Article 12 shall apply throughout Part IV, wherever that word is used. Therefore, it follows that the expression "the State" used in Article 50 has to be construed in the distributive sense as including the Government and Parliament of India and the Government and the legislature of each State and all local or other authorities within the territory of India or under the control of the Government of India. When the concept of separation of the judiciary from the executive is assayed and assessed that concept cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary. If such a narrow and pedantic or syllogistic approach is made and a constricted construction is given, it would lead to an anomalous position that the Constitution does not emphasise the separation of higher judiciary from the executive. Indeed, the distinguished Judges of this Court, as pointed out earlier, in various decisions have referred to Article 50 while discussing the concept of independence of higher or superior judiciary and thereby highlighted and laid stress on the basic principle and values underlying Article 50 in safeguarding the independence of the judiciary.

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85. Regrettably, there are some intractable problems concerned with judicial administration starting from the initial stage of selection of candidates to man the Supreme Court and the High Courts leading to the present malaise. Therefore, it has become inevitable that effective steps have to be taken to improve or retrieve the situation. After taking note of these problems and realising the devastating consequences that may flow, one cannot be a silent spectator or an old inveterate optimist, looking upon the other constitutional functionaries, particularly the executive, in the fond hope of getting invigorative solutions to make the justice delivery system more effective and resilient to meet the contemporary needs of the society, which hopes, as experience shows, have never been successful. Therefore, faced with such a piquant situation, it has become imperative for us to solve these problems within the constitutional fabric by interpreting the various provisions of the Constitution relating to the functioning of the judiciary in the light of the letter and spirit of the Constitution.

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141. Mr Ram Jethmalani, learned senior counsel expressed his grievance that the principles laid down in Chandra Mohan case (1967) 1 SCR 77, 83... were not appreciated by the learned Judges while dealing with

Samsher Singh v. State of Punjab, (1974) 2 SCC 831 who in his submission, have ignored the principle of harmonious construction which was articulated in K.M. Nanavati v. State of Bombay (1961) 1 SCR 497... According to him, the judgment in Gupta case 1981 Supp SCC 87 may be regarded as per incuriam. He articulates that the expression 'consultation' is itself flexible and in a certain context capable of bearing the meaning of 'consent' or 'concurrence'.

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154. The controversy that arises for scrutiny from the arguments addressed boils down with regard to the construction of the word 'consultation'.

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170. Thus, it is seen that the consensus of opinion is that consultation with the CJI is a mandatory condition precedent to the order of transfer made by the President so that non-consultation with the CJI shall render the order unconstitutional i.e. void.

171. The above view of the mandatory character of the requirement of consultation taken in Sankalchand has been followed and reiterated by some of the Judges in Gupta case. Fazal Ali, J. has held in Gupta case: (SCC p. 483, para 569)

"(3) If the consultation with the CJI has not been done before transferring a Judge, the transfer becomes unconstitutional."

Venkataramiah, J. in Gupta case has also expressed the same view.

172. In the light of the above view expressed in Union of India v. Sankalchand Himatlal Sheth, (1977) SCC 4 193... and some of the Judges in Gupta case 1981 Supp SCC 87... it can be simply held that consultation with the CJI under the first proviso to Article 124(2) as well as under Article 217 is a mandatory condition, the violation of which would be contrary to the constitutional mandate.

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181. It cannot be gainsaid that the CJI being the head of the Indian Judiciary and paterfamilias of the judicial fraternity has to keep a vigilant watch in protecting the integrity and guarding the independence of the judiciary and he in that capacity evaluates the merit of the candidate with regard to his/her professional attainments, legal ability etc. and offers his opinion. Therefore, there cannot be any justification in scanning that opinion of the CJI by applying a superimposition test under the guise of overguarding the judiciary.

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183. One should not lose sight of the important fact that appointment to the judicial office cannot be equated with the appointment to the executive or other services. In a recent judgment in All India Judges' Association v. Union of India (1993) 4 SCC 288... rendered by a three-Judge Bench presided over by M.N. Venkatachaliah, C.J. and consisting

of A.M. Ahmadi and P.B. Sawant, JJ., the following observations are made: (SCC pp. 295 e-h, 296 a and c-d, 297 b, paras 7 and 9)

"The judicial service is not service in the sense of 'employment'. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the Council of Ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the ministers, the legislators and the judges, and not the members of the their staff who implement or assist in implementing their decisions. The Council of Ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, .the legislators are different from the legislative staff. So also the judges from the judicial staff. The parity is between the political executive, the legislators and the judges and not between the judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally."

Whereupon, this Court recorded its conclusions. The relevant conclusions are extracted hereunder:

"(1) The 'consultation' with the CJI by the President is relatable to the judiciary and not to any other service.

(2) In the process of various constitutional appointments, 'consultation' is required only to the judicial office in contrast to the other high-ranking constitutional offices. The prior 'consultation' envisaged in the first proviso to Article 124(2) and Article 217(1) in respect of judicial offices is a reservation or limitation on the power of the President to appoint the Judges to the superior courts.

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(4) The context in which the expression "shall always be consulted" used in the first proviso of Article 124(2) and the expression "shall be appointed … after consultation" deployed in Article 217(1) denote the mandatory character of 'consultation', which has to be and is of a binding character.

(5) Articles 124 and 217 do not speak in specific terms requiring the President to consult the executive as such, but the executive comes into play in the process of appointment of Judges to the higher echelons of judicial service by the operation of Articles 74 and 163 of the Constitution. In other words, in the case of appointment of Judges, the President is not obliged to consult the executive as there is no specific provision for such consultation.

(6) The President is constitutionally obliged to consult the CJI alone in the case of appointment of a Judge to the Supreme Court as .per the mandatory proviso to Article 124(2) and in the case of appointment of a Judge to the High Court, the President is obliged to consult the CJI and the Governor of the State and in addition the Chief Justice of the High Court concerned, in case the appointment relates to a Judge other than the Chief Justice of that High Court. Therefore, to place the opinion of the CJI on a par with the other constitutional functionaries is not in consonance with the spirit of the Constitution, but against the very nature of the subject-matter concerning the judiciary and in opposition to the context in which 'consultation' is required. After the observation of Bhagwati, J. in Gupta case that the 'consultation' must be full and effective there is no conceivable reason to hold that such 'consultation' need not be given primary consideration.

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196. In the background of the above factual and legal position, the meaning of the word 'consultation' cannot be confined to its ordinary lexical definition. Its contents greatly vary according to the circumstances and context in which the word is used as in our Constitution.

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207. No one can deny that the State in the present day has become the major litigant and the superior courts particularly the Supreme Court, have become centres for turbulent controversies, some of which with a flavour of political repercussions and the Courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace. By going through various Law Commission Reports (particularly Fourteenth, Eightieth and One Hundred and Twenty-first), Reports of the Seminars and articles of eminent jurists etc., we understand that a radical change in the method of appointment of Judges to the superior judiciary by curbing the executive's power has been accentuated but the desired result has not been achieved even though by now nearly 46 years since the attainment of independence and more than 42 years since the advent of the formation of our constitutional system have elapsed. However, it is a proud privilege that the celebrated birth of our judicial system, its independence, mode of

dispensation of justice by Judges of eminence holding nationalistic views stronger than other Judges in any other nations, and the resultant triumph of the Indian judiciary are highly commendable. But it does not mean that the present system should continue for ever, and by allowing the executive to enjoy the absolute primacy in the matter of appointment of Judges as its 'royal privilege'.

208. The polemics of the learned Attorney-General and Mr Parasaran for sustaining the view expressed in Gupta case 1981 Supp SCC 87... though so distinguished for the strength of their ratiocination, is found to be not acceptable and falls through for all the reasons aforementioned because of the inherent weakness of the doctrine which they have attempted to defend."

Insofar as the minority judgment authored by A.M. Ahmadi, J., (as he then was) is concerned, it is only relevant to highlight the first conclusion recorded in paragraph 313, which is reproduced hereunder:

"313. We conclude:

(*i*) The concept of judicial independence is deeply ingrained in our constitutional scheme and Article 50 illuminates it. The degree of independence is near total after a person is appointed and inducted in the judicial family. ....."

24. Insofar as the instant aspect of the matter is concerned, learned counsel invited our attention to the preamble of the NJAC Act, which is reproduced below:

"An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto."

The statement of objects and reasons is also being extracted hereunder:

"Statement of Objects and Reasons

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2. The Supreme Court in the matter of the Supreme Court Advocates-on-Record Association Vs. Union of India in the year 1993, and in its Advisory Opinion in the year 1998 in the Third Judges case, had interpreted clause (2) of article 124 and clause (1) of article 217 of the Constitution with respect to the meaning of "consultation", as

"concurrence". Consequently, a Memorandum of Procedure for appointment of Judges to the Supreme Court and High Courts was formulated, and is being followed for appointment.

3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new articles 124A, 124B and 124C after article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.

5. The proposed Bill seeks to broad base the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Courts.

6. The Bill seeks to achieve the above objectives.

New Delhi; Ravi Shankar Prasad
The 8th August, 2014."

Based on the non-disclosure of reasons, why the existing procedure was perceived as unsuitable, it was contended, that the only object sought to be achieved was, to dilute the primacy, earlier vested with the Chief Justice of India (based on a decision of a collegium of Judges), provided for under Articles 124 and 217, as originally enacted. This had been done away, it was pointed out, by substituting the Chief Justice of India, with the NJAC.

25. The primary submission advanced at the hands of Mr. Fali S. Nariman, Senior Advocate, was with reference to the violation of the "basic structure", not only through the Constitution (99th Amendment) Act, but also, by enacting the NJAC Act. It was pointed out, that since the commencement of the Constitution, whenever changes were recommended in respect of the appointment of Judges, the issue which remained the focus of attention was, the primacy of the Chief Justice of India. Primacy, it was contended, had been recognized as the decisive voice of the judiciary, based on a collective decision of a collegium of Judges, representing its collegiate wisdom. It was submitted, that the Chief Justice of India, as an individual, as well as, Chief Justices of High Courts, as individuals, could not be considered as *persona designate*. It was pointed out, that the judgment rendered in the Second Judges case, had not become irrelevant. This Court, in the above judgment, provided for the preservation of the "independence of the judiciary". The aforesaid judgment, as also, the later judgment in the Third Judges case, re-established and reaffirmed, that the Chief Justice of India, represented through a body of Judges, had primacy. According to learned counsel, the individual Chief Justice of India, could not and did not, represent the collective opinion of the Judges. It was asserted, that the Constitution (99th Amendment) Act, and the NJAC Act, had done away with, the responsibility vested with the Chief Justice of India, represented through a collegium of Judges (under Articles 124 and 217 – as originally

enacted). Accordingly, it was submitted, that till the system adopted for selection and appointment of Judges, established and affirmed, the unimpeachable primacy of the judiciary, "independence of the judiciary" could not be deemed to have been preserved.

26. Insofar as the issue in hand is concerned, it was the pointed contention of the learned counsel, that the decision rendered by this Court in Sardari Lal v. Union of India[37], came to be overruled in the Samsher Singh case[11]. Referring to the judgment in the Samsher Singh case[11], he invited this Court's attention to the following observations recorded therein:

"147. In J.P. Mitter v. Chief Justice, Calcutta AIR 1965 SC 961 this Court had to consider the decision of the Government of India on the age of a Judge of the Calcutta High Court and, in that context, had to ascertain the true scope and effect of Article 217(3) which clothes the President with exclusive jurisdiction to determine the age of a Judge finally. In that case the Ministry of Home Affairs went through the exercise prescribed in Article 217(3). "The then Home Minister wrote to the Chief Minister, West Bengal, that he had consulted the Chief Justice of India, and he agreed with the advice given to him by the Chief Justice, and so he had decided that the date of birth of the appellant was....It is this decision which was, in due course communicated to the appellant". When the said decision was attacked as one reached by the Home Minister only and not by the President personally, the Court observed:

"The alternative stand which the appellant took was that the Executive was not entitled to determine his age, and it must be remembered that this stand was taken before Article 217(3) was inserted in the Constitution; the appellant was undoubtedly justified in contending that the Executive was not competent to determine the question about his age because that is a matter which would have to be tried normally, in judicial proceedings instituted before High Courts of competent jurisdiction. There is considerable force in the plea which the appellant took at the initial stages of this controversy that if the Executive is allowed to determine the age of a sitting Judge of a High Court, that would seriously affect the independence of the Judiciary itself."

[37] AIR 1971 SC 1547

Based on this reasoning, the Court quashed the order, the ratio of the case being that the President himself should decide the age of the Judge, uninfluenced by the Executive, i.e. by the Minister in charge of the portfolio dealing with justice.

148. This decision was reiterated in Union of India v. Jyoti Prakash Mitter (1971) 1 SCC 396. Although an argument was made that the President was guided in that case by the Minister of Home Affairs and by the Prime Minister, it was repelled by the Court which, on the facts, found the decision to be that of the President himself and not of the Prime Minister or the Home Minister.

149. In the light of the scheme of the Constitution we have already referred to, it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article-making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

27. It was pointed out, that the decision in the Samsher Singh case[11], came to be rendered well before the decision in the First Judges case, wherein this Court felt, that Judges could be fearless only if, institutional immunity was assured, and institutional autonomy was guaranteed. The view expressed in the Samsher Singh case[11] in 1974 was, that the final authority in the matter of appointment of Judges to the higher judiciary, rested with the Chief Justice of India. It was pointed out, that the above position had held the field, ever since. It was submitted that

"independence of the judiciary" has always meant and included independence in the matter of appointment of Judges to the higher judiciary.

28. Mr. Arvind P. Datar, learned Senior Advocate contended, that the NJAC had been created by an amendment to the Constitution. It therefore was a creature of the Constitution. Power had been vested with the NJAC to make recommendations of persons for appointment as Judges to the higher judiciary, including the power to transfer Chief Justices and Judges of High Courts, from one High Court to another. The above constitutional authority, it was submitted, must be regulated by a constitutional scheme, which must flow from the provisions of the Constitution itself. Therefore, it was asserted, that the manner of functioning of the NJAC must be contained in the Constitution itself. It was submitted, that the method of functioning of the NJAC, could not be left to the Parliament, to be regulated by ordinary law. In order to support his aforestated contention, reliance was placed on entries 77 and 78, contained in the Union List of the Seventh Schedule. It was submitted, that the power to frame legislation, with reference to entries 77 and 78 was not absolute, inasmuch as, Article 245 authorized the Parliament, to legislate on subjects falling within its realm, subject to the substantive provisions contained in the Constitution. For the above reason, it was asserted, that the activities of the NJAC could not be made subject to, or

subservient to, the power vested in the Parliament, under entries 77 and 78.

29. It was contended by Mr. Ram Jethmalani, learned Senior Advocate, that there was sufficient circumstantial evidence to demonstrate, that the present political establishment felt, that the judiciary was an obstacle for the implementation of its policies. It was contended, that the entire effort, was to subdue the judiciary, by inducting into the selection process, those who could be politically influenced. In order to project, the concerted effort of the political dispensation, in subverting the "independence of the judiciary", learned counsel, in the first instance, pointed out, that the first Bill to constitute a National Judicial Commission [the Constitution (67th Amendment) Bill, 1990] was introduced in the Lok Sabha on 18.5.1990. The statement of its "Objects and Reasons", which was relied upon, is extracted below:

"The Government of India have in the recent past announced their intention to set up a high level judicial commission, to be called the National Judicial Commission for the appointment of Judges of the Supreme Court and of the High Courts and the transfer of Judges of the High Courts so as to obviate the criticisms of arbitrariness on the part of the Executive in such appointments and transfers and also to make such appointments without any delay. The Law Commission of India in their One Hundred and Twenty-first Report also emphasised the need for a change in the system.

2. The National Judicial Commission to make recommendations with respect to the appointment of Judges of the Supreme Court will consist of the Chief Justice of India and two other Judges of the Supreme Court next in seniority to the Chief Justice of India. The Commission to make recommendations with respect to the appointment of the Judges of the High Courts will consist of the Chief Justice of India, one senior-most Judge of the Supreme Court, the Chief Minister of the State concerned, Chief Justice of the concerned High Court and one senior-most Judge of that High Court.

3. The Bill seeks to achieve the above object.
NEW DELHI;
The 11th May, 1990;"

The proposed National Judicial Commission in the above Bill, was to be made a component of Part XIIIA of the Constitution, by including therein Article 307A. The Chief Justice of India, and the next two senior most Judges of the Supreme Court, were proposed to comprise of the contemplated Commission, for making appointments of Judges to the Supreme Court, Chief Justices and Judges to High Courts, and for transfer of High Court Judges from one High Court to another. The above Commission, omitted any executive and legislative participation. The proposed composition of the Commission, for appointing High Court Judges, included the Chief Justice of India, the Chief Minister or the Governor of the concerned State, the senior most Judge of the Supreme Court, the Chief Justice of the concerned High Court, and the senior most Judge of that Court. The above Bill also provided for, an independent and separate secretarial staff for the contemplated Commission. It was submitted, that the above amendment to the Constitution, was on account of the disillusionment and incredulity with the legal position, expounded by this Court in the First Judges case. It was submitted, that the necessity to give effect to the proposed Constitution (67th Amendment) Bill, 1990, stood obviated when this Court rendered its judgment in the Second Judges case. All this,

according to learned counsel for the petitioners, has been forgotten and ignored.

30. Historically, the next stage, was when the Constitution (98th Amendment) Bill, 2003 was placed before the Parliament for its consideration. In the above Bill, the executive participation in the process of selection and appointment of Judges to the higher judiciary, was introduced by making the Union Minister of Law and Justice, an *ex officio* Member of the Commission. Two eminent citizens (either eminent jurists, or eminent lawyers, or legal academicians of high repute) would also be Members of the Commission. One of them was to be appointed by the President in consultation with the Chief Justice of India, and the other, in consultation with the Prime Minister. Yet another effort was made (by the previous U.P.A. Government), in the same direction, through the Constitution (120th Amendment) Bill, 2013, on similar lines as the 2003 Bill. It was sought to be pointed out, that there was a consensus amongst all the parties, that the aforesaid Bill should be approved. And that, learned counsel personally, as a Member of the Rajya Sabha, had strongly contested the above move. Learned counsel invited this Court's attention to the objections raised by him, during the course of the debate before the Rajya Sabha. He emphasized, that he had submitted to the Parliament, that the Constitution Amendment Bill, needed to be referred to the Select Committee of the Parliament, as the same in his opinion was unconstitutional. An extract of the debate was

also brought to our notice (by substituting the vernacular part thereof, with its English translation), it is being reproduced hereunder:

"My suggestion is: Let the Judicial Appointments Commission Bill go to the Standing Committee. The rest of the business we should pass today. Thank you.

Shri Ram Jethmalali: Madam, thank you; better late than never.

Sir, I wish to make two preliminary suggestions. If there is an assurance that the Constitution (Amendment) Bill as well as the subsidiary Bill will both be referred to a Select Committee of Parliament, I do not propose to address this House at all. But, I do not consider it suitable or proper that only the second Bill should be referred to a Select Committee. Both should be sent. And, I will give my reasons.

Sir, the second suggestion that I have to make is this. My main contention, which I am going to make, is that the Constitution (Amendment) Bill is wholly unconstitutional and, if passed, it will undoubtedly be set aside by the Supreme Court, because it interferes with the basic feature of the Constitution. Such amendments of the Constitution are outside the jurisdiction of this House. The amendment process prescribed by the Constitution requires 2/3rd majority and so on and so forth. That applies only to those amendments of the Constitution which do not touch what are called the basic features of the Constitution as understood in the Kesavananda Bharati case. This Constitutional amendment, certainly, interferes with a basic feature of the Indian Constitution and it will not be sustained ever. But, if it is said that even if you pass it, it will not be brought into force until a Reference is made to the Supreme Court and the Supreme Court answers the question of the validity of this Constitution amendment in the affirmative. If that is done, I, again, need not speak. But, Sir, since I don't expect both these reasonable suggestions to be accepted, I intend to speak and speak my mind.

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Kapil is my great friend and is one of the Ministers in the Government whose work as the Law Minister I keep supervising and I am happy the manner in which he conducts his Ministry. But, Sir, I must declare today that my conscience, understanding and my duty towards the people of this country, which I regard as my paramount obligation, do not permit me to submit to this kind of legislation. Both the Bills, according to me are evil. The evil, first of all, consists in the misleading Statement of Objects-and-Reasons. You ought to have said with complete honesty that what you are trying to demolish is the Collegium System, which seems to be the object, and which is apparent to anyone. Some of the persons who have spoken have spoken on the assumption that that is the purpose of this particular piece of legislation.

Sir, the first point that I propose to make is that the 1993 judgment of Nine Judges is a judgment based upon the discovery of the basic feature of the Constitution, and upon devising a system to sustain that basic feature. Madam, I have myself appeared in that litigation and I claim that I had a tremendous contribution to make to the success of that judgment. In a sense, I claim to be the founder of the Collegium System. But that does not mean that I am an unmixed admirer of the Collegium System. The Collegium System has, doubtless, some faults. But the Collegium System came into existence on the basis of one main argument. That one main argument that we advance, and advance with great vigour and force, is that there is one article of the Constitution, article 50 of the Constitution, which is the shortest article in the Constitution, consisting of only one sentence. That article says that the Government shall strive to keep the Judiciary separate from the Executive.

Sir, we argued before the Supreme Court that this article does not mean that Judges and Ministers should not socially meet. This does not mean that they should live in separate towns, or that they should not live even in adjoining bungalows. The purpose of this article is to ensure that in the appointment of Judges, the Executive has no role to play, except the advisory role. In other words, the doctrine of primacy of the Executive in the appointment process was irksome to us because the whole nation of India has been the victim of the Judges appointed in the earlier system. I have been a refugee from my own country during the Emergency. Why was it? It was because four Supreme Court Judges – I am not talking of the fifth who earned the New York Times praise that the Indian nation will have to build a monument to his memory; I am talking of the other four who – disgraced the Judiciary, disgraced the Supreme Court and were parties to the destruction of Indian democracy and the demolition and the debasement of the whole Constitution of India. Sir, of which system were they the product? They were the product of that system which, in 1981, was ultimately supported by the Gupta Judgment but, after some time, there were people, intellectuals, who spoke up that this system would not work; the system requires change. Sir, the Indian democracy has been saved not by intellectuals; Indian democracy at its most crucial hour has been saved by the poor illiterates of this country.

In times of crises, it is only the brave hearted who matter. On those which one had pride remained tongue tied (Two sentences translated).

That is the tragedy of our country. Sir, the intellectuals of this country have continuously failed, and I regret to say that they are failing even today. Collegium may be the creation of the Judiciary, it is the creation of judicial interpretation, again, of the Constitution, but whatever be the faults of the Collegium, the Collegium today represents some system which is consistent with the basic features of the Constitution, namely, the supremacy of the Judiciary and its freedom from any influence of the Executive in the appointment process.

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Sir, I am speaking for those who are not irrevocably committed to voting for this amendment. There are some people who must have kept their minds still open. I am appealing to those minds today only. Those who are irrevocably committed are committed to the destruction of Indian democracy.

Sir, the key passage in the judgment of the Supreme Court of 1993 is the passage which I wish to share with the House. The question of primacy to the opinion of the Chief Justice of India in the matters of appointment and transfer and their justifiability should be considered in the context of the independence of the Judiciary as a part of the basic structure of the Constitution to secure the rule of law essential for preservation of the democratic system. The broad scheme of separation of powers adopted in the Constitution together with the Directive Principles of separation of the Judiciary from the Executive, even at the lowest strata, provides some insight to the true meaning of the relevant provisions of the Constitution relating to the composition of the Judiciary. The construction of these provisions must accord with these fundamental concepts in the Constitutional scheme to preserve the vitality and promote the growth of the essential of retaining the Constitution as a vibrant organism".

Sir, the Constitution cannot survive, human freedom cannot survive, citizens' human rights cannot survive, no development can take place unless, of course, the judges are independent first of the Executive power because don't forget that every citizen has a grievance against the corrupt members of the Executive, or, errant bureaucracy, public officers misusing power, indulging in corruption, making wrong and illegal orders. The citizen goes to the court, knocks the door of the court and says, "Please give me a mandamus against this corrupt official, against this corrupt Minister". And, Sir, the judges are supposed to decide upon the claims of the poorest who go to the Supreme Court... ... (Interruptions)... ...and to the judges. It may be, and I am conscious... ... (Interruptions)... Sir, this is not a laughing matter. Please listen, and then decide for yourself. ...

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Sir, first of all, let me say this now that the whole judgement of nine Judges is based upon this principle that in the appointment process, the Executive can never have primacy. This is principle number one. It has now become the basic feature of India's Constitution. My grievance today against this Constitution (Amendment) Bill is that you are slowly, slowly now creating a new method by which ultimately you will revert to the system which existed prior to 1993. In other words, the same system would produce those four Judges who destroyed the Indian democracy, human rights and freedom. Sir, kindly see, why. The Constitution Amendment looks very innocent. All that it says is that we shall have a new article 124(a) in the Constitution and article 124(a) merely says that

there shall be a Judicial Appointments Commission. It lays down that the Judicial Appointments Commission will have these functions. It leaves at that. But, kindly see that after the first sentence, every thing is left to a Parliamentary will. After saying that there will be a Judicial Appointments Commission, every thing will be left, according to the second part of 124(a), to a parliamentary legislation which is capable of being removed if the ruling party has one Member majority in both Houses of Parliament. Not only that, I understand that Parliament is not likely to do it, but it can do it and by a majority of one in both Houses, you can demolish the whole thing and substitute it with a Judicial Commission which will consist of only the Law Minister.

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So, Sir, my first objection is that this Bill is a Bill which is intended to deal with the basic structure of the Constitution and, therefore, this Bill is void. (Time-bell) Second, if a Constitutional Amendment is not good enough for this purpose, surely, an ordinary piece of legislation cannot do it, which ordinary piece of legislation can be removed only by a majority of one in each House. It can be removed like the 30th July Food Security Ordinance and you can pass an Ordinance on that day and say that the whole Act is repealed and now the system will be that Judges will be appointed for the next six months by only the Law Minister of India. If there was Mr. Kapil Sibal, ...(Interruptions)... If Mr. Kapil Sibal becomes the Law Minister for ever, Sir, I will allow this Bill to go. (Time-bell) But I am not prepared to accept it for the future Law Ministers. ... (Interruptions)... Sir, let me take two more minutes and tell all those Members that this Bill is not intended to ensure the judicial character. This Bill has nothing to do with the improvement of the judicial character. So long as the Judges are also human, there will be some Judges who will go wrong, who may go wrong. But a great Bar can control them. ...."

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Sir, I hope, people will avoid this kind of a tragedy in the life of this country. You are today digging the grave of the Constitution of India and the freedom of this country. ...(Interruptions)... That's all I wished to say. ...(Interruptions)..."

It was submitted, that in the Rajya Sabha 131 votes were cast in affirmation of the proposed Bill, as against the solitary vote of the learned counsel, against the same on 5.9.2013. It was however pointed out, that the effort did not bear fruit, on account of the intervening declaration for elections to the Parliament.

31. Learned counsel thereafter, invited our attention to the statement of "Objects and Reasons" for the promulgation of the Constitution (121st Amendment) Bill, 2014. The Bill which eventually gave rise to the impugned Constitution (99th Amendment) Act, was taken up for consideration by the Lok Sabha on 13.8.2014, and was passed without much debate. It was submitted, that on the following day i.e., 14.8.2014, the same was placed before the Rajya Sabha, and was again passed, without much discussion. It was pointed out, that an issue, as serious as the one in hand, which could have serious repercussions on the "independence of the judiciary", was sought to be rushed through.

32. It was submitted, that the "Objects and Reasons" of the Constitution (99th Amendment) Act were painfully lacking, in the expression of details, which had necessitated the proposed/impugned constitutional amendment. It was submitted, that it was imperative to have brought to the notice of the Parliament, that the Supreme Court had declared, that the "rule of law", the "separation of powers" and the "independence of the judiciary", were "salient and basic features" of the Constitution. And that, the same could not be abrogated, through a constitutional amendment. And further that, the Supreme Court had expressly provided for the primacy of the Chief Justice of India, based on a decision of a collegium of Judges, with reference to the appointments and transfers of Judges of the higher judiciary.

33. It was submitted by Mr. Ram Jethmalani, that the impugned constitutional amendment, so as to introduce Article 124A, ought to be described as a fraud on the Constitution itself. It was pointed out, that the first effort of introducing Article 124A was made by the previous Government, through the Constitution (120th Amendment) Bill, 2013. In the above Bill, Article 124A alone (as against Articles 124A to 124C, presently enacted) was introduced. It was submitted, that the Rajya Sabha passed the above Bill on 5.9.2013, when 131 Members of the Rajya Sabha supported the Bill (with only one Member opposing it). Learned counsel submitted, that he alone had opposed the Bill. It was asserted, that the above fraud was sought to be perpetuated, through the passing of the Constitution (121st Amendment) Bill, 2014, by the Lok Sabha on 13.8.2014, and by the Rajya Sabha on 14.8.2014. It was pointed out, that Parliamentarians from different political parties had joined hands. It was submitted, that as a Parliamentarian, he was in a position to assert, that the merits and demerits of the impugned amendment to the Constitution, were not debated, when the Bill was passed, because of the universal bias entertained by the legislature, against the judiciary. It was submitted, that prejudice and intolerance had arisen, because of the fact that the judiciary often interfered with, and often effaced legislative action(s), as also, executive decision(s).

34. Learned senior counsel also asserted, that the Constitution (99th Amendment) Act, was wholly *ultra vires,* as it seriously infringed the

"basic structure/feature" of the Constitution i.e., the "independence of the judiciary". It was submitted, that the veracity of the above constitutional amendment, had to be examined in the light of Article 50. According to learned counsel, the politicization of the process of selection and appointment of Judges to the higher judiciary, would lead to a dilution of the "independence of the judiciary". It was submitted, that the inclusion of the Union Minister in charge of Law and Justice, as an *ex officio* Member of the NJAC, had the effect of politicization of the process of appointment of Judges to the higher judiciary. It was pointed out, that the inclusion of the Union Minister in charge of Law and Justice within the framework of the NJAC, meant the introduction of the Government of the day, into the selection process. It was asserted, that the Union Minister's inclusion, meant surrendering one-sixth of the power of appointment, to the Government. It was submitted, that in order to understand the true effect of the inclusion of the Union Minister, into the process of selection and appointment of Judges to the higher judiciary, one had to keep in mind the tremendous amount of patronage, which the Union Minister for Law and Justice carries, and as such, it would be within the inference of the Union Minister in charge of Law and Justice, to make the process fallible, by extending his power of patronage to support or oppose candidates, who may be suitable or unsuitable, to the Government of the day. Even though the Union Minister had been assigned only one vote, it was submitted, that he could paralyse the

whole system, on the basis of the authority he exercised. To drive home his contention, learned counsel made a reference to the introduction of the book "Choosing Hammurabi – Debates on Judicial Appointments", edited by Santosh Paul. In the introduction to the book, the thoughts of H.L. Mencken are expressed in the following words:

"But when politicians talk thus, or act thus without talking, it is precisely the time to watch them most carefully. Their usual plan is to invade the constitution stealthily, and then wait to see what happens. If nothing happens they go on more boldly; if there is a protest they reply hotly that the constitution is worn out and absurd, and that progress is impossible under the dead hand. This is the time to watch them especially. They are up to no good to anyone save themselves. They are trying to whittle away the common rights of the rest of us. Their one and only object, now and always, is to get more power in to their hands that it may be used freely for their advantage, and to the damage of everyone else. Beware of all politicians at all times, but beware of them most sharply when they talk of reforming and improving the constitution."

35. Learned Senior Advocate also contended, that the inclusion of two "eminent persons" in the six-Member NJAC, as provided for, under Article 124A(1) of the Constitution (99th Amendment) Act, was also clearly unconstitutional. It was contended, that there necessarily had to be, an indication of the positive qualifications required to be possessed by the two "eminent persons", to be nominated to the NJAC. Additionally, it was necessary to stipulate disqualifications. Illustratively, it was pointed out, that an individual having a conflict of interest, should be disqualified. And such conflict would be apparent, when the individual had a political role. A politician has to serve his constituency, he has to nourish and sustain his vote bank, and above all, he has to conform with the agenda of his political party. Likewise, a person with ongoing

litigation, irrespective of the nature of such litigation, would render himself ineligible for serving as an "eminent person" within the framework of the NJAC, because of his conflict of interest.

36. With reference to the inclusion of two "eminent persons" in the NJAC, Mr. Arvind P. Datar, learned Senior Advocate, invited our attention to Article 124A, whereunder, the above two "eminent persons" are to be nominated by a committee comprising of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of People, or, where there is no such Leader of Opposition, then, leader of the single largest opposition party in the House of the People. Learned counsel submitted, that neither Article 124A, nor any other provision, and not even the provisions of the NJAC Act, indicate the qualifications, of the two "eminent persons", who have been included amongst the six-Member NJAC. It was sought to be asserted, that in approximately 70 Statutes and Rules, the expression "eminent person" has been employed. Out of the 70 Statutes, in 67, the field in which such persons must be eminent, has been clearly expressed. Only in three statutes, the term "eminent person" was used without any further qualification. It was asserted, that the term "eminent person" had been left vague and undefined, in Article 124A. It was submitted, that the vagueness of the term "eminent person" was itself, good enough to justify the striking down of the provision. It was emphasized, that the determinative role assigned to the two "eminent persons", included amongst the six-Member NJAC, was so important,

that the same could not be left to the imagination of the nominating committee, which comprised of just men "…with all the failings, all the sentiments and all prejudices which we as common people have…" (relying on the words of Dr. B.R. Ambedkar).

37. Referring to the second proviso under Section 5(2), as well as, Section 6(6) of the NJAC Act, it was submitted, that a recommendation for appointment of a Judge, could not be carried out, if the two "eminent persons" did not accede to the same. In case they choose to disagree with the other Members of the NJAC, the proposed recommendation could not be given effect to, even though the other four Members of the NJAC including all the three representatives of the Supreme Court approved of the same. It was pointed out, that the two "eminent persons", therefore would have a decisive say. It was further submitted, that the impact of the determination of the two "eminent persons", would be such, as would negate the primacy hitherto before vested in the Chief Justice of India. It was pointed out, that a positive recommendation by the Chief Justice of India, supported by two other senior Judges of the Supreme Court (next to the Chief Justice of India), could be frustrated by an opposition at the hands of the two "eminent persons". The above implied veto power, according to the learned counsel, could lead to structured bargaining, so as to persuade the other Members of the NJAC, to accede to the names of undesirable nominees (just to avoid a stalemate of sorts). It was submitted, that such a composition had been adversely commented upon

by this Court in Union of India v. R. Gandhi[38]. In the judgment, the provision, which was subject matter of consideration, was Section 10-FX. Under the above provision, the Selection Committee for appointing the Chairperson and Members of the Appellate Tribunal, and the President and Members of the Tribunal was to be comprised of the Chief Justice of India (or his nominee), besides four Secretaries from different Ministries of the Union Government. This Court recorded its conclusions with reference to the aforesaid provision in paragraph 120(viii), which is being extracted hereunder:

"120(viii) Instead of a five-member Selection Committee with the Chief Justice of India (or his nominee) as Chairperson and two Secretaries from the Ministry of Finance and Company Affairs and the Secretary in the Ministry of Labour and the Secretary in the Ministry of Law and Justice as members mentioned in Section 10-FX, the Selection Committee should broadly be on the following lines:
(a) Chief Justice of India or his nominee – Chairperson (with a casting vote);
(b) A Senior Judge of the Supreme Court or Chief Justice of High Court – Member;
(c) Secretary in the Ministry of Finance and Company Affairs –Member; and
(d) Secretary in the Ministry of Law and Justice – Member."

It was submitted, that the purpose sought to be achieved, was not exclusivity, but primacy. It is further submitted, that if primacy was considered to be important for selection of Members to be appointed to a tribunal, primacy assumed a far greater significance, when the issue under consideration was appointment and transfer of Judges of the higher judiciary. It was accordingly contended, that the manner in which the composition of the NJAC had been worked out in Article 124A, and

[38] (2010) 11 SCC 1

the manner in which the NJAC is to function with reference to the provisions of the NJAC Act, left no room for any doubt, that the same was in clear violation of the law laid down by this Court, and therefore, liable to be set aside.

38. Learned counsel on the above facts, contested not only the constitutional validity of clauses (c) and (d) of Article 124A(1), but also emphatically assailed the first proviso under Article 124A(1)(d), which postulates, that one of the "eminent persons" should belong to the Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities or Women. It was submitted, that these sort of populistic measures, ought not to be thought of, while examining a matter as important as the higher judiciary. It was submitted, that it was not understandable, what the choice of including a person from one of the aforesaid categories was aimed at. In the opinion of learned counsel, the above proviso was farcical, and therefore, totally unacceptable. While members of a particular community may be relevant for protecting the interest of their community, yet it could not be conceived, why such a measure should be adopted, for such an important constitutional responsibility. In the opinion of the learned counsel, the inclusion of such a Member in the NJAC, was bound to lead to compromises.

39. It was also the contention of Mr. Arvind P. Datar, that Article 124C introduced by the Constitution (99th Amendment) Act, was wholly unnecessary. It was pointed out, that in the absence of Article 124C, the

NJAC would have had the inherent power to regulate its own functioning. It was submitted, that Article 124C was a serious intrusion into the above inherent power. Now that, the Parliament had been authorized to regulate the procedure for appointments by framing laws, it would also result in the transfer of control over the appointment process (–of Judges to the higher judiciary), to the Parliament. It was submitted, that there could not be any legislative control, with reference to appointment of Judges to the higher judiciary. Such legislative control, according to learned counsel, would breach "independence of the judiciary". It was submitted, that the Parliament having exercised its authority in that behalf, by framing the NJAC Act, and having provided therein, the ultimate control with the Parliament, must be deemed to have crossed the line, and transgressed into forbidden territory, exclusively reserved for the judiciary. Learned counsel contended, that the duties and responsibilities vested in a constitutional authority, could only be circumscribed by the Constitution, and not by the Parliament through legislation. It was submitted, that the NJAC was a creature of the Constitution, as the NJAC flows out of Article 124A. Likewise, the Parliament, was also a creature of the Constitution. It was submitted, that one entity which was the creation of the Constitution, could not regulate the other, owing its existence to the Constitution.

40. It was pointed out by Mr. Ram Jethmalani, learned Senior Advocate, that the statement of "Objects and Reasons", as were projected

for the instant legislation, indicated *inter alia,* that the NJAC would provide "a meaningful role to the judiciary". It was submitted, that what was meant by the aforesaid affirmation, was not comprehendible to him. It was further highlighted, that it also asserted in the "Objects and Reasons", that "the executive and the eminent persons to present their viewpoints and make the participants accountable", was likewise unintelligible to him. It was submitted, that a perusal of the Constitution (99th Amendment) Act (as also, the NJAC Act) would not reveal, how the Members of the NJAC were to be made responsible. It was further submitted, that the statement of "Objects and Reasons" also indicate, that the manner of appointment of Judges to the higher judiciary, would introduce transparency in the selection process. It was contended, that the enactments under reference, amounted to commission of a fraud by Parliament, on the people of the country. As it was not possible to understand, how and who was to be made accountable – the executive, – the "eminent persons", – the judiciary itself. It was accordingly sought to be asserted, that the Parliament seemed to be asserting one thing, while it was doing something else. Learned counsel also placed reliance on Shreya Singhal v. Union of India[39], wherefrom the following observations were brought to our notice:

"50. Counsel for the Petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall."

[39] 2015 (4) SCALE 1

Based on the above submissions, it was asserted, that the statement of "Objects and Reasons", could not have been more vague, ambiguous, and fanciful than the ones in the matter at hand.

41. Mr. Anil B. Divan, Senior Advocate, while appearing for the petitioner in the petition filed by the Bar Association of India (Writ Petition (C) No.108 of 2015), first and foremost pointed out, that the Bar Association of India represents the High Court Bar Association, Kolkata (West Bengal), The Awadh Bar Association, Lucknow (Uttar Pradesh), the Madras Bar Association, Chennai (Tamil Nadu), the Supreme Court Bar Association, New Delhi, the Gujarat High Court Advocates' Association, Gandhinagar (Gujarat), the Advocates' Association, Chennai (Tamil Nadu), the Andhra Pradesh High Court Advocates' Association, Hyderabad (Andhra Pradesh), the Delhi High Court Bar Association, New Delhi, the Bar Association Mumbai (Maharashtra), the Gauhati High Court Bar Association, Guwahati (Assam), the Punjab & Haryana High Court Bar Association, Chandigarh (Punjab & Haryana), the Bombay Incorporated Law Society, Mumbai (Maharashtra), the Madhya Pradesh High Court Bar Association, Jabalpur (Madhya Pradesh), the Advocates' Association Bangalore (Karnataka), the Central Excise, Customs (Gold) Control Bar Association, New Delhi, the Advocates' Association, Allahabad (Uttar Pradesh), the Karnataka Advocates' Federation, Bangalore (Karnataka), the Allahabad High Court Bar Association (Uttar Pradesh), the Goa High Court Bar Association, Panaji (Goa), the Society

of India Law of Firms, New Delhi, the Chhattisgarh High Court Bar Association, Bilaspur (Chhattisgarh), the Nagpur High Court Bar Association, Nagpur (Maharashtra), the Madurai Bench of Madras High Court Bar Association, Madurai (Tamil Nadu), the Jharkhand High Court Bar Association, Ranchi (Jharkhand), the Bar Association of National Capital Region, New Delhi, and the Gulbarga High Court Bar Association, Gulbarga (Karnataka). It was submitted, that all the aforementioned Bar Associations were unanimous in their challenge, to the Constitution (99th Amendment) Act, and the NJAC Act. It was submitted, that the challenge to the former was based on the fact that it violated the "basic structure" of the Constitution, and the challenge to the latter, was based on its being *ultra vires* the provisions of the Constitution.

42. Learned counsel had adopted a stance, which was different from the one adopted by others. The submissions advanced by the learned senior counsel, were premised on the fact, that under the constitutional power of judicial review, the higher judiciary not only enforced fundamental rights, but also restricted the legislature and the executive, within the confines of their jurisdiction(s). It was pointed out, that it was the above power, which was the source of tension and friction between the judiciary on the one hand, and the two other pillars of governance i.e., the legislature and the executive, on the other. This friction, it was pointed out, was caused on account of the fact, that while discharging its responsibility of judicial review, executive backed actions of the

legislature, were sometimes invalidated, resulting in the belief, that the judiciary was influencing and dominating the other two pillars of governance. Illustratively, it was pointed out, that in the beginning of independent governance of the country, judicial review led to the setting aside of legislations, pertaining to land reforms and zamindari abolition. This had led to the adoption of inserting legislations in the Ninth Schedule of the Constitution, so as to exclude them from the purview of judicial review.

43. It was submitted, that the first manifestation of a confrontation between the judiciary and the other two wings of governance, were indicated in the observations recorded in State of Madras v. V.G. Row[40], wherein, as far back as in 1952, the Supreme Court observed, that its conclusions were recorded, not out of any desire to a tilt at the legislative authority in a crusader's spirit, but in discharge of the duty plainly laid upon the Courts, by the Constitution.

44. It was submitted, that the legislations placed in the Ninth Schedule of the Constitution, from the original 13 items (relating to land reforms and zamindari abolition), multiplied at a brisk rate, and currently numbered about 284. And many of them, had hardly anything to do with land reforms. It was contended, that the decision rendered by this Court in I.C. Golak Nath v. State of Punjab[41], was a judicial reaction to the uninhibited insertions in the Ninth Schedule, leading to completely

[40] (1952) SCR 597
[41] AIR 1967 SC 1643

eclipsing fundamental rights. It therefore came to be held in the I.C. Golak Nath case[41], that Parliament by way of constitutional amendment(s) could not take away or abridge fundamental rights.

45. To project his contention, pertaining to tension and friction between the judiciary and the other two wings of governance, it was submitted, that from 1950 to 1973, there was virtually no attempt by the political-executive, to undermine or influence or dominate over the judiciary. It was pointed out, that during the aforesaid period, when Jawaharlal Nehru (upto 27th May, 1964), Gulzari Lal Nanda (upto 9th June, 1964), Lal Bahadur Shastri (upto 11th January,1966), Gulzari Lal Nanda (upto 24th January, 1966) and Indira Gandhi (upto 1972) were running the executive and political governance in India, in their capacity as Prime Minister, had not taken any steps to dominate over the judiciary. Thereafter, two facts could not be digested by the political-executive leadership. The first, the abolition of the Privy Purses by an executive fiat, which was invalidated by the Supreme Court in Madhavrao Scindia Bahadur v. Union of India[42]. And the second, the fundamental rights case, namely, the Kesavananda Bharati case[10], wherein the Supreme Court by a majority of 7:6, had propounded the doctrine of "basic structure" of the Constitution, which limited the amending power of the Parliament, under Article 368. As a sequel to the above judgments, the executive attempted to intimidate the judiciary, by the first supersession in the Supreme Court on 25.4.1973. Thereafter, internal emergency was

[42] (1971) 1 SCC 85

declared on 25.06.1975, which continued till 21.03.1977. It was submitted, that during the emergency, by way of constitutional amendment(s), the power of judicial review vested in the higher judiciary, was sought to be undermined. It was submitted, that the intrusion during the emergency came to be remedied when the Janata Party came to power on 22.03.1977, through the 43rd and 44th Constitutional Amendments, which restored judicial review, to the original position provided for by the Constituent Assembly.

46. It was submitted, that in the recent past also, the exercise of the power of judicial review had been inconvenient for the political-executive, as it resulted in exposing a series of scams. In this behalf, reference was made to two judgments rendered by this Court, i.e., Centre for Public Interest Litigation v. Union of India[43], and Manohar Lal Sharma v. Principal Secretary[44]. It was submitted, that the executive and the legislature can never appreciate that the power of judicial review has been exercised by the higher judiciary, as a matter of public trust. As a sequel to the above two judgments, it was pointed out, that an amount of approximately Rupees two lakh crores (Rs. 20,00,00,00,00,000/-) was gained by the public exchequer, for just a few coal block allocations (for which reliance was placed on an article which had appeared in the Indian Express dated 10.3.2015). And an additional amount of Rupees one lakh ten thousand crores (Rs.11,00,00,00,00,000/-) was gained by the public

[43] (2012) 3 SCC 1
[44] (2014) 2 SCC 532

exchequer from the spectrum auction (for which reliance was placed on an article in the Financial Express dated 25.03.2015). It was submitted, that the embarrassment faced by the political-executive, has over shadowed the monumental gains to the nation. It was contended, that the Constitution (99th Amendment) Act, and the NJAC Act, were truthfully a political-executive device, to rein in the power of judicial review, to avoid such discomfiture.

47. It was also contended, that while adjudicating upon the present controversy, it was imperative for this Court, to take into consideration the existing socio-political conditions, the ground realities pertaining to the awareness of the civil society, and the relevant surrounding circumstances. These components, according to learned counsel, were described as relevant considerations, for a meaningful judicial verdict in the V.G. Row case[40]. Referring to Shashikant Laxman Kale v. Union of India[45], it was contended, that for determining the purpose or the object of the legislation, it was permissible for a Court to look into the circumstances which had prevailed at the time when the law was passed, and events which had necessitated the passing of the legislation. Referring to the judgment rendered by this Court, in Re: the Special Courts Bill, 1978[46], learned counsel placed emphatic reliance on the following:

"106. The greatest trauma of our times, for a developing country of urgent yet tantalising imperatives, is the dismal, yet die-hard, poverty of

[45] (1990) 4 SCC 366
[46] (1979) 1 SCC 380

the masses and the democratic, yet graft-riven, way of life of power-wielders. Together they blend to produce gross abuse geared to personal aggrandizement, suppression of exposure and a host of other horrendous, yet hidden, crimes by the summit executives, pro tem, the para-political manipulators and the abetting bureaucrats. And the rule of law hangs limp or barks but never bites. An anonymous poet sardonically projected the social dimension of this systemic deficiency:

The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose
Who steals the common from the goose.

107. The impact of 'summit' crimes in the Third World setting is more terrible than the Watergate syndrome as perceptive social scientists have unmasked. Corruption and repression-cousins in such situations-hijack developmental processes. And, in the long run, lagging national progress means ebbing people's confidence in constitutional means to social justice. And so, to track down and give short shrift to these heavy-weight criminaloids who often mislead the people by public moral weight-lifting and multipoint manifestoes is an urgent legislative mission partially undertaken by the Bill under discussion. To punish such super-offenders in top positions, sealing off legalistic escape routes and dilatory strategies and bringing them to justice with high speed and early finality, is a desideratum voiced in vain by Commissions and Committees in the past and is a dimension of the dynamics of the Rule of Law. This Bill, hopefully but partially, breaks new ground contrary to people's resigned cynicism that all high-powered investigations, reports and recommendations end in legislative and judicative futility, that all these valiant exercises are but sound and fury signifying nothing, that 'business as usual' is the signature tune of public business, heretofore, here and hereafter. So this social justice measure has my broad assent in moral principle and in constitutional classification, subject to the serious infirmities from which it suffers as the learned Chief Justice has tersely sketched. Whether this remedy will effectively cure the malady of criminal summitry is for the future to tell.

108. All this serves as a backdrop. Let me unfold in fuller argumentation my thesis that the Bill, good so far as it goes, is bad so far as it does not go-saved though by a pragmatic exception I will presently explain. Where the proposed law excludes the pre-and post-emergency crime-doers in the higher brackets and picks out only 'Emergency' offenders, its benign purpose perhaps becomes a crypto cover up of like criminals before and after. An 'ephemeral' measure to meet a perennial menace is neither a logical step nor national fulfilment. The classification, if I may anticipate my conclusion, is on the brink of constitutional break-down at that point and becomes almost vulnerable to the attack of Article 14.

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114. The crucial test is 'All power is a trust', its holders are 'accountable for its exercise', for 'from the people, and for the people, all springs, and all must exist'. By this high and only standard the Bill must fail morally if it exempts non-Emergency criminals about whom prior Commission Reports, now asleep in official pigeon holes, bear witness and future Commission Reports (who knows?) may, in time, testify. In this larger perspective, Emergency is not a substantial differentia and the Bill nearly recognises this by ante-dating the operation to February 27, 1975 when there was no 'Emergency'. Why ante-date if the 'emergency' was the critical criterion?

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117. Let us take a close look at the 'Emergency', the vices it bred and the nexus they have to speedier justice, substantial enough to qualify for reasonable sub-classification. Information flowing from the proceedings and reports of a bunch of high-powered judicial commissions shows that during that hushed spell, many suffered shocking treatment. In the words of the Preamble, civil liberties were withdrawn to a great extent, important fundamental rights of the people were suspended, strict censorship on the press was placed and judicial powers were curtailed to a large extent.

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128. Let us view the problem slightly differently. Even if liberty had not been curtailed, press not gagged or writ jurisdiction not cut down, criminal trials and appeals and revisions would have taken their own interminable delays. It is the forensic delay that has to be axed and that has little to do with the vices of the Emergency. Such crimes were exposed by judicial commissions before, involving Chief Ministers and Cabinet Ministers at both levels and no criminal action followed except now and that of a select group. It was lack of will-not Emergency-that was the villain of the piece in non-prosecution of cases revealed by several Commissions like the Commission of Enquiry appointed by the Government of Orissa in 1967 (Mr. Justice Khanna), the Commission of Enquiry appointed by the Government of J&K in 1965 (Mr. Justice Rajagopala Ayyangar), the Mudholkar Commission against 14 ex-United Front Ministers appointed by the Government of Bihar in 1968 and the T.L. Venkatarama Aiyar Commission of Inquiry appointed by the Government of Bihar, 1970-to mention but some. We need hardly say that there is no law of limitation for criminal prosecutions. Somehow, a few manage to be above the law and the many remain below the law. How? – I hesitate to state."

Last of all, reliance was placed on the decision of this Court in Subramanian Swamy v. Director, Central Bureau of Investigation[47],

[47] (2014) 8 SCC 682

wherein this Court extensively referred to the conditions regarding corruption which prevailed in the country. For the above purpose, it took into consideration the view expressed by the N.N. Vohra Committee Report, bringing out the nexus between the criminal syndicates and mafia.

48. Reliance was, then placed on the efforts made by the executive on the death of the first Chief Justice of India (after the promulgation of the Constitution), when Patanjali Sastri, J., who was the senior most Judge, was sought to be overlooked. Relying on recorded texts in this behalf, by Granville Austin, George H. Gadbois Jr. and M.C. Chagla, it was submitted, that all the six Judges, at that time, had threatened to resign, if the senior most Judge was overlooked for appointment as Chief Justice of India.

49. Referring to the first occasion, when the convention was broken, by appointing A.N. Ray, J., as the Chief Justice of India, it was submitted, that the supersession led to public protest, including speeches by former Judges, former Attorneys General, legal luminaries and members of the Bar, throughout the country. M. Hidayatullah, CJ., in a public speech, complimented the three Judges, who were superseded, for having resigned from their office, immediately on the appointment of A.N. Ray, as Chief Justice of India. In the speech delivered by M. Hidayatullah, CJ., he made a reference about rumors being afloat, that the senior most Judge after him, namely, J.C. Shah, J., would not succeed him as the

Chief Justice of India. And that, an outsider was being brought to the Supreme Court, as its Chief Justice. His speech highlighted the fact, that all except one sitting Judge of the Supreme Court had agreed to resign in the event of supersession of J.C. Shah, J.. He had also pointed out, in his speech, that if the decision was taken by the executive, even a day before his retirement, he too would join his colleagues in resigning from his position as the Chief Justice of India. It was accordingly submitted, that the constitutional convention, that the senior most Judge of the Supreme Court would be appointed as the Chief Justice of India, was truly and faithfully recognized as an impregnable convention. To support the aforesaid contention, it was also pointed out, that even in situations wherein the senior most puisne Judge would have a very short tenure, the convention had remained unbroken, despite the inefficacy of making such appointments. In this behalf, the Court's attention was drawn to the fact that J.C. Shah, CJ. (had a tenure of 35 days), K.N. Singh, CJ. (had a tenure of 18 days) and S. Rajendra Babu, CJ. (had a tenure of 29 days).

50. It was also the contention of the learned senior counsel, that the executive is an important litigant and stakeholder before the higher judiciary, and as such, the executive ought to have no role, whatsoever, in the matter of appointments/transfers of Judges to the higher judiciary. In this behalf, learned counsel placed reliance on a number of judgments rendered by this Court, wherein the participation of the

executive in the higher judiciary, had been held to be unconstitutional, in the matter of appointments of Judges and other Members of tribunals, vested with quasi judicial functions. It was submitted, that the inclusion of the Union Minister in charge of Law and Justice in the NJAC, was a clear breach of the judgments rendered by this Court. Additionally, it was pointed out, that two "eminent persons", who were to be essential components of the NJAC, were to be selected by a Committee, wherein the dominating voice was that of the political leadership. It was pointed out, that in the three-Member Committee authorised to nominate "eminent persons" included the Prime Minister and the Leader of the Opposition in the Lok Sabha, besides the Chief Justice of India. It was therefore submitted, that in the six-Member NJAC, three Members would have political-executive lineage. This aspect of the matter, according to the learned counsel, would have a devastating affect. It would negate primacy of the higher judiciary, and the same would result in undermining the "independence of the judiciary". Based on the above foundation, learned senior counsel raised a number of contentions. Firstly, it was submitted, that through the impugned constitutional amendment and the NJAC Act, the constitutional convention in this country, that the senior most Judge of the Supreme Court would be appointed as the Chief Justice of India, had been breached. It was submitted, that the above convention had achieved the status of a constitutional axiom – a constitutional principle. To substantiate the

above contention, it was submitted, that right from 26.01.1950, the senior most puisne Judge of the Supreme Court has always been appointed as the Chief Justice of India except on two occasions. Firstly, the above convention was breached, when A.N. Ray, J., was appointed as Chief Justice of India on 25.4.1973, by superseding three senior most Judges. It was submitted, that the aforesaid supersession was made on the day following the Supreme Court delivered the judgment in the Kesavananda Bharati case[10]. Secondly, the supersession took place during the internal emergency declared by Prime Minister, Indira Gandhi. At that juncture, M.H. Beg, J., was appointed as Chief Justice of India on 29.1.1977, by superseding his senior H.R. Khanna, J.. It was contended, that the aforesaid two instances should be considered as aberrations, in the convention pertaining to appointment of Chief Justice of India.

51. Mr. Arvind P. Datar also assailed the constitutional validity of Article 124C, introduced by the Constitution (99th Amendment) Act. It was submitted, that the Parliament was delegated with the authority to "regulate the procedure for the appointment of the Chief Justice of India and other Judges of the Supreme Court, and the Chief Justices and other Judges of the High Courts". And the NJAC was empowered to lay down, by regulation, "the procedure of discharging its own functions, the manner of selection of persons for appointment, and such other matters, as may be considered necessary by it". It was the contention of the learned counsel, that the delegation of power contemplated under Article

124C, amounted to vesting the NJAC, with what was earlier vested with the Chief Justice of India. In this behalf, reference was also made to Sections 11, 12 and 13 of the NJAC Act. The power to make rules, has been vested with the Central Government under Section 11, and the power to make regulations has been entrusted to the NJAC under Section 12. The aforementioned rules and regulations, as drawn by the Central Government/NJAC, are required to be placed before the Parliament under Section 13, and only thereafter, the rules and regulations were to be effective (or not to have any effect, or to have effect as modified). It was submitted, that the entrustment of the procedure of appointment of Judges to the higher judiciary, and also, the action of assigning the manner in which the NJAC would discharge its functions (of selecting Judges to the higher judiciary), with either the executive or the legislature, was unthinkable, if "independence of the judiciary" was to be maintained. It was pointed out, that the intent behind Article 124C, in the manner it had been framed, stood clearly exposed, by the aforesaid provisions of the NJAC Act.

52. Reference was also made to Section 12 of the NJAC Act, to highlight, that the NJAC had been authorized to notify in the Official Gazette, regulations framed by it, with the overriding condition, that the regulations so framed by the NJAC were to be consistent with the provisions of the NJAC Act, as also, the rules made thereunder (i.e., under Section 11 of the NJAC Act). Having so empowered the NJAC

(under Sections 11 and 12 referred to above), and having delineated in Section 12(2), the broad outlines with reference to which the regulations could be framed, it was submitted, that the power to delegate the authority to frame regulations clearly stood exhausted. In that, the Parliament had no jurisdiction thereafter, to interfere in the matter of framing regulations. In fact, according to the learned counsel, consequent upon the empowerment of the NJAC to frame regulations, the Parliament was rendered *functus officio,* on the issue of framing regulations. According to learned counsel, the above also established, the inference drawn in the foregoing paragraph.

53. It was also the contention of the learned counsel, that the NJAC constituted, by way of the Constitution (99th Amendment) Act, would be sustainable, so long as it did not violate the "basic structure" of the Constitution. It was emphasized, that one of the recognized features of the "basic structure" of the Constitution was, the "independence of the judiciary". The procedure which the NJAC could adopt for discharging its functions, and the procedure it was liable to follow while holding its meetings, and the ambit and scope with reference to which the NJAC was authorized to frame its regulations, had to be left to the exclusive independent will of an independent NJAC. That, according to learned counsel, would have ensured the "independence of the NJAC". It was accordingly contended, that Article 124C breached the "independence of the judiciary", and also, undermined the independence of the NJAC.

54. The next contention advanced at the hands of the learned counsel, was with reference to clause (2) of Article 124A, whereby judicial review was barred, with reference to actions or proceedings of the NJAC, on the ground of the existence of a vacancy or defect in the constitution of the NJAC. Learned counsel then invited this Court's attention to the exclusion of the power of judicial review, contemplated under Articles 323A(2)(d) and 323B(3)(d), wherein the power of judicial review was similarly excluded. It was submitted, that this Court struck down a similar provision in the aforesaid Articles, holding that the same were violative of the "basic structure" of the Constitution. In this behalf, learned counsel placed reliance on the decision of this Court in the Kihoto Hollohan case[34], and referred to the following observations recorded therein:

"129. The unanimous opinion according to the majority as well as the minority is that Paragraph 7 of the Tenth Schedule enacts a provision for complete exclusion of judicial review including the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 of the Constitution and, therefore, it makes in terms and in effect a change in Articles 136, 226 and 227 of the Constitution which attracts the proviso to clause (2) of Article 368 of the Constitution; and, therefore, ratification by the specified number of State legislatures before the Bill was presented to the President for his assent was necessary, in accordance therewith. The majority view is that in the absence of such ratification by the State legislatures, it is Paragraph 7 alone of the Tenth Schedule which is unconstitutional; and it being severable from the remaining part of the Tenth Schedule, Paragraph 7 alone is liable to be struck down rendering the Speakers' decision under Paragraph 6 that .of a judicial tribunal amenable to judicial review by the Supreme Court and the High Courts under Articles 136, 226 and 227. The minority opinion is that the effect of invalidity of Paragraph 7 of the Tenth Schedule is to invalidate the entire Constitution (Fifty-second Amendment) Act, 1985 which inserted the Tenth Schedule since the President's assent to the Bill without prior ratification by the State legislatures is non est. The

minority view also is that Paragraph 7 is not severable from the remaining part of the Tenth Schedule and the Speaker not being an independent adjudicatory authority for this purpose as contemplated by a basic feature of democracy, the remaining part of the Tenth Schedule is in excess of the amending powers being violative of a basic feature of the Constitution. In the minority opinion, we have held that the entire Constitution (Fifty-second Amendment) Act, 1985 is unconstitutional and an abortive attempt to make the constitutional amendment indicated therein."

Reliance was also placed on the following conclusions recorded by this Court in Dr. Kashinath G. Jalmi v. The Speaker[48].

"43. In Kihoto Hollohan there was no difference between the majority and minority opinions on the nature of finality attaching to the Speaker's order of disqualification made under para 6 of the Tenth Schedule, and also that para 7 therein was unconstitutional in view of the non-compliance of the proviso to clause 2 of Article 368 of the Constitution, by which judicial review was sought to be excluded. The main difference in the two opinions was, that according to the majority opinion this defect resulted in the constitution standing amended from the inception with insertion of the Tenth Schedule minus para 7 therein, while according to the minority the entire exercise of constitutional amendment was futile and an abortive attempt to amend the constitution, since Para 7 was not severable. According to the minority view, all decisions rendered by the several Speakers under the Tenth Schedule were, therefore, nullity and liable to be ignored. According to the majority view, para 7 of the Tenth Schedule being unconstitutional and severable, the Tenth Schedule minus para 7 was validly enacted and, therefore, the orders made by the Speaker under the Tenth Schedule were not nullity but subject to judicial review. On the basis of the majority opinion, this Court has exercised the power of judicial review over the orders of disqualification made by the speakers from the very inception of the Tenth Schedule, and the exercise of judicial review has not been confined merely to the orders of disqualification made after 12th November, 1991 when the judgment in Kihoto Hollohan (1992 (1) SCC 309...) was rendered. Venkatachaliah, J. (as he then was) wrote the majority opinion and, thereafter, on this premise, exercised the power of judicial review over orders of disqualification made prior to 12.11.1991. The basic fallacy in the submission made on behalf of the respondents that para 7 must be treated as existing till 12th November, 1991 is that on that view there would be no power of judicial review against an order of disqualification made by the Speaker prior to 12th November, 1991 since para 7 in express terms totally excludes judicial review."

[48] AIR 1993 SC 1873

It was, therefore, the vehement contention of the learned counsel, that clause (2) of Article 124A should be struck down, as being violative of the "basic structure" of the Constitution.

55. Mr. Fali S. Nariman, learned senior counsel, also raised a purely technical plea. It was his contention, that 121st Constitution Amendment Bill, now the Constitution (99th Amendment) Act, was introduced in the Lok Sabha on 11th of August, 2014 and was passed by the Lok Sabha on 13th of August, 2014. It was further submitted, that the 121st Constitution Amendment Bill was discussed and passed by Rajya Sabha on 14.8.2014. Thereupon, the said Amendment Bill, which envisaged a constitutional amendment, was sent to the State Legislatures for ratification. Consequent upon its having been ratified by 16 State Legislatures, it was placed before the President for his assent. It was pointed out, that the President accorded his assent on 31.12.2014, whereupon, it became the Constitution (99th Amendment) Act. Learned counsel then invited our attention to Section 1 of the Constitution (99th Amendment) Act, which reads as under:

"1(1) This Act may be called the Constitution (Ninety-ninth Amendment) Act, 2014.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint."

Based on the aforesaid provision, it was contended, that in spite of having received the assent of the President on 31.12.2014, the Constitution (99th Amendment) Act, would not come into force

automatically. And that, the same would come into force in terms of the mandate contained in Section 1(2), - "… on such date as the Central Government may, by notification in the Official Gazette, appoint." It was submitted, that the Central Government notified the Constitution (99th Amendment) Act, in the Gazette of India Extraordinary on 13.4.2015. Based on the aforesaid factual position, the Constitution (99th Amendment) Act, came into force with effect from 13.4.2015.

56. In conjunction with the factual position noticed in the foregoing paragraph, learned counsel pointed out, that the NJAC Bill, was also introduced in the Lok Sabha on 11.8.2014. The Lok Sabha passed the Bill on 13.8.2014, whereupon, it was passed by the Rajya Sabha on 14.8.2014. Thereafter, the NJAC Bill received the assent of the President on 31.12.2014, and became the NJAC Act. It was contended, that the enactment of the NJAC Act was based/founded on the Constitution (99th Amendment) Act. It was submitted, that since the Constitution (99th Amendment) Act, was brought into force on 13.4.2015, the consideration of the NJAC Bill and the passing of the NJAC Act prior to the coming into force of the Constitution (99th Amendment) Act, would render it stillborn and therefore nugatory. The Court's attention was also invited to the fact, that the aforesaid legal infirmity, was noticed and raised during the course of the parliamentary debate pertaining to the NJAC Bill, before the Rajya Sabha. Learned counsel invited this Court's attention to the following questions and answers, which are recorded on pages 442 to 533

with reference to the debates in the Rajya Sabha on 13.8.2014, and at pages 229 to 375 on 14.8.2014 (Volume 232 No.26 and 27), as under:

"that Mr. Sitaram Yechury, Member of Parliament, (Rajya Sabha) raised a constitutional objection (on August 13, 2014) to the NJAC Bill saying:
".....till the Constitution Amendment (121st Bill) comes into effect, the Legislature, I would like to humbly submit, does not have the right to enact a Bill for the creation of a Judicial Commission for appointments." (page 488)
".....I am only asking you to seriously consider we are creating a situation where this proposal for creation of a Judicial Appointments Commission will become *ultra vires* of the Indian Constitution because our right to bring about a Bill to enact such a provision comes only after the Constitution Amendment Bill becomes effective." (page 489)
".....Therefore, you please consider what I am saying with seriousness. I want also the law Minister to consider it. Let it not be struck down later as *ultra vires*. So, let us give it a proper consideration." (Page-490)
- The Leader of the Opposition (Shri Ghulam Nabi Azad) then said:
"The leader of the opposition (Shri Ghulam Nabi Azad): Sir, I just want to say that Mr. Yechury has given a totally different dimension to the entire thing. It is quite an eye opener for all of us that the entire legislation will become *ultr vires*. So, my suggestion is that before my colleague, Mr. Anand Sharma, speaks, I would request one thing. Of course, we have great lawyers from all sides here but I think one of the oldest luminaries in the legal profession is Mr. Parasaran. Before we all decide what to do, can we request him to throw light on what Mr. Yechury has said? (Page-490)
- Mr. K. Parasaran (Nominated Member) then gave his views saying:
Shri K. Parasarn (contd.)...Before ratification, if you take up the Bill and pass the Bill, today, it will be unconstitutional and *ultra vires*. Because the power to make enactment, as we see, is only in the Articles. The Article 368 gives the power to ....

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Mr. Deputy Chairman: What I want to know is this. You have mentioned that there are two provisions. Number one, if it is amended in a particular way, it can directly go to the President. If the amendment involves Chapter IV, part 5, or Chapter V, etc., etc., it has to be ratified by half in the Assemblies. Okay. I accept both of them. But do any of these objections object us from considering this Bill now? That is my question.
Shri K. Parasaran: No. We don't have the legislative competence. (Page-492)
- The Minister of Law and Justice then said:
".....This Bill will become effective after ratification but the separate Bill is for guidance to the Legislatures as to how the entire structure has come

into existence. Therefore, it is not unconstitutional. We have got summary power under Article 246 read with Entries 77 and 78, which is not a limited power. It is a plenary power, exhaustive power. This Parliament can pass any law with regard to composition and organization of the Supreme Court; this Parliament can pass any law with regard to High Court composition. That is not a limited power. ……." (Page-495)

Mr. Deputy Chairman: Yes, I will come ….(interruptions)….

Now, Mr. Minister, the point is that you yourself admit that only after 50 per cent of the Assemblies have endorsed it by a Resolution can your Bill come into force, and after the President has given assent. And then, you are saying that the Bill was passed along with this only as a guideline, so that Members of the Assemblies know what you are going to do.

Shri Ravi Shankar Prasad: But it would become effective after assent. That is all.

Mr. Deputy Chairman: That's what I am saying. It will become effective after six months.

Now, I would like to know one thing from Mr. Parasaran. Article 246, according to him, (the Minister) gives absolute powers to Parliament to pass a legislation. Is there any provision in the Constitution, which prevents passing of such a Bill before the Constitutional Amendment is endorsed by the President? Is there any such provision? …(interruptions) …. I will come to you. Yes, Mr. Parasaran. (Page-495)

- In response Mr. K. Parasaran then said:

"Shri K. Parasaran: Sir, I would explain this. Now, we are concerned with Article 124 and a legislation under Article 246 read with the relevant entries in the Seventh Schedule, pointed out by the Hon. Minister. Now, the Supreme Court has interpreted Article 124. We cannot pass an Act contrary to that judgment and, therefore, the need for amendment to the constitution. If the Constitution is not amended, then we lack the legislative competence. There is no good of going to Article 246 and reading the entries. Had we the legislative competence, under Article 246 read with the entries…. (Emphasis supplied) page 495.

Mr. Deputy Chairman: Then, how do you explain Article 246?

Shri K. Parasaran: Suppose the Constitutional Amendment is passed, then can this Bill be introduced and discussed as it is? As a hypothetical case, if this Amendment Bill is not passed, can we introduce this Bill and pass it? We will not be able to do it." (Emphasis supplied) (Page-496)."

57. In other words, it was the contention of the learned counsel, that the NJAC Bill was passed by both Houses of Parliament, when Parliament had no power, authority or jurisdiction to consider such a Bill, in the teeth of Articles 124(2) and 217(1), as enacted in the original

Constitution. It was submitted, that the passing of the said Bill, was in itself unconstitutional, *ultra vires* and void, because the amended provisions contained in the Constitution (99th Amendment) Act, had not come into play. It was submitted, that the passing by the Lok Sabha, as also, by the Rajya Sabha of the 121st Constitution Amendment Bill on 13/14.8.2014, and the ratification thereof by 16 State Legislatures, as also, the assent given thereto by the President on 31.12.2014, would not bestow validity on the NJAC Act. This, for the simple reason, that the Constitution (99th Amendment) Act, was brought into force only on 13.4.2015. In the above view of the matter, according to the learned counsel, till 13.4.2015, Articles 124(2) and 217(1) of the Constitution of India were liable to be read, as they were originally enacted. In the aforesaid context, it was submitted, that the NJAC Act could not have been passed, till the unamended provisions of the Constitution were in force. And that, the mere assent of the President to the NJAC Act on 31.12.2014, could not infuse validity thereon.

58. In order to substantiate the aforesaid contention, learned counsel placed reliance on A.K. Roy v. Union of India[49], and invited our attention to the following:

"45 The argument arising out of the provisions of Article 368(2) may be considered first. It provides that when a Bill whereby the Constitution is amended is passed by the requisite majority, it shall be presented to the President who shall give his assent to the Bill, "and thereupon the Constitution shall stand amended in accordance with the terms of the Bill." This provision shows that a constitutional amendment cannot have any effect unless the President gives his assent to it and secondly, that

[49] (1982) 1 SCC 271

nothing more than the President's assent to an amendment duly passed by the Parliament is required, in order that the Constitution should stand amended in accordance with the terms of the Bill. It must follow from this that the Constitution stood amended in accordance with the terms of the 44th Amendment Act when the President gave his assent to that Act on April 30, 1979. We must then turn to that Act for seeing how and in what manner the Constitution stood thus amended. The 44th Amendment Act itself prescribes by Section 1(2) a pre-condition which must be satisfied before any of its provisions can come into force. That pre-condition is the issuance by the Central Government of a notification in the official gazette, appointing the date from which the Act or any particular provision thereof will come into force, with power to appoint different dates for different provisions. Thus, according to the very terms of the 44th Amendment, none of its provisions can come into force unless and until the Central Government issues a notification as contemplated by Section 1(2).

46. There is no internal contradiction between the provisions of Article 368(2) and those of Section 1(2) of the 44th Amendment Act. Article 368(2) lays down a rule of general application as to the date from which the Constitution would stand amended in accordance with the Bill assented to by the President. Section 1(2) of the Amendment Act specifies the manner in which that Act or any of its provisions may be brought into force. The distinction is between the Constitution standing amended in accordance with the terms of the Bill assented to by the President and the date of the coming into force of the Amendment thus introduced into the Constitution. For determining the date with effect from which the Constitution stands amended in accordance with the terms of the Bill, one has to turn to the date on which the President gave, or was obliged to give, his assent to the Amendment. For determining the date with effect from which the Constitution, as amended, came or will come into force, one has to turn to the notification, if any, issued by the Central Government under Section 1(2) of the Amendment Act.

47. The Amendment Act may provide that the amendment introduced by it shall come into force immediately upon the President giving his assent to the Bill or it may provide that the amendment shall come into force on a future date. Indeed, no objection can be taken to the constituent body itself appointing a specific future date with effect from which the Amendment Act will come into force; and if that be so, different dates can be appointed by it for bringing into force different provisions of the Amendment Act. The point of the matter is that the Constitution standing amended in accordance with the terms of the Bill and the amendment thus introduced into the Constitution coming into force are two distinct things. Just as a law duly passed by the legislature can have no effect unless it comes or is brought into force, similarly, an amendment of the Constitution can have no effect unless it comes or is brought into force. The fact that the constituent body may itself specify a

future date or dates with effect from which the Amendment Act or any of its provisions will come into force shows that there is no antithesis between Article 368(2) of the Constitution and Section 1(2) of the 44th Amendment Act. The expression of legislative or constituent will as regards the date of enforcement of the law or Constitution is an integral part thereof. That is why it is difficult to accept the submission that, contrary to the expression of the constituent will, the amendments introduced by the 44th Amendment Act came into force on April 30, 1979 when the President gave his assent to that Act. The true position is that the amendments introduced by the 44th Amendment Act did not become a part of the Constitution on April 30, 1979. They will acquire that status only when the Central Government brings them into force by issuing a notification under Section 1(2) of the Amendment Act."

59. It was also the contention of Mr. Fali S. Nariman, that just as a constitutional amendment was liable to be declared as *ultra vires,* if it violated and/or abrogated, the "core" or the "basic structure" of the Constitution; even a simple legislative enactment, which violated the "basic structure" of the Constitution, was liable to be declared as unconstitutional. For the instant proposition, learned counsel referred to the Madras Bar Association case[35], and placed reliance on the following observations recorded therein:

"109. Even though we have declined to accept the contention advanced on behalf of the Petitioners, premised on the "basic structure" theory, we feel it is still essential for us, to deal with the submission advanced on behalf of the respondents in response. We may first record the contention advanced on behalf of the respondents. It was contended, that a legislation (not being an amendment to the Constitution), enacted in consonance of the provisions of the Constitution, on a subject within the realm of the legislature concerned, cannot be assailed on the ground that it violates the "basic structure" of the Constitution. For the present controversy, the respondents had placed reliance on Articles 245 and 246 of the Constitution, as also, on entries 77 to 79, 82 to 84, 95 and 97 of the Union List of the Seventh Schedule, and on entries 11-A and 46 of the Concurrent List of the Seventh Schedule. Based thereon it was asserted, that Parliament was competent to enact the NTT Act. For examining the instant contention, let us presume it is so. Having accepted the above, our consideration is as follows. The

Constitution regulates the manner of governance in substantially minute detail. It is the fountainhead distributing power, for such governance. The Constitution vests the power of legislation at the Centre, with the Lok Sabha and the Rajya Sabha, and in the States with the State Legislative Assemblies (and in some States, the State Legislative Councils, as well). The instant legislative power is regulated by "Part XI" of the Constitution. The submission advanced at the hands of the learned counsel for the respondents, insofar as the instant aspect of the matter is concerned, is premised on the assertion that the NTT Act has been enacted strictly in consonance with the procedure depicted in "Part XI" of the Constitution. It is also the contention of the learned counsel for the respondents, that the said power has been exercised strictly in consonance with the subject on which the Parliament is authorized to legislate. Whilst dealing with the instant submission advanced at the hands of the learned counsel for the respondents, all that needs to be stated is, that the legislative power conferred under "Part XI" of the Constitution has one overall exception, which undoubtedly is, that the "basic structure" of the Constitution, cannot be infringed, no matter what. On the instant aspect some relevant judgments rendered by Constitutional Benches of this Court, have been cited hereinabove. It seems to us, that there is a fine difference in what the petitioners contend, and what the respondents seek to project. The submission advanced at the hands of the learned counsel for the petitioners does not pertain to lack of jurisdiction or inappropriate exercise of jurisdiction. The submission advanced at the hands of the learned counsel for the petitioners pointedly is, that it is impermissible to legislate in a manner as would violate the "basic structure" of the Constitution. This Court has repeatedly held that an amendment to the provisions of the Constitution would not be sustainable if it violated the "basic structure" of the Constitution, even though the amendment had been carried out by following the procedure contemplated under "Part XI" of the Constitution. This leads to the determination that the "basic structure" is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the "basic structure" would be unacceptable. Such submissions advanced at the hands of the learned counsel for the respondents are, therefore, liable to be disallowed, and are accordingly declined."

60. Mr. Arvind P. Datar, learned senior counsel, assailed the constitutional validity of various provisions of the NJAC Act, by advancing the same submissions, as were relied upon by him while

assailing the constitutional validity of Articles 124A, 124B and 124C. For reasons of brevity, the aforestated submissions noticed with reference to individual provisions of the NJAC Act are not being repeated again.

61. A challenge was also raised, to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he was considered "fit" to hold the office. It was contended, that the procedure to regulate the appointment of the Chief Justice of India, was to be determined by Parliament, by law under Article 124C. It was contended, that the term "fit", expressed in Section 5 of the NJAC Act, had not been elaborately described. And as such, fitness would have to be determined on the subjective satisfaction of the Members of the NJAC. It was submitted, that even though the learned Attorney General had expressed, during the course of hearing, that fitness meant "...mental and physical fitness alone...", it was always open to the Parliament to purposefully define fitness, in a manner as would sub-serve the will of the executive. It was submitted, that even an ordinance could be issued without the necessity, of following the procedure, of enacting law. It was asserted, that the criterion of fitness could be defined and redefined. It was submitted, that it was a constitutional convention, that the senior most Judge of the Supreme

Court would always be appointed as Chief Justice of India. And that, the aforesaid convention had remained unbroken, even though in some cases the tenure of the appointee, had been short, and as such, may not have enured to the advantage, of the judicial organization as a whole. Experience had shown, according to learned counsel, that adhering to the practice of appointing the senior most Judge as the Chief Justice of India, had resulted in institutional harmony amongst Judges, which was extremely important for the health of the judiciary, and also, for the "independence of the judiciary". It was submitted, that it would be just and appropriate, at the present juncture, to understand the width of the power, so as to prevent any likelihood of its misuse in future. It was submitted, that various ways and means could be devised to supersede Judges, and also, to bring in favourites. Past experience had shown, that the executive had abused its authority, when it departed from the above rule in April 1973, by superseding J.M. Shelat, J., the senior most Judge and even the next two Judges in the order of seniority after him, namely, K.S. Hegde and A.N. Grover, and appointed the fourth senior most Judge A.N Ray, as the Chief Justice of India. Again in January 1977 on the retirement of A.N. Ray, CJ., the senior most Judge H.R. Khanna, was ignored, and the next senior most Judge, M.H. Beg, was appointed as the Chief Justice of India. Such control in the hands of the executive would cause immense inroads, in the decision making process. And could

result in, Judges trying to placate and appease the executive, for personal gains and rewards.

62. The submission noticed above was sought to be illustrated through the following instance. It was pointed out, that it would be genuine and legitimate for the Parliament to enact, that a person would be considered fit for appointment as Chief Justice of India, only if he had a minimum remaining tenure of at least two years. Such an enactment would have a devastating effect, even though it would appear to be innocuously legitimate. It was contended, that out of the 41 Chief Justices of India appointed till date, only 12 Chief Justices of India, had a tenure of more than two years. Such action, at the hands of the Parliament, was bound to cause discontentment to those, who had a legitimate expectation to hold the office of Chief Justice of India. It was submitted, that similar instances can be multiplied with dimensional alterations by prescribing different parameters. It was submitted, that the Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice of India, because the office of the Chief Justice of India was pivotal, as it shouldered extremely serious and onerous responsibilities. The exercise of the above authority, it was pointed out, could/would seriously affect the "independence of the judiciary". In the above context, reference was also made, to the opinion expressed by renowned persons, having vast experience in the judicial institution, effectively bringing out the veracity of the contention

advanced. Reference in this regard was made to the observations of M.C. Chagla, in his book, "Roses in December – An Autobiography", wherein he examined the impact of supersession on Judges, who by virtue of the existing convention, were in line to be the Chief Justice of India, but were overlooked by preferring a junior. Reference was also made to the opinion expressed by H.R. Khanna, J., (in his book – "Neither Roses Nor Thorns"). Finally, the Court's attention was drawn to the view expressed by H.M. Seervai (in "Constitutional Law of India – A Critical Commentary'). It was submitted, that leaving the issue of determination of fitness with the Parliament, was liable to fan the ambitions of Judges, and would make them loyal to those who could satisfy their ambitions. It was therefore the contention of the learned counsel, that Section 5, which created an ambiguity in the matter of appointment of the Chief Justice of India, and could be abused to imperil "independence of the judiciary", was liable to be declared as unconstitutional.

63. It was also the contention of the learned counsel for the petitioners, that on the issue of selection and appointment of Judges to the higher judiciary, the NJAC was liable to take into consideration ability, merit and suitability (as may be specified by regulations). It was submitted, that the above criteria could be provided through regulations framed under Section 12(2)(a), (b) and (c). It was pointed out, that the regulations framed for determining the suitability of a Judge (with reference to ability and merit), would be synonymous with the conditions of eligibility.

Inasmuch as, a candidate who did not satisfy the standards expressed in the regulations, would also not satisfy, the prescribed conditions of appointment. It was asserted, that it would be a misnomer to treat the same to be a matter of mere procedure. Thus viewed, it was contended, that the provisions of the NJAC Act, which laid down (or provided for the laying down) substantive conditions for appointment, was clearly beyond the purview of Article 124C, inasmuch as, under the above provision, Parliament alone had been authorised by law, to regulate the procedure for appointment of Judges of the Supreme Court, or to empower the NJAC to lay the same down by regulations, *inter alia* the manner of selection of persons for appointment, as Judges of the Supreme Court. It was submitted, that the NJAC Act, especially in terms of Section 5(2), had travelled far beyond the jurisdictional parameters contemplated under Article 124C.

64. It was also contended, that while recommending names for appointment of a Judge to the Supreme Court, seniority in the cadre of Judges, was liable to be taken into consideration, in addition to ability and merit. It was submitted, that the instant mandate contained in the first proviso under Section 5(2) of the NJAC Act, clearly breached the "federal structure" of governance, which undoubtedly required regional representation in the Supreme Court. Since the "federal structure" contemplated in the Constitution was also one of the "basic structures"

envisioned by the framers of the Constitution, the same could not have been overlooked.

65. Besides the above, the Court's attention was invited to the second proviso, under Section 5(2) of the NJAC Act, which mandates that the NJAC would not make a favourable recommendation, if any two Members thereof, opposed the candidature of an individual. It was contended, that placing the power of veto, in the hands of any two Members of the NJAC, would violate the recommendatory power expressed in Article 124B. In this behalf, it was contended, that the second proviso under Section 5(2), would enable two eminent persons (– lay persons, if the submission advanced by the learned Attorney General is to be accepted) to defeat a unanimous opinion of the Chief Justice of India and the two senior most Judges of the Supreme Court. And thereby negate the primacy vested in the judiciary, in the matter of appointment of Judges to the higher judiciary.

66. It was submitted, that the above power of veto exercisable by two lay persons, or alternatively one lay person, in conjunction with the Union Minister in charge of Law and Justice, would cause a serious breach in the "independence of the judiciary". Most importantly, it was contended, that neither the impugned constitutional amendment, nor the provisions of the NJAC Act, provide for any quorum for holding the meetings of the NJAC. And as such (quite contrary to the contentions advanced at the hands of the learned Attorney General), it was

contended, that a meeting of the NJAC could not be held, without the presence of the all Members of the NJAC. In order to support his above contention, he illustratively placed reliance on the Constitution (122nd Amendment) Bill, 2014 [brought before the Parliament, by the same ruling political party, which had successfully amended the Constitution by tabling the Constitution (121st Amendment) Bill, 2014]. The objective sought to be achieved through the Constitution (122nd Amendment) Bill, 2014, was to insert Article 279A. The proposed Article 279A intended to create the Goods and Services Tax Council. Sub-Article (7) of Article 279A postulated, that "... One-half of the total number of Members of the Goods and Services Tax Council..." would constitute the quorum for its meetings. And furthermore, that "... Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting ...". Having laid down the above parameters, in the Bill which followed the Bill that led to the promulgation of the Constitution (99th Amendment) Act, it was submitted, that the omission of providing for a quorum for the functioning of the NJAC, and the omission to quantify the strength required for valid decision making, was not innocent. And that, it vitiated the provision itself.

III. <u>RESPONDENTS' RESPONSE, ON MERITS:</u>

67. The learned Attorney General commenced his response on merits by asserting, that there was no provision in the Constitution of India, either when it was originally drafted, or at any stage thereafter, which contemplated, that Judges would appoint Judges to the higher judiciary. It was accordingly asserted, that the appointment of Judges by Judges was foreign to the provisions of the Constitution. It was pointed out, that there were certain political upheavals, which had undermined the "independence of the judiciary", including executive overreach, in the matter of appointment and transfer of Judges of the higher judiciary, starting with supersession of senior Judges of the Supreme Court in 1973, followed by, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and thereafter, the second supersession of a senior Judge of the Supreme Court in 1977. It was acknowledged, that there was continuous interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's. Despite thereof, whilst adjudicating upon the controversy in the First Judges case rendered in 1981, this Court, it was pointed out, had remained unimpressed, and reiterated the primacy of the executive, in the matter of appointment of Judges to the higher judiciary.

68. It was pointed out, that the issue for reconsideration of the decision rendered in the First Judges case arose in Subhash Sharma v. Union of India[4], wherein the questions considered were, whether the opinion of the Chief Justice of India, in regard to the appointment of Judges to the

Supreme Court and High Courts, as well as, transfer of High Court Judges, was entitled to primacy, and also, whether the matter of fixation of the judge-strength in High Courts, was justiciable? It was asserted, that the aforesaid two questions were placed for determination by a Constitution Bench of nine Judges (keeping in view the fact that the First Judges case, was decided by a seven-Judge Bench). It was asserted, that the decision rendered by this Court in the Second Judges case, was on the *suo motu* exercise of jurisdiction by this Court, wherein this Court examined matters far beyond the scope of the reference order. It was contended, that the Second Judges case was rendered, without the participation of all the stakeholders, inasmuch as, the controversy was raised at the behest of practicing advocates and associations of lawyers, and there was no other stakeholder involved during its hearing.

69. It was asserted, that the judiciary had no jurisdiction to assume to itself, the role of appointment of Judges to the higher judiciary. It was pointed out, that it is the Parliament alone, which represents the citizenry and the people of this country, and has the exclusive jurisdiction to legislate on matters. Accordingly, it was asserted, that the decisions in the Second and Third Judges cases, must be viewed as legislation without any jurisdictional authority.

70. It was pointed out, that the issue relating to the amendment of the Constitution, pertaining to the subject of appointment of Judges to the higher judiciary, through a Judicial Commission commenced with the

Constitution (67th Amendment) Bill, 1990. The Bill however lapsed. On the same subject, the Constitution (82nd Amendment) Bill, 1997 was introduced. The 1997 Bill, however, could not be passed. This was followed by the Constitution (98th Amendment) Bill, 2003 which was introduced when the present Government was in power. In 2003 itself, a National Commission was set up to review the working of the Constitution, followed by the Second Administrative Reforms Commission in 2007. Interspersed with the aforesaid events, were a number of Law Commission's Reports. The intention of the Parliament, since the introduction of the Bill in 1990, it was submitted, was aimed at setting up a National Judicial Commission, for appointment and transfer of Judges of the higher judiciary. It was pointed out, that no positive achievement was made in the above direction, for well over two decades. Mr. Justice M.N. Venkatachaliah, who headed the National Commission to review the working of the Constitution, had also recommended a five-Member National Judicial Commission, whereby, a wide consultative process was sought to be introduced, in the selection and appointment of Judges. It was submitted, that all along recommendations were made, for a participatory involvement of the executive, as well as the judiciary, in the matter of appointment of Judges to the higher judiciary. It was also pointed out, that the Constitution (98th Amendment) Bill, 2003 proposed a seven-Member National Judicial Commission. Thereafter, the Administrative Reforms Commission, proposed a eight-Member National

Judicial Commission, to be headed by the Vice-President, and comprising of the Prime Minister, the Speaker, the Chief Justice of India, the Law Minister and two leaders of the Opposition. The aforesaid recommendation, was made by a Commission headed by Veerappa Moily, the then Union Law Minister. The present Constitution (99th Amendment) Act, 2014, whereby Article 124 has been amended and Articles 124A to 124C have been inserted in the Constitution, contemplates a six-Member National Judicial Commission. It was submitted, that there was no justification in finding anything wrong, in the composition of the NJAC. To point out the safeguards against entry of undesirable persons into the higher judiciary, it was emphasized, that only if five of the six Members of the NJAC recommended a candidate, he could be appointed to the higher judiciary. It was submitted, that the aforestated safeguards, postulated in the amended provisions, would not only ensure transparency, but would also render a broad based consideration.

71. As a counter, to the submissions advanced on behalf of the petitioners, it was asserted, that the Parliament's power to amend the Constitution was plenary, subject to only one restriction, namely, that the Parliament could not alter the "basic structure" of the Constitution. And as such, a constitutional amendment must be presumed to be constitutionally valid (unless shown otherwise). For the instant proposition, reliance was placed on Charanjit Lal Chowdhury v. Union of

India[50], Ram Krishna Dalmia v. Justice S.R. Tendolkar[51], the Kesavananda Bharati case[10], (specifically the view expressed by K.S. Hegde and A.K. Mukherjea, JJ.), B. Banerjee v. Anita Pan[52], and Government of Andhra Pradesh v. P. Laxmi Devi[53].

72. It was asserted, that the Parliament was best equipped to assess the needs of the people, and to deal with the changing times. For this, reliance was placed on Mohd. Hanif Quareshi v. State of Bihar[54], State of West Bengal v. Anwar Ali Sarkar[55]. It was contended, that while enacting the Constitution (99th Amendment) Act, and the NJAC Act, the Parliament had discharged a responsibility, which it owed to the citizens of this country, by providing for a meaningful process for the selection and appointment of Judges to the higher judiciary.

73. Referring to the decisions rendered by this Court in the Second and Third Judges cases, it was asserted, that the way he saw it, there was only one decipherable difference introduced in the process of selection contemplated through the NJAC. Under the system introduced, the judiciary could not "insist" on the appointment of an individual. But the judiciary continued to retain the veto power, to stop the appointment of an individual considered unworthy of appointment. According to him, the nomination of a candidate, for appointment to the higher judiciary, under the above judgments, could also not fructify, if any two members of the

[50] AIR 1951 SC 41
[51] AIR 1958 SC 538
[52] (1975) 1 SCC 166
[53] (2008) 4 SCC 720
[54] AIR 1958 SC 731
[55] 1952 SCR 284

collegium, expressed an opinion against the nominated candidate. It was pointed out, that the above position had been retained in the impugned provisions. According to the learned Attorney General, the only difference in the impugned provisions was, that the right of the judiciary to "insist" on the appointment of a nominee, was no longer available to the judiciary. Under the collegium system, a recommendation made for appointment to the higher judiciary, could be returned by the executive for reconsideration. However, if the recommendation was reiterated, the executive had no choice, but to appoint the recommended nominee. It was pointed out, that the instant right to "insist" on the appointment of a Judge, had now been vested in the NJAC. It was vehemently contended, that the denial to "insist", on the appointment of a particular nominee, would surely not undermine the "independence of the judiciary". The "independence of the judiciary", according to the learned Attorney General, would be well preserved, if the right to "reject" a nominee was preserved with the judiciary, which had been done.

74. Based on the aforesaid submission, it was asserted, that the process initiated by the Parliament in 1990 (for the introduction of a Commission, for appointment of Judges to the higher judiciary), had taken twenty-four years to fructify. The composition of the NJAC introduced through the Constitution (99th Amendment) Act, according to him, meets with all constitutional requirements, as the same is neither in breach of the rule of "separation of powers", nor that of "the

independence of the judiciary". It was contended, that the impugned provisions preserve the "basic structure" of the Constitution.

75. It was submitted, that the assailed provisions had only introduced rightful checks and balances, which are inherent components of an effective constitutional arrangement. The learned Attorney General also cautioned this Court, by asserting, that it was neither within the domain of the petitioners, nor of this Court, to suggest an alternative combination of Members for the NJAC, or an alternative procedure, which would regulate its functioning more effectively. Insofar as the present petitions are concerned, it was asserted, that the challenge raised therein, could only be accepted, if it was shown, that the Parliament while exercising its plenary power to amend the Constitution, had violated the "basic structure" of the Constitution.

76. It was submitted, that it was not the case of any of the petitioners before this Court, either that the Parliament was not competent to amend Article 124, or that the procedure prescribed therefor under Article 368 had not been followed. In the above view of the matter, it was submitted, that the only scope for examination with reference to the present constitutional amendment was, whether while making the aforestated constitutional amendment, the Parliament had breached, any of the "basic features" of the Constitution.

77(i). For demonstrating the validity of the impugned constitutional amendment, reliance in the first instance was placed on the

Kesavananda Bharati case[10]. Reference was made to the observations of S.M. Sikri, CJ., to contend, that the extent of the amending power under Article 368 was duly adverted to. Reading the preamble to the Constitution, it was pointed out, that the fundamental importance expressed therein was, the freedom of the individual, and the inalienability of economic, social and political justice, as also, the importance of the Directive Principles (paragraph 282). In this behalf, it was also submitted, that the "fundamental features" of the Constitution, as for instance, secularism, democracy and the freedom of the individual would always subsist in a welfare State (paragraph 283). Leading to the conclusion, that even fundamental rights could be amended in public interest, subject to the overriding condition, that the same could not be completely abrogated (paragraph 287). In this behalf, it was also pointed out, that the wisdom of the Parliament to amend the Constitution could not be the subject matter of judicial review (paragraph 288), leading to the overall conclusion, that by the process of amendment, it was open to the Parliament to adjust fundamental rights, in order to secure the accomplishment of the Directive Principles, while maintaining the freedom and dignity of every citizen (paragraph 289). Thus viewed, it was felt, that the rightful legal exposition would be, that even though every provision of the Constitution could be amended, the contemplated amendment should ensure, that the "basic foundation and structure" of the Constitution remained intact. In this behalf, an illustrative reference

was made to the features, which constituted the "basic structure" of the Constitution. According to the learned Attorney General, they included, the supremacy of the Constitution, the republican and democratic form of Government, the secular character of the Constitution, the "separation of powers" between the legislature, the executive and the judiciary, and the federal character of the Constitution (paragraph 292). In addition to the above, it was asserted, that India having signed the Universal Declaration of Human Rights, had committed itself to retaining such of the fundamental rights, as were incorporated in the above declaration (paragraph 299). In the above view, according to the Attorney General, the expression "amendment of this Constitution" would restrain the Parliament, from abrogating the fundamental rights absolutely, or from completely changing the "fundamental features" of the Constitution, so as to destroy its identity. And that, within the above limitation, the Parliament could amend every Article of the Constitution (paragraph 475). It was insisted, that the impugned provisions had not breached any of the above limitations.

(ii) Reference was then made to the common opinion expressed by J.M. Shelat and A.N. Grover, JJ., (in the Kesavananda Bharati case[10]) to assert, that one of the limitations with reference to the amendment to the Constitution was, that it could not be amended to such an extent, as would denude the Constitution of its identity (paragraph 537). It was submitted, that the power to amend, could not result in the abrogation of

the Constitution, or lead to the framing of a new Constitution, or to alter or change the essential elements of the constitutional structure (paragraph 539). It was pointed out, that it was not proper, to give a narrow meaning to the power vested in the Parliament to amend the Constitution, and at the same time, to give it such a wide meaning, so as to enable the amending body, to change the structure and identity of the Constitution (paragraph 546). With reference to the power of judicial review, it was contended, that there was ample evidence in the Constitution itself, to indicate that a system of "checks and balances" was provided for, so that none of the pillars of governance would become so predominant, as to disable the others, from exercising and discharging the functions entrusted to them. It was submitted, that judicial review, provided expressly through Articles 32 and 226, was an incident of the aforestated system of checks and balances (paragraph 577). Based on the historical background, the preamble, the entire scheme of the Constitution, and other relevant provisions thereof, including Article 368, it was submitted that it could be inferred, that the supremacy of the Constitution, the republican and democratic form of Government, sovereignty of the country, the secular and federal character of the Constitution, the demarcation of powers between the legislature, the executive and the judiciary, the dignity of the individual secured through the fundamental rights, and the mandate to build a welfare State (contained in Parts III and IV), and the unity and the integrity of the

nation, could be regarded as the "basic elements" of the constitutional structure (paragraph 582). It was also asserted, that as a society grows, its requirements change, and accordingly, the Constitution and the laws have to be changed, to suit the emerging needs. And accordingly, the necessity to amend the Constitution, to adapt to the changing needs, arises. Likewise, in order to implement the Directive Principles, it could be necessary to abridge some of the fundamental rights vested in the citizens. The power to achieve the above objective needed, a broad and liberal interpretation of Article 368. Having so held, it was concluded, that even the fundamental rights could be amended (paragraph 634). Reference was made to the fact, that the founding fathers were aware, that in a changing world, there would be nothing permanent, and therefore, they vested the power of amendment in the Parliament through Article 368, so as to keep the Constitution in tune with, the changing concepts of politics, economics and social ideas, and to so reshape the Constitution, as would meet the requirements of the time (paragraph 637). With reference to the above, it was contended, that the Parliament did not have the power to abrogate or emasculate the "basic elements" or "fundamental features" of the Constitution, such as the sovereignty of India, the democratic character of our polity, the unity of the country, and the essential elements of the individual freedoms secured to the citizens. Despite the above limitations, it was pointed out, that the amending power under Article 368 was wide enough, to amend every

Article of the Constitution, so as to reshape the Constitution to fulfill the obligations imposed on the State (paragraph 666). And accordingly, it was pointed out, that while recording conclusions, this Court had observed, that the power to amend the Constitution under Article 368 was very wide, yet did not include the power to destroy, or emasculate the "basic elements" or the "fundamental features" of the Constitution (paragraph 744).

(iii). Reference was then made to the observations of H.R. Khanna, J. (in the Kesavananda Bharati case[10]). It was pointed out, that from 1950 to 1967 till this Court rendered the judgment in the I.C. Golak Nath case[41], the accepted position was, that the Parliament had the power to amend Part III of the Constitution, so as to take away or abridge the fundamental rights. Having noticed the fact, that no attempt was made by the Parliament to take away or abridge the fundamental rights, relating to the liberty of a person, and the freedom of expression, it was recorded, that even in future it could not be done. Accordingly, with reference to Article 368, it was sought to be concluded, that the Parliament had the power to amend Part III of the Constitution, as long as the "basic structure" of the Constitution was retained (paragraph 1421). If the "basic structure" of the original Constitution was retained, inasmuch as had the original Constitution continued to subsist, even though some of its provisions were changed, the power of amendment would be considered to have been legitimately exercised (paragraph

1430). And therefore, the true effect of Article 368 would be, that the Constitution did not vest with the Parliament, the power or authority for drafting a new and radically changed Constitution, with a different structure and framework (paragraph 1433). Accordingly, subject to the retention of the "basic structure or framework" of the Constitution, the power vested with the Parliament to amend the Constitution was treated as plenary, and would include the power to add, alter or repeal different Articles of the Constitution, including those relating to fundamental rights. All the above measures were included in the Parliament's power of amendment, and the denial of such a broad and comprehensive power, would introduce rigidity in the Constitution, as would break the Constitution itself (paragraph 1434). As such, it was held, that the amending power conferred by Article 368, would include the power to amend the fundamental rights, contained in Part III of the Constitution (paragraph 1435). In this behalf, it was asserted, that the issue, whether the amendment introduced would (or would not) be an improvement over the prevailing position, was not justiciable. It was asserted, whether the amendment would be an improvement or not, was for the Parliament alone to determine. And Courts, could not substitute the wisdom of the legislature, by their own foresight, prudence and understanding (paragraph 1436). It was asserted, that the amending power of the Parliament must contain the right to enact legislative provisions, for experiment and trial, so as to eventually achieve the best results

(paragraph 1437). In the ultimate analysis, it was held, that the amendment of the Constitution had a wide and broad connotation, and would embrace within itself, the total repeal of some of the Articles, or their substitution by new Articles, which may not be consistent, or in conformity with other Articles. And a Court while judging the validity of an amendment, could only concern itself with the question, as to whether the constitutional requirements for making the amendment had been satisfied? And accordingly, an amendment, made in consonance with the procedure prescribed, could not be struck down, on the ground that it was a change for the worst (paragraph 1442). While examining the question, whether the right to property could be included in the "basic structure or framework" of the Constitution, the answer rendered was in the negative. It was held, that in exercising the power of judicial review, Courts could not be oblivious of the practical needs of the Government. And that, the power of amendment could be exercised even for trial and error, inasmuch as opportunity had to be allowed for vindicating reasonable belief by experience (paragraph 1535). It was contended, that no generation had a monopoly to wisdom, nor the right to place fetters on future generations, nor to mould the machinery of Government, keeping in mind eternal good. The possibility, that the power of amendment may be abused, furnished no ground for denial of its existence. According to the Attorney General, it was therefore not correct to assume, that if the Parliament was held entitled to amend Part III of the Constitution, it

would automatically and necessarily result in abrogation of the fundamental rights. Whilst concluding, that the right to property did not pertain to the "basic structure or framework" of the Constitution, it was held, that power of amendment under Article 368 did not include the power to abrogate the Constitution, or to alter the "basic structure or framework" of the Constitution. Despite having so concluded, it was held, that no part of the fundamental rights could claim immunity, from the power of amendment (paragraph 1537).

78. Reference was then made to the judgments rendered by this Court in Indira Nehru Gandhi v. Raj Narain[56], Waman Rao v. Union of India[57], and the M. Nagaraj case[36], to contend, that the "basic structure" of the Constitution was to be determined, on the basis of the features which existed in the text of the original enactment of the Constitution, on the date of its coming into force. It was therefore pointed out, that the subsequent amendments to the Constitution, could not be taken into consideration, to determine the "basic features" of the Constitution.

79. Having laid down the aforestated foundation, the learned Attorney General submitted, that that reference could only be made to Articles 124 and 217, as they originally existed, when the Constitution was promulgated. If the original provisions were to be taken into consideration, according to the learned Attorney General, it would be apparent that the above Articles, expressed that the right to make

[56] (1975) Supp SCC 1
[57] (1981) 2 SCC 362

appointments of Judges to the higher judiciary, being limited only to a "consultative" participation of the judiciary, was in the determinative domain of the executive. It was pointed out, that on the subject of appointment of Judges to the higher judiciary, the primacy of the Chief Justice of India, through the collegium process, was an innovation of the judiciary itself (in the Second Judges case). The above primacy, was alien to the provisions of the Constitution, as originally enacted. And as such, the amendment to Article 124, and the insertion of Articles 124A to 124C therein, could not be examined on the touchstone of material, which was in stark contrast with the plain reading of Articles 124 and 217 (as they were originally enacted). It was accordingly asserted, that the present challenge to the Constitution (99th Amendment) Act, would not fall within the defined parameters of the "basic structure" concept, elaborated extensively by him (as has been recorded by us, above). The prayers made by the petitioners on the instant ground were therefore, according to the learned Attorney General, liable to be rejected.

80. Having traveled thus far, it was pointed out, that it was important to understand the true purport and effect of the term "independence of the judiciary". In this behalf, in the first instance, the Court's attention was invited to, the First Judges case, wherein reference was made to the opinion expressed by E.S. Venkataramiah, J. (as he then was), who had taken the view, that it was difficult to hold, that merely because the power of appointment was with the executive, the "independence of the

judiciary" would be compromised. In stating so, it was emphasized, that the true principle was, that after such appointment, the executive should have no scope, to interfere with the work of a Judge (paragraph 1033). Based thereon, it was asserted, that the independence of a Judge would not stand compromised, if after his appointment, the role of the executive, to deal with him, is totally excluded. Reference was then made to the opinion expressed by P.N. Bhagwati, J. (as he then was) (in the same judgment), to the effect, that the concept of "independence of the judiciary", was not limited only to independence from executive pressure/influence, but was relatable to many other pressures and prejudices. And in so recording, it was held, that "independence of the judiciary" included fearlessness of the other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belonged (paragraph 1037). Based thereon, it was asserted, that "independence of the judiciary", included independence from the influence of other Judges as well. And as such, it was concluded, that the composition of the NJAC was such, as would ensure the independence of the Judges appointed to the higher judiciary, as contemplated in the First Judges case.

81. In conjunction with the issue of "independence of the judiciary", which flows out of the concept of "separation of powers", it was pointed out, that the scheme of the Constitution envisaged a system of checks and balances. Inasmuch as, each organ of governance while being

allowed the freedom to discharge the duties assigned to it, was subjected to controls, at the hands of one of the other organs, or both of the other organs. Illustratively, it was sought to be contended, that all executive authority, is subject to scrutiny through judicial review (at the hands of the judiciary). Likewise, legislation enacted by the Parliament, or the State legislatures, is also subject to judicial review, (at the hands of the judiciary). Even though, the executive and the legislature have the freedom to function and discharge their individual responsibilities, without interference by the other organ(s) of governance, yet the judiciary has been vested with the responsibility to ensure, that the exercise of executive and legislative functions, is in consonance with law. Likewise, it was submitted, that in the matter of appointment of Judges, Articles 124 and 217 provided for executive control, under the scheme of checks and balances. It was submitted, that the instant scheme of checks and balances, was done away with, by the Second and Third Judges cases, in the matter of appointment of Judges to the higher judiciary. It was asserted, that the position of checks and balances has been restored by the Constitution (99th Amendment) Act, by reducing the role of the executive, from the position which existed at the commencement of the Constitution. Referring to the decisions in the Kesavananada Bharati case[10], the Indira Nehru Gandhi case[56], the Sankalchand Himatlal Sheth case[5], Asif Hameed v. State of Jammu and Kashmir[58], State of Bihar v.

[58] 1989 Supp (2) SCC 364

Bihar Distillery Limited[59], and Bhim Singh v. Union of India[13], it was submitted, that this Court had recognized, that the concept of checks and balances, was inherent in the scheme of the Constitution. And that, even though the legislature, the executive and the judiciary were required to function within their own spheres demarcated through different Articles of the Constitution, yet their attributes could never be in absolute terms. It was submitted, that each wing of governance had to be accountable, and till the principle of accountability was preserved, the principle of "separation of powers" would not be achievable. It was therefore contended, that the concept of "independence of the judiciary", could not be gauged as an absolute end, overlooking the checks and balances, provided for in the scheme of the Constitution.

82. Having so asserted, it was contended, that in the matter of appointment of Judges to the higher judiciary, the most important and significant feature was, that no unworthy or doubtful appointment should go through, even though at times, the candidature of a seemingly good candidate, may not be accepted. It was asserted, that the NJAC had provided for a complete protection, in the sense noticed hereinabove, by providing in the procedure of appointment, that a negative view expressed by any of the two Members of the NJAC, would result in the rejection of the concerned candidate. Therefore, merely two Members of the NJAC, would be sufficient to veto a proposal for appointment. It was submitted, that since three Members of the NJAC were Judges of the

[59] (1997) 2 SCC 453

Supreme Court, their participation in the NJAC would ensure, that "independence of the judiciary" remained completely safeguarded and secured. It was therefore contended, that not only the Constitution (99th Amendment) Act, but also the NJAC Act fully satisfied the independence criterion, postulated as a "basic structure" of the Constitution.

83. In order to reiterate the above position, it was asserted, that primacy in the matter of appointment of Judges to the higher judiciary, was not contemplated in the Constitution, as originally framed. In this behalf, reference was made to Articles 124 and 217. And in conjunction therewith, adverting to the debates on the subject, by Members of the Constituent Assembly. Thereupon, it was asserted, that the issue of primacy of the Chief Justice, based on a decision by a collegium of Judges, was a judicial innovation, which required reconsideration. Moreover, it was submitted, that the Second and Third Judges cases, were founded on the interpretation of Articles of the Constitution, which had since been amended, and as such, the very basis of the Second and Third Judges cases, no longer existed. Therefore, the legal position declared in the above judgments, could not constitute the basis, of the contentions advanced at the hands of the petitioners. Furthermore, even if the ratio recorded by this Court in the Second and Third Judges cases, was still to be taken into consideration, conclusions (5), (6) and (7) recorded by J.S. Verma, J. (who had transcripted the majority view), show that the primacy of the judiciary was to ensure, that no

appointment could be made to the higher judiciary, unless it had the approval of the collegium. It was submitted, that the instant aspect, which constituted the functional basis for ensuring "independence of the judiciary", had been preserved in the impugned constitutional amendment, and the NJAC Act. It was accordingly contended, that if the right to insist on the appointment of a candidate proposed by the judiciary, was taken away, from the Chief Justice of India (based on a decision of a collegium of Judges), the same would not result, in the emasculation of the "basic structure" of the Constitution. In other words, the same would not violate the "essential and fundamental features" of the Constitution, nor in the least, the "independence of the judiciary".

84. Based on the above submissions, the learned Attorney General invited the Court's attention to the primary contention advanced by the petitioners, namely, that even if all the three Judges of the Supreme Court who are now *ex officio* Members of the NJAC, collectively recommended a nominee, such recommendation could be annulled, by the non-Judge Members of the NJAC. Learned Attorney General submitted, that the above contention was limited to the right to "insist" on an appointment. And that, the right to "insist" did not flow from the conclusions recorded in the Second and Third Judges cases. And further, that the same cannot, by itself, be taken as an incident to establish a breach of the "independence of the judiciary".

85. Insofar as the Second and Third Judges cases are concerned, it was submitted, that the same may have been the need of the hour, on account of the fact that in 1976, sixteen Judges were transferred (from the High Courts in which they were functioning), to other High Courts. In the Sankalchand Himatlal Sheth case[5], one of the transferred Judges challenged his transfer, *inter alia*, on the ground, that his non-consensual transfer was outside the purview of Article 222, as the same would adversely affect the "independence of the judiciary". Irrespective of the determination rendered, on the challenge raised in the Sankalchand Himatlal Sheth case[5], it was pointed out, the very same question came to be re-agitated in the First Judges case. It was held by the majority, while interpreting Article 222, that the consent of the Judge being transferred, need not be obtained. It was also pointed out, that ever since the inception of the Constitution, the office of the Chief Justice of India, was occupied by the senior most Judge of the Supreme Court. The above principle was departed from in April 1973, as the next senior most Judge – J.M. Shelat, was not elevated to the office of the Chief Justice of India. Even the next two senior most Judges, after him - K.S. Hegde and A.N. Grover, were also ignored. The instant supersession by appointing the fourth senior most Judge – A.N. Ray, as the Chief Justice of India, was seen as a threat to the "independence of the judiciary". Again in January 1977, on the retirement of A.N. Ray, CJ., the senior most Judge immediately next to him – H.R. Khanna, was ignored and the second

senior most Judge – M.H. Beg, was appointed, as the Chief Justice of India. In the above background, the action of the executive, came to be portrayed as a subversion of the "independence of the judiciary". It was in the above background, that this Court rendered the Second and Third Judges cases, but the implementation of the manner of appointment of Judges to the higher judiciary, in consonance therewith, had been subject to, overwhelming and all around criticism, including being adversely commented upon by J.S. Verma, CJ., the author of the majority view in the Second Judges case, after his retirement. In this behalf, the Court's attention was invited to his observations, extracted hereunder:

"My 1993 Judgment, which holds the field, was very much misunderstood and misused. It was in this context, that I said that the working of the judgment, now, for some time, is raising serious questions, which cannot be called unreasonable. Therefore, some kind of re-think is required. My Judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise, between the Executive and the Judiciary, both taking part in it."

It was therefore contended, that in the changed scenario, this Court ought to have, at its own, introduced measures to negate the accusations leveled against the prevailing system, of appointment of Judges to the higher judiciary. Since no such remedial measures were adopted by the judiciary of its own, the legislature had brought about the Constitution (99th Amendment) Act, supplemented by the NJAC Act, to broad base the process of selection and appointment, of Judges to the higher judiciary, to make it transparent, and to render the participants accountable.

86. Having dealt with the constitutional aspect of the matter, the learned Attorney General invited the Court's attention, to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointment Commission (Kenya, Pakistan, South Africa and U.K.), or Committee (Israel), or Councils (France, Italy, Nigeria and Sri Lanka). In four countries, Judges were appointed directly by the Governor General (Australia, Canada and New Zealand), or the President (Bangladesh). It was submitted, that in Germany appointment of Judges was made through a multistage process of nomination by the Minister of Justice, and confirmation by Parliamentary Committees, whereupon, the final order of appointment of the concerned individual, is issued by the President. In the United States of America, Judges were appointed through a process of nomination by the President, and confirmation by the Senate. It was submitted, that in all the fifteen countries referred to above, the executive was the final determinative/appointing authority. Insofar as the appointments made by the Judicial Appointments Commissions/Committees/Councils (referred to above) were concerned, out of nine countries with Commissions, in two countries (South Africa and Sri Lanka) the executive had overwhelming majority, in four countries (France, Israel, Kenya and U.K.) there was a balanced representation of stakeholders including the executive, in three countries (Italy, Nigeria and Pakistan) the number of Judges was in a majority. In

the five countries without Commissions/ Committees/ Councils (Canada, Australia, New Zealand, Bangladesh and the United States of America), the decision was taken by the executive, without any formal process of consultation with the judiciary. It was pointed out, that in Germany, the appointment process was conducted by the Parliament, and later confirmed by the President. It was pointed out, that the judiciary in all the countries referred to above, was totally independent. Based on the above submissions, it was contended, that the manner of selection and appointment of Judges, could not be linked to the concept of "independence of the judiciary". It was submitted, that the judicial functioning in the countries referred to above, having been accepted as more than satisfactory, there is no reason, that the system of appointment introduced in India, would be adversely impacted by a singular representative of the executive in the NJAC. It was therefore asserted, that the submissions advanced at the hands of the petitioners, were not acceptable, even with reference to the experience of other countries, governed through a constitutional framework (some of them, of the Westminster Model).

87. It was further asserted, that the absence of the absolute majority of Judges in the NJAC, could not lead to the inference, that the same was violative of the "basic structure" of the Constitution, so as to conclude, that it would impinge upon the "independence of the judiciary". It was asserted, that the representation of the judiciary in the NJAC, was larger

than that of the other two organs of the governance, namely, the executive and the legislature. In any case, given the representation of the judiciary in the NJAC, it was fully competent, to stall the appointment of a candidate to the higher judiciary, who was considered by the judicial representatives, as unsuitable. Any two, of the three representatives of the judiciary, were sufficient to veto any appointment supported by others.

88. It was further submitted, that the NJAC was broad based with representatives from the judiciary, the executive and the "two eminent persons", would not fall in the category of jurists, eminent legal academicians, or eminent lawyers. It was contended, that the intention to include "eminent persons", who had no legal background was to introduce, in the process of selection and appointment of Judges, lay persons in the same manner, as has been provided for in the Judicial Appointments Commission, in the United Kingdom.

89. It was also the contention of the learned Attorney General, that this would not be the first occasion, when such an exercise has been contemplated by parliamentary legislation. The Court's attention was drawn to the Consumer Protection Act, 1986, wherein the highest adjudicatory authority is, the National Consumer Disputes Redressal Commission. It was pointed out, that the above Redressal Commission, comprised of Members, with and without a judicial background. The President of the National Consumer Disputes Redressal Commission has

to be a person, who has been a Judge of the Supreme Court. Illustratively, it was contended, where a matter is being adjudicated upon by a three-Member Bench, two of the Members may not be having any judicial background. These two non-judicial Members, could overrule the view expressed by a person, who had been a former Judge in the higher judiciary. It was submitted, that situations of the above nature, do sometimes take place. Yet, such a composition for adjudicatory functioning, where the Members with a judicial background are in a minority, is legally and constitutionally valid. If judicial independence cannot be held to be compromised in the above situation, it was asserted, that it was difficult to understand how the same could be considered to be compromised in a situation, wherein the NJAC has three out of its six Members, belonging to the judicial fraternity.

90. It was sought to be suggested, that the primacy of the judiciary, in the matter of appointment of Judges to the higher judiciary, could not be treated as a part of the "basic structure" of the Constitution. Furthermore, the lack of absolute majority of Judges in the NJAC, would also not tantamount to the constitutional amendment being rendered violative of the "basic structure". In the above view of the matter, it was asserted, that the submissions advanced at the hands of the learned counsel representing the petitioners, on the aspect of violation of the "basic structure" of the Constitution, by undermining the "independence of the judiciary", were liable to be rejected.

91. With reference to the inclusion of two "eminent persons", in the six-Member NJAC, it was submitted, that the general public was the key stakeholder, in the adjudicatory process. And accordingly, it was imperative to ensure their participation in the selection/appointment of Judges to the higher judiciary. Their participation, it was submitted, would ensure sufficient diversity, essential for rightful decision making. It was submitted, that in the model of the commission suggested by M.N. Venkatachaliah, CJ., the participation of one eminent person was provided. He was to be nominated by the President, in consultation with the Chief Justice of India. In the 2003 Bill, which was placed before the Parliament, the proposed Judicial Commission was to include one eminent person, to be nominated by the executive. The 2013 Bill, which was drafted by the previous political dispensation – the U.P.A. Government, the Judicial Commission proposed, was to have two eminent persons, to be selected by the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. The 2014 Bill, which was drafted by the present political dispensation – the N.D.A. Government, included two eminent persons, to be selected in just about the same manner as was contemplated under the 2013 Bill. The variation being, that one of the eminent persons was required to belong to the Scheduled Castes, or the Scheduled Tribes, or Other Backward Classes, or Minorities, or Women, thereby fulfilling the obvious social obligation. It was submitted, that their participation in the deliberations, for

selection of Judges to the higher judiciary, could not be described as adversarial to the judicial community. Their participation would make the process of appointment, more broad based.

92. While responding to the submissions, advanced at the hands of the learned counsel for the petitioners, to the effect that the Constitution (99th Amendment) Act, did not provide any guidelines, reflecting upon the eligibility of the "eminent persons", to be nominated to the NJAC, and as such, was liable to be struck down, it was submitted, that the term "eminent person" was in no way vague. It meant – a person who had achieved distinction in the field of his expertise. Reference was also made to the debates of the Constituent Assembly, while dealing with the term "distinguished jurist", contained in Article 124(3), it was pointed out, that the term "distinguished person" was not vague. In the present situation, it was submitted, that since the selection and nomination of "eminent persons", was to be in the hands of high constitutional functionaries (no less than the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha), it was natural to assume, that the person(s) nominated, would be chosen, keeping in mind the obligation and the responsibility, that was required to be discharged. Reliance in this behalf, was placed on the Centre for Public Interest Litigation case[43], to assert, that it was sufficient to assume, that such a high profile committee, as the one in question, would exercise its powers objectively, and in a fair and reasonable manner. Based on the above, it was

contended, that it was well settled, that mere conferment of wide discretionary powers, would not vitiate the provision itself.

93. Referring to the required qualities of a Judge recognized in the Indian context, as were enumerated in the "Bangalore Principles of Judicial Conduct", and thereupon accepted the world over, as revised at the Round Table Meeting of Chief Justices held at The Hague, in November 2002, it was submitted, that the two "eminent persons" would be most suited, to assess such matters, with reference to the nominees under consideration. Whilst the primary responsibility of the Members from the judiciary would be principally relatable to, ascertaining the judicial acumen of the candidates concerned, the responsibility of the executive would be, to determine the character and integrity of the candidate, and the inputs, whether the candidate possessed the values, expected of a Judge of the higher judiciary, would be that of "eminent persons" in the NJAC. It was therefore asserted, that the two "eminent persons" would be "lay persons" having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualifications. It was submitted, that the instant broad based composition of the NJAC, was bound to be more suitable, than the prevailing system of appointment of Judges. Relying upon the R. Gandhi case[38], it was submitted, that it would not be proper to make appointments, by vesting the process of selection, with an isolated group, or a selection committee dominated by representatives of

a singular group – the judiciary. In a matter of judicial appointments, it was submitted, the object ought to be, to pick up the best legally trained minds, coupled with a qualitative personality. For this, according to the Attorney General, a collective consultative process, would be the most suitable. It was pointed out, that "eminent persons", having no nexus to judicial activities, would introduce an element of detachment, and would help to bring in independent expertise, to evaluate non-legal competencies, from an ordinary citizen's perspective, and thereby, represent all the stakeholders of the justice delivery system. It was contended, that the presence of "eminent persons" was necessary, to ensure the representative participation of the general public, in the selection and appointment of Judges to the higher judiciary. Their presence would also ensure, that the selection process was broad based, and reflected sufficient diversity and accountability, and in sync with the evolving process of selection and appointment of Judges, the world over.

94. The learned Attorney General, then addressed the issue of inclusion of the Union Minister in charge of Law and Justice, as an *ex officio* Member in the NJAC. Reference was first made to Articles 124 and 217, as they were originally enacted in the Constitution. It was submitted, that originally, the power of appointment of Judges to the higher judiciary, was exclusively vested with the President. In this behalf reliance was placed on Article 74, whereunder the President was obliged to act on the aid and advice of the Council of Ministers, headed by the

Prime Minister. It was pointed out, that the above position, was so declared, by the First Judges case. And as such, from the date of commencement of the Constitution, the executive had the exclusive role, in the selection and appointment of Judges to the higher judiciary. It was asserted, that the position was changed, for the first time, in 1993 by the Second Judges case, wherein the term "consultation", with reference to the Chief Justice of India, was interpreted as "concurrence". Having been so interpreted, primacy in the matter of appointment of Judges to the higher judiciary, came to be transferred from the executive, to the Chief Justice of India (based on a collective decision, by a collegium of Judges). Despite the above, the Union Minister in charge of Law and Justice, being a representative of the executive, continued to have a role in the selection process, though his involvement was substantially limited, as against the responsibility assigned to the executive under Articles 124 and 217, as originally enacted. It was pointed out, that by including the Union Minister in charge of Law and Justice, as a Member of the NJAC, the participatory role of the executive, in the matter of selection and appointment of Judges to the higher judiciary, had actually been diminished, as against the original position. Inasmuch as, the executive role in the NJAC, had been reduced to one out of the six Members of the Commission. In the above view of the matter, it was asserted, that it was unreasonable for the petitioners to grudge, the presence of the Union Minister in charge of Law and Justice, as a Member of the NJAC.

95. Insofar as the inclusion of the Union Minister in the NJAC is concerned, it was submitted, that there could be no escape from the fact, that the Minister in question, would be the connect between the judiciary and the Parliament. His functions would include, the responsibility to inform the Parliament, about the affairs of the judicial establishment. It was submitted, that his exclusion from the participatory process, would result in a lack of coordination between the two important pillars of governance. Furthermore, it was submitted that the Minister in question, as a member of the executive, will have access to, and will be able to, provide the NJAC with all the relevant information, about the antecedents of a particular candidate, which the remaining Members of the NJAC are unlikely to have access to. This, according to the learned Attorney General, would ensure, that the persons best suited to the higher judiciary, would be selected. Moreover, it was submitted, that the executive was a key stakeholder in the justice delivery system, and as such, it was imperative for him to have, a role in the process of selection and appointment of Judges, to the higher judiciary.

96. The learned Attorney General allayed all fears, with reference to the presence of Union Minister, in the NJAC, by asserting that he would not be in a position to politicize the appointments, as he was just one of the six-Members of the NJAC. And that, the other Members would constitute an adequate check, even if the Minister in question, desired to favour a particular candidate, on political considerations. This submission was

made by the learned Attorney General, keeping in mind the assumed fear, which the petitioners had expressed, on account of the political leanings of the Union Minister, with the governing political establishment. It was accordingly asserted, that the presence of one member of the executive, in a commission of six Members, would not impact the "independence of the judiciary", leading to the clear and unambiguous conclusion, that the presence of the Union Minister in charge of Law and Justice in the NJAC, would not violate the "basic structure" of the Constitution.

97. Referring to the judgment rendered by this Court, in the Madras Bar Association case[35], it was submitted that, for the tribunal in question, the participation of the executive in the selection of its Members, had been held to be unsustainable, because the executive was a stakeholder in each matter, that was to be adjudicated by the tribunal. It was submitted, that the above position did not prevail insofar as the higher judiciary was concerned, since the stakeholders before the higher judiciary were diverse. It was, therefore, submitted, that the validity of the NJAC could not be assailed, merely on the ground of presence of the Union Minister, as an *ex officio* Member of the NJAC.

98. The manner of appointment of Judges to the higher judiciary, through the NJAC, it was asserted, would have two major advantages. It would introduce transparency in the process of selection and appointments of Judges, which had hitherto before, been extremely

secretive, with the civil society left wondering about, the standards and the criterion adopted, in determining the suitability of candidates. Secondly, the NJAC would diversify the selection process, which would further lead to accountability in the matter of appointments. It was submitted, that not only the litigating public, or the practicing advocates, but also the civil society, had the right to know. It was pointed out, that insofar as the legislative process was concerned, debates in the Parliament are now in the public domain. The rights of individuals, determined at the hands of the executive, have been transparent under the Right to Information Act, 2005. It was submitted that likewise, the selection and appointment of Judges to the higher judiciary, must be known to the civil society, so as to introduce not only fairness, but also a degree of assurance, that the best out of those willing, were being appointed as Judges.

99. Referring to Article 124A(2) inserted through the Constitution (99th Amendment) Act, it was asserted, that a constitutional process could not be held up, due to the unavailability (and/or the disability) of one or more Members of the NJAC. So that a defect in the constitution of the NJAC, or any vacancy therein, would not impact the process of selection and appointment of Judges to the higher judiciary. Article 124A(2) provided, that the proceedings of the NJAC would not be questioned or invalidated on account of a vacancy or a defect in the composition of the NJAC. It was contended, that it was wrongful for the petitioners to frown

on Article 124A(2), as there were a number of statutory enactments with similar provisions. In this behalf, the Court's attention was *inter alia* drawn to Section 4(2), of the Central Vigilance Commission Act 2003, Section 4(2), of the Lokpal and Lokayuktas Act 2013, Section 7, of the National Commission for Backward Classes Act 1993, Section 29A, of the Consumer Protection Act 1986, Section 7, of the Advocates Welfare Act 2001, Section 8, of the University Grants Commission Act 1956, Section 9, of the Protection of Human Rights Act 1993, Section 7, of the National Commission for Minorities Act 1993, Section 8, of the National Commission for Minority Educational Institutions Act 2004, Section 24, of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, and a host of other legislative enactments of the same nature. Relying on the judgments in Bangalore Woollen, Cotton and Silk Mills Co. Ltd. v. Corporation of the City of Bangalore[60], Khadim Hussain v. State of U.P.[61], B.K. Srinivasan v. State of Karnataka[62], and People's Union for Civil Liberties v. Union of India[63], it was asserted, that on an examination of provisions of similar nature, this Court had repeatedly held, that modern legislative enactments ensured, that the defects of procedure, which do not lead to any substantial prejudice, are statutorily placed beyond the purview of challenge. It was accordingly asserted, that invalidity on account of a technical irregularity, being excluded from judicial review, the

[60] (1961) 3 SCR 707
[61] (1976) 1 SCC 843
[62] (1987) 1 SCC 658
[63] (2005) 5 SCC 363

submissions advanced on behalf of the petitioners, on the constitutional validity of clause (2) of Article 124A, deserved an outright rejection.

100. It was the contention of the learned Attorney General, that the NJAC did not suffer from the vice of excessive delegation. It was sought to be reiterated, that the power of nomination of "eminent persons" was securely and rightfully left to the wisdom of the Prime Minister of India, the Chief Justice of India and the Leader of the Opposition in the Parliament. It was submitted, that the parameters expressed in Sections 5 and 6 of the NJAC Act, delineating the criterion for selection, by specifically providing, that ability, merit and suitability would expressly engage the attention of the NJAC, while selecting Judges for appointment to the higher judiciary, clearly laid out the parameters for this selection and appointment process. It was submitted, that the modalities to determine ability, merit and suitability would be further detailed through rules and regulations. And that, factors such as, the minimum number of years of practice at the Bar, the number and nature of cases argued, academic publications in reputed journals, the minimum and maximum age, and the like, would be similarly provided for. All these clearly defined parameters, it was contended, would make the process of selection and appointment of Judges to the higher judiciary transparent, and would also ensure, that the candidates to be considered, were possessed of the minimum desired standards. It was submitted, that the Memorandum of Procedure for Appointment and Transfer of Chief Justices and Judges of

the High Courts, as also, for elevation of Judges to the Supreme Court, were bereft of any such particulars, and the absence of any prescribed criterion, had resulted in the appointment of Judges, even to the Supreme Court, which should have ordinarily been avoided. The learned Attorney General made a reference to three instances, which according to him, were universally condemned, by one and all. One of the Judges appointed to this Court, according to him, was a non-performer as he had authored just a few judgments as a Judge of the High Courts of Delhi and Kerala, and far lesser judgments as the Chief Justice of the Uttarakhand and Karnataka High Courts, and less than ten judgments during his entire tenure as a Judge of the Supreme Court. The second Judge, according to him, was notoriously late in commencing Court proceeding, a habit which had persisted with the said Judge even as a Judge of the Patna and Rajasthan High Courts, and thereafter, as the Chief Justice of the Jharkhand High Court, and also as a Judge of the Supreme Court. The third Judge, according to the learned Attorney General, was notoriously described as a tweeting Judge, because of his habit of tweeting his views, after he had retired. Learned counsel for the respondents, acknowledged having understood the identity of the Judges from their above description by the learned Attorney General, and also affirmed the factual position asserted in respect of the Judges mentioned. The learned Attorney General also handed over to us a compilation (in a sealed cover) about appointments of Judges made to different High

Courts, despite the executive having expressed an adverse opinion. The compilation made reference to elevation of five Judges to High Courts (– two Judges to the Jammu and Kashmir High Court, one Judge to the Punjab and Haryana High Court, one Judge to the Patna High Court, and one Judge to the Calcutta High Court) and three Judges to the Supreme Court. It may be clarified that the objection with reference to the Supreme Court Judges was not related to their suitability, but for the reason that some High Courts were unrepresented in the Supreme Court. We would therefore understand the above position as covering the period from 1993 till date. But it was not his contention, that these elevations had proved to be wrongful. We may only notice, that two of the three Supreme Court Judges referred to, were in due course elevated to the high office of Chief Justice of India.

101. The learned Attorney General vehemently contested the assertion made by the learned counsel representing the petitioners, that the power to frame rules and regulations for the functioning of the NJAC was unguided, inasmuch as, neither the constitutional amendment nor the legislative enactment, provided for any parameters for framing the rules and regulations, pertaining to the criterion of suitability. In this behalf, it was submitted, that sufficient guidelines were ascertainable from Articles 124B and 124C. Besides the aforesaid, the Court's attention was drawn to Sections 5(2), 6(1) and 6(3) of the NJAC Act, wherein the parameters of suitability for appointment of Judges had been laid down. In this behalf,

it was also asserted, that Article 124, as originally enacted, had laid down only basic eligibility conditions, for appointment of Judges to the higher judiciary, but no suitability criteria had been expressed. It was also asserted, that the procedure and conditions for appointment of Judges, were also not prescribed. As against the above, it was pointed out, that Articles 124B and 124C and Sections 5(2), 6(1) and 6(3) of the NJAC Act, clearly laid down conditions and guidelines for determining the suitability of a candidate for appointment as a Judge. On the basis of the aforementioned analysis, it was submitted, that neither the constitutional amendment was violative of the "basic structure", nor the NJAC Act, was constitutionally invalid. For the above reasons, it was asserted, that the challenge raised by the petitioners was liable to be rejected.

102. In response to the technical submission advanced by Mr. Fali S. Nariman, namely, that since the Constitution (99th Amendment) Act, was brought into force, consequent upon the notification issued by the Central Government in the Official Gazette on 13.4.2015, the consideration of the NJAC Bill and the passing of the NJAC Act, prior to the coming into force of the Constitution (99th Amendment) Act, would render it null and void, the learned Attorney General invited our attention to Article 118, which authorizes, each House of Parliament, to make rules for regulating their procedure, in the matter of conducting their business. It was pointed out, that Rules of Procedure and the Conduct of Business of the Lok Sabha, had been duly enacted by the Lok Sabha. A relevant

extract of the aforesaid rules was handed over to us. Rule 66 thereof, is being extracted hereunder:

"66. A Bill, which is dependent wholly or partly upon another Bill pending before the House, may be introduced in the House in anticipation of the passing of the Bill on which it is dependent:

Provided that the second Bill shall be taken up for consideration and passing in the House only after the first Bill has been passed by the Houses and assented to by the President."

Referring to the proviso under Rule 66, it was acknowledged that the rule read independently, fully justified the submissions of Mr. Fali S. Nariman. It was however pointed out, that it was open to the Parliament to seek a suspension of the above rule under Rule 388. Rule 388 is also extracted hereunder:

"388. Any member may, with the consent of the Speaker, move that any rule may be suspended in its application to a particular motion before the House and if the motion is carried the rule in question shall be suspended for the time being."

The learned Attorney General then handed over to us, the proceedings of the Lok Sabha dated 12.8.2014, *inter alia*, including the Constitution (121st Amendment) Bill, and the NJAC Bill. He invited our attention to the fact, that while moving the motion, the then Union Minister in charge of Law and Justice had sought, and was accorded approval, for the suspension of the proviso to Rule 66 of the Rules of Procedure and Conduct of Business of the Lok Sabha. Relevant extract of the Motion depicting the suspension of Rule 388 is being reproduced hereunder:

"Motion under Rule 388

Shri Ravi Shankar Prasad moved the following motion:-

"That this House do suspend the proviso to rule 66 of the Rules of Procedure and Conduct of Business in Lok Sabha in its application to the

motions for taking into consideration and passing the National Judicial Appointments Commission Bill, 2014 in as much as it is dependent upon the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014."

The motion was adopted.

The motions for consideration of the Bills viz. (i) The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (Insertion of new Articles 124A, 124B and 124C); and (ii) The National Judicial Appointments Commission Bill, 2014 were moved by Shri Ravi Shankar Prasad."

Premised on the strength of the Rules framed under Article 118, learned Attorney General, also placed reliance on Article 122, which is being reproduced below:

"122. Courts not to inquire into proceedings of Parliament.— (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.
(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

Based on Article 122, it was submitted, that the Constitution itself contemplated, that the validity of the proceedings in the Parliament, could not be called in question, on the ground of alleged irregularity in procedure. While reiterating, that the procedure laid down by the Parliament under Article 118, had been duly complied with, it was submitted, that even if that had not been done, as long as the power of Parliament to legislate was not questioned, no challenge could be premised on the procedural defects in enacting the NJAC Act. In this behalf, reference was also made to Article 246, so as to contend, that the competence of the Parliament to enact the NJAC Act was clearly and

unambiguously vested with the Parliament. In support of the above contention, reliance was placed on in re: Hindu Women's Rights to Property Act, 1937[64], rendered by the Federal Court, wherein it had observed as under:

"One of the provisions included in Sch. 9 is that a bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act (Sch. 9, para. 68 (2)). Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor. General's assent. But it does not appear to the Court that the form, content or subject-matter of a bill at the time of its introduction into, or of its consideration by either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the bill after it has become an Act. In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other."

[64] AIR 1941 FC 72

Reliance was also placed on Pandit M.S.M. Sharma v. Dr. Shree Krishna Sinha[65], wherefrom the following observations were brought to our notice:

"It now remains to consider the other subsidiary questions raised on behalf of the petitioner. It was contended that the procedure adopted inside the House of the Legislature was not regular and not strictly in accordance with law. There are two answers to this contention, firstly, that according to the previous decision of this Court, the petitioner has not the fundamental right claimed by him. He is, therefore, out of Court. Secondly, the validity of the proceedings inside the Legislature of a State cannot be called in question on the allegation that the procedure laid down by the law had not been strictly followed. Article 212 of the Constitution is a complete answer to this part of the contention raised on behalf of the petitioner. No Court can go into those questions which are within the special jurisdiction of the Legislature itself, which has the power to conduct its own business. Possibly, a third answer to this part of the contention raised on behalf of the petitioner is that it is yet premature to consider the question of procedure as the Committee is yet to conclude its proceedings. It must also be observed that once it has been held that the Legislature has the jurisdiction to control the publication of its proceedings and to go into the question whether there has been any breach of its privileges, the Legislature is vested with complete jurisdiction to carry on its proceedings in accordance with its rules of business. Even though it may not have strictly complied with the requirements of the procedural law laid down for conducting its business, that cannot be a ground for interference by this Court under Art. 32 of the Constitution. Courts have always recognised the basic difference between complete want of jurisdiction and improper or irregular exercise of jurisdiction. Mere non-compliance with rules of procedure cannot be a ground for issuing a writ under Art. 32 of the Constitution vide Janardan Reddy v. The State of Hyderabad, (1951) SCR 344."

Based on the aforesaid submissions, it was the vehement contention of the learned Attorney General, that there was no merit in the technical objections raised by the petitioners while assailing the provisions of the NJAC Act.

103. Mr. K.K. Venugopal, learned Senior Advocate, entered appearance on behalf of the State of Madhya Pradesh. While reiterating a few of the

[65] 1961 (1) SCR 96

legal submissions canvassed by the learned Attorney General, he emphasized, that the judgments rendered by this Court, in the Second and Third Judges cases, turned the legal position, contemplated under the original Articles 124 and 217, on its head. It was submitted, that this Court has been required to entertain a public interest litigation, in an unprecedented exercise of judicial review, wherein it is sought to be asserted, that the "independence of the judiciary", had been encroached by the other two organs of governance. It was contended by learned counsel, that the instant assertion was based on a misconception, as primacy in the matter of appointment of Judges to the higher judiciary, was never vested with the judiciary. It was pointed out, that primacy in the matter of appointment of Judges to the higher judiciary, was vested with the executive under Articles 124 and 217, as originally enacted. Furthermore, this Court through its judgments culminating in the First Judges case, while correctly interpreting the aforesaid provisions of the Constitution, had rightly concluded, that the interaction between the executive and the Chief Justice of India (as well as, the other Judges of the higher judiciary) was merely "consultative", and that, the executive was entirely responsible for discharging the responsibility of appointment of Judges including Chief Justices, to the higher judiciary. It was submitted, that the Second Judges case, by means of a judicial interpretation, vested primacy, in the matter of appointment of Judges to the higher judiciary, with the Chief Justice of India, and his collegium of

Judges. It was pointed out, that after the rendering of the Second Judges case, appointments of Judges commenced to be made, in the manner expressed by the above Constitution Bench. It was asserted, that there had been, an all around severe criticism, of the process of appointment of Judges to the higher judiciary, as contemplated by the Second and Third Judges cases. It was contended, that the selection process was now limited to Judges selecting Judges, without any external participation. It was also asserted, that the exclusion of the executive from the role of selection and appointment of Judges was so extensive, that the executive has got no right to initiate any candidature, for appointment of Judges/Chief Justices to the higher judiciary. Such an interpretation of the provisions of the Constitution, it was pointed out, had not only resulted in reading the term "consultation" in Articles 124 and 217 as "concurrence", but has gone far beyond. It was sought to be asserted, that in the impugned amendment to the Constitution, the intent contained in the original Articles 124 and 217, has been retained. The amended provisions, it was pointed out, have been tilted in favour of the judiciary, and the participatory role, earlier vested in the executive, has been severely diluted. It was submitted, that even though no element of primacy had been conferred on the judiciary by Article 124, as originally enacted, primacy has now been vested in the judiciary, inasmuch as, the NJAC has the largest number of membership from the judicial fraternity. It was highlighted, that the Union Minister in charge of Law and Justice,

is the sole executive representative, in the selection process, contemplated under the amended provisions. It was therefore asserted, that it was a far cry, for anyone to advocate, that the role of the judiciary in the manner of appointment of Judges to the higher judiciary having been diluted, had impinged on its independence.

104. It was contended, that the author of the majority view in the Second Judges case (J.S. Verma, J., as he then was), had himself found fault with the manner of implementation of the judgments in the Second and Third Judges cases. It was submitted that Parliament, being the voice of the people, had taken into consideration, the criticism levelled by J.S. Verma, J. (besides others), to revise the process of appointment of Judges contemplated under the Second and Third Judges cases. Having so contended, learned counsel asserted, that if this Court felt that any of the provisions, with reference to selection and appointment of Judges to the higher judiciary, would not meet the standards and norms, which this Court felt sacrosanct, it was open to this Court to read down the appropriate provisions, in a manner as to round off the offending provisions, rather than quashing the impugned constitutional and legislative provisions in their entirety.

105. Mr. Ranjit Kumar, learned Solicitor General of India submitted, that the entire Constitution had to be read as a whole. In this behalf, it was contended, that each provision was an integral part of the Constitution, and as such, its interpretation had to be rendered holistically. For the

instant proposition, reliance was placed on the Kihoto Hollohan case[34], T.M.A. Pai Foundation v. State of Karnataka[6], R.C. Poudyal v. Union of India[66], the M. Nagaraj case[36], and the Kesavananda Bharati case[10]. Based on the above judgments, it was asserted, that the term "President", as it existed in Articles 124 and 217, if interpreted holistically, would lead to the clear and unambiguous conclusion, that the President while discharging his responsibility with reference to appointment of Judges/Chief Justices to the higher judiciary, was bound by the aid and advice of the Council of Ministers, as contemplated under Article 74. It was contended, that the aforesaid import was rightfully examined and interpreted with reference to Article 124, in the First Judges case. But had been erroneously overlooked, in the subsequent judgments. Accordingly, it was asserted, that there could be no doubt whatsoever, while examining the impugned constitutional amendment, as also, the impugned legislative enactment, that Parliament had not breached any component of the "basic structure" of the Constitution.

106. It was also contended, that in case the challenge raised to the impugned constitutional amendment, was to be accepted by this Court, and the legal position declared by this Court, was to be given effect to, the repealed provisions would not stand revived, merely because the amendment/legislation which were being assailed, were held to be unconstitutional. Insofar as the instant aspect of the matter is concerned, learned Solicitor General raised two independent contentions.

[66] 1994 Supp (1) SCC 324

107. Firstly, that the issue whether a constitutional amendment once struck down, would revive the original/substituted Article, was a matter which had already been referred to a nine-Judge Constitutional Bench. In order to support the aforesaid contention, and to project the picture in its entirety, reliance was placed on, Property Owners' Association v. State of Maharashtra[67], Property Owners' Association v. State of Maharashtra[68], and Property Owners' Association v. State of Maharashtra[69]. It was submitted, that the order passed by this Court, wherein the reference to a nine-Judge Constitution Bench had been made, was a case relating to the constitutionality of Article 31C. It was pointed out that Article 31C, as originally enacted provided, that "...notwithstanding anything contained in Article 13, no law giving effect to the policy of the State, towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it was inconsistent with, the rights conferred by Articles 14 and 19". It was submitted, that the latter part of Article 31C, which provided "...and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy..." had been struck down by this Court in the Kesavananda Bharati case[10]. It was contended, that when the matter pertaining to the effect of the striking down of a constitutional amendment, had been referred to a nine-Judge Bench, it would be

[67] (1996) 4 SCC 49
[68] (2001) 4 SCC 455
[69] (2013) 7 SCC 522

improper for this Court, sitting in its present composition, to determine the aforesaid issue.

108. The second contention advanced at the hands of the learned Solicitor General, was based on Sections 6, 7 and 8 of the General Clauses Act. It was contended, that an amendment which had deleted some part of the erstwhile Article 124 of the Constitution, and substituted in its place something different, as in the case of Article 124, by the Constitution (99th Amendment) Act, would not result in the revival of the original Article which was in place, prior to the constitutional amendment, even if the amendment itself was to be struck down. It was submitted, that if a substituted provision was declared as unconstitutional, for whatever ground or reason(s), the same would not automatically result in the revival of the repealed provision. In order to support the aforesaid contention, reliance was placed on Ameer-un-Nissa Begum v. Mahboob Begum[70], Firm A.T.B. Mehtab Majid & Co. v. State of Madras[71], B.N. Tewari v. Union of India[72], Koteswar Vittal Kamath v. K. Rangappa Baliga & Co.[73], Mulchand Odhavji v. Rajkot Borough Municipality[74], Mohd. Shaukat Hussain Khan v. State of Andhra Pradesh[75], State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd.[76], India Tobacco Co. Ltd. v. Commercial Tax Officer, Bhavanipore[77],

[70] AIR 1955 SC 352
[71] AIR 1963 SC 928
[72] AIR 1965 SC 1430
[73] (1969) 1 SCC 255
[74] (1971) 3 SCC 53
[75] (1974) 2 SCC 376
[76] (1977) 1 SCC 643
[77] (1975) 3 SCC 512

and Kolhapur Canesugar Works Ltd. v. Union of India[78]. It was submitted, that the general rule of construction was, that a repeal through a repealing enactment, would not revive anything repealed thereby. Reliance was also placed on, State of U.P. v. Hirendra Pal Singh[79], Joint Action Committee of Air Line Pilots' Association of India v. Director General of Civil Aviation[80], and State of Tamil Nadu v. K. Shyam Sunder[81], to contend, that the settled legal proposition was, whenever an Act was repealed, it must be considered as if it had never existed. It was pointed out, that consequent upon the instant repeal of the earlier provisions, the earlier provisions must be deemed to have been obliterated/abrogated/wiped out, wholly and completely. The instant contention was sought to be summarized by asserting, that if a substituted provision was to be struck down, the question of revival of the original provision (which had been substituted, by the struck down provision) would not arise, as the provision which had been substituted, stood abrogated, and therefore had ceased to exist in the statute itself. It was therefore submitted, that even if the challenge raised to the impugned constitutional amendment was to be accepted by this Court, the originally enacted provisions of Articles 124 and 217 would not revive.

109. The learned Solicitor General additionally contended, that the present challenge at the hands of the petitioners should not be

[78] (2000) 2 SCC 536
[79] (2011) 5 SCC 305
[80] (2011) 5 SCC 435
[81] (2011) 8 SCC 737

entertained, as it has been raised prematurely. It was submitted, that the challenge raised by the petitioners was based on assumptions and presumptions, without allowing the crystallization of the impugned amendment to the Constitution. It was asserted, that the position would crystalise only after rules and regulations were framed under the NJAC Act. It was submitted, that the question of "independence of the judiciary", with reference to the amendments made, could be determined only after the NJAC Act was made operational, by laying down the manner of its functioning. Since the pendency of the present litigation had delayed the implementation of the provisions of the amendment to the Constitution, as also to the NJAC Act, it would be improper for this Court, to accede to a challenge based on conjectures and surmises.

110. Mr. K. Parasaran, Senior Advocate, entered appearance on behalf of the State of Rajasthan. He submitted, that he would be supporting the validity of the impugned constitutional amendment, as also, the NJAC Act, and that, he endorsed all the submissions advanced on behalf of the Union of India. It was his contention, that Judges of the higher judiciary were already burdened with their judicial work, and as such, they should not be seriously worried about the task of appointment of Judges, which by the impugned amendment, had been entrusted to the NJAC. In his view, the executive and the Parliament were accountable to the people, and therefore, they should be permitted to discharge the onerous responsibility, of appointing Judges to the higher judiciary. It was

asserted, that the executive and the legislature would then be answerable, to the people of this country, for the appointments they would make.

111. On the issue of inclusion of two "eminent persons" in the six-Member NJAC, it was asserted, that the nomination of the "eminent persons" was to be made by the Prime Minister, the Chief Justice of India, and the Leader of the Opposition in the Lok Sabha. All these three individuals, being high ranking constitutional functionaries, should be trusted, to discharge the responsibility bestowed on them, in the interest of the "independence of the judiciary". It was submitted, that if constitutional functionaries, and the "eminent persons", could not be trusted, then the constitutional machinery itself would fail. It was pointed out, that this Court had repeatedly described, that the Constitution was organic in character, and it had an inbuilt mechanism for evolving, with the changing times. It was asserted, that the power vested with the Parliament, under Article 368 to amend the provisions of the Constitution, was a "constituent power", authorizing the Parliament to reshape the Constitution, to adapt with the changing environment. It was contended, that the above power vested in the Parliament could be exercised with the sole exception, that "the basic structure/features" of the Constitution, as enunciated by the Supreme Court in the Kesavananda Bharati case[10], could not be altered/changed. According to the learned senior counsel, the Constitution (99th Amendment) Act was

an exercise of the aforestated constituent power, and that, the amendment to the Constitution introduced thereby, did not in any manner, impinge upon the "independence of the judiciary".

112. Referring to Article 124A, it was asserted, that the NJAC was a six-Member Commission for identifying, selecting and appointing Judges to the higher judiciary. It could under no circumstances, be found wanting, with reference to the assertions made by the petitioners. It was pointed out, that the only executive representative thereon being the Union Minister in charge of Law and Justice, it could not be inferred, that the executive would exert such influence through him, as would undermine the independence of the five other Members of the Commission. It was submitted, that the largest representation of the Commission, was that of Judges of the Supreme Court, inasmuch as, the Chief Justice of India, and the two senior most Judges of the Supreme Court were *ex officio* Members of the NJAC.

113. With reference to the two "eminent persons" on the NJAC, it was his contention, that they could not be identified either with the executive or the legislature. For the nomination of the two "eminent persons", the Selection Committee comprises of one member of the executive, one member of the legislature, and one member of the judiciary. In the above view of the matter, it was asserted, that the contention, that the two "eminent persons" in the Commission would support the executive/the legislature, was preposterous. It was therefore the submission of the

learned senior counsel, that the "independence of the judiciary" could not be considered to have been undermined, keeping in mind the composition of the NJAC.

114. It was also contended, that the proceedings before the NJAC would be more transparent and broad based, and accordingly, more result oriented, and would ensure, that the best candidates would be selected for appointment as Judges to the higher judiciary.

115. It was asserted, that the NJAC provided for a consultative process with persons who were *ex-hypothesi*, well qualified to give proper advice in the matter of appointment of Judges to the higher judiciary. It was accordingly the assertion of learned counsel, that the determination rendered by this Court, in the Second and Third Judges cases, was not in consonance with the intent, with which Articles 124 and 217 were originally enacted. It was therefore submitted, that the subject of "independence of the judiciary", with reference to the impugned constitutional amendment, should not be determined by relying on the Second and Third Judges cases, but only on the basis of the plain reading of Articles 124 and 217, in conjunction with, the observations expressed by the Members of the Constituent Assembly while debating on the above provisions. It was submitted, that whilst the Union Minister in charge of Law and Justice, would be in an effective position to provide necessary inputs, with reference to the character and antecedents of the candidate(s) concerned (in view of the governmental machinery available

at his command), the two "eminent persons" would be in a position to participate in the selection process, by representing the general public, and thereby, the selection process would be infused with all around logical inputs, for a wholesome consideration.

116. It was submitted, that since any two Members of the NJAC, were competent to veto the candidature of a nominee, three representatives of the Supreme Court of India, would be clearly in a position to stall the appointment of unsuitable candidates. It was therefore contended, that the legislations enacted by the Parliament, duly ratified in terms of Article 368, should be permitted to become functional, with the constitution of the NJAC, and should further be permitted to discharge the responsibility of appointing Judges to the higher judiciary. It was submitted, that in case of any deficiency in the discharge of the said responsibility, this Court could *suo motu* negate the selection process, or exclude one or both of the "eminent persons" from the selection process, if they were found to be unsuitable or unworthy of discharging their responsibility. Or even if they could not establish their usefulness. It was submitted, that this Court should not throttle the contemplated process of selection and appointment of Judges to the higher judiciary, through the NJAC, without it's even having been tested.

117. Mr. T.R. Andhyarujina, Senior Advocate, entered appearance on behalf of the State of Maharashtra. It was his contention, while endorsing the submissions advanced on behalf of the Union of India, that the

impugned Constitution (99th Amendment) Act, was a rare event, inasmuch as, the Parliament unanimously passed the same, with all parties supporting the amendment. He asserted, that there was not a single vote against the amendment, even though it was conceded, that there was one Member of Parliament, who had abstained from voting. Besides the above, it was asserted, that even the State legislatures ratified the instant constitutional amendment, wherein the ruling party, as also, the parties in opposition, supported the amendment. Based on the above, it was contended, that the instant constitutional amendment, should be treated as the unanimous will of the people, belonging to all sections of the society, and therefore the same could well be treated, as the will of the nation, exercised by all stakeholders.

118. It was submitted, that the amendment under reference should not be viewed with suspicion. It was pointed out, that Articles 124 and 217 contemplated a dominating role for the executive. It was contended, that the judgment in the Second Judges case, vested primacy in the matter of appointment of Judges to the higher judiciary, with the Chief Justice of India and his collegium of Judges. This manner of selection and appointment of Judges to the higher judiciary, according to learned counsel, was unknown to the rest of the world, as in no other country, the appointment of Judges is made by Judges themselves. Indicating the defects of the collegium system, it was asserted, that the same lacked transparency, and was not broad based enough. Whilst acknowledging,

the view expressed by J.S. Verma, CJ., that the manner of appointment of Judges contemplated by the Second and Third Judges cases was very good, it was submitted, that J.S. Verma, CJ., himself was disillusioned with their implementation, as he felt, that there had been an utter failure on that front. Learned senior counsel submitted, that the questions that needed to be answered were, whether there was any fundamental illegality in the constitutional amendment? Or, whether the appointment of Judges contemplated through the NJAC violated the "basic structure" of the Constitution? And, whether the "independence of the judiciary" stood subverted by the impugned constitutional amendment? It was asserted, that it was wrong to assume, that the manner of appointment of Judges, had any impact on the "independence of the judiciary". In this behalf, it was pointed out, that the independence of Judges, did not depend on who appointed them. It was also pointed out, that independence of Judges depended upon their individual character. Learned counsel reiterated the position expounded by Dr. B.R. Ambedkar, during the Constituent Assembly debates. He submitted, that the concept of "independence of the judiciary" should not be determined with reference to the opinion expressed by this Court in the Second and Third Judges cases, but should be determined with reference to the debates in the Constituent Assembly, which led to the crystallization of Articles 124 and 217, as originally enacted.

119. Learned counsel placed reliance on Lord Cooke of Thorndon in his article titled "Making the Angels Weep", wherein he scathingly criticized the Second Judges case. Reference was also made to his article "Where Angels Fear to Tread", with reference to the Third Judges case. The Court's attention was also drawn to the criticism of the Second and Third Judges cases, at the hands of H.M. Seervai, Fali S. Nariman and others, especially the criticism at the hands of Krishna Iyer and Ruma Pal, JJ., and later even the author of the majority judgment in the Second Judges case – J.S. Verma, CJ.. It was, accordingly, the contention of the learned senior counsel, that whilst determining the issue of "independence of the judiciary", reference should not be made to either of the above two judgments, but should be made to the plain language of Articles 124 and 217. Viewed in the above manner, it was asserted, that there would be no question of arriving at the conclusion, that the impugned constitutional amendment, violated the basic concepts of "separation of powers" and "independence of the judiciary".

120. Even though, there were no guidelines, for appointment of the two "eminent persons", emerging from the Constitution (99th Amendment) Act, and/or the NJAC Act, yet it was submitted, that it was obvious, that the "eminent persons" to be chosen, would be persons who were well versed in the working of courts. On the Court's asking, learned senior counsel suggested, that "eminent persons" for the purpose could only be picked out of eminent lawyers, eminent jurists, and even retired Judges,

or the like. Insofar as the instant aspect of the matter is concerned, it is obvious that learned senior counsel had adopted a position, diametrically opposite to the one canvassed by the learned Attorney General. Another aspect, on which we found a little divergence in the submission of Mr. T.R. Andhyarujina was, that in many countries the executive participation in the matter of appointment of Judges to the higher judiciary, was being brought down. And in some countries it was no longer in the hands of the executive. In this behalf, the clear contention advanced by the learned senior counsel was, that the world over, the process of appointment of Judges to the higher judiciary was evolving, so as to be vested in Commissions of the nature of the NJAC. And as such, it was wholly unjustified to fault the same, on the ground of "independence of the judiciary", when the world over Commissions were found to have been discharging the responsibility satisfactorily.

121. Mr. Tushar Mehta, Additional Solicitor General of India, entered appearance on behalf of the State of Gujarat. He adopted the submissions advanced by the learned Attorney General, as also, Mr. Ranjit Kumar, the learned Solicitor General. It was his submission, that the system innovated by this Court for appointment of Judges to the higher judiciary, comprising of the Chief Justice and his collegium of Judges, was a judicial innovation. It was pointed out, that since 1993 when the above system came into existence, it had been followed for appointment of Judges to the higher judiciary, till the impugned

constitutional amendment came into force. It was asserted that, in the interregnum, some conspicuous events had taken place, depicting the requirement of a change in the method and manner of appointment of Judges to the higher judiciary. Learned counsel invited our attention to the various Bills which were introduced in the Parliament for the purpose of setting up a Commission for appointments of Judges to the higher judiciary, as have already been narrated hereinbefore. It was pointed out, that several representations were received by the Government of the day, advocating the replacement of the "collegium system", with a broad based National Judicial Commission, to cater to the long standing aspiration of the citizens of the country. The resultant effect was, the passing of the Constitution (99th Amendment) Act, and the NJAC Act, by the Parliament. It was submitted, that the same came to be passed almost unanimously, with only one Member of Rajya Sabha abstaining. It was asserted, that this was a rare historical event after independence, when all political parties, having divergent political ideologies, voted in favour of the impugned constitutional amendment. In addition to the above, it was submitted, that as of now 28 State Assemblies had ratified the Bill. It was asserted, that the constitutional mechanism for appointment of Judges to the higher judiciary, had operated for a sufficient length of time, and learning from the experience emerging out of such operation, it was felt, that a broad based Commission should be constituted. It was contended, that the impugned constitutional

amendment, satisfied all the parameters for testing the constitutional validity of an amendment. Learned Additional Solicitor General similarly opposed, the submissions advanced at the hands of the petitioners challenging the inclusion of the Union Minister in charge of Law and Justice, as a Member of the NJAC. He also found merit in the inclusion of two "eminent persons", in the NJAC. It was contended, that the term "eminent persons", with reference to appointment of Judges to the higher judiciary, was by itself clear and unambiguous, and as and when, a nomination would be made, its authenticity would be understood. He distanced himself from the submission advanced by Mr. T.R. Andhyarujina, who represented the State of Maharashtra, while advancing submission about the identity of those who could be nominated as "eminent persons" to the NJAC. It was submitted, by placing reliance on Municipal Committee, Amritsar v. State of Punjab[82], K.A. Abbas v. Union of India[83], and the A.K. Roy case[49], that similar submissions advanced before this Court, with reference to vagueness and uncertainty of law, were consistently rejected by this Court. According to learned counsel, with reference to the alleged vagueness in the term "eminent persons", in case the nomination of an individual was assailed, a court of competent jurisdiction would construe it, as far as may be, in accordance with the intention of the legislature. It was asserted, that it could not be assumed, that there was a political danger, that if two wrong

[82] (1969) 1 SCC 475
[83] (1970) 2 SCC 780

persons were nominated as "eminent persons" to the NJAC, they would be able to tilt the balance against the judicial component of the NJAC. It was submitted, that the appointment of the two "eminent persons" was in the safe hands, of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha. In the above view of the matter, the learned Additional Solicitor General, concluded with the prayer, that the submissions advanced at the hands of the learned counsel for the petitioners deserved to be rejected.

122. Mr. Ravindra Srivastava, Senior Advocate, entered appearance on behalf of the State of Chhattisgarh. He had chosen to make submissions divided under eleven heads. However, keeping in view the fact, that detailed submissions had already been advanced by counsel who had entered appearance before him, he chose to limit the same. It was the primary contention of the learned senior counsel, that the impugned constitutional amendment, as also the NJAC Act, did not in any manner violate the "basic structure" of the Constitution. According to the learned senior counsel, the impugned constitutional amendment, furthers and strengthens the "basic structure" principle, of a free and independent judiciary. It was his submission, that the assertions made at the hands of the petitioners, to the effect that the impugned constitutional amendment, impinges upon the "basic structure" of the Constitution, and the "independence of the judiciary", were wholly misconceived. It was submitted, that this Court had not ever held, that the primacy of the

judiciary through the Chief Justice of India, was an essential component of the "independence of the judiciary". It was asserted, that while considering the challenge raised by the petitioners to the impugned constitutional amendment, it would be wholly unjustified to approach the challenge by assuming, that the primacy of the judiciary through the Chief Justice of India, would alone satisfy the essential components of "separation of power" and "independence of the judiciary". It was submitted, that the introduction of plurality, in the matter of appointment of Judges to the higher judiciary, was an instance of independence, rather than an instance of interference. With reference to the Members of the NJAC, it was submitted, that the same would ensure not only transparency, but also a broad based selection process, without any ulterior motives. It was asserted, that the adoption of the NJAC for selection of Judges to the higher judiciary, would result in the selection of the best out of those willing to be appointed. With reference to the participation of the Union Minister in charge of Law and Justice, as an *ex officio* Member of the NJAC, it was submitted, that the mere participation of one executive representative, would not make the process incompatible, with the concept of "independence of the judiciary". In this behalf, emphatic reliance was placed on the observations of E.S. Venkataramiah, J., from two paragraphs of the First Judges case, which are being extracted hereunder:

"1033. As a part of this very contention it is urged that the Executive should have no voice at all in the matter of appointment of Judges of the

superior courts in India as the independence of the judiciary which is a basic feature of the Constitution would be in serious jeopardy if the executive can interfere with the process of their appointment. It is difficult to hold that merely because the power of appointment is with the executive, the independence of the judiciary would become impaired. The true principle is that after such appointment the executive should have no scope to interfere with the work of a Judge."

"1038. The foregoing gives a fairly reliable picture of the English system of appointments of Judges. It is thus seen that in England the Judges are appointed by the Executive. "Nevertheless, the judiciary is substantially insulated by virtue of rules of strict law, constitutional conventions, political practice and professional tradition, from political influence."

It was finally submitted by learned counsel, that a multi-member constitutional body, was expected to act fairly and independently, and not in violation of the Constitution. It was contended, that plurality by itself was an adequate safeguard. Reliance in this behalf was placed on T.N. Seshan v. Union of India[84], so as to eventually conclude, that the constitutional amendment did not violate the "basic structure" of the Constitution, and that, it was in consonance with the concept of a free and independent judiciary, by further strengthening the "basic structure" of the Constitution.

123. Mr. Ajit Kumar Sinha, Senior Advocate, entered appearance on behalf of the State of Jharkhand. He asserted, that he should be taken as having adopted all the submissions addressed, on behalf of the Union of India. While commencing his submissions, he placed reliance on Article 124(4) and proviso (b) under Article 217(1) to contend, that Judges of the higher judiciary, could not be removed except by an order passed by the President, after an address by each House of Parliament,

[84] (1995) 4 SCC 611

supported by a majority of the total membership of that House, and by a majority of not less than 2/3rd of the Members of the House present and voting, had been presented to the President, on the ground of proved misbehaviour or incapacity. In this behalf, learned senior counsel placed reliance on Section 16 of the General Clauses Act, 1897, which provides that the power to appoint includes the power to suspend or dismiss. Read in conjunction with Article 367, which mandates, that unless the context otherwise required, the provisions of the General Clauses Act 1897, would apply to the interpretation of the provisions of the Constitution, in the same manner as they applied to the interpretation of an Act of the legislature. Based on the aforesaid, it was sought to be asserted, that in the absence of any role of the judiciary in the matter of removal of a Judge belonging to the higher judiciary, the judiciary could not demand primacy in the matter of appointment of Judges of the higher judiciary, as an integral component of the "independence of the judiciary". It was submitted, on the issue of "independence of the judiciary", the question of manner of appointment was far less important, than the question of removal from the position of Judge. Adverting to the manner of removal of Judges of the higher judiciary, in accordance with the provisions referred to hereinabove, it was asserted, that in the matter of removal of a Judge from the higher judiciary, there was no judicial participation. It was solely the prerogative of the legislature. That being so, it was contended, that the submissions advanced at the behest of the

petitioners, that primacy in the matter of appointment of Judges, should be vested in the judiciary, was nothing but a fallacy.

124. The second contention advanced by learned senior counsel was, that it should not be assumed as if the NJAC, would take away the power of appointment of Judges to the higher judiciary, from the judiciary. It was submitted, that three of the six Members of the NJAC belonged to the judiciary, and that, one of them, namely, the Chief Justice of India was to preside over the proceedings of the NJAC, as its Chairperson. Thus viewed, it was submitted, that it was wholly misconceived on the part of the petitioners to contend, that the power of appointment of Judges, had been taken away from the judiciary, and vested with the executive. It was submitted, that there was nothing fundamentally illegal or unconstitutional in the manner of appointment of Judges to the higher judiciary, as contemplated by the impugned constitutional amendment. It was also contended, that the manner of appointment of Judges, contemplated through the NJAC, could not be perceived as violative of the "basic structure" of the Constitution, by the mere fact, that any two Members of the NJAC can veto a proposal of appointment of a Judge to the higher judiciary. And that, the above would result in the subversion of the "independence of the judiciary". In support of the aforestated submissions, it was highlighted, that the manner of appointment of Judges, which was postulated in the judgments rendered in the Second and Third Judges cases, do not lead to the inference, that if the manner

of appointment as contemplated therein was altered, it would violate the "basic structure" of the Constitution.

125. Mr. Yatindra Singh, learned Senior Advocate, entered appearance as an intervener. He contended, that the preamble to the Constitution of India, Article 50 (which provides for separation of the judiciary from the executive), the oath of office of a Judge appointed to the higher judiciary, the security of his tenure including the fixed age of retirement, the protection of the emoluments payable to Judges including salary and leave, etc., the fact that the Judges appointed to the higher judiciary served in Courts of Record, having the power to punish for contempt, and the provisions of the Judicial Officers Protection Act, 1850, and the Judges (Protection) Act, 1985, which grant immunity to them from civil as well as criminal proceedings, are incidents, which ensured "independence of the judiciary". It was submitted, that the manner of appointment of Judges to the higher judiciary, had nothing to do with "independence of the judiciary". It was pointed out, that insofar as the determination of the validity of the impugned constitutional amendment was concerned, it was not essential to make a reference to the judgments rendered by this Court in the Second and Third Judges cases. It was submitted, that the only question that needed to be determined insofar as the present controversy is concerned, was whether, the manner of appointment postulated through the NJAC, would interfere with "independence of Judges". In this behalf, it was firstly asserted, that

neither the Second nor the Third Judges case had concluded, that the manner of appointment of Judges would constitute the "basic structure" of the Constitution. Nor that, the manner of appointment of Judges to the higher judiciary as postulated in the Second and Third Judges cases, if breached, would violate the "basic structure" of the Constitution. It was submitted, that the judgments rendered in the Second and Third Judges cases merely interpreted the law, as it then existed. It was asserted, that the above judgments did not delve into the question, whether any factor(s) or feature(s) considered, were components of the "basic structure" of the Constitution.

126. Learned senior counsel, also placed reliance on the manner of appointment of Judges in the United States of America, Australia, New Zealand, Canada, and Japan to contend, that in all these countries Judges appointed to the higher judiciary, were discharging their responsibilities independently, and as such, there was no reason or justification for this Court to infer, if the manner of appointment of Judges was altered from the position contemplated in the Second and Third Judges cases, to the one envisaged by the impugned constitutional amendment, it would affect the "independence of the Judges". It was submitted, that different countries in the world had adopted different processes of selection for appointment of Judges. Each country had achieved "independence of the judiciary", and as such, it was

presumptuous to think that Judges appointed by Judges alone, can discharge their duties independently.

127. Learned senior counsel also pointed out, that the "collegium system" was not the only process of appointment of Judges, which could achieve the "independence of the judiciary". Had it been so, it would have been so concluded in the judgments rendered in the Second and Third Judges cases. It was the submission of the learned senior counsel, that "independence of the judiciary" could be achieved by other methods, as had been adopted in other countries, or in a manner, as the Parliament deemed just and proper for India. It was asserted, that the manner of appointment contemplated by the impugned constitutional amendment had no infirmity, with reference to the issue of "independence of the judiciary", on account of the fact, that there was hardly any participation in the NJAC, at the behest of organs other than the judiciary.

128. Last of all, learned senior counsel contended, that the "collegium system" did not serve the purpose of choosing the best amongst the available. The failure of the "collegium system", according to the learned senior counsel, was apparent from the opinion expressed by V.R. Krishna Iyer, J. in the foreword to the book "Story of a Chief Justice", authored by U.L. Bhat, J. The "collegium system" was also adversely commented upon, by Ruma Pal, J., while delivering the 5th V.M. Tarkunde Memorial Lecture on the topic "An Independent Judiciary". Reference in this

behalf, was also made to the observations made by S.S. Sodhi, J., a former Chief Justice of the Allahabad High Court, in his book "The Other Side of Justice", and the book authored by Fali S. Nariman, in his autobiography "Before Memory Fades". It was contended, that the aforesaid experiences, and the adverse all around comments, with reference to the implementation of the "collegium system", forced the Parliament to enact the Constitution (99th Amendment) Act, which provided for a far better method for selection and appointment of Judges to the higher judiciary, than the procedure contemplated under the "collegium system". It was submitted, that whilst the NJAC did not exclude the role of the judiciary, it included two "eminent persons" with one executive nominee, namely, the Union Minister in charge of Law and Justice, as Members of the NJAC. Since the role of the executive/Government in the NJAC was minimal, it was preposterous to assume, that the executive would ever be able to have its way, in the matter of appointment of Judges to the higher judiciary. It was submitted, that the NJAC would fulfill the objective of transparency, in the matter of appointment of Judges, and at the same time, would make the selection process broad based. While concluding his submissions, it was also suggested by the learned counsel, that the NJAC should be allowed to operate for some time, so as to be tested, before being scrapped at its very inception. And that, it would be improper to negate the process even before the experiment had begun.

129. Mr. Dushyant A. Dave, Senior Advocate and President of the Supreme Court Bar Association, submitted that the only question that needed to be adjudicated upon, with reference to the present controversy was, whether the manner of appointment of Judges to the higher judiciary, through the NJAC, would fall within the constitutional frame work? Learned senior counsel commenced his submissions by highlighting the fact, that parliamentary democracy contemplated through the provisions of the Constitution, was a greater basic concept, as compared to the "independence of the judiciary". It was submitted, that the manner in which submissions had been advanced at the behest of the petitioners, it seemed, that the matter of appointment of Judges to the higher judiciary, is placed at the highest pedestal, in the "basic structure doctrine". Learned senior counsel seriously contested the veracity of the aforesaid belief. It was submitted, that if those representing the petitioners, were placing reliance on the judgment rendered in the Second Judges case, to project the aforesaid principle, it was legally fallacious, to do so. The reason, according to learned senior counsel was, that the judgment in the Second Judges case, was not premised on an interpretation of any constitutional provision(s), nor was it premised on an elaborate discussion, with reference to the subject under consideration, nor was reliance placed on the Constituent Assembly debates. It was pointed out, that the judgment in the Second Judges case was rendered, on the basis of the principles contemplated by

the authors of the judgment, and not on any principles of law. It was accordingly asserted, that the petitioners' contentions, deserved outright rejection.

130. Learned senior counsel invited this Court's attention to the fact, that the judgments rendered in the Kesavananda Bharati case[10], the Minerva Mills Ltd. case[33], and I.R. Coelho v. State of Tamil Nadu[85], wherein the concept of "basic structure" of the Constitution was formulated and given effect to, were all matters wherein on different aspects, the power of judicial review had been suppressed/subjugated. It was submitted, that none of the aforesaid judgments could be relied upon to determine, whether the manner of appointment of the Judges to the higher judiciary, constituted a part of the "basic structure" of the Constitution. It was therefore, that reliance was placed on Article 368 to contend, that the power to amend the Constitution, had been described as a "constituent power", i.e., a power similar to the one which came to be vested in the Constituent Assembly, for drafting the Constitution. It was submitted, that no judgment could negate or diminish the "constituent power" vested with the Parliament, under Article 368. Having highlighted the aforesaid factual position, learned senior counsel advanced passionate submissions with reference to various appointments made, on the basis of the procedure postulated in the Second and Third Judges cases. Reference was pointedly made to the appointment of a particular Judge to this Court as well. It was pointed out, that the

[85] (2007) 2 SCC 1

concerned Judge had decided a matter, by taking seisin of the same, even though it was not posted for hearing before him. Thereafter, even though a review petition was filed to correct the anomaly, the same was dismissed by the concerned Judge. While projecting his concern with reference to the appointment of Judges to the higher judiciary under the collegium system, learned senior counsel emphatically pointed out, that the procedure in vogue before the impugned constitutional amendment, could be described as a closed-door process, where appointments were made in a hush-hush manner. He stated that the stakeholders, including prominent lawyers with unimpeachable integrity, were never consulted. It was submitted, that inputs were never sought, from those who could render valuable assistance, for the selection of the best, from amongst those available. It was pointed out, that the process of appointment of Judges under the collegium system, was known to have been abused in certain cases, and that, there were certain inherent defects therein. It was submitted, that the policy of selection, and the method of selection, were not justiciable, being not amenable to judicial review, and as such, no challenge could be raised to the wrongful appointments made under the "collegium system".

131. On the subject of the manner of interpreting the Constitution, with reference to appointments to the higher judiciary, reliance was placed on Registrar (Admn), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy[32], to contend, that in spite of having noticed the judgments

rendered in the Second Judges case, this Court struck a note of caution, with reference to the control, vested in the High Courts, over the subordinate judiciary. It was pointed out, that it had been held, that control had to be exercised without usurping the power vested with the executive, especially the power under Articles 233, 234 and 235. It is submitted, that the power of the executive in the matter of appointments of Judges to the higher judiciary, could not be brushed aside, without any justification. It was contended, that it was improper to assume, that only the judiciary could appoint the best Judges, and the executive or the legislature could not.

132. Learned senior counsel also made an impassioned reference, to the failure of the judiciary, to grant relief to the victims of the 1984 riots in Delhi, and the 2003 riots in Gujarat. It was also asserted, that justice had been denied to those who deserved it the most, namely, the poor citizenry of this country. It was pointed out, that the manner of appointment of Judges, through the "collegium system", had not produced Judges of the kind who were sensitive to the rights of the poor and needy. It was the assertion of the learned senior counsel, that the new system brought in for selection and appointment of Judges to the higher judiciary, should be tried and tested, and in case, certain parameters had to be provided for, to ensure its righteous functioning to achieve the best results, it was always open to this Court to provide such guidelines.

V. THE DEBATE AND THE DELIBERATION:

I.

133. The Union Government, as also, the participating State Governments, were all unanimous in their ventilation, that the impugned constitutional amendment, had been passed unanimously by both the Lok Sabha and the Rajya Sabha, wherein parliamentarians from all political parties had spoken in one voice. The Lok Sabha had passed the Bill with 367 Members voting in favour of the Bill, and no one against it (the Members from the AIADMK – 37 in all, had however abstained from voting). The Rajya Sabha passed the Bill with 179 Members voting in favour of the Bill, and one of its Members – Ram Jethmalani, abstaining. It was submitted, that on account of the special procedure prescribed under the proviso to Article 368(2), the Bill was ratified in no time by half the State Legislatures. Mr. Tushar Mehta, learned Additional Solicitor General of India, had informed the Court, that as many as twenty-eight State Assemblies, had eventually ratified the Bill. It was assented to by the President on 31.12.2014. It was therefore asserted, that the Constitution (99th Amendment) Act manifested, the unanimous will of the people, and therefore, the same must be deemed to be expressive of the desire of the nation. Based on the fact, that impugned constitutional

amendment reflected the will of the people, it was submitted, that it would not be appropriate to test it through a process of judicial review, even on the touchstone of the concept of "basic structure".

134. Learned counsel representing the petitioners, described the aforesaid assertion as misplaced. The contention was repulsed by posing a query, whether the same was the will of the nation of the "haves", or the will of the nation of the "have-nots"? Another question posed was, whether the impugned constitutional amendment represented the desire of the rich, the prosperous and the influential, or the poor and the needy, whose conditions, hopes and expectations had nothing to do with the impugned constitutional amendment? It was submitted, that the will of the nation, could only be decided by a plebiscite or a referendum. It was submitted, that the petitioners would concede, that it could certainly be described as the overwhelming will of the political-executive. And no more. It was asserted, that the impugned constitutional amendment had an oblique motive. The amendment was passed unanimously, in the opinion of the petitioners, for the simple reason, that the higher judiciary corrects the actions of the executive and the legislatures. This, it was pointed out, bothers the political-executive.

135. With reference to the will of the people, it was submitted, that the same could easily be ascertainable from the decision rendered in the L.C Golak Nath case[41], wherein a eleven-Judge Bench declared, that a constitutional amendment was "law" with reference to Part III of the

Constitution, and therefore, was subject to the constraint of the fundamental rights, in the said part. It was pointed out, that the Parliament, had invoked Article 368, while passing the Constitution (25th Amendment) Act, 1971. By the above amendment, a law giving effect to the policy of the State under Articles 39(b) and 39(c) could not be declared void, on the ground that it was inconsistent with the fundamental rights expressed through Articles 14, 19 and 31. Article 31C also provided, that a legislative enactment containing such a "declaration", namely, that it was for giving effect to the above policy of the State, would not be called in question on the ground, that it did not factually gave effect to such policy. It was pointed out, that this Court in the Kesavananda Bharati case[10], had overruled the judgment in the I.C. Golak Nath case[41]. This Curt, while holding as unconstitutional the part of Article 31C, which denied judicial review, on the basis of the "declaration" referred to above, also held, that the right of judicial review was a part of the "basic structure" of the Constitution.

136. Proceeding further, it was submitted, that on 12.6.1975, the election of Indira Gandhi to the Lok Sabha was set aside by the Allahabad High Court. That decision was assailed before the Supreme Court. Pending the appeal, the Parliament passed the Constitution (39th Amendment) Act, 1975. By the above amendment, election to the Parliament, of the Prime Minister and the Speaker could not be assailed,

nor could the election be held void, or be deemed to have ever become void, on any of the grounds on which an election could be declared void. In sum and substance, by a deeming fiction of law, the election of the Prime Minister and the Speaker would continue to be valid, irrespective of the defect(s) and illegalities therein. By the above amendment, it was provided, that any pending appeal before the Supreme Court would be disposed of, in conformity with the provisions of the Constitution (39th Amendment) Act, 1975. The aforesaid amendment was struck down by this Court, by declaring that the same amounted to a negation of the "rule of law", and also because, it was "anti-democratic", and as such, violated the "basic structure" of the Constitution. It was submitted, that as an answer to the striking down of material parts of Article 39A of the Constitution, the Parliament while exercising its power under Article 368, had passed the Constitution (42nd Amendment) Act, 1976, by an overwhelming majority. Through the above amendment, the Parliament added clauses (4) and (5) to Article 368, which read as under:

"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.
(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

The aforesaid amendment was set aside, as being unconstitutional, by a unanimous decision, in the Minerva Mills Ltd. case[33]. It was held, that

the amending power of the Parliament under Article 368 was limited, inasmuch as, it had no right to repeal or abrogate the Constitution, or to destroy its "basic or essential features".

137. Learned senior counsel pointed out, that over the years, yet another stratagem was adopted by the Parliament, for avoiding judicial interference in the working of the Parliament. In this behalf, reference was made to the Constitution (45th Amendment) Bill, 1978, wherein it was provided, that even the "basic structure" of the Constitution could be amended, on its approval through a referendum. The amendment added a proviso to Article 368(2) postulating, that a law compromising with the "independence of the judiciary" would require ratification by one half of the States, and thereupon, would become unassailable, if adopted by a simple majority vote in a referendum. Through its aforesaid action, the Government of the day, revealed its intention to compromise even the "independence of the judiciary". Though the above Bill was passed by an overwhelming majority in the Lok Sabha, it could not muster the two-thirds majority required in the Rajya Sabha. It was pointed out, that the propounder of the Bill was the then Janata Party Government, and not the Congress Party Government (which was responsible for the emergency, and the earlier constitutional amendments). It was therefore asserted, that it should not surprise anyone, if all political parties had spoken in one voice, because all political parties were united in their resolve, to overawe and subjugate the judiciary.

138. It was submitted, that the intention of the legislature and the executive, irrespective of the party in power, has been to invade into the "independence of the judiciary". It was further submitted, that attempts to control the judiciary have been more pronounced in recent times. In this behalf, the Court's attention was drawn to the judgments in Lily Thomas v. Union of India[86], and Chief Election Commissioner v. Jan Chaukidar[87]. It was pointed out, that in the former judgment, this Court held as invalid and unconstitutional, Section 8(4) of the Representation of the People Act, 1951, which provided *inter alia,* that a Member of Parliament convicted of an offence and sentenced to imprisonment for not less than two years, would not suffer the disqualification contemplated under the provision, for a period of three months from the date of conviction, or if the conviction was assailed by way of an appeal or revision – till such time, as the appeal or revision was disposed of. By the former judgment, convicted Members became disqualified, and had to vacate their respective seats, even though, the conviction was under challenge. In the latter judgment, this Court upheld the order passed by the Patna High Court, declaring that a person who was confined to prison, had no right to vote, by virtue of the provisions contained in Section 62(2) of the Representation of the People Act, 1951. Since he/she was not an elector, therefore it was held, that he/she could not

[86] (2013) 7 SCC 653
[87] (2013) 7 SCC 507

be considered as qualified, to contest elections to either House of Parliament, or to a Legislative Assembly of a State.

139. It was pointed out, that Government (then ruled by the U.P.A.) introduced a series of Bills, to invalidate the judgment rendered by this Court in the Jan Choukidar case[87]. This was sought to be done by passing the Representation of the People (Amendment and Validation) Act, 2013, within three months of the rendering of the above judgment. It was submitted, that it was wholly misconceived for the learned counsel representing the Union of India, and the concerned States to contend, that the determination by the Parliament and the State Legislatures, with reference to constitutional amendments, could be described as actions which the entire nation desired, or represented the will of the people. It was submitted, that what was patently unconstitutional, could not constitute either the desire of the nation, or the will of the people.

140. Referring to the "collegium system" of appointing Judges to the higher judiciary, it was pointed out, that the same was put in place by a decision rendered by a nine-Judge Bench, in the Second Judges case, through which the "independence of the judiciary" was cemented and strengthened. This could be achieved, by vesting primacy with the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. It was further pointed out, that the collegium system has been under criticism, on account of lack of transparency. It was submitted, that taking advantage of the above criticism, political parties

across the political spectrum, have been condemning and denouncing the "collegium system". Yet again, it was pointed out, that the Parliament in its effort to build inroads into the judicial system, had enacted the impugned constitutional amendment, for interfering with the judicial process. This oblique motive, it was asserted, could not be described as the will of the people, or the will of the nation.

141. In comparison, while making a reference to the impugned constitutional amendment and the NJAC Act, it was equally seriously contended, that the constitutional amendment compromised the "independence of the judiciary", by negating the "primacy of the judiciary". With reference to the insinuations levelled by the Union of India and the concerned State Governments, during the course of hearing, reference was made to an article bearing the title "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts", authored by Nick Robinson. Reference was made to the following expositions made therein:

"Given their virtual self-selection, judges on the Indian Supreme Court are viewed as less politicised than in the United States. The panel structure of the Court also prevents clear ideological blocks from being perceived (even if there are more "activist" or "conservative" judges) there is not the sense that all the judges have to assemble together for a decision to be legitimate or fair in the eyes of the public. Quite the opposite, judges are viewed as bringing different skills or backgrounds that should be selectively utilized."

142. It was submitted, that the method of appointment, evolved through the Second and Third Judges cases, had been hailed by several jurists, who had opined that the same could be treated as a precedent worthy of

emulation by the United Kingdom. Reference in this behalf was also made to, the opinion of Lord Templeman, a Member of the House of Lords in the United Kingdom.

143. Having given our thoughtful consideration to the position assumed by the learned counsel representing the rival parties, it is essential to hold, that every constitutional amendment passed by the Parliament, either by following the ordinary procedure contemplated under Article 368(2), or the special procedure contemplated in the proviso to Article 368(2), could in a sense of understanding, by persons not conversant with the legal niceties of the issue, be treated as the will of the people, for the simple reason, that parliamentarians are considered as representatives of the people. In our view, as long as the stipulated majority supports a constitutional amendment, it would be treated as a constitutional amendment validly passed. Having satisfied the above benchmark, it may be understood as an expression of the will of the people, in the sense noticed above. The strength and enforceability of a constitutional amendment, would be just the same, irrespective of whether it was passed by the bare minimum majority postulated therefor, or by a substantial majority, or even if it was approved unanimously. What is important, is to keep in mind, that there are declared limitations, on the amending power conferred on the Parliament, which cannot be breached.

144. An ordinary legislation enacted by the Parliament with reference to subjects contained in the Union List or the Concurrent List, and likewise, ordinary legislation enacted by State Legislatures on subjects contained in the State List and the Concurrent List, in a sense of understanding noticed above, could be treated as enactments made in consonance with the will of the people, by lay persons not conversant with the legal niceties of the issue. Herein also, there are declared limitations on the power of legislations, which cannot be violated.

145. In almost all challenges, raised on the ground of violation of the "basic structure" to constitutional amendments made under Article 368, and more particularly, those requiring the compliance of the special and more rigorous procedure expressed in the proviso under Article 368(2), the repeated assertion advanced at the hands of the Union, has been the same. It has been the contention of the Union of India, that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review. The same argument had been repeatedly rejected by this Court by holding, that Article 368 postulates only a "procedure" for amendment of the Constitution, and that, the same could not be treated as a "power" vested in the Parliament to amend the Constitution, so as to alter, the "core" of the Constitution, which has also been described as, the "basic features/basic structure" of the Constitution. The above position has

been projected, through the judgments cited on behalf of the petitioners, to which reference has been made hereinabove.

146. Therefore, even though the Parliament may have passed the Constitution (121st Amendment) Bill, with an overwhelming majority, inasmuch as, only 37 Members from the AIADMK had consciously abstained from voting in the Lok Sabha, and only one Member of the Rajya Sabha – Ram Jethmalani, had consciously abstained from voting in favour thereof, it cannot be accepted, that the same is exempted from judicial review. The scope of judicial review with reference to a constitutional amendment and/or an ordinary legislation, whether enacted by the Parliament or a State Legislature, cannot vary, so as to adopt different standards, by taking into consideration the strength of the Members of the concerned legislature, which had approved and passed the concerned Bill. If a constitutional amendment breaches the "core" of the Constitution or destroys its "basic or essential features" in a manner which was patently unconstitutional, it would have crossed over forbidden territory. This aspect, would undoubtedly fall within the realm of judicial review. In the above view of the matter, it is imperative to hold, that the impugned constitutional amendment, as also, the NJAC Act, would be subject to judicial review on the touchstone of the "basic structure" of the Constitution, and the parameters laid down by this Court in that behalf, even though the impugned constitutional amendment may have been approved and passed unanimously or by an

overwhelming majority, and notwithstanding the ratification thereof by as many as twenty-eight State Assemblies. Accordingly, we find no merit in the contention advanced by the learned counsel for the respondents, that the impugned constitutional amendment is not assailable, through a process of judicial review.

II.

147. It was the submission of the learned Attorney General, that the "basic features/basic structure" of the Constitution, should only be gathered from a plain reading of the provision(s) of the Constitution, as it/they was/were originally enacted. In this behalf, it was acknowledged by the learned counsel representing the petitioners, that the scope and extent of the "basic features/basic structure" of the Constitution, was to be ascertained only from the provisions of the Constitution, as originally enacted, and additionally, from the interpretation placed on the concerned provisions, by this Court. The above qualified assertion made on behalf of the petitioners, was unacceptable to the learned counsel representing the respondents.

148. The above disagreement, does not require any detailed analysis. The instant aspect, stands determined in the M. Nagaraj case[36], wherein it was held as under:

"...The question is – whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument.

Under Article 141 of the Constitution the pronouncement of this Court is the law of the land."

149. The cause, effect and the width of a provision, which is the basis of a challenge, may sometimes not be apparent from a plain reading thereof. The interpretation placed by this Court on a particular provision, would most certainly depict a holistic understanding thereof, wherein the plain reading would have naturally been considered, but in addition thereto, the vital silences hidden therein, based on a harmonious construction of the provision, in conjunction with the surrounding provisions, would also have been taken into consideration. The mandate of Article 141, obliges every court within the territory of India, to honour the interpretation, conclusion, or meaning assigned to a provision by this Court. It would, therefore be rightful, to interpret the provisions of the Constitution relied upon, by giving the concerned provisions, the meaning, understanding and exposition, assigned to them, on their interpretation by this Court. In the above view of the matter, it would neither be legal nor just, to persist on an understanding of the concerned provision(s), merely on the plain reading thereof, as was suggested on behalf of the respondents. Even on a plain reading of Article 141, we are obligated, to read the provisions of the Constitution, in the manner they have been interpreted by this Court.

150. The manner in which the term "consultation" used in Articles 124, 217 and 222 has been interpreted by the Supreme Court, has been considered at great length in the "Reference Order", and therefore, there is no occasion for us, to re-record the same yet again. Suffice it to notice,

that the term "consultation" contained in Articles 124, 217 and 222 will have to be read as assigning primacy to the opinion expressed by the Chief Justice of India (based on a decision, arrived at by a collegium of Judges), as has been concluded in the "Reference Order". In the Second and Third Judges cases, the above provisions were interpreted by this Court, as they existed in their original format, i.e., in the manner in which the provisions were adopted by the Constituent Assembly, on 26.11.1949 (-which took effect on 26.01.1950). Thus viewed, we reiterate, that in the matter of appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to any other High Court, under Articles 124, 217 and 222, primacy conferred on the Chief Justice of India and his collegium of Judges, is liable to be accepted as an integral constituent of the above provisions (as originally enacted). Therefore, when a question with reference to the selection and appointment (as also, transfer) of Judges to the higher judiciary is raised, alleging that the "independence of the judiciary" as a "basic feature/structure" of the Constitution has been violated, it would have to be ascertained whether the primacy of the judiciary exercised through the Chief Justice of India (based on a collective wisdom of a collegium of Judges), had been breached. Then alone, would it be possible to conclude, whether or not, the "independence of the judiciary" as an essential "basic feature" of the Constitution, had been preserved (-and had not been breached).

III.

151. We have already concluded in the "Reference Order", that the term "consultation" used in Articles 124, 217 and 222 (as originally enacted) has to be read as vesting primacy in the judiciary, with reference to the decision making process, pertaining to the selection and appointment of Judges to the higher judiciary, and also, with reference to the transfer of Chief Justices and Judges of one High Court, to another. For arriving at the above conclusion, the following parameters were taken into consideration:

(i) Firstly, reference was made to four judgments, namely, the Samsher Singh case[11], rendered in 1974 by a seven-Judge Bench, wherein keeping in mind the cardinal principle – the "independence of the judiciary", it was concluded, that consultation with the highest dignitary in the judiciary – the Chief Justice of India, in practice meant, that the last word must belong to the Chief Justice of India, i.e., the primacy in the matter of appointment of Judges to the higher judiciary must rest with the judiciary. The above position was maintained in the Sankalchand Himatlal Sheth case[5] in 1977 by a five-Judge Bench, wherein it was held, that in all conceivable cases, advice tendered by the Chief Justice of India (in the course of his "consultation"), should principally be accepted by the Government of India, and that, if the Government departed from the counsel given by the Chief Justice of India, the Courts would have an opportunity to examine, if any other

extraneous circumstances had entered into the verdict of the executive. In the instant judgment, so as to emphasize the seriousness of the matter, this Court also expressed, that it expected, that the above words would not fall on deaf ears. The same position was adopted in the Second Judges case rendered in 1993 by a nine-Judge Bench, by a majority of 7:2, which also arrived at the conclusion, that the judgment rendered in the First Judges case, did not lay down the correct law. M.M. Punchhi, J., (as he then was) one of the Judges on the Bench, who supported the minority opinion, also endorsed the view, that the action of the executive to put off the recommendation(s) made by the Chief Justice of India, would amount to an act of deprival, "violating the spirit of the Constitution". In sum and substance therefore, the Second Judges case, almost unanimously concluded, that in the matter of selection and appointment of Judges to the higher judiciary, primacy in the decision making process, unquestionably rested with the judiciary. Finally, the Third Judges case, rendered in 1998 by another nine-Judge Bench, reiterated the position rendered in the Second Judges case.

(ii) Secondly, the final intent emerging from the Constituent Assembly debates, based *inter alia* on the concluding remarks expressed by Dr. B.R. Ambedkar, maintained that the judiciary must be independent of the executive. The aforesaid position came to be expressed while deliberating on the subject of "appointment" of Judges to the higher judiciary. Dr. B.R. Ambedkar while responding to the sentiments

expressed by K.T. Shah, K.M. Munshi, Tajamul Husain, Alladi Krishnaswami Aayar and Ananthasayanam Ayyangar, noted the view of the Constituent Assembly, that the Members were generally in agreement, that "independence of the judiciary", from the executive "should be made as clear and definite as it could be made by law". The above assertion made while debating on the issue of appointment of Judges to the Supreme Court, effectively resulted in the acknowledgement, that the issue of "appointment" of the Judges to the higher judiciary, had a direct nexus with "independence of the judiciary". Dr. B.R. Ambedkar declined the proposal of adopting the manner of appointment of Judges, prevalent in the United Kingdom and in the United States of America, and thereby, rejected the subjugation of the process of selection and appointment of Judges to the higher judiciary, at the hands of the executive and the legislature respectively. While turning down the latter proposal, Dr. B.R. Ambedkar was suspicious and distrustful, that in such an eventuality, appointments to the higher judiciary, could be impacted by "political pressure" and "political considerations".

(iii) Thirdly, the actual practice and manner of appointment of Judges to the higher judiciary, emerging from the parliamentary debates, clearly depict, that absolutely all Judges (except in one case) appointed since 1950, had been appointed on the advice of the Chief Justice of India. It is therefore clear, that the political-executive has been conscious of the

fact, that the issue of appointment of Judges to the higher judiciary, mandated the primacy of the judiciary, expressed through the Chief Justice of India. In this behalf, even the learned Attorney General had conceded, that the supersession of senior Judges of the Supreme Court, at the time of the appointment of the Chief Justice of India in 1973, the mass transfer of Judges of the higher judiciary during the emergency in 1976, and the second supersession of a Supreme Court Judge, at the time of the appointment of the Chief Justice of India in 1977, were executive aberrations.

(iv) Fourthly, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary drawn in 1950, soon after India became independent, as also, the Memorandum of Procedure for appointment of Judges and Chief Justices to the higher judiciary redrawn in 1999, after the decision in the Second Judges case, manifest that, the executive had understood and accepted, that selection and appointment of Judges to the higher judiciary would emanate from, and would be made on the advice of the Chief Justice of India.

(v) Fifthly, having adverted to the procedure in place for the selection and appointment of Judges to the higher judiciary, the submission advanced on behalf of the respondents, that the Second and Third Judges cases had created a procedure, where Judges select and appoint Judges, or that, the system of *Imperium in Imperio* had been created for appointment of Judges, was considered and expressly rejected (in the

"Reference Order"). Furthermore, the submission, that the executive had no role, in the prevailing process of selection and appointment of Judges to the higher judiciary was also rejected, by highlighting the role of the executive in the matter of appointment of Judges to the higher judiciary. Whilst recording the above conclusions, it was maintained (in the "Reference Order"), that primacy in the matter of appointment of Judges to the higher judiciary, was with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges.

(vi) Sixthly, the contention advanced at the behest of the respondents, that even in the matter of appointment of Judges to the higher judiciary (and in the matter of their transfer) under Articles 124, 217 (and 222), must be deemed to be vested in the executive, because the President by virtue of the constitutional mandate contained in Article 74, had to act in accordance with the aid and advice tendered to him by the Council of Ministers, was rejected by holding, that primacy in the matter of appointment of Judges to the higher judiciary, continued to remain with the Chief Justice of India, and that, the same was based on the collective wisdom of a collegium of Judges. In recording the above conclusion, reliance was placed on Article 50. Reliance was also placed on Article 50, for recording a further conclusion, that if the power of appointment of Judges was left to the executive, the same would breach the principles of "independence of the judiciary" and "separation of powers".

152. In view of the above, it has to be concluded, that in the matter of appointment of Judges to the higher judiciary, as also, in the matter of their transfer, primacy in the decision making process, inevitably rests with the Chief Justice of India. And that, the same was expected to be expressed, on the basis of the collective wisdom, of a collegium of Judges. Having so concluded, we reject all the submissions advanced at the hands of the learned counsel for the respondents, canvassing to the contrary.

IV.

153. The next question which arises for consideration is, whether the process of selection and appointment of Judges to the higher judiciary (i.e., Chief Justices, and Judges of the High Courts and the Supreme Court), and the transfer of Chief Justices and Judges of one High Court to another, contemplated through the impugned constitutional amendment, retains and preserves primacy in the decision making process, with the judiciary? It was the emphatic contention of the learned Attorney General, the learned Solicitor General, the learned Additional Solicitor General, and a sizeable number of learned senior counsel who represented the respondents, that even after the impugned constitutional amendment, primacy in the decision making process, under Articles 124, 217 and 222, has been retained with the judiciary. Insofar as the instant aspect of the matter is concerned, it was contended on behalf of the respondents, that three of the six Members of the NJAC were *ex officio*

Members drawn from the judiciary - the Chief Justice of India, and two other senior Judges of the Supreme Court, next to the Chief Justice. In conjunction with the aforesaid factual position, it was pointed out, that there was only one nominee from the political-executive – the Union Minister in charge of Law and Justice. It was submitted, that the remaining two Members, out of the six-Member NJAC, were "eminent persons", who were expected to be politically neutral. Therefore, according to learned counsel representing the respondents, primacy in the matter of selection and appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one High Court to another, even under the impugned constitutional amendment, continued to remain, in the hands of the judiciary.

154. In conjunction with the aforesaid submission, it was emphatically pointed out, that the provisions of the NJAC Act postulate, that the NJAC would not recommend a person for appointment as a Judge to the higher judiciary, if any two Members of the NJAC, did not agree with such recommendation. Based on the fact, that the Chief Justice of India and the two other senior Judges of the Supreme Court, were *ex officio* Members of the NJAC, it was asserted, that the veto power for rejecting an unsuitable recommendation by the judicial component of the NJAC, would result in retaining primacy in the hands of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary, and also, in the matter of transfer of Chief Justices and Judges from one

High Court to another. This according to learned counsel for the respondents, was because the judicial component would be sufficient, in preventing the other Members of the NJAC, from having their way.

155. Having given our thoughtful consideration to the above contention, there can be no doubt, that in the manner expressed by the learned counsel, the suggested inference may well be justified on paper. The important question to be considered is, whether as a matter of practicality, the impugned constitutional amendment can be considered to have sustained, primacy in the matter of decision making, under the amended provisions of Articles 124, 217 and 222, in conjunction with the inserted provisions of Articles 124A to 124C, with the judiciary?

156. The exposition made by the learned Attorney General and some of the other learned counsel representing the respondents, emerges from an over simplified and narrow approach. The primacy vested in the Chief Justice of India based on the collective wisdom of a collegium of Judges, needs a holistic approach. It is not possible for us to accept, that the primacy of the judiciary would be considered to have been sustained, merely by ensuring that the judicial component in the membership of the NJAC, was sufficiently capable, to reject the candidature of an unworthy nominee. We are satisfied, that in the matter of primacy, the judicial component of the NJAC, should be competent by itself, to ensure the appointment of a worthy nominee, as well. Under the substituted scheme, even if the Chief Justice of India and the two other senior most

Judges of the Supreme Court (next to the Chief Justice of India), consider a nominee to be worthy for appointment to the higher judiciary, the concerned individual may still not be appointed, if any two Members of the NJAC opine otherwise. This would be out-rightly obnoxious, to the primacy of the judicial component. The magnitude of the instant issue, is apparent from the fact that the two "eminent persons" (-lay persons, according to the learned Attorney General), could defeat the unanimous recommendation made by the Chief Justice of India and the two senior most Judges of the Supreme Court, favouring the appointment of an individual under consideration. Without any doubt, demeaning primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. The reason to describe it as being obnoxious is this – according to the learned Attorney General, "eminent persons" had to be lay persons having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification, such lay persons would have the collective authority, to override the collective wisdom of the Chief Justice of India and two Judges of the Supreme Court of India. The instant issue, is demonstrably far more retrograde, when the Union Minister in charge of Law and Justice also supports the unanimous view of the judicial component, because still the dissenting voice of the "eminent persons" would prevail. It is apparent, that primacy of the judiciary has been rendered a further devastating blow, by making it extremely fragile.

157. When the issue is of such significance, as the constitutional position of Judges of the higher judiciary, it would be fatal to depend upon the moral strength of individuals. The judiciary has to be manned by people of unimpeachable integrity, who can discharge their responsibility without fear or favour. There is no question of accepting an alternative procedure, which does not ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary (as also, in the matter of transfer of Chief Justices and Judges of High Courts, to other High Courts). In the above stated position, it is not possible to conclude, that the combination contemplated for constitution of the NJAC, is such, that would not be susceptible to an easy breach of the "independence of the judiciary".

158. Articles 124A(1)(a) and (b) do not provide for an adequate representation in the matter, to the judicial component, to ensure primacy of the judiciary in the matter of selection and appointment of Judges to the higher judiciary, and therefore, the same are liable to be set aside and struck down as being violative of the "basic structure" of the Constitution of India. Thus viewed, we are satisfied, that the "basic structure" of the Constitution would be clearly violated, if the process of selection of Judges to the higher judiciary was to be conducted, in the manner contemplated through the NJAC. The impugned constitutional amendment, being *ultra vires* the "basic structure" of the Constitution, is liable to be set aside.

V.

159. It is surprising, that the Chief Justice of India, on account of the position he holds as *pater familias* of the judicial fraternity, and on account of the serious issues, that come up for judicial adjudication before him, which have immeasurable political and financial consequences, besides issues of far reaching public interest, was suspected by none other than Dr. B.R. Ambedkar, during the course of the Constituent Assembly debates, when he declined to accept the suggestions made by some Members of the Constituent Assembly, that the selection and appointment of Judges to the higher judiciary should be made with the "concurrence" of the Chief Justice of India, by observing, that even though the Chief Justice of India was a very eminent person, he was after all just a man with all the failings, all the sentiments, and all the prejudices, which common people have. And therefore, the Constituent Assembly did not leave it to the individual wisdom of the Chief Justice of India, but required consultation with a plurality of Judges, by including in the consultative process (at the discretion of the President of India), not only Judges of the Supreme Court of India, but also Judges of High Courts (in addition to the mandatory consultation with the Chief Justice of India). One would also ordinarily feel, that the President of India and/or the Prime Minister of India in the discharge of their onerous responsibilities in running the affairs of the country, practically all the time take decisions having far

reaching consequences, not only in the matter of internal affairs of the country on the domestic front, but also in the matter of international relations with other countries. One would expect, that vesting the authority of appointment of Judges to the higher judiciary with any one of them should not ordinarily be suspect of any impropriety. Yet, the Constituent Assembly did not allow any of them, any defined participatory role. In fact the debate in the Constituent Assembly, removed the participation of the political-executive component, because of fear of being impacted by "political-pressure" and "political considerations". Was the view of the Constituent Assembly, and the above noted distrust, legitimate?

160. A little personal research, resulted in the revelation of the concept of the "legitimate power of reciprocity", debated by Bertram Raven in his article – "The Bases of Power and the Power/Interaction Model of Interpersonal Influence" (this article appeared in Analyses of Social Issues and Public Policy, Vol. 8, No.1, 2008, pp. 1-22). In addition to having dealt with various psychological reasons which influenced the personality of an individual, reference was also made to the "legitimate power of reciprocity". It was pointed out, that the reciprocity norm envisaged, that if someone does something beneficial for another, the recipient would feel an obligation to reciprocate ("I helped you when you needed it, so you should feel obliged to do this for me." – Goranson and Berkowitz, 1966; Gouldner, 1960). In the view expressed by the author,

the inherent need of power, is universally available in the subconscious of the individual. On the satisfaction and achievement of the desired power, there is a similar unconscious desire to reciprocate the favour.

161. The psychological concept of the "legitimate power of reciprocity", was also highlighted by Dennis T. Regan of the Cornell University in his article – "Effects of a Favour and Liking on Compliance". It was pointed out, that there was sufficient evidence to establish, that favours do generate feelings of obligation, and the desire to reciprocate. According to the author, the available data suggested, that a favour would lead to reported feelings of obligation, on the part of its recipient.

162. In his book "Influence: The Psychology of Persuasion" – Robert Cialdini, Regent's Professor Emeritus of Psychology and Marketing at Arizona State University, in Chapter II titled – "Reciprocation", expressed the view, that "possibly one of the most potent compliance techniques, was the rule of reciprocation, which prompts one to repay, what someone has given to him. When a gift is extended, the recipient feels indebted to the giver, often feels uncomfortable with this indebtedness, and feels compelled to cancel the debt…often against his/her better judgment". It was pointed out, that the rule of reciprocation, was widespread across the human cultures, suggesting that it was fundamental to creating interdependencies on which societies, cultures, and civilizations were built. It was asserted, that in fact the rule of reciprocation assured, that someone who had given something away first, has a relative assurance,

that this initial gift will eventually be repaid. In the above view of the matter, nothing would be lost. Referring to Marcel Nauss, who had conducted a study on gift giving, it was emphasised, that "there is an obligation to give, an obligation to receive, and an obligation to repay". According to the author, it was in the above network of indebtedness, that the first giver could exploit the favour, and would rightfully assume the role of a compliance practitioner. And accordingly it was concluded, that although the obligation to repay constituted the essence of the reciprocity rule, it was the obligation to receive, that made the rule so easy to exploit. Describing the power of reciprocity, Cialdini in his article expressed, that the person who gives first remains, in control; and the person who was the recipient, always remained in debt. It is pointed out, that the above situation was often deliberately created, and psychologically maintained. It was also the view of the author, that the more valuable, substantial and helpful the original favour, the more indebted the recipient would continue to feel. In the above article, a reference was made to Alvin Gouldner, in whose opinion, there was no human society on earth, that does not follow the rule of reciprocity. Referring also to the views of the renowned cultural anthropologists – Lionel Tiger and Robin Fox, it was affirmed, that humans lived in a "web of indebtedness". Therefore it was felt, that reciprocity was a debt and a powerful psychological tool, which was all, but impossible to resist.

163. Under the constitutional scheme in place in the United States of America, federal Judges are nominated by the President, and confirmed by the Senate. The issue being debated, namely, the concept of "the legitimate power of reciprocity", therefore directly arises in the United States, in the matter of appointment of federal Judges. The first favour to the federal Judge is extended by the President, who nominates his name, and further favours are extended by one or more Member(s) of the Senate, with whose support the Judge believes he won the vote of confirmation. An article titled as "Loyalty, Gratitude, and the Federal Judiciary", written by Laura E. Little (Associate Professor of Law, Temple University School of Law, as far back as in 1995), deals with the issue in hand, pointedly with reference to appointment of Judges. The article reveals, that the issue of reciprocity has been a subject of conscious debate, with reference to the appointment of Judges for a substantial length of time. The conclusions drawn in the above article are relevant to the present controversy, and are being extracted hereunder:

"On the issue of impartiality, an individual undertaking a federal judgeship confronts a difficult task. Contemporary lawyers commonly agree that the law is not wholly the product of neutral principles and that a judge must choose among values as she shapes the law. Yet, the standards governing impartiality in federal courts largely assume that total judicial neutrality and dispassion are possible. The process of mapping out a personal framework for decisionmaking is therefore apt to create considerable discordance for the judge. Added to this burden are the special pulls of gratitude and loyalty toward the individuals who made possible the judge's job.

I have sought to show both that gratitude and loyalty can have a powerful influence for a federal judge undertaking to decide a case. The problem is complex because loyalty and gratitude pose a greater potential problem for some judges than for others. This complexity

emerges to a great degree from the process of nomination and confirmation, which often generates, or at least reinforces, a judge's sense of loyalty and gratitude to her benefactors.

In the last few years, we have witnessed a wave of dissatisfaction with the selection process for federal judges. Legal scholarship in particular has offered frequent critique and constructive suggestions for change. As it must, this scholarship recognizes that any change ventured must weigh the impact of nomination and confirmation on a number of segments of American life, including the constitutional balance of powers and public perception of the judiciary.

To omit from these concerns the effect of any change on the ultimate quality of judicial decisionmaking would, of course, be a mistake. Thus, in studying any new selection procedure, we must contemplate the procedure's potential for creating and invigorating a judge's feelings of loyalty and gratitude to her benefactors. The foregoing should, therefore, not only shed light on the process of federal court decisionmaking in general, but also give much needed guidance for evaluating proposed changes to judicial selection."

164. It is however pertinent to mention, that in her article, Laura E. Little has expressed, what most moral philosophers believed, that gratitude has significant moral components. And further, that gratitude has a ready place in utilitarian moral systems, which were designed to ensure the greatest good for the greatest number of individuals. The concept of gratitude was however intertwined with loyalty by Laura E. Little, as in her view, gratitude and loyalty, were closely related. A beneficiary could show gratitude to a benefactor, through an expression of loyalty. The point sought to be made was, that in understanding loyalty one understands, who we are in our friendships, loves, family bonds, national ties, and religious devotion. Insofar as the patterns of behaviour in the Indian cultural system is concerned, a child is always obligated to his parents for his upbringing, and it is the child's inbuilt moral obligation, to reciprocate to his parents by extending unimpeachable loyalty and

gratitude. The above position finds replication in relationships of teacher and taught, master and servant, and the like. In the existing Indian cultural scenario, an act of not reciprocating towards a benefactor, would more often than not, be treated as an act of grave moral deprivation. When the favour extended is as important as the position of judgeship in the higher judiciary, one would best leave it to individual imagination, to determine the enormity of the reciprocal gratitude and loyalty.

165. The consideration recorded hereinabove, endorses the view, that the political-executive, as far as possible, should not have a role in the ultimate/final selection and appointment of Judges to the higher judiciary. Specially keeping in mind the enormity of the participation of the political-executive, in actions of judicial adjudication. Reciprocity, and feelings of pay back to the political-executive, would be disastrous to "independence of the judiciary". In this, we are only reiterating the position adopted by Dr. B.R. Ambedkar. He feared, that with the participation of the political-executive, the selection of Judges, would be impacted by "political pressure" and "political considerations". His view, finds support from established behavioural patterns expressed by Psychologists. It is in this background, that it needs to be ensured, that the political-executive dispensation has the least nexus, with the process of finalization of appointments of Judges to the higher judiciary.

VI.

166. The jurisdictions that have to be dealt with, by Judges of the higher judiciary, are large and extensive. Within the above jurisdictions, there are a number of jurisdictions, in which the executive is essentially a fundamental party to the *lis*. This would *inter alia* include cases arising out of taxing statutes which have serious financial implications. The executive is singularly engaged in the exploitation of natural resources, often through private entrepreneurs. The sale of natural resources, which also, have massive financial ramifications, is often subject to judicial adjudication, wherein also, the executive is an indispensable party. Challenges arising out of orders passed by Tribunals of the nature of the Telecom Disputes Settlement & Appellate Tribunal and the Appellate Tribunal for Electricity, and the like, are also dealt with by the higher judiciary, where also the executive has a role. Herein also, there could be massive financial implications. The executive is also a necessary party in all matters relating to environmental issues, including appeals from the National Green Tribunals. Not only in all criminal matters, but also in high profile scams, which are no longer a rarity, the executive has an indispensable role. In these matters, sometimes accusations are levelled against former and incumbent Prime Ministers and Ministers of the Union Cabinet, and sometimes against former and incumbent Chief Ministers and Ministers of the State Cabinets. Even in the realm of employment issues, adjudication rendered by the Central Administrative Tribunal, and the Armed Forces Appellate Tribunal come up before the

Judges of the higher judiciary. These adjudications also sometimes include, high ranking administrators and armed forces personnel. Herein too, the executive is an essential constituent. This is only a miniscule part of the extensive involvement of the political-executive, in litigation before the higher judiciary.

167. Since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an *ex officio* Member of the NJAC, would be clearly questionable. In today's world, people are conscious and alive to the fact, that their rights should be adjudicated in consonance of the rules of natural justice. One of the rules of natural justice is, that the adjudicator should not be biased. This would mean, that he should neither entertain a prejudice against either party to a *lis*, nor should he be favourably inclined towards any of them. Another component of the rule of bias is, that the adjudicator should not have a conflict of interest, with the controversy he is to settle. When the present set of cases came up for consideration, a plea of conflict of interest was raised even against one of the presiding Judges on the Bench, which resulted in the recusal of Anil R. Dave, J. on 15.4.2015. A similar prayer was again made against one of us (J.S. Khehar, J.), on 21.4.2015, on the ground of conflict of interest. What needs to be highlighted is, that bias, prejudice, favour and conflict of interest are issues which repeatedly emerge. Judges are careful to avoid adjudication in such matters. Judges

are not on one or the other side of the adjudicatory process. The political-executive in contrast, in an overwhelming majority of cases, has a participatory role. In that sense, there would/could be an impact/effect, of a decision rendered one way or the other. A success or a defeat – a win or a loss. The plea of conflict of interest would be available against the executive, if it has a participatory role in the final selection and appointment of Judges, who are then to sit in judgment over matters, wherever the executive is an essential and mandatory party. The instant issue arose for consideration in the Madras Bar Association case[35]. In the above case a five-Judge Bench considered the legality of the participation of Secretaries of Departments of the Central Government in the selection and appointment of the Chairperson and Members of the National Tax Tribunal. On the above matter, this Court held, as under:

"131.Section 7 cannot even otherwise be considered to be constitutionally valid, since it includes in the process of selection and appointment of the Chairperson and Members of NTT, Secretaries of Departments of the Central Government. In this behalf, it would also be pertinent to mention that the interests of the Central Government would be represented on one side in every litigation before NTT. It is not possible to accept a party to a litigation can participate in the selection process whereby the Chairperson and Members of the adjudicatory body are selected…."

The position herein is no different. The Attorney General however attempted to distinguish the matter in hand, from the controversy decided in the cited case by asserting, that in cases adjudicated upon by the National Tax Tribunal the "…Central Government would be represented on one side in every litigation …" which is not the case before the higher judiciary. The rebuttal, clearly avoids the issue canvassed.

One would assume from the response, that the position was conceded to the extent of matters, where the executive was a party to the *lis*. But that itself would exclude the selected Judges from hearing a large majority of cases. One would therefore reject the response of the Union of India.

168. We are of the view, that consequent upon the participation of the Union Minister in charge of Law and Justice, a Judge approved for appointment with the Minister's support, may not be able to resist or repulse a plea of conflict of interest, raised by a litigant, in a matter when the executive has an adversarial role. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the *lis*. The above, would have the inevitable effect of undermining the "independence of the judiciary", even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an *ex officio* Member of the NJAC, would render the amended provision of Article 124A(1)(c) as *ultra vires* the Constitution, as it impinges on the principles of "independence of the judiciary" and "separation of powers".

VII.

169. The learned Attorney General had invited our attention to the manner in which judicial appointments were being made in fifteen countries. It was submitted, that in nine countries Judges were appointed either through a Judicial Appointments Commission, or through a Judicial Appointments Committee, or through a Judicial Appointments Council. It was highlighted, that in four countries, Judges were appointed directly by the executive, i.e., by the Governor General or the President. We were informed, that in one European country, Judges were nominated by the Minister of Justice and confirmed by the Parliamentary Committee. In the United States of America, Judges were appointed through a process of nomination by the President and confirmation by the Senate. It was highlighted, that in all the fifteen countries, the executive was the final determinative/appointing authority. And further that, in all the countries, the executive had a role to play in the selection and appointment of Judges. The foresaid factual position was brought to our notice for the singular purpose of demonstrating, that executive participation in the process of selection and appointment of Judges had not made the judiciary in any of the fifteen countries, subservient to the political-executive. It was asserted, that the countries referred to by him were in different continents of the world, and there was no complaint with reference to the "independence of the judiciary". The point sought to be driven home was, that the mere participation of the executive in the selection and appointment of Judges

to the higher judiciary, did not impinge upon the "independence of the judiciary".

170. The aforestated submission does not require an elaborate debate. Insofar as the instant aspect of the matter is concerned, as the same was examined in the Second Judges case, wherein S. Ratnavel Pandian, J., one of the Judges who passed a separate concurring order, supporting the majority view. He had rejected the submission of the nature advanced by the learned Attorney General, with the following observations:

"194. Nevertheless, we have, firstly to find out the ails from which our judicial system suffers; secondly to diagnose the root cause of those ailments under legalistic biopsies, thirdly to ascertain the nature of affliction on the system and finally to evolve a new method and strategy to treat and cure those ailments by administering and injecting a 'new invented medicine' (meaning thereby a newly-developed method and strategy) manufactured in terms of the formula under Indian pharmacopoeia (meaning thereby according to national problems in a mixed culture etc.) but not according to American or British pharmacopoeia which are alien to our Indian system though the system adopted in other countries may throw some light for the development of our system. The outcry of some of the critics is when the power of appointment of Judges in all democratic countries, far and wide, rests only with the executive, there is no substance in insisting that the primacy should be given to the opinion of the CJI in selection and appointment of candidates for judgeship. This proposition that we must copy and adopt the foreign method is a dry legal logic, which has to be rejected even on the short ground that the Constitution of India itself requires mandatory consultation with the CJI by the President before making the appointments to the superior judiciary. It has not been brought to our notice by any of the counsel for the respondents that in other countries the executive alone makes the appointments notwithstanding the existence of any existing similar constitutional provisions in their Constitutions."

171. Despite our having dealt with the submission canvassed at the hands of the learned Attorney General based on the system of appointment of Judges to the higher judiciary in fifteen countries, we

consider it expedient to delve further on the subject. During the hearing of the present controversy, a paper written in November 2008, by Nuno Garoupa and Tom Ginsburg of the Law School, University of Chicago, came to hand. The paper bore the caption – "Guarding the Guardians: Judicial Councils and Judicial Independence". The paper refers to comparative evidence, of the ongoing debate, about the selection and discipline of Judges. The article proclaims to aim at two objectives. Firstly, the theory of formation of Judicial Councils, and the dimensions on which they differ. And secondly, the extent to which different designs of Judicial Council, affect judicial quality. These two issues were considered as of extreme importance, as the same were determinative of the fact, whether Judges would be able to have an effective role in implementing social policy, as broadly conceived. It was observed, that Judicial Councils had come into existence to insulate the appointment, promotion and discipline of Judges from partisan political influence, and at the same time, to cater to some level of judicial accountability. It was the authors' view, that the Judicial Councils lie somewhere in between the polar extremes of letting Judges manage their own affairs, and the alternative of complete political-executive control of appointments, promotions and discipline.

172. According to the paper, France established the first High Council of the Judiciary in 1946. Italy's Judicial Council was created in 1958. Italy was the first to fully insulate the entire judiciary from political control. It

was asserted, that the Italian model was, thereupon, followed in other countries. The model established in Spain and Portugal comprised of a significant proportion of Members who were Judges. These models were established, after the fall of dictatorship in these countries. Councils created by these countries, are stated to be vested with, final decision making authority, in matters pertaining to judicial promotion, tenure and removal. According to the paper, the French model came into existence as a consequence of concerns about excessive politicization. Naturally, the process evolved into extensive independence of judicial power. Yet, judicial concern multiplied manifolds in the judiciary's attempt to give effect to the European Convention of Human Rights. And the judiciary's involvement in the process of judicial review, in the backdrop of surmounting political scandals. The paper describes the pattern in Italy to be similar. In Italy also, prominent scandals led to investigation of businessmen, politicians and bureaucrats (during the period from 1992 to 1997), which resulted in extensive judicial participation, in political activity. The composition of the Council in Italy, was accordingly altered in 2002, to increase the influence of the Parliament.

173. The paper noted, that the French-Italian models had been adopted in Latin America, and other developing countries. It was pointed out, that the World Bank and other similar multilateral donor agencies, insist upon Judicial Councils, to be associated with judicial reform, for enforcement of the rule of law. The Elements of European Statute on the

Judiciary, was considered as a refinement of the Judicial Council model. The perceived Supreme Council of Magistracy, requires that at least half of the Members are Judges, even though, some of the Members of the Supreme Council are drawn from the Parliament. It was the belief of the authors of the paper, that the motivating concern for adoption of the Supreme Councils, in the French-Italian tradition, was aimed at ensuring "independence of the judiciary" after periods of undemocratic rule. Perhaps because of concerns over structural problems, it was pointed out, that external accountability had emerged as a second goal for these Supreme Councils. Referring to the Germany, Austria and Netherlands models, it was asserted, that their Councils were limited to playing a role in selection (rather than promotion and discipline) of Judges. Referring to Dutch model, it was pointed out, that recent reforms were introduced to ensure more transparency and accountability.

174. It was also brought out, that Judicial Councils in civil law jurisdictions, had a nexus to the Supreme Court of the country. Referring to Costa Rica and Austria, it was brought out, that the Judicial Councils in these countries were a subordinate organ of the Supreme Court. In some countries like Brazil, Judicial Councils were independent bodies with constitutional status, while in others Judicial Councils governed the entire judiciary. And in some others, like Guatemala and Argentina, they only governed lower courts.

175. Referring to recruitment to the judiciary in common law countries, it was pointed out, that in the United Kingdom, the Constitutional Reform Act, 2005 created a Judicial Appointments Commission, which was responsible for appointments solely based on merit, had no executive participation. It was pointed out, that New Zealand and Australia were debating whether to follow the same. The above legislation, it was argued, postulated a statutory duty on Government Members, not to influence judicial decisions. And also, excluded the participation of the Lord Chancellor in all such activities, by transferring his functions to the President of the Courts of England and Wales, (formerly designated as Lord Chief Justice of England and Wales).

176. Referring to the American experience, it was noted, that concern over traditional methods of judicial selection (either by politicians or by election) had given way to "Merit Commissions" so as to base selection of Judges on merit. Merit Commissions, it was felt, were analogous to Judicial Councils. The system contemplated therein, was non-partisan. The Judicial Selection Commission comprised of judges, lawyers and political appointees.

177. Referring to the works of renowned jurists on the subject, it was sought to be concluded, that in today's world, there was a strong consensus, that of all the procedures, the merit plan insulated the judiciary from political pressure. In their remarks, emerging from the survey carried out by them, it was concluded, that it was impossible to

eliminate political pressure on the judiciary. Judicial Commissions/ Councils created in different countries were, in their view, measures to enhance judicial independence, and to minimize political influence. It was their view that once given independence, Judges were more useful for resolving a wider range of more important disputes, which were considered essential, given the fact that more and more tasks were now being assigned to the judiciary.

178. In analyzing the conclusions drawn in the article, one is constrained to conclude, that in the process of evolution of societies across the globe, the trend is to free the judiciary from executive and political control, and to incorporate a system of selection and appointment of Judges, based purely on merit. For it is only then, that the process of judicial review will effectively support nation building. In the subject matter, which falls for our consideration, it would be imperative for us, to keep in mind, the progression of the concepts of "independence of the judiciary" and "judicial review" were now being recognized the world over. The diminishing role of executive and political participation, on the matter of appointments to the higher judiciary, is an obvious reality. In recognition of the above trend, there cannot be any greater and further participation of the executive, than that which existed hitherto before. And in the Indian scenario, as is presently conceived, through the judgments rendered in the Second and Third Judges cases. It is therefore imperative to conclude, that the participation of the Union

Minister in charge of Law and Justice in the final determinative process vested in the NJAC, as also, the participation of the Prime Minister and the Leader of the Opposition in the Lok Sabha (and in case of there being none – the Leader of the single largest Opposition Party in the House of the People), in the selection of "eminent persons", would be a retrograde step, and cannot be accepted.

VIII.

179. The only component of the NJAC, which remains to be dealt with, is with reference to the two "eminent persons" required to be nominated to the NJAC. It is not necessary to detail the rival submissions on the instant aspect, as they have already been noticed extensively, hereinbefore.

180. We may proceed by accepting the undisputed position, that neither the impugned constitutional amendment, nor the NJAC Act postulate any positive qualification to be possessed by the two "eminent persons" to be nominated to the NJAC. These constitutional and legislative enactments do not even stipulate any negative disqualifications. It is therefore apparent, that the choice of the two "eminent persons" would depend on the free will of the nominating authorities. The question that arises for consideration is, whether it is just and appropriate to leave the issue, to the free will and choice, of the nominating authorities?

181. The response of the learned Attorney General was emphatic. Who could know better than the Prime Minister, the Chief Justice of India, or

the Leader of Opposition in the Lok Sabha (and when there is no such Leader of Opposition, then the Leader of the single largest Opposition Party in the Lok Sabha)? And he answered the same by himself, that if such high ranking constitutional authorities can be considered as being unaware, then no one in this country could be trusted, to be competent, to take a decision on the matter – neither the legislature, nor the executive, and not even the judiciary. The Attorney General then quipped – surely this Court would not set aside the impugned constitutional amendment, or the NJAC Act, on such a trivial issue. He also suggested, that we should await the outcome of the nominating authorities, and if this Court felt that a particular individual nominated to discharge the responsibility entrusted to him as an "eminent person" on the NJAC, was inappropriate or unacceptable or had no nexus with the responsibility required to be shouldered, then his appointment could be set aside.

182. Having given our thoughtful consideration to the matter, we are of the view, that the issue in hand is certainly not as trivial, as is sought to be made out. The two "eminent persons" comprise of 1/3rd strength of the NJAC, and double that of the political-executive component. We could understand the import of the submission, only after hearing learned counsel. The view emphatically expressed by the Attorney General was that the "eminent persons" had to be "lay persons" having no connection with the judiciary, or even to the profession of advocacy, perhaps individuals who may not have any law related academic qualification.

Mr. T.R. Andhyarujina, learned senior counsel who represented the State of Maharashtra, which had ratified the impugned constitutional amendment, had appeared to support the impugned constitutional amendment, as well as, the NJAC Act, expressed a diametrically opposite view. In his view, the "eminent persons" with reference to the NJAC, could only be picked out of, eminent lawyers, eminent jurists, and even retired Judges, or the like, having an insight to the working and functioning of the judicial system. It is therefore clear, that in the view of the learned senior counsel, the nominated "eminent persons" would have to be individuals, with a legal background, and certainly not lay persons, as was suggested by the learned Attorney General. We have recorded the submissions advanced by Mr. Dushyant A. Dave, learned senior counsel – the President of the Supreme Court Bar Association, who had addressed the Bench in his usual animated manner, with no holds barred. We solicited his view, whether it would be proper to consider the inclusion of the President of the Supreme Court Bar Association and/or the Chairman of the Bar Council of India, as *ex officio* Members of the NJAC in place of the two "eminent persons". His response was spontaneous "Please don't do that !!" and then after a short pause, "… that would be disastrous !!". Having examined the issue with the assistance of the most learned and eminent counsel, it is imperative to conclude, that the issue of description of the qualifications (– perhaps , also the disqualifications) of "eminent persons" is of utmost importance,

and cannot be left to the free will and choice of the nominating authorities, irrespective of the high constitutional positions held by them. Specially so, because the two "eminent persons" comprise of 1/3rd strength of the NJAC, and double that of the political-executive component, and as such, will have a supremely important role in the decision making process of the NJAC. We are therefore persuaded to accept, that Article 124A(1)(d) is liable to be set aside and struck down, for having not laid down the qualifications of eligibility for being nominated as "eminent persons", and for having left the same vague and undefined.

183. It is even otherwise difficult to appreciate the logic of including two "eminent persons", in the six-Member NJAC. If one was to go by the view expressed by the learned Attorney General, "eminent persons" had been included in the NJAC, to infuse inputs which were hitherto not available with the prevailing selection process, for appointment of Judges to the higher judiciary. Really a submission with all loose ends, and no clear meaning. He had canvassed, that they would be "lay persons" having no connection with the judiciary, or even with the profession of advocacy, perhaps individuals who did not even have any law related academic qualification. It is difficult to appreciate what inputs the "eminent persons", satisfying the qualification depicted by the learned Attorney General, would render in the matter of selection and appointment of Judges to the higher judiciary. The absurdity of including two "eminent

persons" on the NJAC, can perhaps be appreciated if one were to visualize the participation of such "lay persons", in the selection of the Comptroller and Auditor-General, the Chairman and Members of the Finance Commission, the Chairman and Members of the Union Public Service Commission, the Chief Election Commissioner and the Election Commissioners and the like. The position would be disastrous. In our considered view, it is imprudent to ape a system prevalent in an advanced country, with an evolved civil society.

184. The sensitivity of selecting Judges is so enormous, and the consequences of making inappropriate appointments so dangerous, that if those involved in the process of selection and appointment of Judges to the higher judiciary, make wrongful selections, it may well lead the nation into a chaos of sorts. The role of "eminent persons" cannot be appreciated in the manner expressed through the impugned constitutional amendment and legislative enactment. At best, to start with, one or more "eminent persons" (perhaps even a committee of "eminent persons"), can be assigned an advisory/consultative role, by allowing them to express their opinion about the nominees under consideration. Perhaps, under the judicial component of the selection process. And possibly, comprising of eminent lawyers, eminent jurists, and even retired Judges, or the like having an insight to the working and functioning of the judicial system. And by ensuring, that the participants have no conflict of interest. Obviously, the final selecting body would not

be bound by the opinion experienced, but would be obliged to keep the opinion tendered in mind, while finalizing the names of the nominated candidates.

185. It is also difficult to appreciate the wisdom of the Parliament, to introduce two lay persons, in the process of selection and appointment of Judges to the higher judiciary, and to simultaneously vest with them a power of veto. The second proviso under Section 5(2), and Section 6(6) of the NJAC Act, clearly mandate, that a person nominated to be considered for appointment as a Judge of the Supreme Court, and persons being considered for appointment as Chief Justices and Judges of High Courts, cannot be appointed, if any two Members of the NJAC do not agree to the proposal. In the scheme of the selection process of Judges to the higher judiciary, contemplated under the impugned constitutional amendment read with the NJAC Act, the two "eminent persons" are sufficiently empowered to reject all recommendations, just by themselves. Not just that, the two "eminent persons" would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would obviously include the power to reject, the unanimous recommendation of the entire judicial component of the NJAC. In our considered view, the vesting of such authority in the "eminent persons", is clearly unsustainable, in the scheme of "independence of the judiciary". Vesting of such authority on persons who have no nexus to the system of administration of justice is clearly

arbitrary, and we hold it to be so. The inclusion of "eminent persons", as already concluded above (refer to paragraph 156), would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). For the reasons recorded hereinabove, it is apparent, that Article 124A(1)(d) is liable to be set aside and struck down as being violative of the "basic structure" of the Constitution.

IX.

186. During the course of hearing, the learned Attorney General, made some references to past appointments to the Supreme Court, so as to trumpet the accusation, that the "collegium system" had not functioned efficiently, inasmuch as, persons of the nature referred to by him, came to be selected and appointed as Judges of the Supreme Court. In a manner as would be in tune with the dignity of this Court, he had not referred to any of the Judge(s) by name. His reference was by deeds. Each and every individual present in the Court-hall, was aware of the identity of the concerned Judge, in the manner the submissions were advanced. The projection by the learned Attorney General was joyfully projected by the print and electronic media, extensively highlighting the allusions canvassed by the learned Attorney General.

187. If our memory serves us right, the learned Attorney General had made a reference to the improper appointment of three Judges to the Supreme Court. One would have felt, without going into the merits of the

charge, that finding fault with just three Judges, despite the appointment of over a hundred Judges to the Supreme Court, since the implementation of the judgment rendered in the Second Judges case (pronounced on 6.10.1993) – M.K. Mukherjee, J., being the first Judge appointed under the "collegium system" on 14.12.1993, and B.N. Kirpal, CJ., the first Chief Justice thereunder, having been appointed as Judge of the Supreme Court on 11.9.1995, under the "collegium system", should be considered as no mean achievement.

188. The first on the list of the learned Attorney General was a Judge who, according to him, had hardly delivered any judgments, both during the period he remained a Judge and Chief Justice of different High Courts in the country, as also, the period during which he remained a Judge of this Court. The failure of the "collegium system", was attributed to the fact, that such a person would have been weeded out, if a meaningful procedure had been in place. And despite his above disposition, the concerned Judge was further elevated to the Supreme Court. The second instance cited by him was, in respect of a Judge, who did not abide by any time schedule. It was asserted, that the Judge, was inevitably late in commencing court proceedings. It was his contention, that past experience with reference to the said Judge, indicated a similar demeanour, as a Judge of different High Courts and as Chief Justice of one High Court. It was lamented, that the above behaviour was not sufficient, in the process adopted under the "collegium system", to reject

the Judge from elevation to the Supreme Court. The third Judge was described as an individual, who was habitually tweeting his views, on the internet. He described him as an individual unworthy of the exalted position of a Judge of the Supreme Court, and yet, the "collegium system" had supported his appointment to the Supreme Court.

189. Just as it was impossible to overlook a submission advanced by the Attorney General, so also, it would be improper to leave out submissions advanced on a similar note, by none other than the President of the Supreme Court Bar Association. Insofar as Mr. Dushyant A. Dave, Senior Advocate, is concerned, his pointed assertion of wrongful appointments included a reference to a Judge of this Court, who had allegedly taken on his board a case, which was not assigned to his roster. It was alleged, that he had disposed of the case wrongfully. Before, we dwell on the above contention, it is necessary to notice, that the charge leveled, does not relate to an allegedly improper selection and appointment. The accusation is limited to a wrongful determination of "one" case. Insofar as the instant aspect of the matter is concerned, it is necessary for us to notice, that a review petition came to be filed against the alleged improper order, passed by the said Judge. The same was dismissed. After the Judge demitted office, a curative petition was filed, wherein the alleged improper order passed by the concerned Judge, was assailed. The same was also dismissed. Even thereafter, a petition was filed against the concerned Judge, by impleading him as a party-respondent. The said

petition was also dismissed. We need to say no more, than what has been observed hereinabove, with reference to the particular case, allegedly wrongly decided by the concerned Judge.

190. It is imperative for us, while taking into consideration the submissions advanced by the learned Attorney General, to highlight, that the role of appointment of Judges in consonance with the judgment rendered in the Second Judges case, envisages the dual participation of the members of the judiciary, as also, the members of the executive. Details in this behalf have been recorded by us in the "Reference Order". And therefore, in case of any failure, it is not only the judicial component, but also the executive component, which are jointly and equally responsible. Therefore, to single out the judiciary for criticism, may not be a rightful reflection of the matter.

191. It is not within our realm to express our agreement or disagreement with the contentions advanced at the hands of the learned Attorney General. He may well be right in his own perception, but the misgivings pointed out by him may not be of much significance in the perception of others, specially those who fully appreciate the working of the judicial system. The misgivings pointed out by the learned Attorney General, need to be viewed in the background of the following considerations:

Firstly, the allegations levelled against the Judges in question, do not depict any lack of ability in the discharge of judicial responsibility. Surely, that is the main consideration to be taken into account, at the

time of selection and appointment of an individual, as a Judge at the level of the higher judiciary.

Secondly, none of the misgivings expressed on behalf of the respondents, are referable to integrity and misdemeanor. Another aspect, which cannot be compromised, at the time of selection of an individual, as a Judge at the level of the higher judiciary. Nothing wrong at this front also.

Thirdly, not in a single of the instances referred to above, the political-executive had objected to the elevation of the Judges referred to. We say so, because on our asking, we were furnished with the details of those who had been elevated, despite objections at the hands of the Union-executive. None of the Judges referred to, figured in that list.

Fourthly, no allegation whatsoever was made by the Attorney General, with reference to Judges, against whom objections were raised by the political-executive, and yet, they were appointed at the insistence of the Chief Justice, under the "collegium system".

Fifthly, that the political-executive disposition, despite the allegations levelled by the learned Attorney General, chose to grant post-retirement assignments, to three of the four instances referred to, during the course of hearing. A post-retirement assignment was also allowed by the political-executive, to the Judge referred to by Mr. Dushyant A. Dave. In the above factual scenario, either the learned Attorney General had got it all wrong. And if he is right, the political-executive got it all wrong, because it faltered despite being aware of the factual position highlighted.

Lastly, it has not been possible for us to comprehend, how and why, a Judge who commenced to tweet his views after his retirement, can be considered to be unworthy of elevation. The fact that the concerned Judge started tweeting his views after his retirement, is not in dispute. The inclusion of this instance may well demonstrate, that all in all, the functioning of the "collegium system" may well not be as bad as it is shown to be.

192. The submissions advanced by Mr. Dushyant A. Dave were not limited just to the instance of a Judge of the Supreme Court. He expressed strong views about persons like Maya Kodnani, a former Gujarat Minister, convicted in a riots case, for having been granted relief, while an allegedly renowned activist Teesta Setalvad, had to run from pillar to post, to get anticipatory bail. He also made a reference to convicted politicians and film stars, who had been granted relief by two different High Courts, as also by this Court. It was his lament, that whilst film stars and politicians were being granted immediate relief by the higher judiciary, commoners suffered for years. He attributed all this, to the defective selection process in vogue, which had resulted in the appointment of "bad Judges". He repeatedly emphasized, that victims of the 1984 anti-Sikh riots in Delhi, and the 2002 anti-Muslim riots in Gujarat, had not got any justice. It was his contention, that Judges selected and appointed through the process presently in vogue, were to blame. He also expressed the view, that the appointed Judges were

oblivious of violations of human rights. It was submitted, that it was shameful, that courts of law could not deliver justice, to those whose fundamental and human rights had been violated.

193. It is necessary to emphasise, that under every system of law, there are two sides to every litigation. Only one of which succeeds. The question of how a matter has been decided would always be an issue of debate. The party, who succeeds, would feel justice had been done. While the party that loses, would complain that justice had been denied. In the judicial process, there are a set of remedies, that are available to the parties concerned. The process contemplates, culmination of proceedings at the level of the Supreme Court. Once the process has run the full circle, it is indeed futile to allege any wrong doing, except on the basis of adequate material to show otherwise. Not that, the Supreme Court is right, but that, there has to be a closure. Most of the instances, illustratively mentioned by the President of the Supreme Court Bar Association, pertained to criminal prosecutions. The adjudication of such controversies is dependent on the adequacy of evidence produced by the prosecution. The nature of the allegations (truthful, or otherwise), have an important bearing, on the interim relief(s) sought, by the parties. The blame for passing (or, not passing) the desired orders, does not therefore *per se,* rest on the will of the adjudicating Judge, but the quality and authenticity of the evidence produced, and the nature of the allegations. Once all remedies available stand exhausted, it does not lie in the mouth

of either the litigant, or the concerned counsel to imply motives, without placing on record any further material. It also needs to be recorded, that while making the insinuations, learned senior counsel, did not make a pointed reference to any High Court Judge by name, nor was it possible for us to identify any such Judge, merely on the basis of the submissions advanced, unlike the instances with reference to Judges of the Supreme Court. In the above view of the matter, it is not possible for us to infer, that there are serious infirmities in the matter of selection and appointment of Judges to the higher judiciary, under the prevailing "collegium system", on the basis of the submissions advanced before us.

194. It is apparent that learned counsel had their say, without any limitations. That was essential, to appreciate the misgivings in the prevailing procedure of selection and appointment of Judges to the higher judiciary. We have also recorded all the submissions (hopefully) in terms of the contentions advanced, even in the absence of supporting pleadings. We will be failing in discharging our responsibility, if we do not refer to the parting words of Mr. Dushyant A. Dave – the President of the Supreme Court Bar Association, who having regained his breath after his outburst, did finally concede, that still a majority of the Judges appointed to the High Courts and the Supreme Court, were/are outstanding, and a miniscule minority were "bad Judges". All in all, a substantial emotional variation, from how he had commenced. One can only conclude by observing, that individual failings of men who are

involved in the actual functioning of the executive, the legislature and the judiciary, do not necessarily lead to the inference, that the system which selects them, and assigns to them their role, is defective.

x.

195. It must remain in our minds, that the Indian Constitution is an organic document of governance, which needs to change with the evolution of civil society. We have already concluded, that for far more reasons than the ones, recorded in the Second Judges case, the term "consultation", referred to selection of Judges to the higher judiciary, really meant, even in the wisdom of the framers of the Constitution, that primacy in the matter, must remain with the Chief Justice of India (arrived at, in consultation with a plurality of Judges). Undoubtedly, it is open to the Parliament, while exercising its power under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of "separation of powers" and "independence of the judiciary", which are "core" components of the "basic structure" of the Constitution, are maintained.

196. That, however, will depend upon the standards of the moral fiber of the Indian polity. It cannot be overlooked, that the learned Attorney General had conceded, that there were certain political upheavals, which

had undermined the "independence of the judiciary", including an executive overreach, at the time of appointment of the Chief Justice of India in 1973, followed by the mass transfer of Judges of the higher judiciary during the emergency in 1976, and thereafter a second supersession, at the time of appointment of another Chief Justice of India in 1977. And further, the interference by the executive, in the matter of appointment of Judges to the higher judiciary during the 1980's.

197. An important issue, that will need determination, before the organic structure of the Constitution is altered, in the manner contemplated by the impugned constitutional amendment, would be, whether the civil society, has been able to maneuver its leaders, towards national interest? And whether, the strength of the civil society, is of a magnitude, as would be a deterrent for any overreach, by any of the pillars of governance? At the present juncture, it seems difficult to repose faith and confidence in the civil society, to play any effective role in that direction. For the simple reason, that it is not yet sufficiently motivated, nor adequately determined, to be in a position to act as a directional deterrent, for the political-executive establishment. It is therefore, that the higher judiciary, which is the savior of the fundamental rights of the citizens of this country, by virtue of the constitutional responsibility assigned to it under Articles 32 and 226, must continue to act as the protector of the civil society. This would necessarily contemplate the obligation of preserving the "rule of law", by forestalling the political-executive, from

transgressing the limits of their authority as envisaged by the Constitution.

198. Lest one is accused of having recorded any sweeping inferences, it will be necessary to record the reasons, for the above conclusion. The Indian Express, on 18.6.2015, published an interview with L.K. Advani, a veteran BJP Member of Parliament in the Lok Sabha, under the caption "Ahead of the 40th anniversary of the imposition of the Emergency on 25.6.1975". His views were dreadfully revealing. In his opinion, forces that could crush democracy, were now stronger than ever before. He asserted, "I do not think anything has been done that gives me the assurance that civil liberties will not be suspended or destroyed again. Not at all"!! It was also his position, that the emergency could happen again. While acknowledging, that the media today was more alert and independent, as compared to what it was, when emergency was declared by the then Prime Minister Indira Gandhi, forty years ago. In his perception, the media did not have any real commitment to democracy and civil liberties. With reference to the civil society, he pointed out, that hopes were raised during the Anna Hazare mobilization against corruption, which according to him, ended in a disappointment, even with reference to the subject of corruption. This when the poor and downtrodden majority of this country, can ill afford corruption. Of the various institutions, that could be held responsible, for the well

functioning of democracy in this country, he expressed, that the judiciary was more responsible than the other institutions.

199. On the above interview, Mani Shankar Aiyar, a veteran Congress Member of Parliament in the Rajya Sabha, while expressing his views noticed, that India could not be "emergency proof", till the Constitution provided for the declaration of emergency, at the discretion of an elected Government. He pointed out, that it should not be forgotten, that in 1975, emergency had been declared within the framework of the Constitution. It was therefore suggested, that one of the solutions to avoid a declaration of emergency could be, to remove Part XVIII of the Constitution, or to amend it, and "to provide for only an external emergency". He however raised a poser, whether it would be practical to do so? One would venture to answer the same in the negative. And in such situation, to trust, that the elected Government would act in the interest of the nation.

200. The stance of L.K. Advani was affirmed by Sitaram Yechury, a veteran CPI (Marxist) Member of Parliament in the Rajya Sabha, who was arrested, like L.K. Advani, during the emergency in 1975.

201. The present N.D.A. Government was sworn in, on 26.5.2014. One believes, that thereafter thirteen Governors of different States and one Lieutenant Governor of a Union Territory tendered their resignations in no time. Some of the Governors demitted their office shortly after they were appointed, by the previous U.P.A. – dispensation. That is despite

the fact, that a Governor under the Constitutional mandate of Article 156(3) has a term of five years, from the date he enters upon his office. A Governor is chosen out of persons having professional excellence and/or personal acclaim. Each one of them, would be eligible to be nominated as an "eminent person" under Article 124A(1)(d). One wonders, whether all these resignations were voluntary. The above depiction is not to cast any aspersion. As a matter of fact, its predecessor – the U.P.A. Government, had done just that in 2004.

202. It is necessary to appreciate, that the Constitution does not envisage the "spoils system" (also known as the "patronage system"), wherein the political party which wins an election, gives Government positions to its supporters, friends and relatives, as a reward for working towards victory, and as an incentive to keep the party in power.

203. It is also relevant to indicate, the images of the "spoils system" are reflected from the fact, that a large number of persons holding high positions, in institutions of significance, likewise resigned from their assignments, after the present N.D.A. Government was sworn in. Some of them had just a few months before their tenure would expire – and some, even less than a month. Those who left included bureaucrats from the All India Services occupying coveted positions at the highest level, Directors/Chairmen of academic institutions of national acclaim, constitutional authorities (other than Governors), Directors/Chairmen of National Research Institutions, and the like. Seriously, the instant

narration is not aimed at vilification, but of appreciation of the ground reality, how the system actually works.

204. From the above, is one to understand, that all these individuals were rank favorites, approved by the predecessor political-executive establishment? Or, were the best not chosen to fill the slot by the previous dispensation? Could it be, that those who get to hold the reins of Government, introduce their favourites? Or, whether the existing incumbents, deserved just that? Could it be, that just like its predecessor, the present political establishment has now appointed its rank favourites? What emerges is, trappings of the spoils system, and nothing else. None of the above parameters, can be adopted in the matter of appointment of Judges to the higher judiciary. For the judiciary, the best out of those available have to be chosen. Considerations cannot be varied, with a change in Government. Demonstrably, that is exactly what has happened (repeatedly?), in the matter of non-judicial appointments. It would be of utmost importance therefore, to shield judicial appointments, from any political-executive interference, to preserve the "independence of the judiciary", from the regime of the spoils system. Preserving primacy in the judiciary, in the matter of selection and appointment of Judges to the, higher judiciary would be a safe way to do so.

205. In conclusion, it is difficult to hold, in view of the factual position expressed above, that the wisdom of appointment of Judges, can be

shared with the political-executive. In India, the organic development of civil society, has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it absolutely insulated and independent, from the other organs of governance. In our considered view, the present status of the evolution of the "civil society" in India, does not augur the participation of the political-executive establishment, in the selection and appointment of Judges to the higher judiciary, or in the matter of transfer of Chief Justices and Judges of one High Court, to another.

XI.

206. It may be noticed, that one of the contentions advanced on behalf of the petitioners was, that after the 121st Constitution Amendment Bill was passed by the Lok Sabha and the Rajya Sabha, it was sent to the State Legislatures for ratification. Consequent upon the ratification by the State Legislatures, in compliance of the mandate contained in Article 368, the President granted his assent to the same on 31.12.2014, whereupon it came to be enacted as the Constitution (99th Amendment) Act. Section 1(2) thereof provides, that the provisions of the amendment, would come into force from such date as may be notified by the Central Government, in the Official Gazette. And consequent upon the issuance of the above notification, the amendment was brought into force, through a notification, with effect from 13.4.2015. It was the submission of the

petitioners, that the jurisdiction to enact the NJAC Act, was acquired by the Parliament on 13.4.2015, for the simple reason, that the same could not have been enacted whilst the prevailing Articles 124(2) and 217(1) were in force, as the same, did not provide for appointments to be made by a body such as the NJAC. It was submitted, that the NJAC Act was promulgated, to delineate the procedure to be followed by the NJAC while recommending appointments of Judges and Chief Justices, to the higher judiciary. It was contended, that procedure to be followed by the NJAC could not have been legislated upon by the Parliament, till the Constitution was amended, and the NJAC was created, as a constitutional entity for the selection and appointment (as also, transfer) of Judges at the level of the higher judiciary. The NJAC, it was asserted, must be deemed to have been created, only when the Constitution (99th Amendment) Act, was brought into force, with effect from 13.4.2015. It was submitted, that the NJAC Act received the assent of the President on 31.12.2014 i.e., on a date when the NJAC had not yet come into existence. For this, learned counsel had placed reliance on the A.K. Roy case[49], to contend, that the constitutional amendment in the instant case would not come into force on 13.12.2014, but on 13.4.2015.

207. A complementary additional submission was advanced on behalf of the petitioners, by relying upon the same sequence of facts. It was contended, that the power of veto vested in two Members of the NJAC, through the second proviso under Section 5(2) of the NJAC Act (in the

matter of appointment of the Chief Justice and Judges of the Supreme Court), and Section 6(6) of the NJAC Act (in the matter of appointment of Chief Justices and Judges of High Courts) could not be described as laying down any procedure. It was submitted, that the above provisions clearly enacted substantive law. Likewise, it was contended, that the amendment of the words "after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary for the purpose", on being substituted by the words "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A", as also, the deletion of the first proviso under Article 124(2) which mandated consultation with the Chief Justice of India, and the substitution of the same with the words, "on the recommendation of the National Judicial Appointments Commission referred to under Article 124A", would result in the introduction of an absolutely new regimen. It was submitted, that such substitution would also amount to an amendment of the existing provisions of the Constitution, and as such, the same would also require the postulated ratification provided in respect of a constitutional amendment, under the proviso to Article 368(2). And since the NJAC Act, had been enacted as an ordinary legislation, the same was liable to be held as *non est* on account of the fact, that the procedure contemplated under Article 368, postulated for an amendment to the Constitution, had not been followed.

208. Since it was not disputed, that the Parliament had indeed enacted Rules of Procedure and the Conduct of Business of Lok Sabha under Article 118, which contained Rule 66 postulating, that a Bill which was dependent wholly or partly on another Bill could be "introduced" in anticipation of the passing of the Bill, on which it was dependent. Leading to the inference, that the 121st Constitution Amendment Bill, on which the NJAC Bill was dependent, could be taken up for consideration (by introducing the same in the Parliament), but could not have been passed till after the passing of the Constitution (99th Amendment) Act, on which it was dependent.

209. Whilst there can be no doubt, that viewed in the above perspective, we may have unhesitatingly accepted the above submission, and in fact the same was conceded by the Attorney General to the effect, that the dependent Bill can "... be taken up for consideration and passing in the House, only after the first Bill has been passed by the House...". But our attention was invited by the Attorney General to Rule 388, which authorises the Speaker to allow the suspension, of a particular rule (which would include Rule 66). If Rule 66 could be suspended, then Rule 66 would not have the impact, which the petitioners seek through the instant submission. It is not a matter of dispute, that the then Union Minister in charge of Law and Justice had sought (under Rule 388 of the Rules of Procedure and Conduct of Business of the Lok Sabha) the suspension of the proviso to Rule 66. And on due consideration, the Lok

Sabha had suspended the proviso to Rule 66, and had taken up the NJAC Bill for consideration. Since the validity of Rule 388 is not subject matter of challenge before us, it is apparent, that it was well within the competence of the Parliament, to have taken up for consideration the NJAC Act, whilst the Constitution (121st Amendment) Bill, on which the NJAC Act was fully dependent, had still not been passed, in anticipation of the passing of the Constitution (121st Amendment) Bill.

210. The principle contained in Rule 66, even if the said rule had not been provided for, would always be deemed to have been impliedly there. In the absence of a foundation, no superstructure can be raised. The instant illustration is relateable to Rule 66, wherein the pending Bill would constitute the foundation, and the Bill being introduced in anticipation of the passing of the pending Bill, would constitute the superstructure. Therefore, in the absence of the foundational Bill (-in the instant case, the 121st Constitution Amendment Bill), there could be no question of raising the infrastructure (-in the instant case, the NJAC Act). In our considered view, it was possible in terms of Rule 388, to introduce and pass a Bill in the Parliament, in anticipation of the passing of the dependent Bill – the Constitution (121st Amendment) Bill. But, it is still not possible to contemplate, that a Bill which is dependent wholly (or, in part) upon another Bill, can be passed and brought into operation, till the dependent Bill is passed and brought into effect.

211. It is however necessary to record, that even though the position postulated in the preceding paragraphs, as canvassed by the Attorney General, was permissible, the passing of the dependent enactment i.e., the NJAC Bill, could not have been given effect to, till the foundational enactment had become operational. In the instant case, the NJAC Act, would have failed the test, if it was given effect to, from a date prior to the date on which, the provisions of the enactment on which it was dependent – the Constitution (99th Amendment) Act, became functional. In other words, the NJAC Act, would be stillborn, if the dependent provisions, introduced by way of a constitutional amendment, were yet to come into force. Stated differently, the contravention of the principle contemplated in Rule 66, could not have been overlooked, despite the suspension of the said rule, and the dependent enactment could not come into force, before the depending/controlling provision became operational. The sequence of facts narrated hereinabove reveals, that the dependent and depending provisions, were brought into force simultaneously on the same date, i.e., on 13.4.2015. It is therefore apparent, that the foundation – the Constitution (99th Amendment) Act, was in place, when the superstructure – the NJAC Act, was raised. Thus viewed, we are satisfied, that the procedure adopted by the Parliament at the time of putting to vote the NJAC Bill, or the date on which the NJAC Act received the assent of the President, cannot invalidate the enactment of the NJAC Act, as suggested by the learned counsel for the petitioners.

212. One is also persuaded to accept the contention advanced by the learned Attorney General, that the validity of any proceeding, in Parliament, cannot be assailed on the ground of irregularity of procedure, in view of the protection contemplated through Article 122. Whilst accepting the instant contention, of the learned Attorney General, it is necessary for us to record, that in our considered view, the aforestated irregularity pointed out by the learned counsel, would be completely beyond the purview of challenge, specially because it was not the case of the petitioners, that the Parliament did not have the legislative competence to enact the NJAC Act. For the reasons recorded hereinabove, it is not possible for us to accept, that the NJAC Act was stillborn, or that it was liable to be set aside, for the reasons canvassed by the learned counsel for the petitioners.

213. It is also not possible for us to accept, that while enacting the NJAC Act, it was imperative for the Parliament to follow the procedure contemplated under Article 368. Insofar as the instant aspect of the matter is concerned, the Constitution (99th Amendment) Act, amended Articles 124 and 217 (as also, Articles 127, 128, 222, 224, 224A and 231), and Articles 124A to 124C were inserted in the Constitution. While engineering the above amendments, the procedural requirements contained in Article 368 were admittedly complied with. It is therefore apparent, that no procedural lapse was committed while enacting the Constitution (99th Amendment) Act. Article 124C, authorized the

Parliament to enact a legislation in the nature of the NJAC Act. This could validly be done, by following the procedure contemplated for an ordinary legislation. It is not disputed, that such procedure, as was contemplated for enacting an ordinary legislation, had indeed been followed by the Parliament, after the NJAC Bill was tabled in the Parliament, inasmuch as, both Houses of Parliament approved the NJAC Bill by the postulated majority, and thereupon, the same received the assent of the President on 31.12.2014. For the above reasons, the instant additional submission advanced by the petitioners, cannot also be acceded to, and is accordingly declined.

XII.

214. Mr. Mukul Rohatgi, learned Attorney General for India, repulsed the contentions advanced at the hands of the petitioners, that *vires* of the provisions of the NJAC Act, could be challenged, on the ground of being violative of the "basic structure" of the Constitution.

215. The first and foremost contention advanced, at the hands of the learned Attorney General was, that the constitutional validity of an amendment to the Constitution, could only be assailed on the basis of being violative of the "basic structure" of the Constitution. Additionally it was submitted, that an ordinary legislative enactment (like the NJAC Act), could only be assailed on the grounds of lack of legislative competence and/or the violation of Article 13 of the Constitution. Inasmuch as, the State cannot enact laws, which take away or abridge

rights conferred in Part III of the Constitution, or are in violation of any other constitutional provision. It was acknowledged, that law made in contravention of the provisions contained in Part III of the Constitution, or of any other constitutional provision, to the extent of such contravention, would be void. Insofar as the instant aspect of the matter is concerned, the learned Attorney General, placed reliance on the Indira Nehru Gandhi case[56], State of Karnataka v. Union of India[88], and particularly to the following observations:

"238. Mr Sinha also contended that an ordinary law cannot go against the basic scheme or the fundamental backbone of the Centre-State relationship as enshrined in the Constitution. He put his argument in this respect in a very ingenious way because he felt difficulty in placing it in a direct manner by saying that an ordinary law cannot violate the basic structure of the Constitution. In the case of Smt Indira Nehru Gandhi v. Shri Raj Narain such an argument was expressedly rejected by this Court. We may rest content by referring to a passage from the judgment of our learned brother Chandrachud, J., … which runs thus:
"The constitutional amendments may, on the ratio of the Fundamental Rights case be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the Legislature as defined and specified in Chapter I, Part 11 of the Constitution and (2) it must not offend against the provisions of Articles 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features'— this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution."

[88] (1977) 4 SCC 608

The Court's attention was also drawn to Kuldip Nayar v. Union of India[89], wherein it was recorded:

"107. The basic structure theory imposes limitation on the power of Parliament to amend the Constitution. An amendment to the Constitution under Article 368 could be challenged on the ground of violation of the basic structure of the Constitution. An ordinary legislation cannot be so challenged. The challenge to a law made, within its legislative competence, by Parliament on the ground of violation of the basic structure of the Constitution is thus not available to the petitioners."

Last of all, learned Attorney General placed reliance on Ashoka Kumar Thakur v. Union of India[90], and referred to the following observations:

"116. For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution."

Based on the afore-quoted judgments, it was the assertion of the learned Attorney General, that the validity of a legislative enactment, i.e., an ordinary statute, could not be assailed on the ground, that the same was violative of the "basic structure" of the Constitution. It was therefore asserted, that reliance placed at the hands of the learned counsel, appearing for the petitioners, on the Madras Bar Association case[35], was not acceptable in law.

[89] (2006) 7 SCC 1
[90](2008) 6 SCC 1

216. The above contention, advanced by the learned Attorney General, has been repulsed. For this, in the first instance, reliance was placed on Public Services Tribunal Bar Association v. State of U.P.[91] In the instant judgment, it is seen from the observations recorded in paragraph 26, that this Court concluded, that the constitutional validity of an ordinary legislation could be challenged on only two grounds, namely, for reasons of lack of legislative competence, and on account of violation of any fundamental rights guaranteed in Part III of the Constitution, or of any other constitutional provision. The above determination supports the contention advanced by the learned Attorney General, who seeks to imply from the above conclusion, that an ordinary legislation cannot be assailed on the ground of it being violative of the "basic structure" of the Constitution. Despite having held as above, in its final conclusion recorded in paragraph 44, it was observed as under:

"44. For the reasons stated above, we find that the State Legislature was competent to enact the impugned provisions. Further, that the provisions enacted are not arbitrary and therefore not violative of Articles 14, 16 or any other provisions of the Constitution. They are not against the basic structure of the Constitution of India either. Accordingly, we do not find any merit in these appeals and the same are dismissed with no order as to costs."

It was pointed out, that it was apparent, that even while determining the validity of an ordinary legislation, namely, the U.P. Public Services (Tribunals) Act, 1976, this Court in the aforestated judgment had examined, whether the provisions of the assailed legislation, were against the "basic structure" of the Constitution, and having done so, it had

[91] (2003) 4 SCC 104

rejected the contention. Thereby implying, that it was open for an aggrieved party to assail, even the provisions of an ordinary legislation, based on the concept of "basic structure". In addition to the above, reliance was placed on the Kuldip Nayar case[89] (also relied upon by the learned Attorney General), and whilst acknowledging the position recorded in the above judgment, that an ordinary legislation could not be challenged on the ground of violation of the "basic structure" of the Constitution, the Court, in paragraph 108, had observed thus:

"108. As stated above, "residence" is not the constitutional requirement and, therefore, the question of violation of basic structure does not arise."

It was submitted, that in the instant judgment also, this Court had independently examined, whether the legislative enactment in question, namely, the Representation of the People (Amendment) Act 40 of 2003, indeed violated the "basic structure" of the Constitution. And in so determining, concluded that the question of residence was not a constitutional requirement, and therefore, the question of violation of the "basic structure" did not arise. Learned counsel then placed reliance on the M. Nagaraj case[36], wherein it was concluded as under:

"124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

125. We have not examined the validity of individual enactments of appropriate States and that question will be gone into in individual writ petition by the appropriate Bench in accordance with law laid down by us in the present case."

217. It was submitted by Dr. Rajeev Dhavan, learned senior counsel, that this Court in the M. Nagaraj case[36], while upholding the constitutional validity of the impugned constitutional amendment, by testing the same by applying the "width test", extended the aforesaid concept to State legislations. It was accordingly sought to be inferred, that State legislations could be assailed, not only on the basis of the letter and text of constitutional provisions, but also, on the basis of the "width test", which was akin to a challenge raised to a legislative enactment based on the "basic structure" of the Constitution.

218. Reliance was then placed on Uttar Pradesh Power Corporation Limited v. Rajesh Kumar[92], wherein the issue under reference had been raised, as is apparent from the discussion in paragraph 61, which is extracted below:

"61. Dr. Rajeev Dhavan, learned senior Counsel, supporting the decision of the Division Bench which has declared the Rule as ultra vires, has submitted that if M. Nagaraj is properly read, it does clearly convey that social justice is an overreaching principle of the Constitution like secularism, democracy, reasonableness, social justice, etc. and it emphasises on the equality code and the parameters fixed by the Constitution Bench as the basic purpose is to bring in a state of balance but the said balance is destroyed by Section 3(7) of the 1994 Act and Rule 8-A inasmuch as no exercise has been undertaken during the post M. Nagaraj period. In M. Nagraj, there has been emphasis on interpretation and implementation, width and identity, essence of a right, the equality code and avoidance of reverse discrimination, the nuanced distinction between the adequacy and proportionality, backward class and backwardness, the concept of contest specificity as regards equal justice and efficiency, permissive nature of the provisions and conceptual essence of guided power, the implementation in concrete terms which would not cause violence to the constitutional mandate; and the effect of accelerated seniority and the conditions prevalent for satisfaction of the conditions precedent to invoke the settled principles."

[92] (2012) 7 SCC 1

The matter was adjudicated upon as under:

"86. We are of the firm view that a fresh exercise in the light of the judgment of the Constitution Bench in M. Nagaraj is a categorical imperative. The stand that the constitutional amendments have facilitated the reservation in promotion with consequential seniority and have given the stamp of approval to the Act and the Rules cannot withstand close scrutiny inasmuch as the Constitution Bench has clearly opined that Articles 16(4-A) and 16(4-B) are enabling provisions and the State can make provisions for the same on certain basis or foundation. The conditions precedent have not been satisfied. No exercise has been undertaken. What has been argued with vehemence is that it is not necessary as the concept of reservation in promotion was already in vogue. We are unable to accept the said submission, for when the provisions of the Constitution are treated valid with certain conditions or riders, it becomes incumbent on the part of the State to appreciate and apply the test so that its amendments can be tested and withstand the scrutiny on parameters laid down therein."

In addition to the above judgment, reliance was also placed on State of Bihar v. Bal Mukund Sah[93], wherein a Constitution Bench of this Court, while examining the power of the State legislature, to legislate on the subject of recruitment of District Judges and other judicial officers, placed reliance on the judgment rendered by this Court in the Kesavananda Bharati case[10], which took into consideration five of the declared "basic features" of the Constitution, and examined the subject matter in question, by applying the concept of "separation of powers" between the legislature, the executive and the judiciary, which was accepted as an essential feature of the "basic structure" of the Constitution. Finally, reliance was placed on Nawal Kishore Mishra v. High Court of Judicature of Allahabad[94], wherefrom reliance was placed on conclusion no. 20.11, which is extracted below:

[93] (2000) 4 SCC 640
[94] (2015) 5 SCC 479

"20.11 Any such attempt by the legislature would be forbidden by the constitutional scheme as that was found on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an independent judiciary as both the concepts having been elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme."

It was therefore the contention of the learned senior counsel, that it was not justified for the respondents to raise the contention, that the validity of the provisions of the NJAC Act could not be tested on the touchstone of the concept of the "basic structure" of the Constitution.

219. It needs to be highlighted, that the issue under reference arose on account of the fact, that learned counsel for the petitioners had placed reliance on the judgment of this Court, in the Madras Bar Association case[35], wherein this Court had examined the provisions of the National Tax Tribunal Act, 2005, and whilst doing so, had held the provisions of the above legislative enactment as *ultra vires* the provisions of the Constitution, on account of their being violative of the "basic structure" of the Constitution. It is therefore quite obvious, that the instant contention was raised, to prevent the learned counsel for the petitioners, from placing reliance on the conclusions recorded in the Madras Bar Association case[35].

220. We have given our thoughtful consideration to the above contentions. The "basic structure" of the Constitution, presently *inter alia* includes the supremacy of the Constitution, the republican and democratic form of Government, the "federal character" of distribution of powers, secularism, "separation of powers" between the legislature, the

executive, and the judiciary, and "independence of the judiciary". This Court, while carving out each of the above "basic features", placed reliance on one or more Articles of the Constitution (some times, in conjunction with the preamble of the Constitution). It goes without saying, that for carving out each of the "core" or "basic features/basic structure" of the Constitution, only the provisions of the Constitution are relied upon. It is therefore apparent, that the determination of the "basic features" or the "basic structure", is made exclusively from the provisions of the Constitution. Illustratively, we may advert to "independence of the judiciary" which has been chosen because of its having been discussed and debated during the present course of consideration. The deduction of the concept of "independence of the judiciary" emerged from a collective reading of Articles 12, 36 and 50. It is sometimes not possible, to deduce the concerned "basic structure" from a plain reading of the provisions of the Constitution. And at times, such a deduction is made, from the all-important silences hidden within those Articles, for instance, the "primacy of the judiciary" explained in the Samsher Singh case[11] the Sankalchand Himatlal Sheth case[5] and the Second Judges case, wherein this Court while interpreting Article 74 along with Articles 124, 217 and 222, in conjunction with the intent of the framers of the Constitution gathered from the Constituent Assembly debates, and the conventions adhered to by the political-executive authority in the matter of appointment and transfer of Judges of the higher judiciary, arrived at the

conclusion, that "primacy of the judiciary" was a constituent of the "independence of the judiciary" which was a "basic feature" of the Constitution. Therefore, when a plea is advanced raising a challenge on the basis of the violation of the "basic structure" with reference to the "independence of the judiciary", its rightful understanding is, and has to be, that Articles 12, 36 and 50 on the one hand, and Articles 124, 217 and 222 on the other, (read collectively and harmoniously) constitute the basis thereof. Clearly, the "basic structure" is truly a set of fundamental foundational principles, drawn from the provisions of the Constitution itself. These are not fanciful principles carved out by the judiciary, at its own. Therefore, if the conclusion drawn is, that the "independence of the judiciary" has been transgressed, it is to be understood, that rule/principle collectively emerging from the above provisions, had been breached, or that the above Articles read together, had been transgressed.

221. So far as the issue of examining the constitutional validity of an ordinary legislative enactment is concerned, all the constitutional provisions, on the basis whereof the concerned "basic feature" arises, are available. Breach of a single provision of the Constitution, would be sufficient to render the legislation, *ultra vires* the Constitution. In such view of the matter, it would be proper to accept a challenge based on constitutional validity, to refer to the particular Article(s), singularly or collectively, which the legislative enactment violates. And in cases where

the cumulative effect of a number of Articles of the Constitution is stated to have been violated, reference should be made to all the concerned Articles, including the preamble, if necessary. The issue is purely technical. Yet, if a challenge is raised to an ordinary legislative enactment based on the doctrine of "basic structure", the same cannot be treated to suffer from a legal infirmity. That would only be a technical flaw. That is how, it will be possible to explain the observations made by this Court, in the judgments relied upon by the learned counsel for the petitioners. Therefore, when a challenge is raised to a legislative enactment based on the cumulative effect of a number of Articles of the Constitution, it is not always necessary to refer to each of the concerned Articles, when a cumulative effect of the said Articles has already been determined, as constituting one of the "basic features" of the Constitution. Reference to the "basic structure", while dealing with an ordinary legislation, would obviate the necessity of recording the same conclusion, which has already been scripted while interpreting the Article(s) under reference, harmoniously. We would therefore reiterate, that the "basic structure" of the Constitution is inviolable, and as such, the Constitution cannot be amended so as to negate any "basic features" thereof, and so also, if a challenge is raised to an ordinary legislation based on one of the "basic features" of the Constitution, it would be valid to do so. If such a challenge is accepted, on the ground of violation of the "basic structure", it would mean that the bunch of Articles of the Constitution (including

the preamble thereof, wherever relevant), which constitute the particular "basic feature", had been violated. We must however credit the contention of the learned Attorney General by accepting, that it would be technically sound to refer to the Articles which are violated, when an ordinary legislation is sought to be struck down, as being *ultra vires* the provisions of the Constitution. But that would not lead to the inference, that to strike down an ordinary legislative enactment, as being violative of the "basic structure", would be wrong. We therefore find no merit in the contention advanced by the learned Attorney General, but for the technical aspect referred to hereinabove.

XIII.

222. Various challenges were raised to the different provisions of the NJAC Act. First and foremost, a challenge was raised to the manner of selection and appointment of the Chief Justice of India. Section 5(1) of the NJAC Act, it was submitted, provides that the NJAC would recommend the senior most Judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he is considered "fit" to hold the office. It was contended, that the Parliament had been authorized by law to regulate the procedure for the appointment of the Chief Justice of India, under Article 124C. It was submitted, that the NJAC should have been allowed to frame regulations, with reference to the manner of selection and appointment of Judges to the higher judiciary including the Chief Justice of India.

223. It was submitted, that the term "fit", expressed in Section 5(1) of the NJAC Act, had not been elaborately described. And as such, fitness would be determined on the subjective satisfaction of the Members of the NJAC. It was acknowledged, that even though the learned Attorney General had expressed, during the course of hearing, that fitness only meant "...mental and physical fitness...", a successor Attorney General may view the matter differently, just as the incumbent Attorney General has differed with the concession recorded on behalf of his predecessor (in the Third Judges case), even though they both represent the same ruling political party. And, it was always open to the Parliament to purposefully define the term "fit", in a manner which could sub-serve the will of the executive. It was pointed out, that even an ordinance could be issued without the necessity, of following the procedure of enacting law, to bring in a person of the choice of the political-executive. It was contended, that the criterion of fitness could be defined or redefined, as per the sweet will of the non-judicial authorities.

224. It was pointed out, that there was a constitutional convention, whereunder the senior most Judge of the Supreme Court, has always been appointed as Chief Justice of India. And that, the aforesaid convention had remained unbroken, even though in some cases the tenure of the appointee had been extremely short, and may not have enured to the advantage of the judiciary, as an institution. Experience had shown, according to learned counsel, that adhering to the practice of

appointing the senior most Judge as the Chief Justice of India, had resulted in institutional harmony and collegiality amongst Judges, which was extremely important for the health of the judiciary, and also, for the independence of the judiciary. It was submitted, that it would be just and appropriate, at the present juncture, to understand the width of the power, so as to prevent any likelihood of its misuse in future.

225. It was suggested, that various ways and means could be devised to supersede senior Judges, to bring in favourites. Past experience had shown, that the executive had abused its authority, when it departed from the above seniority rule in April 1973, by superseding J.M. Shelat, the senior most Judge, and even the next two Judges in the order of seniority after him, namely, K.S. Hegde and A.N. Grover, while appointing the fourth senior most Judge A.N Ray, as the Chief Justice of India. Again in January 1977 on the retirement of A.N. Ray, CJ., the senior most Judge H.R. Khanna, was ignored, and the next senior most Judge M.H. Beg, was appointed as the Chief Justice of India. Such control in the hands of the executive, according to learned counsel, would cause immense inroads in the decision making process. And could result in, Judges trying to placate and appease the political-executive segment, aimed at personal gains and rewards.

226. The submission noticed above, was sought to be illustrated through the following instance. It was contended, that it would be genuine and legitimate, for the Parliament to enact by law, that a person would be

considered "fit" for appointment as Chief Justice of India, only if he had a minimum left over tenure of two years. Such an enactment would have a devastating effect, even though it would appear to be innocuously legitimate. It was pointed out, that out of the 41 Chief Justices of India appointed till date, only 12 Chief Justices of India had a tenure of more than two years. If such action, as has been illustrated above, was to be taken at the hands of the Parliament, it was bound to cause discontent to those who had a legitimate expectation to hold the office of Chief Justice of India, under the seniority rule, which had been in place for all this while.

227. It was asserted, that the illustration portrayed in the foregoing paragraph, could be dimensionally altered, by prescribing different parameters, tailor-made for accommodating a favoured individual. It was submitted, that the Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice of India, as the office of the Chief Justice of India was pivotal, and shouldered extremely onerous responsibilities. The exercise of the above authority by the Parliament, it was pointed out, could/would seriously affect the "independence of the judiciary".

228. In the above context, reference was also made, to the opinion expressed by renowned persons, having vast experience in judicial institutions, effectively bringing out the veracity of the contention advanced. Reference in this regard was made to the observations of M.C.

Chagla, in his book, "Roses in December – An Autobiography", wherein he described the impact of supersession on Judges, who by virtue of the existing convention, were in line to be the Chief Justice of India, but were overlooked by preferring a junior. The position was expressed thus:

The effect of these supersessions was most deleterious on the judges of the Supreme Court who were in the line of succession to the Chief Justiceship. Each eyed the other with suspicion and tried to outdo him in proclaiming his loyalty to the Government either in their judgments or even on public platforms. If a judge owes his promotion to the favour of Government and not to his own intrinsic merit, then the independence of the judiciary is inevitably lost."

H.R. Khanna, J., (in his book – "Neither Roses Nor Thorns") expressed the position as under:

"A couple of days before the pronouncement of judgment the atmosphere of tension got aggravated because all kinds of rumours started circulating and the name of the successor of the Chief Justice was not being announced. The announcement came on the radio after the judgment was pronounced and it resulted in the supersession of the three senior judges.

I felt extremely perturbed because in my opinion it was bound to generate fear complex or hopes of reward and thus undermine the independence of the judiciary. Immediately on hearing the news I went to the residence of Justice Hegde. I found him somewhat tense, as anyone in that situation would be, but he was otherwise calm. He told me that he, as well as Justice Shelat and Justice Grover who had been superseded, were tendering their resignations.

After the resignation of Shelat, Hegde and Grover, the court acquired a new complexion and I found perceptible change in the atmosphere. Many things happened which made one unhappy and I thought the best course was to get engrossed in the disposal of judicial work. The judicial work had always an appeal for me and I found the exclusive attention paid to it to be rewarding as well as absorbing.

One of the new trends was the change in the approach of the court with a view to give tilt in favour of upholding the orders of the government. Under the cover of highsounding words like social justice the court passed orders, the effect of which was to unsettle settled principles and dilute or undo the dicta laid down in the earlier cases."

In this behalf, reference was also made to the observations of H.M. Seervai (in "Constitutional Law of India – A Critical Commentary"), which are as follows:

"In Sankalchand Sheth's Case, Bhagwati J. after explaining why the Chief Justice of India had to be consulted before a judge could be transferred to the High Court of another State, said: "I think it was Mr. Justice Jackson who said 'Judges are more often bribed by their ambition and loyalty rather than by money'... In my submission in quoting the above passage Bhagwati J. failed to realize that his only loyalty was to himself for, as will appear later, he was disloyal, inter alia, to his Chief, Chandrachud C.J. in order to fulfil his own ambition to be the Chief Justice of India as soon as possible. That Bhagwati J. was bribed by that ambition will be clear when I deal with his treatment in the Judges' Case of Chief Justice Chandrachud's part in the case of Justice Kumar and Singh C.J. It will interest the reader to know that the word "ambition" is derived from "ambit, canvass for votes.",... Whether Bhagwati J. canvassed the votes of one or more of his brother judges that they should disbelieve Chief Justice Chandrachud's affidavit in reply to the affidavit of Singh C.J. is not known; but had he succeeded in persuading one or more of his brother judges to disbelieve that affidavit, Chandrachud C.J. would have resigned,and Justice Bhagwati's ambition to be the next Chief Justice of India, would, in all probability, have been realised. However, his attempt to blacken the character and conduct of Chandrachud C.J. proved futile because 4 of his brother judges accepted and acted upon the Chief Justice's affidavit and held that the transfer of Singh C.J. to Madras was valid."

229. It was submitted, that leaving the issue of determination of fitness, with the Parliament, was liable to fan ambitions of Judges, and was likely to make the Judges loyal, to those who could satisfy their ambitions. It was therefore emphasized, that Section 5(1), which created an ambiguity, in the matter of appointment to the office of Chief Justice of India, had the trappings of being abused to imperil "independence of the judiciary", and therefore, could not be permitted to remain on the statute-book, irrespective of the assurance of the Attorney General, that for the purpose in hand, the term "fit" meant "... mental and physical fitness...".

230. It was also contended, that while recommending names for appointment of a Judge to the Supreme Court, the concerned Judges' seniority in the cadre of Judges (of High Courts), was liable to be taken as the primary consideration, coupled with his ability and merit. It was submitted, that the instant mandate contained in the first proviso under Section 5(2) of the NJAC Act, clearly breached the convention of regional representation in the Supreme Court. Since the "federal character", of distribution of powers, was also one of the recognized "basic structures", it was submitted, that regional representation could not have been overlooked.

231. Besides the above, the Court's attention was invited to the second proviso under Section 5(2), which forbids the NJAC from making a favourable recommendation, if any two Members thereof, opposed the nomination of a candidate. It was contended, that placing the power of veto, in the hands of two Members of the NJAC, would violate the recommendatory power expressed in Article 124B. In this behalf, it was contended, that the above position would entitle two "eminent persons"– lay persons (if the submission advanced by the learned Attorney General is to be accepted), to defeat a unanimous recommendation of the Chief Justice of India and the two senior most Judges of the Supreme Court. And would also, negate the primacy vested in the judiciary, in the matter of appointment of Judges, to the higher judiciary.

232. It was submitted, that the above power of veto exercisable by two lay persons, or alternatively one lay person, in conjunction with the Union Minister in charge of Law and Justice, would cause serious inroads into the "independence of the judiciary". Most importantly, it was contended, that neither the impugned constitutional amendment, nor the provisions of the NJAC Act, provided for any quorum for holding meetings of the NJAC. And as such, quite contrary to the contentions advanced at the hands of the learned Attorney General, a meeting of the NJAC could not be held, without the presence of the all Members of the NJAC. In order to support his above contention, he illustratively placed reliance on the Constitution (122nd Amendment) Bill, 2014 (brought before the Parliament, by the same ruling political party, which had amended the Constitution, by tabling the Constitution (121st Amendment) Bill, 2014. The objective sought to be achieved under the above Bill was, to insert a new Article 279A. The new Article 279A created the Goods and Services Tax Council. Sub-Article (7) of Article 279A postulates, that "... One-half of the total number of Members of the Goods and Services Tax Council..." would constitute the quorum for its meetings. And furthermore, that "... Every decision of the Goods and Services Tax Council would be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting ...". Having laid down the above parameters, in the Bill which followed the Bill, that led to the promulgation of the impugned

Constitution (99th Amendment) Act, it was submitted, that the omission of a quorum for the functioning of the NJAC, and the omission of quantifying the strength required for valid decision making, vitiated the provision itself.

233. The contention advanced at the hands of the learned counsel for the petitioners, as has been noticed in the foregoing paragraph, does not require any detailed examination, as the existing declared legal position, is clear and unambiguous. In this behalf, it may be recorded, that in case a statutory provision vests a decision making authority in a body of persons without stipulating the minimum quorum, then a valid meeting can be held only if the majority of all the members of the body, deliberate in the process of decision making. On the same analogy therefore, a valid decision by such a body will necessitate a decision by a simple majority of all the members of the body. If the aforesaid principles are made applicable to the NJAC, the natural outcome would be, that a valid meeting of the NJAC must have at least four Members participating in a six–Member NJAC. Likewise, a valid decision of the NJAC can only be taken (in the absence of any prescribed prerequisite), by a simple majority, namely, by at least four Members of the NJAC (three Members on either side, would not make up the simple majority). We are satisfied, that the provisions of the NJAC Act which mandate, that the NJAC would not make a recommendation in favour of a person for appointment as a Judge of the High Court or of the Supreme Court, if any two Members

thereof did not agree with such recommendation, cannot be considered to be in violation of the rule/principle expressed above. As a matter of fact, the NJAC Act expressly provides, that if any two Members thereof did not agree to any particular proposal, the NJAC would not make a recommendation. There is nothing in law, to consider or treat the aforesaid stipulations in the second proviso to Section 5(2) and Section 6(6) of the NJAC Act, as unacceptable. The instant submission advanced at the hands of the learned counsel for the petitioners is therefore liable to be rejected, and is accordingly rejected.

234. We have also given our thoughtful consideration to the other contentions advanced at the hands of the learned counsel for the petitioners, with reference to Section 5 of the NJAC Act. We are of the view, that it was not within the realm of Parliament, to subject the process of selection of Judges to the Supreme Court, as well as, to the position of Chief Justice of India, in uncertain and ambiguous terms. It was imperative to express, the clear parameters of the term "fit", with reference to the senior most Judge of the Supreme Court under Section 5 of the NJAC Act. We are satisfied, that the term "fit" can be tailor-made, to choose a candidate far below in the seniority list. This has been adequately demonstrated by the learned counsel for the petitioners.

235. The clear stance adopted by the learned Attorney General, that the term "fit" expressed in Section 5(1) of the NJAC Act, had been accepted by the Government, to mean and include, only "…mental and physical

fitness…", to discharge the onerous responsibilities of the office of Chief Justice of India, and nothing more. Such a statement cannot, and does not, bind successor Governments or the posterity for all times to come. The present wisdom, cannot bind future generations. And, it was exactly for this reason, that the respondents could resile from the statement made by the then Attorney General, before the Bench hearing the Third Judges case, that the Union of India was not seeking a review or reconsideration of the judgment in the Second Judges case (that, it had accepted to treat as binding, the decision in the Second Judges case). And yet, during the course of hearing of the present case, the Union of India did seek a reconsideration of the Second Judges case.

236. Insofar as the challenge to Section 5(1) of the NJAC Act is concerned, we are satisfied to affirm and crystalise the position adopted by the Attorney General, namely, that the term "fit" used in Section 5(1) would be read to mean only "… mental and physical fitness …". If that is done, it would be legal and constitutional. However, if the position adopted breached the "independence of the judiciary", in the manner suggested by the learned counsel for the petitioners, the same would be assailable in law.

237. We will now endeavour, to address the second submission with reference to Section 5 of the NJAC Act. Undoubtedly, postulating "seniority" in the first proviso under Section 5(2) of the NJAC Act, is a laudable objective. And if seniority is to be supplemented and enmeshed

with "ability and merit", the most ideal approach, can be seen to have been adopted. But what appears on paper, may sometimes not be correct in practice. Experience shows, that Judges to every High Court are appointed in batches, each batch may have just two or three appointees, or may sometimes have even ten or more individuals. A group of Judges appointed to one High Court, will be separated from the lot of Judges appointed to another High Court, by just a few days, or by just a few weeks, and sometimes by just a few months. In the all India seniority of Judges, the complete batch appointed on the same day, to one High Court, will be placed in a running serial order (in seniority) above the other Judges appointed to another High Court, just after a few days or weeks or months. Judges appointed later, will have to be placed en masse below the earlier batch, in seniority. If appointment of Judges to the Supreme Court, is to be made on the basis of seniority (as a primary consideration), then the earlier batch would have priority in the matter of elevation to the Supreme Court. And hypothetically, if the batch had ten Judges (appointed together to a particular High Court), and if all of them have proved themselves able and meritorious as High Court Judges, they will have to be appointed one after the other, when vacancies of Judges arise in the Supreme Court. In that view of the matter, Judges from the same High Court would be appointed to the Supreme Court, till the entire batch is exhausted. Judges from the same High Court, in the above situation where the batch comprised of ten

Judges, will occupy a third of the total Judge positions in the Supreme Court. That would be clearly unacceptable, for the reasons indicated by the learned counsel for the petitioners. We also find the position, unacceptable in law.

238. Therefore, insofar as Section 5(2) of the NJAC Act is concerned, there cannot be any doubt, that consideration of Judges on the basis of their seniority, by treating the same as a primary consideration, would adversely affect the present convention of ensuring representation from as many State High Courts, as is possible. The convention in vogue is, to maintain regional representation. For the reasons recorded above, the first proviso under Section 5(2) is liable to be struck down and set aside.

Section 6(1) applies to appointment of a Judge of a High Court as Chief Justice of a High Court. It has the same seniority connotation as has been expressed hereinabove, with reference to the first proviso under Section 5(2). For exactly the same reasons as have been noticed above, based on seniority (as a primary consideration), ten High Courts in different States could have Chief Justices drawn from one parent High Court. Section 6(1) of the NJAC Act was therefore liable to meet the same fate, as the first proviso under Section 5(2).

239. We are also of the considered view, that the power of veto vested in any two Members of the NJAC, would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). Details in this behalf have

already been recorded in part VIII hereinabove. Section 6(6) of the NJAC Act, has the same connotation as the second proviso under Section 5(2), and Section 6(6) of the NJAC Act would therefore meet the same fate, as Section 5(2). For the reasons recorded hereinabove, we are satisfied, that Sections 5(2) and 6(6) of the NJAC Act also breach the "basic structure" of the Constitution, with reference to the "independence of the judiciary" and the "separation of powers". Sections 5(2) and 6(6), in our considered view, are therefore, also liable to be declared as *ultra vires* the Constitution.

240. A challenge was also raised by the learned counsel for the petitioners to Section 7 of the NJAC Act. It was asserted, that on the recommendation made by the NJAC, the President was obliged to appoint the individual recommended as a Judge of the High Court under Article 217(1). It was submitted, that the above position was identical to the position contemplated under Article 124(2), which also provides, that a candidate recommended by the NJAC would be appointed by the President, as a Judge of the Supreme Court. It was submitted, that neither Article 124(2) nor Article 217(1) postulate, that the President could require the NJAC to reconsider, the recommendation made by the NJAC, as has been provided for under the first proviso to Section 7 of the NJAC Act. It was accordingly the contention of the learned counsel for the petitioners, that the first proviso to Section 7 was *ultra vires* the provisions of Articles 124(2) and 217(1), by providing for reconsideration,

and that, the same was beyond the pale and scope of the provisions referred to above.

241. Having considered the submission advanced by the learned counsel for the petitioners in the foregoing paragraph, it is not possible for us to accept that Section 7 of the NJAC Act, by providing that the President could require the NJAC to reconsider a recommendation made by it, would in any manner violate Articles 124(2) and 217(1) (which mandate, that Judges would be appointed by the President on the recommendation of the NJAC). It would be improper to infer, that the action of the President, requiring the NJAC to reconsider its proposal, amounted to rejecting the proposal made by the NJAC. For, if the NJAC was to reiterate the proposal made earlier, the President even in terms of Section 7, was bound to act in consonance therewith (as is apparent from the second proviso under Section 7 of the NJAC Act). In our considered view, the instant submission advanced at the hands of the petitioners deserves to be rejected, and is accordingly rejected.

242. Learned counsel for the petitioners had also assailed the validity of Section 8 of the NJAC Act, which provides for the Secretary to the Government of India, in the Department of Justice, to be the convener of the NJAC. It was contended, that the function of a convener, with reference to the NJAC, would entail the responsibility of *inter alia* preparing the agenda for the meetings of the NJAC, namely, to decide the names of the individuals to be taken up for consideration, in the next

meeting. This would also include, the decision to ignore names from being taken up for consideration in the next meeting. He may include or exclude names from consideration, at the behest of his superior. It would also be the responsibility of the convener, to compile data made available from various quarters, as contemplated under the NJAC Act, and in addition thereto, as may be required by the Union Minister in charge of Law and Justice, and the Chief Justice of India. It was submitted, that such an onerous responsibility, could not be left to the executive alone, because material could be selectively placed by the convener before the NJAC, in deference to the desire of his superior – the Union Minister in charge of Law and Justice, by excluding favourable material, with reference to a candidate considered unsuitable by the executive, and by excluding unfavourable material, with reference to a candidate who carried favour with the executive.

243. It was additionally submitted, that it was imperative to exclude all executive participation in the proceedings of the NJAC for two reasons. Firstly, the executive was the largest individual litigant, in matters pending before the higher judiciary, and therefore, cannot have any discretionary role in the process of selection and appointment of Judges to the higher judiciary (in the manner expressed in the preceding paragraph). And secondly, the same would undermine the concepts of "separation of powers" and "independence of the judiciary", whereunder

the judiciary has to be shielded from any possible interference, either from the executive or the legislature.

244. We have given our thoughtful consideration to the above two submissions, dealt with in the preceding two paragraphs. We have already concluded earlier, that the participation of the Union Minister in charge of Law and Justice, as a Member of the NJAC, as contemplated under Article 124A(1), in the matter of appointment of Judges to the higher judiciary, would breach the concepts of "separation of powers" and the "independence of the judiciary", which are both undisputedly components of the "basic structure" of the Constitution of India. For exactly the same reasons, we are of the view, that Section 8 of the NJAC Act which provides, that the Secretary to the Government of India, in the Department of Justice, would be the convener of the NJAC, is not sustainable in law. In a body like the NJAC, the administrative functioning cannot be under executive or legislative control. The only remaining alternative, is to vest the administrative control of such a body, with the judiciary. For the above reasons, Section 8 of the NJAC Act would likewise be unsustainable in law.

245. Examined from the legal perspective, it was unnecessary for us to examine the individual provisions of the NJAC Act. Once the constitutional validity of Article 124A(1) is held to be unsustainable, the impugned constitutional amendment, as well as, the NJAC Act, would be rendered a nullity. The necessity of dealing with some of the issues was

prompted by the consideration, that broad parameters should be expressed.

V. THE EFFECT OF STRIKING DOWN THE IMPUGNED CONSTITUTIONAL AMENDMENT:

246. Would the amended provisions of the Constitution revive, if the impugned constitutional amendment was to be set aside, as being violative of the "basic structure" of the Constitution? It would be relevant to mention, that the instant issue was not adverted to by the learned counsel for the petitioners, possibly on the assumption, that if on a consideration of the present controversy, this Court would strike down the Constitution (99th Amendment) Act, then Articles 124, 127, 128, 217, 222, 224, 224A and 231, as they existed prior to the impugned amendment, would revive. And on such revival, the judgments rendered in the Second and Third Judges cases, would again regulate selections and appointments, as also, transfer of Judges of the higher judiciary.

247. A serious objection to the aforesaid assumption, was raised on behalf of the respondents by the Solicitor General, who contended, that the striking down of the impugned constitutional amendment, would not result in the revival of the provisions, which had been amended by the Parliament. In order to canvass the aforesaid proposition, reliance was placed on Article 367, which postulates, that the provisions of the General Clauses Act, 1897 had to be applied, for an interpretation of the Articles of the Constitution, in the same manner, as the provisions of the General Clauses Act, are applicable for an interpretation of ordinary

legislation. Insofar as the instant submission is concerned, we have no hesitation in affirming, that unless the context requires otherwise, the provisions of the General Clauses Act, can be applied, for a rightful and effective understanding of the provisions of the Constitution.

248. Founded on the submission noticed in the foregoing paragraph, the Solicitor General placed reliance on Sections 6, 7 and 8 of the General Clauses Act, which are being extracted hereunder:

"6. Effect of repeal.-Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--
(a) revive anything not in force or existing at the time at which the repeal takes effect; or
(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.
7. Revival of repealed enactments.-(1) In any Central Act or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose.
(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.
8. Construction of references to repealed enactments.-(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

249. Relying on Section 6, it was submitted, that the setting aside of the impugned constitutional amendment, should be considered as setting aside of a repealing provision. And as such, the acceptance of the claim of the petitioners, would not lead to the automatic revival of the provisions as they existed prior to the amendment. Relying on Section 7 it was asserted, that if a repealed provision had to be revived, it was imperative for the legislature to express such intendment, and unless so expressly indicated, the enactment wholly or partly repealed, would not stand revived. Finally relying on Section 8 of the General Clauses Act, it was submitted, that when an existing provision was repealed and another provision was re-enacted as its replacement, no further reference could be made to the repealed enactment, and for all intents and purposes, reference must mandatorily be made, only to the re-enacted provision. Relying on the principles underlying Sections 6, 7 and 8, it was submitted, that even if the prayers made by the petitioners were to be accepted, and the impugned constitutional amendment was to be set aside, the same would not result in the revival of the unamended provisions.

250. Learned Solicitor General also referred to a number of judgments rendered by this Court, to support the inference drawn by him. We shall therefore, in the first instance, examine the judgments relied upon:

(i) Reliance in the first instance was placed on the Ameer-un-Nissa Begum case[70]. Our pointed attention was drawn to the observations recorded in paragraph 24 thereof, which is reproduced hereunder:

"24 The result will be the same even if we proceed on the footing that the various 'Firmans' issued by the Nizam were in the nature of legislative enactments determining private rights somewhat on the analogy of private Acts of Parliament. We may assume that the 'Firman' of 26-6-1947 was repealed by the 'Firman' of 24-2-1949, and the latter 'Firman' in its turn was repealed by that of 7-9-1949. Under the English Common Law when a repealing enactment was repealed by another statute, the repeal of the second Act revived the former Act 'ab initio'. But this rule does not apply to repealing Acts passed since 1850 and now if an Act repealing a former Act is itself repealed, the last repeal does not revive the Act before repealed unless words are added reviving it: vide Maxwell's Interpretation of Statutes, p. 402 (10th Edition).
It may indeed be said that the present rule is the result of the statutory provisions introduced by the Interpretation Act of 1889 and as we are not bound by the provisions of any English statute, we can still apply the English Common Law rule if it appears to us to be reasonable and proper. But even according to the Common Law doctrine, the repeal of the repealing enactment would not revive the original Act if the second repealing enactment manifests an intention to the contrary...."

Having given our thoughtful consideration to the conclusions recorded in the judgment relied upon, we are satisfied, that the same does not support the cause of the respondents, because in the judgment relied upon, it was clearly concluded, that under the English Common Law when a repealing enactment was repealed by another law, the repeal of the second enactment would revive the former "*ab initio*". In the above view of the matter, based exclusively on the English Common Law, on the setting aside of the impugned constitutional amendment, the unamended

provision, would stand revived. It also needs to be noticed, that the final position to the contrary, expressed in the judgment relied upon, emerged as a consequence of subsequent legislative enactment, made in England, which is inapplicable to India. Having taken the above subsequent amendments into consideration, it was concluded, that the repeal of the repealing enactment would not revive the original enactment, except "… if the second repealing enactment manifests an intention to the contrary. …" In other words, the implication would be, that the original Act would revive, but for an intention to the contrary expressed in the repealing enactment. It is however needs to be kept in mind, that the above judgment, did not deal with an exigency where the provision enacted by the legislation had been set aside by a Court order.

(ii) Reliance was then placed on the Firm A.T.B. Mehtab Majid & Co. case[71], and more particularly, the conclusions drawn in paragraph 20 thereof. A perusal of the above judgment would reveal, that this Court had recorded its conclusions, without relying on either the English Common Law, or the provisions of the General Clauses Act, which constituted the foundation of the contentions advanced at the hands of the respondents, before us. We are therefore satisfied, that the conclusions drawn in the instant judgment, would not be applicable, to arrive at a conclusion one way or the other, insofar as the present controversy is concerned.

(iii) Reference was thereafter made to the B.N. Tewari case[72], and our attention was drawn to the following observations:

"6. We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that in Devadasan's case, AIR 1964 SC 179, the final order of this Court was in these terms:-
"In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid."
That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in Devadasan's case AIR 1964 SC 179 there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place. But it must be made clear that the judgment of this Court in Devadasan's case AIR 1964 SC 179, is only concerned with that part of the instructions of the Government of India which deal with the carry forward rule; it does not in any way touch the reservation for scheduled castes and scheduled tribes at 12-1/2% and 5%, respectively; nor does it touch the filling up of schedule tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes are not available in a particular year or vice versa. The effect of the judgment in Devadasan's case, AIR 1964 SC 179, therefore is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes or filling up of scheduled tribe vacancies by a member of scheduled castes in a particular year if a sufficient number of scheduled tribe candidates are not available in that year of vice versa. This adjustment in the reservation between scheduled castes and tribes has nothing to do with the carry forward rule from year to year either of 1952 which had ceased to exist or of 1955 which was struck down by this Court. In this view of the matter it is unnecessary to consider whether the carry forward rule of 1952 would be unconstitutional, for that rule no longer exists."

The non-revival of the carry-forward-rule of 1952, which was sought to be modified in 1955, determined in the instant judgment, was not on account of the submissions, that have been advanced before us in the present controversy. But, on account of the fact, that the Government of India had itself cancelled the carry-forward-rule of 1952. Moreover, the issue under consideration in the above judgment, was not akin to the controversy in hand. As such, we are satisfied that reliance on the B.N. Tewari case[72] is clearly misplaced.

(iv) Relying on the Koteswar Vittal Kamath case[73], learned Solicitor General placed reliance on the following observations recorded therein:

"8. On that analogy, it was argued that, if we hold that the Prohibition Order of 1950, was invalid, the previous Prohibition Order of 1119, cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In the case of Firm A. T. B. Mehtab Majid & Co. (supra), the new Rule 16 was substituted for the old Rule 16. The process of substitution consists of two steps. First, the old rule it made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect, and it was for this reason that the court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived. In the case before us, there was no substitution of the Prohibition Order of 1950, for the Prohibition Order of 1119. The Prohibition Order of 1950, was promulgated independently of the Prohibition Order of 1119 and because of the provisions of law it would have had the effect of making the Prohibition Order of 1119 inoperative if it had been a valid Order. If the Prohibition Order of 1950 is found to be void ab initio, it could never make the Prohibition Order of 1119 inoperative. Consequently, on the 30th March, 1950, either the Prohibition Order of 1119 or the Prohibition Order of 1950 must be held to have been in force in Travancore-Cochin, so that the provisions of Section 73(2) of Act 5 of 1950 would apply to that Order and would continue it in force. This further continuance after Act 5 of 1950, of course, depends on the validity of Section 3 of Act 5 of 1950, because Section 73(2) purported to continue the Order in force under that section, so that we proceed to examine the argument relating to the validity of Section 3 of Act 5 of 1950."

A perusal of the conclusion drawn hereinabove, apparently supports the contention advanced at the hands of the respondents, that if the amendment to an erstwhile legislative enactment, envisages the substitution of an existing provision, the process of substitution must be deemed to comprise of two steps. The first step would envisage, that the old rule would cease to exist, and the second step would envisage, that the new rule had taken the place of the old rule. And as such, even if the new rule was to be declared as invalid, the first step depicted above, namely, that the old rule has ceased to exist, would remain unaltered. Thereby, leading to the inference, that in the present controversy, even if the impugned constitutional amendment was to be set aside, the same would not lead to the revival of the unamended Articles 124, 127, 128, 217, 222, 224, 224A and 231. In our considered view, the observations made in the judgment leading to the submissions and inferences recorded above, are not applicable to the present case. The highlighted portion of the judgment extracted above, would apply to the present controversy. In the present case the impugned constitutional amendment was promulgated independently of the original provisions of the Constitution. In fact, the amended provisions introduce a new scheme of selection and appointment of Judges to the higher judiciary, directionally different from the prevailing position. And therefore, the original provisions of the Constitution would have been made inoperative, only if the amended provisions were valid. Consequently, if reliance must be

placed on the above judgment, the conclusion would be against the proposition canvassed. It would however be relevant to mention, that the instant judgment, as also, some of the other judgments relied upon by the learned counsel for the respondents, have been explained and distinguished in the State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd.[76], which will be dealt with chronologically hereinafter.

(v) The learned Solicitor General then placed reliance on, the Mulchand Odhavji case[74], and invited our attention to the observations recorded in paragraph 8 thereof. Reliance was even placed on, the Mohd. Shaukat Hussain Khan case[75], and in particular, the observations recorded in paragraph 11 thereof. We are satisfied, that the instant two judgments are irrelevant for the determination of the pointed contention, advanced at the hands of the learned counsel for the respondents, as the subject matter of the controversy dealt with in the above cases, was totally different from the one in hand.

(vi) Reference was then made to the Central Provinces Manganese Ore Co. Ltd. case[76], and our attention was drawn to the following observations recorded therein:

"18. We do not think that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word "substitution" is to indicate that the process cannot be split up into two pieces like this. If the process described as substitution fails, it is totally ineffective so as to leave intact what was sought to be displaced. That seems to us to be the ordinary and natural meaning of the words "shall be substituted". This part could not become

effective without the assent of the Governor-General. The State Governor's assent was insufficient. It could not be inferred that, what was intended was that, in case the substitution failed or proved ineffective, some repeal, not mentioned at all, was brought about and remained effective so as to create what may be described as a vacuum in the statutory law on the subject-matter. Primarily, the question is one of gathering, the intent from the use of words in the enacting provision seen in the light of the procedure gone through. Here, no intention to repeal, without a substitution, is deducible. In other words, there could be no repeal if substitution failed. The two were a part and parcel of a single indivisible process and not bits of a disjointed operation.

19. Looking at the actual procedure which was gone through, we find that, even if the Governor had assented to the substitution, yet, the amendment would have been effective, as a piece of valid legislation, only when the assent of the Governor-General had also been accorded to it. It could not be said that what the Legislature intended or what the Governor had assented to consisted of a separate repeal and a fresh enactment. The two results were to follow from one and the same effective Legislative process. The process had, therefore, to be so viewed and interpreted.

20. Some help was sought to be derived by the citation of B.N. Tewari v. Union of India [1965]2 SCR 421 and the case of Firm A. T. B. Mehtab Majid and Co. v. State of Madras. Tewari's case related to the substitution of what was described as the "carry forward" rule contained in the departmental instruction which was sought to be substituted by a modified instruction declared invalid by the court. It was held that when the rule contained in the modified instruction of 1955 was struck down the rule contained in a displaced instruction did not survive. Indeed, one of the arguments there was that the original "carry forward" rule of 1952 was itself void for the very reason for which the "carry forward" rule, contained in the modified instructions of 1955, had been struck down. Even the analogy of a merger of an order into another which was meant to be its substitute could apply only where there is a valid substitution. Such a doctrine applies in a case where a judgment of a subordinate court merges in the judgment of the appellate court or an order reviewed merges in the order by which the review is granted. Its application to a legislative process may be possible only in cases of valid substitution. The legislative intent and its effect is gathered, inter alia, from the nature of the action of the authority which functions. It is easier to impute an intention to an executive rule-making authority to repeal altogether in any event what is sought to be displaced by another rule. The cases cited were of executive instructions. We do not think that they could serve as useful guides in interpreting a Legislative provision sought to be amended by a fresh enactment. The procedure for enactment is far more elaborate and formal. A repeal and a displacement of a Legislative provision by a fresh enactment can only take place after that elaborate

procedure has been followed in toto. In the case of any rule contained in an executive instruction, on the other hand, the repeal as well as displacement are capable of being achieved and inferred from a bare issue of fresh instructions on the same subject.

21. In Mehtab Majid & Co.'s case a statutory role was held not to have revived after it was sought to be substituted by another held to be invalid. This was also a case in which no elaborate legislative procedure was prescribed for a repeal as it is in the case of statutory enactment of statutes by legislatures. In every case, it is a question of intention to be gathered from the language as well as the acts of the rule-making or legislating authority in the context in which these occur.

22. A principle of construction contained now in a statutory provision made in England since 1850 has been:

Where an Act passed after 1850 repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into operation. (See: Halsbury's Laws of England, Third Edn. Vol. 36, P. 474; Craies on "Statute Law", 6th Edn. p.386).

Although, there is no corresponding provision in our General Clauses Acts, yet, it shows that the mere use of words denoting a substitution does not ipso facto or automatically repeal a provision until the provision, which is to take its place becomes legally effective. We have as explained above, reached the same conclusion by considering the ordinary and natural meaning of the term "substitution" when it occurs without anything else in the language used or in the context of it or in the surrounding facts and circumstances to lead to another inference. It means, ordinarily, that unless the substituted provision is there to take its place, in law and in effect, the pre-existing provision continues. There is no question of a "revival".”

It would be relevant to mention, that the learned Solicitor General conceded, that the position concluded in the instant judgment, would defeat the stance adopted by him. We endorse the above view. The position which is further detrimental to the contention advanced on behalf of the respondents is, that in recording the above conclusions, this Court in the above cited case, had taken into consideration, the judgments in the Firm A.T.B. Mehtab Majid case[71], the B.N. Tewari case[72], the Koteswar Vittal Kamath case[73], and the Mulchand Odhavji case[74]. The earlier judgments relied upon by the learned counsel for the

respondents would, therefore, be clearly inapplicable to the controversy in hand. In this view of the matter, there is hardly any substance in the pointed issue canvassed on behalf of the respondents.

(vii) The learned Solicitor General, then placed reliance on Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India[95], and invited our attention to the following observations recorded therein:

"107. In the cases before us we do not have rules made by two different authorities as in Mulchand case (1971) 3 SCC 53 and no intention on the part of the Central Government to keep alive the exemption in the event of the subsequent notification being struck down is also established. The decision of this Court in Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. (1969) 3 SCR 40) does not also support the Petitioners. In that case again the question was whether a subsequent legislation which was passed by a legislature without competence would have the effect of reviving an earlier rule which it professed to supersede. This case again belongs to the category of Mohd. Shaukat Hussain Khan case, AIR 1974 SC 1480. It may also be noticed that in Koteswar Vittal Kamath case, AIR 1969 SC 504, the ruling in the case of Firm A.T.B. Mehtab Majid and Co. AIR 1963 SC 928 has been distinguished. The case of State of Maharashtra v. Central Provinces Manganese Ore Co. Ltd., AIR 1977 SC 879 is again distinguishable. In this case the whole legislative process termed substitution was abortive, because, it did not take effect for want of the assent of the Governor-General and the Court distinguished that case from Tiwari case, AIR 1965 SC 1430. We may also state that the legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, 'substitution', or 'supersession'. It depends upon the totality of circumstances and the context in which they are used."

What needs to be noticed from the extract reproduced above is, that this Court in the above judgment clearly concluded, that the legal effect on an earlier law, when the later law enacted in its place was declared invalid, did not depend merely upon the use of the words like 'substitution' or, 'supersession'. And further, that it would depend on the totality of the

[95] (1985) 1 SCC 641

circumstances, and the context, in which the provision was couched. If the contention advanced by the learned Solicitor General is accepted, it would lead to a constitutional breakdown. The tremors of such a situation are already being felt. The retiring Judges of the higher judiciary, are not being substituted by fresh appointments. The above judgment, in our considered view, does not support the submission being canvassed, because on consideration of the "…totality of circumstances and the context…" the instant contention is just not acceptable. We are therefore of the considered view, that even the instant judgment can be of no avail to the respondents, insofar as the present controversy is concerned.

(viii) Reliance was next placed on the judgment rendered by this Court in Bhagat Ram Sharma v. Union of India[96]. The instant judgment was relied upon only to show, that an enactment purported to be an amendment, has the same qualitative effect as a repeal of the existing statutory provision. The aforesaid inference was drawn by placing reliance on Southerland's Statutory Construction, 3rd Edition, Volume I. Since there is no quarrel on the instant proposition, it is not necessary to record anything further. It however needs to be noticed, that we are not confronted with the effect of an amendment or a repeal. We are dealing with the effect of the striking down of a constitutional amendment and a legislative enactment, through a process of judicial review.

[96] 1988 (Supp) SCC 30

(ix) Reliance was then placed on State of Rajasthan v. Mangilal Pindwal[97], and particularly on the observations/conclusions recorded in paragraph 12 thereof. All that needs to be stated is, that the issue decided in the above judgment, does not arise for consideration in the present case, and accordingly, the conclusions drawn therein cannot be made applicable to the present case.

(x) Next in order, reliance was placed on the India Tobacco Co. Ltd. case[77], and our attention was invited to the following observations recorded therein:

"15. The general rule of construction is that the repeal of a repealing Act does not revive anything repealed thereby. But the operation of this rule is not absolute. It is subject to the appearance of a "different intention" in the repealing statute. Again, such intention may be explicit or implicit. The questions, therefore, that arise for determination are: Whether in relation to cigarettes, the 1941 Act was repealed by the 1954 Act and the latter by the 1958 Act? Whether the 1954 Act and 1958 Act were repealing enactments? Whether there is anything in the 1954 Act and the 1958 Act indicating a revival of the 1941 Act in relation to cigarettes?
16. It is now well settled that "repeal" connotes abrogation or obliteration of one statute by another, from the statute book as completely "as if it had never been passed"; when an Act is repealed, "it must be considered (except as to transactions past and closed) as if it had never existed". (Per Tindal, C.J. in Kay v. Goodwin (1830) 6 Bing 576, 582 and Lord Tenterdon in Surtees v. Ellison (1829) 9 B&C 750, 752 cited with approval in State of Orissa v. M.A. Tulloch & Co., AIR 1964 SC 1284).
17. Repeal is not a matter of mere from but one of substance, depending upon the intention of the Legislature. If the intention, indicated expressly or by necessary implication in the subsequent statute, was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal - (see Craies on statute Law, 7th Edn. pp. 349, 353, 373, 374 and 375; Maxwell's Interpretation of Statutes, 11th Edn. pp. 164, 390 based on Mount v. Taylor (1868) L.R. 3 C.P. 645; Southerland's Statutory

[97] (1996) 5 SCC 60

Construction 3rd Edn. Vol. I, paragraphs 2014 and 2022, pp. 468 and 490). Broadly speaking, the principal object of a Repealing and Amending Act is to 'excise dead matter, prune off superfluities and reject clearly inconsistent enactments'-see Mohinder Singh v. Mst. Harbhajan Kaur."

What needs to be kept in mind, as we have repeatedly expressed above is, that the issue canvassed in the judgments relied upon, was the effect of a voluntary decision of a legislature in amending or repealing an existing provision. That position would arise, if the Parliament had validly amended or repealed an existing constitutional provision. Herein, the impugned constitutional amendment has definetly the effct of substituting some of the existing provisions of the Constitution, and also, adding to it some new provisions. Naturally substitution connotes, that the earlier provision ceases to exist, and the amended provision takes its place. The present situation is one where, the impugned constitutional amendment by a process of judicial review, has been set aside. Such being the position, whatever be the cause and effect of the impugned constitutional amendment, the same will be deemed to be set aside, and the position preceding the amendment will be restored. It does not matter what are the stages or steps of the cause and effect of the amendment, all the stages and steps will stand negated, in the same fashion as they were introduced by the amendment, when the amended provisions are set aside.

(xi) In addition to the above judgment, reliance was also placed on the Kolhapur Canesugar Works Ltd. case[78], West U.P. Sugar Mills

Association v. State of U.P.[98], Gammon India Ltd. v. Special Chief Secretary[99], the Hirendra Pal Singh case[79], the Joint Action Committee of Air Line Pilots' Associations of India case[80], and the K. Shyam Sunder case[81]. The conclusions drawn in the above noted judgments were either based on the judgments already dealt with by us hereinabove, or on general principles. It is not necessary to examine all the above judgments, by expressly taking note of the observations recorded in each of them.

251. Even though we have already recorded our determination with reference to the judgments cited by the learned Solicitor General, it is imperative for us to record, that it is evident from the conclusions returned in the Central Provinces Manganese Ore Co. Ltd. case[76], that in the facts and circumstances of the present case, it would have to be kept in mind, that if the construction suggested by the learned Solicitor General was to be adopted, it would result in the creation of a void. We say so, because if neither the impugned constitutional provision, nor the amended provisions of the Constitution would survive, it would lead to a breakdown of the constitutional machinery, inasmuch as, there would be a lacuna or a hiatus, insofar as the manner of selection and appointment of Judges to the higher judiciary is concerned. Such a position, in our view, cannot be the result of any sound process of interpretation. Likewise, from the observations emerging out of the decision rendered in

[98] (2002) 2 SCC 645
[99] (2006) 3 SCC 354

the Indian Express Newspapers (Bombay) Pvt. Ltd. case[95], we are satisfied, that the clear intent of the Parliament, while enacting the Constitution (99th Amendment) Act, was to provide for a new process of selection and appointment of Judges to the higher judiciary by amending the existing provisions. Naturally therefore, when the amended provision postulating a different procedure is set aside, the original process of selection and appointment under the unamended provisions would revive. The above position also emerges from the legal position declared in the Koteswar Vittal Kamath case[73].

252. It is not possible for us to accept the inferential contentions, advanced at the hands of the learned counsel for the respondents by placing reliance on Sections 6, 7 and 8 of the General Clauses Act. We say so, because the contention of the learned Solicitor General was based on the assumption, that a judicial verdict setting aside an amendment, has the same effect as a repeal of an enactment through a legislation. This is an unacceptable assumption. When a legislature amends or repeals an existing provision, its action is of its own free will, and is premised on well founded principles of interpretation, including the provisions of the General Causes Act. Not so when an amendment/repeal is set aside through a judicial process. It is not necessary to repeat the consideration recorded in paragraph 250(ix) above. When a judgment sets aside, an amendment or a repeal by the legislature, it is but natural that the *status quo ante*, would stand restored.

253. For the reasons recorded hereinabove, we are of the view, that in case of setting aside of the impugned Constitution (99th Amendment) Act, the provisions of the Constitution sought to be amended thereby, would automatically revive.

VI. CONCLUSIONS:

254. Article 124A constitutes the edifice of the Constitution (99th Amendment) Act, 2014. The striking down of Article 124A would automatically lead to the undoing of the amendments made to Articles 124, 124B, 124C, 127, 128, 217, 222, 224, 224A and 231. This, for the simple reason, that the latter Articles are sustainable only if Article 124A is upheld. Article 124A(1) provides for the constitution and the composition of the National Judicial Appointments Commission (NJAC). Its perusal reveals, that it is composed of the following:

(a) the Chief Justice of India, Chairperson, *ex officio*;

(b) two other senior Judges of Supreme Court, next to the Chief Justice of India – Members, *ex officio*;

(c) the Union Minister in charge of Law and Justice – Member, *ex officio*;

(d) two eminent persons, to be nominated – Members.

If the inclusion of anyone of the Members of the NJAC is held to be unconstitutional, Article 124A will be rendered nugatory, in its entirety. While adjudicating upon the merits of the submissions advanced at the hands of the learned counsel for the rival parties, I have arrived at the conclusion, that clauses (a) and (b) of Article 124A(1) do not provide an

adequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same are accordingly, violative of the principle of "independence of the judiciary". I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is *ultra vires* the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an *ex officio* Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It has also been concluded by me, that clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is *ultra vires* the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the "basic structure" of the Constitution. In the above view of the matter, I am of the considered view, that all the clauses (a) to (d) of Article 124A(1) are liable to be set aside. The same are, accordingly struck down. In view of the striking down of Article 124A(1), the entire Constitution (99th Amendment) Act, 2014 is liable to be set aside. The same is accordingly hereby struck down in its entirety, as being *ultra vires* the provisions of the Constitution.

255. The contention advanced at the hands of the respondents, to the effect, that the provisions of the Constitution which were sought to be amended by the impugned constitutional amendment, would not revive, even if the challenge raised by the petitioners was accepted (and the Constitution (99th Amendment) Act, 2014, was set aside), has been considered under a separate head, to the minutest detail, in terms of the submissions advanced. I have concluded, that with the setting aside of the impugned Constitution (99th Amendment) Act, 2014, the provisions of the Constitution sought to be amended thereby, would automatically revive, and the *status quo ante* would stand restored.

256. The National Judicial Appointments Commission Act, 2014 *inter alia* emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A(1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also liable to be set aside, the same is accordingly hereby struck down. In view of the above, it was not essential for us, to have examined the constitutional *vires* of individual provisions of the NJAC Act. I have all the same, examined the challenge raised to Sections 5, 6, 7 and 8 thereof. I have concluded, that Sections 5, 6 and 8 of the NJAC Act are *ultra vires* the provisions of the Constitution.

VII. <u>ACKNOWLEDGEMENT</u>:

257. Before parting with the order, I would like to record my appreciation for the ablest assistance rendered to us, by the learned counsel who addressed us from both the sides. I would also like to extend my deepest sense of appreciation to all the assisting counsel, who had obviously whole heartedly devoted their time and energy in the preparation of the case, and in instructing the arguing counsel. I would be failing in my duty, if I do not express my gratitude to my colleagues on the Bench, as also, learned counsel who agreed to assist the Bench, during the summer vacation. I therefore, express my gratefulness and indebtedness to them, from the bottom of my heart.

.....J.
(Jagdish Singh Khehar)

Note: The emphases supplied in all the quotations in the instant judgment, are mine.

New Delhi;
October 16, 2015.