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CONSTITUTIONAL LAW – II

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I INTRODUCTION

RULE OF law is the guiding star for any democratically elected government. One cannot deny that maintaining the rule of law is the primary duty of the judiciary. In that sense judiciary is a bulwark of injustice. However, justice cannot be a matter of mere individual perception. Judges are expected to provide justice within the framework of constitutional norms. But the dimensions of the framework would ultimately be decided by the judges. Therefore, the role of the judiciary, in particular the individual judges gain more importance when they try to interpret the constitutional norms in a new light. The new interpretations could change the course of the history of a nation. Hence, such interpretations are required to be firmly rooted in the Constitution. Judicial review as an ultimate power of the court comes with a heavy responsibility. This is more so where a society like Indian believes that the judiciary is a watchdog against the erosion of constitutional morality. The belief and the prestige enjoyed by the Supreme Court in India is not an overnight result. Years of consistent integrity and fearless safeguarding of individual rights against the mighty state made the Indian judiciary stand tall. This year's survey focuses on how Indian judiciary fulfilled its constitutional responsibility with grace and agile.

II ARTICLE 129

Supreme Court and the high courts are termed as courts of recording the Constitution of India. By virtue of article 129 and 215 these constitutional courts enjoy contempt jurisdiction. However, the issue is whether the high courts have

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jurisdiction to try contempt of Supreme Court when both courts are court of record. In *Vitusah Oberoi* v. *Court of its Own Motion,*[1] an appeal was preferred from an order passed by a Division Bench of the High Court of Delhi whereby the appellants have been found guilty of contempt of Supreme Court. The appellants belong to *Mid Day*, an English Daily with a large circulation in the National Capital Region. Four stories appeared in *Mid Day* reporting misuse of official residence of Justice Sabharwal who was then the Chief Justice of India. The newspaper articles also alleged that his official residence was shown as the registered office of three companies promoted by Justice Sabharwal's sons. The articles also made other allegations in this regard.

Mr. R.K. Anand, an advocate practicing in Delhi high court brought these publications to the notice of a Division Bench of the High Court of Delhi. The High Court on being satisfied that the news item was objectionable and tended to lower the image of judiciary, initiated *suo-motu* contempt proceedings against the appellants. Countering the notice, the appellants contended that their publications were an attempt to bring to the light of impropriety committed only by Justice Y.K. Sabharwal and they had no intention to either malign or undermine the judiciary or any other Judge of the Supreme Court or any other court for that matter. Further, they submitted that all the facts published in the paper were supported by unimpeachable documents and were true.

In spite of the explanations given by the appellants, the high court found them guilty of contempt. In an appeal to the Supreme Court it was contended that the High Court under article 215[2] of the Constitution of India and under section 10[3]

The court held that power to punish for the contempt of subordinate courts is one of the features of a court of record. The scope of such power was already considered and settled by the Supreme Court in *Delhi Judicial Service Association* v. *State of Gujarat*.[4] In its judgment the court clearly held that the language used in article 129 articulated in clear terms that the Supreme Court is a court of record and was entitled not only to punish for its own contempt but to do all that which is within the powers of a court of record. Since, the Constitution described the Supreme Court as a court of record, article 129 thereof recognises the existing inherent power of a court of record in its full plenitude including the power to punish for its own contempt and the contempt of its subordinate courts.

1 AIR 2017 SC 225.

2 Art. 215 - High Courts to be courts of record: Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

3 S. 10, Contempt of Courts Act, 1971 (Act 70 of 1971) - Power of High Court to punish contempt of subordinate courts: Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to it as it has and exercises in respect of contempt of itself.

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

4 (1991) 4 SCC 406.

Similarly article 215 permits high court to punish for its own contempt and for the contempt of its subordinate judiciary. However, article 215 does not confer any jurisdiction to High Court to initiate or punish for the contempt of a superior court. Such a power has never been recognized as an attribute of a court of record nor has the same been specifically conferred upon the high courts under article 215. Moreover, when the superior court is already vested with contempt jurisdiction, high court cannot be said to have the similar jurisdiction. The most important logic laid down by the Supreme Court in this case is that if the Supreme Court having the jurisdiction and not inclined to invoke the said jurisdiction, there should be no question of a court subordinate to the Supreme Court doing so. Hence, the order passed by the High Court was set aside as the order was without jurisdiction.

In Re: Mohit Chaudhary, Advocate[5] is another case where the apex court *suo motu* initiated contempt proceedings against an advocate on record. In this case Mr. Mohit Chaudhary, Advocate-on-Record, made serious allegations of manipulation by the Registry of Supreme Court to favour one of the parties in a case with the objective of "Bench Hunt". He wrote a letter to this effect to the Chief Justice of India. The allegation in the letter is that the Registry had colluded with the opposite litigant to hastily list the matter with the aim of bench hunting. He further contended that the matter was stated to have suddenly appeared in the evening list prior to the date as supplementary matter before the special bench. Further, he mentioned that the listing is in violation of the normal rule of listing before a regular bench and indulging in constituting a special bench at the eleventh hour as a non-conventional and mischievous act on the part of the Registry.

The Court took the matter seriously as the contemnor is an Advocate-on-Record practicing in that capacity since the year 2009 – not a novice in the field. It found that the allegations made by the contemnor are baseless as no bench is constituted by the Registry. A bench is always constituted by the Chief Justice of Supreme Court. Therefore, the allegation of bench-hunt would have the effect of making an imputation impliedly against the Chief Justice. A mere simple investigation in to the matter would reveal that all the allegations made in the letter were palpably false because specific directions had been issued for the matter to be listed "to be heard finally". Further the order produced in the Court was actually passed by the same bench before which the matter was listed earlier and therefore, there was no change even in the bench, nor had the case been placed before a special bench. It was listed before the regular bench which heard the matter before.

As a result, the apex court took up the matter *suo motu* and issued notice of contempt to Mohit Chaudhary with liberty to file an affidavit in this behalf. After receiving the notice of contempt, the contemnor sought to back track his allegations by filing an affidavit before the court. However, the court found that the affidavit filed by the contemnor could hardly be accepted as unconditional apology. Thereafter, the contemnor sought the liberty to file further explanation.

5 AIR 2017 SC 3836.

Accordingly, he filed a second affidavit wherein the contemnor sought to place an unconditional apology admitting that he had nit abided by the discipline of the court. Nonetheless, the contempt proceedings continued against the contemnor. On behalf of the contemnor it was contended that the contemnor had thrown himself at the mercy of the court, and there was little else he could do. It was argued that the contemnor had erred grievously, but what he had done, could not be called. Thus, he could only plead for the indulgence of mercy.

At this juncture the court had to decide whether the second apology which was unconditional was sufficient to absolve the guilt of the contemnor; or whether he shall bear some further consequences for his conduct, despite the unconditional apology.

These cords of the case shows, that in the original writ petition on numerous occasions the petitioner changed the counsel. In fact, the contemnor was given a second time to represent the petitioner. After weighing various facts, the Court felt that the petitioner engaged the contemnor and it is the contemnor who utilized the opportunity tore-enter the scene, took a conscious decision to be a pawn in the hands of the litigant, to scandalize the court and the registry of the Court, with the sole objective of achieving a bench shifting.

The Court felt that the conduct of the contemnor was clearly to sub-serve the interest of his client even though, it would amount to false allegations and be unbecoming of an advocate. Though it is the duty of the advocate to put his best case for the litigant before the court, he is still an officer of the court. The advocate needs to balance this dual responsibility. Further it was observed that to be an Advocate-on-Record in the Supreme Court, is not an automatic right coming from the enrollment at the Bar. The rigors of examination to enlist as Advocate-on-Record, giving him the right to act and file pleadings before this court, in accordance with the Supreme Court Rules, 2013 make it special. Hence, an advocate-on-record is a coveted position only a worthy can hold.

Explaining the contempt jurisdiction, the court held that the prime objective is to protect "the fair name of the judiciary". These kinds of wiled allegations would hamper the performance of Registry in its tasks. Any kind of false and unfair allegations would impede the working of the Registry and administration of Justice. Such actions cannot be tolerated.

The court rightly pointed out that "law is no trade, briefs no merchandise". Therefore, an advocate cannot engross in a blind quest of relief for his client. After careful examination of the legal principles and important issues emerged the court felt that it cannot let the contemnor go scot-free, without any consequences. The court felt that it is not an innocent act but a well thought decision; hence the contemnor's conduct was not becoming of an advocate-on-record in the Supreme Court. As a result, the contemnor was not permitted to practice as an Advocate-on-Record, for a period of one month from the date of the order.

6 AIR 2017 SC 2042.

III ARTICLE 133 AND 134A

In *Agnigundala Venkata Ranga Rao* v. *IndukuruRamachandra Reddy,*[6] Supreme Court was required to decide on the true nature of article 133 and 134 A. In this case, respondents filed first appeal before the single judge of the high court. The single judge of the high court allowed the appeal and while setting aside the judgment/ decree of the trial court dismissed the suit. At that point of time the plaintiff (respondent before the high court) orally prayed to the Single Judge to grant leave to file appeal to Supreme Court as provided under article 134-A(b) of the Constitution and accordingly the single judge granted "leave" to the plaintiff. When the case was appealed before the Supreme Court it was observed by the Supreme Court that a Single Judge has no constitutional power vested in him to grant leave. A question was raised by the Supreme Court on its own - What is the true interpretation of articles 133[7] and 134-A of the Constitution and who can grant the certificate of fitness to appeal to the Supreme Court? Answering the question, the Supreme Court said that this question was settled finally in *State Bank of India* v. *S.B.I. Employees Union*[8] wherein clause (3) of article 133 clearly mentioned that unless Parliament by law otherwise provides, no appeal could be made before the Supreme Court from the judgment, decree or final order of one judge of the high court. Article 134-A of the Constitution inserted by the forty-fourth Amendment of the Constitution deals only about the time and manner in which an application for a certificate could be made before the high court. Therefore, article 134-A does not constitute an independent provision under which a certificate can be issued. Hence, it is clear that no single judge can issue certificate under clause (3) of article 133 of the Constitution. As a result, the Supreme Court revoked the certificate but allowed the petition of appeal by treating it as a special leave petition under article 136 of the Constitution.

IV ARTICLE 226

In *Rajesh Goyal* v. *State of Uttarakhand*,[9] the issue raised was delay and laches. In this case the High Court of Uttarakhand held that there was no period of limitation

7 Art. 133 - (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under art.134-A

(a) that the case involves a substantial question of law of general importance; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in art. 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one judge of a High Court.

8 1987 (4) SCC 370.

9 AIR 2017 UTR 119.

as such unlike the civil suit, within which, a writ petition is to be filed. The issue of delay needs to be determined on the facts of each case. Ordinarily a writ petition filed after three years was not be entertained. However, there is no absolute bar that the petition filed beyond the period is liable to be dismissed. In such a case the Court could insist for reasons for not approaching the Court within a reasonable period. Further, what is 'reasonable period' would vary from case to case. If the Court is satisfied that there was a reasonable explanation for not approaching the Court, the Court is entitled to grant relief in appropriate cases, despite seemingly long delay.

While giving the relief, the Court needs to bear in mind the impact of grant of relief in a delayed matter on the third party rights. As "the jurisdiction under article 226 of the Constitution is discretionary, as much as it is extra ordinary, the ultimate guide for the Court would be its innate sense of justice and it would, in substance, boil down to a self-imposed limitation to be exercised wisely on facts of each case. The Court would be astute to prevent them is carriage of justice and the guiding light would be to further the cause of justice".

Union of India v. *Rajasthan High Court*[10] is a classic case where the Supreme Court examined the scope of High Court's jurisdiction under article 226. In this case a Division Bench of the Rajasthan high court issued a direction to the Union Government and to its Secretaries in the Ministries of Civil Aviation and Home Affairs to include the chief justices and the judges of the high court in the list of persons exempted from pre-embarkation security checks at airports. The said judgment suggested amending a circular issued by the Bureau of Civil Aviation Security (BCAS). In the same judgment, the court directed the BCAS to complete this exercise within thirty days. The high court has directed that certain suggestions formulated by it for laying down a National Security Policy should be considered by the Union government. The Union of India moved the Supreme Court under article 136 of the Constitution.

The facts of case are that a report was published in the daily edition of the *Rajasthan Patrika* on 10 February 2000, of a breach of security which took place at Sanganer Airport, Jaipur. On 8 February 2000, a person who was to board a flight to Mumbai was detained by airport security staff for carrying a revolver with six live cartridges. He was prosecuted for a violation of sections 21 and 13 of the Arms Act and was finally convicted by the Civil Judge and Judicial Magistrate of the first class and sentenced to a fine of rupees one thousand. The accused paid the fine and, as the Additional Superintendent of Police, Immigration stated before the court, the revolver and live cartridges were released.

The Rajasthan high court took *suo moto* cognizance of the news report and a public interest petition was registered. During the trial it was found that under the provisions contained in section 5(e) of the Aircraft Act, 1934 and Rule 8(a) of the Aircraft Rules, 1957, the Union government has made provisions for security screening. Under these rules certain categories of VIPs/persons are exempted from frisking and searching, screening of their hand baggage if carried by themselves.

10 AIR 2017 SC 101.

The Registrar General of the High Court of Rajasthan addressed a communication to the Secretary to the Union government in the Ministry of Civil Aviation stating that in the list of VIPS chief justice of the high courts and judges of the high courts have not been exempted from pre-embarkation security checks at civil airports in the country. The letter further says that the chief justice is a constitutional authority and non-inclusion of the chief justice in the list of VVIPs/VIPs who have been exempted from pre-embarkation security checks at civil airports in the country issued by the Ministry of Civil Aviation, Government of India will cause great inconvenience to his Lordship. Therefore, the letter directed to amend the aforesaid circular accordingly and also to include the Chief Justice of High Court of Rajasthan in the list of persons exempting from pre-embarkation security checks in the civil airports in the Country.

In reply, the Ministry of Civil Aviation declined to accept the request by stating that the list of exempted persons was kept to the bare minimum in view of the ever-increasing threat perception. But subsequently, on 26 March 2004, after a security meeting by Union government with the Security Categorization Committee a circular was issued by BCAS by which chief justices of high courts were also included in the list of exempted persons.

Before the said circular was issued, the hgh court had decided the petition directing to include the chief justices of the high courts and other judges of high court in the exemption from pre-embarkation security checks. While delivering the judgment, the high court held that by not including the chief justice and judges of the high court in the exemption list, the Department of Civil Aviation and Home Affairs had failed to maintain the status of the chief justice and the judges of the high court. Further it was observed by the court that the circular of exemption also makes the people believe that pre-boarding frisking of chief justices and Judges of the high court is very necessary in view of ever increasing terrorist threat perception. It also opined that the Circular also gives a meaning that if the chief justices and Judges of the high court are not subjected to pre-boarding frisking, national security may be in danger.

An interesting observation made by the court that in view of the threat perception all VVIPs/VIPs should submit themselves to pre-embarkation security checks without exhibiting their egos, but if certain persons amongst them were to be exempted then all constitutional functionaries should be treated at par.

Further, the high court also proceeded to formulate certain suggestions for formulating a National Security Policy in the following terms:

1. There should be a clear cut and well thought out National Security Policy, instead of the piece-meal chasing of the ghosts of the past.
2. A mechanism to task the agencies in this regard with proper powers of oversight. It may be an individual or a committee directly under the Prime Minister.
3. A single individual to oversee the functioning of the intelligence community, both unformed and ununiformed, with authority to demand the cooperation of services of the State units, despite the color of the State Governments.
4. Procedures to avoid duplication and waste of resources.

Upon an appeal to the Supreme Court of India, Justice Dr. D Y Chandrachud held that the high court has evidently transgressed the wise and self-imposed restraints on the power of judicial review by entertaining the writ petition and issuing these directions. He said that the matters of security ought to be determined by authorities of the government vested with the duty and obligation to do so. There is no doubt that the breach of security at Sanganer was a serious issue. Such an issue needed to be carefully investigated. Such an exercise was for the authorities to carry out. It was not for the court in the exercise of its power of judicial review to suggest a policy which it considered fit.

Suggesting of a National Security Policy by the high court is nothing but transgressing into the powers of executive and it is beyond the legitimate domain of judicial review. There is no doubt that the powers under article 226 are wide enough to reach out to injustice wherever it may originate. It is true that these powers have been construed liberally and have been applied expansively where human rights have been violated. But a careful examination of the case reveals that the cause for which the *suo moto* writ petition was registered was ultimately ignored and found no place in the final directions given by the high court. The directions given by the High Court was unrelated to the very basis on which the jurisdiction under article 226 was invoked. Justice Chandrachud rightly pointed out that there is a more fundamental reason why the case should not have been entertained and directions of this nature ought not to have been issued. He opined that the matters of security are not issues of prestige. Accordingly, the Supreme Court allowed the appeal and set aside the high court judgment.

In *JSW Infrastructure Limited* v. *Kakinada Seaports Limited*[11] the issue in dispute was a Policy Clause against creation of monopoly. The High Court of Orissa interfered by way of interpretation of the said clause and held that the appellants were wrongly considered and consequently set aside the award of Letter of Award in favour of them. In an appeal the Supreme Court held that it is a well settled law that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. It relied upon *Tata Cellular* v. *Union of India*[12] wherein it was held that:

(i) there should be judicial restraint in review ministrative action;
(ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process
(iii) the court does not usually have the necessary expertise to correct such technical decisions.;
(iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries

11 AIR 2017 SC 1175.
12 (1994) 6 SCC 651.

Further, relying on *Jagdish Mandal* v. *State of Orissa*[13] it was held that in evaluation of tenders and awarding contracts, they being essentially commercial functions ordinarily the superior courts should refrain from exercising their power of judicial review. It also relied on *Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd*.[14] wherein it was held that "a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision making process or the decision". Therefore, in the present case it was observed that there are no allegations of *malafide* and the appellant consortium has offered better revenue sharing to the employer hence interference with the administrative decision by the high court was unjustified.

Can a high court under article 226 issue a writ of mandamus and direct the state government to amend a statute? This issue was raised in *State of Himachal Pradesh* v. *Satpal Saini*.[15] In this case, State of Himachal Pradesh appealed to the Supreme Court against the directions that were issued by a Division Bench of the High Court directing the State Government to amend the provisions of section 118 of the H.P. Tenancy and Land Reforms Act, 1972 within a period of ninety days. Aggrieved by the mandamus the state government contended before the apex court that these directions trench upon the sovereign legislative power of the state legislature.

The Supreme Court rightly pointed out that the high court while issuing the above directions acted in a manner contrary to the settled limitations on the power of judicial review under article 226. It is a well settled law that no directions can be issued to the legislature to enact a law. Whether to enact or amend a law is a plenary constitutional power vested in legislature expressly under articles 245 and 246 of the Constitution.

The legislature being the repository of the sovereign legislative power, the doctrine of separation of powers ensures non-interference by the court in such power. No court can on the pretext of judicial review encroach upon the basic constitutional function of the legislature to determine whether a law should be enacted. It was held that issuing writ of mandamus to amend law is a plain usurpation of a power entrusted to another arm of the state.

The apex court relied on *Mallikarjuna Rao* v. *State of Andhra Pradesh*,[16] *V.K. Sood* v. *Secretary, Civil Aviation,*[17] *State of Himachal Pradesh* v. *A Parent of a Student of Medical College, Shimla,*[18] *Asif Hameed* v. *State of Jammu & Kashmir,*[19] *Union of*

13 (2007) 14 SCC 517.
14 (2016) 16 SCC 818.
15 AIR 2017 SC 810.
16 AIR 1990 SC 1251.
17 AIR 1993 SC 2285.
18 AIR 1985 SC 910.
19 AIR 1989 SC 1899.

India v. *Association for Democratic Reforms*[20] and held that the court under article 226, has no power to direct the executive to exercise its law-making power. As a result, the Supreme Court set-aside the directions issued by the high court for amending the provisions of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 and the Rules.

The scheme of constitution about the distribution of powers between three organs of the state is clear. As they enjoy constitutional status each of them are co-equal. The constitution assigned the function to judiciary to keep the executive actions in accordance with the constitution. Only legislature enjoys the popular sovereignty. Therefore, courts were constitutionally restricted to frame any policy.

V ARTICLE 142

Article 142 is one of the important article under which the Supreme Court had issued several path breaking orders. Lack of completeness of law enables the Supreme Court to issue orders based on logic and rationale under article 142. In *Nidhi Kaim* v. *State of Madhya Pradesh*[21] the Supreme Court had the opportunity to discuss at length the power of the Supreme Court under article 142. In this case the orders passed by the Madhya Pradesh Professional Examination Board (hereinafter referred to as *Vyapam)* were challenged. *Vyapam* cancelled the appellants' results of the MBBS course on the ground that the appellants had obtained admission to the course, by resorting to unfair means, during the Pre-Medical Test during the years 2008 to 2012.

The appellants approached the High Court of Madhya Pradesh and their petitions under 226 were dismissed. As a result, the order of the high court was appealed before the Supreme Court. The division bench comprising, J. Chelameswar, J. and Abhay Manohar Sapre, J. affirmed the orders of the High Court. However, J. Chelameswar, J while delivering the judgment, expressed the view that to provide complete justice as under article 142 of the Constitution, though the appellant acquired the MBBS degree by illegal means, the qualifications successfully acquired by the them should not be annulled as it would waste the knowledge gained by them.

He said that the knowledge gained by them cannot be transferred to those who were denied the admission. He opined that the cancellation of the results of the appellants, would not serve any purpose. Hence, they should be allowed to practice the profession. However, the second judge J. Abhay Manohar Sapre, in the Division Bench expressed that there is no reason to invoke jurisdiction under article142, to sustain the benefit of education acquired by the appellants. Due to these divergent views on invoking article 142 the bench referred the case to the Chief Justice of India, to constitute a larger bench to deal with the matter. Accordingly, a larger bench was constituted.

20 AIR 2002 SC 2112.
21 AIR 2017 SC 986.

An argument was raised before the chief justice that the judgment delivered by the Division Bench is divided and hence there is no majority in judgment. As per the terms of article 145(5) of the Constitution, a decision taken by the majority alone will be treated as judgment and in the present case the division bench decision could not be treated as judgment as both the judges delivered different judgments therefore this case needs a rehearing of the entire matter by a larger Bench. After careful examination of the contentions it was decided that the case be reverted to the Division Bench for clarification whether the reference required re-hearing of the entire matter, and if not, the limited issue referred for consideration.

The division bench held that they had delivered concurrent order that the decision of the *Vyapam* to annul the admissions of the appellant is correct. The only point of divergence between both of them is that whether the appellants should be disentitled to retain the benefits of the training in medical course which they had secured.

There is no provision under the Indian Constitution that provides an intra-court appeal insofar as the Supreme Court is concerned. A re-hearing of entire matter would amount to an intra-court appeal. Therefore, the only issue to be decided by the larger bench was whether the jurisdiction vested in this court under article 142 of the Constitution should be invoked in favour of the appellants, in order to render complete justice in the matter.

Accordingly, the larger bench headed by the chief justice heard the matter with respect to invoking the jurisdiction under article 142 of the Constitution. It was contended on behalf of the appellants that the powers of the Supreme Court are unlimited under article 142 and distinct from the inherent power contemplated under section 151 of the Code of Civil Procedure, and section 482 of the Code of Criminal Procedure, 1973. The order of J. Chelameswar, J. was that the cancellation of appellants' admission would not be of any advantage to the more meritorious candidates, who were deprived of admission, as it is not possible to transfer the knowledge acquired by the appellants. Further, the restoration of *status quo ante* in the present case was also not possible. Maintaining *status quo* is possible in matters relating to property but the instant controversy could not be dealt with like a dispute concerning immovable property, wherein, on the culmination of the *lis*, the property can be restored to the rightful owner.

Chelameswar, J., had taken recourse to article 142, to legitimize only the knowledge acquired by the appellants, and not their actions or conduct. Such a decision also had considerable societal advantage. One has to keep in mind the fact that five years of national resources are required to acquire what had been annulled by *Vyapam*. The present case is an apt case for invoking article 142 as the law applicable was found to be inadequate and the remedies available under the law would fail to resolve the dispute completely. Further, invoking article 142 would also be justified when there was a scope for a better and more fulfilling outcome is possible outside the law.

On the other hand, it was argued that crores of rupees were collected, to help undeserving students to pass the entrance examination to the MBBS course. An offence of this magnitude leading to the admission of undeserving candidates by corrupt means

would undermine the trust of the people and the integrity of the medical profession itself. Hence keeping the public perception in mind the court must restrain in invoking article 142.

Writing for majority the chief justice held that it was an established fact that the appellants acquired the admissions illegally by deception and manipulation. Therefore, the question is whether the consequences of fraud, can be overlooked in the facts and circumstances of this case, in order to render complete justice to the appellants.

To answer the above the court rightly pointed that the admissions obtained by the appellants was a well-orchestrated plan based on established fraud and the concurrent findings of both courts that the MBBS course being vitiated and it has attained finality. Therefore, validity of the admission does not require any further consideration. In view of these findings it was held that the deception and deceit, adopted by the appellants, was not a simple affair, which can be overlooked. Relying on *Union Carbide* v. *Union of India*[21A] the court explained the circumstances when article 142 can be invoked.

The jurisdiction of the Supreme Court under article 142 extended to deal with any extraordinary situation in the larger interest of administration of justice and from preventing manifest injustice being done. Larger interest of administration of justice, and preventing manifest injustice are the two essential ingredients for consideration of invoking article 142. In the present case both of these requirements did not exist. Therefore, restoring the academic benefits to the appellants, would not serve any larger interest of administration of justice. The Court rightly pointed out that on the contrary, such an initiative would cause manifestation of injustice; hence there is no need to invoke article 142 in this case.

Asha Ranjan v. *State of Bihar*[22] is an another case where the scope of article 142 has come up before the apex court. This petition was filed in the apex court asking the court to transfer the trial of a criminal court from Patna to Delhi. Needless to say that such a plea could be entertained in law will largely depend upon the factual scenario and satisfaction of the judicial conscience of the Court.

The petitioner's husband was allegedly murdered by the accused Shahabuddin and his henchmen. However, he being powerful, the police deliberately did not include his name in the list of accused persons. Upon the petition, this matter has been transferred to the CBI. The factual matrix of the case shows that the victim was the husband of the petitioner. He was a journalist and reported various criminal activities of the said Shahabuddin. Shahabuddin allegedly threatened to eliminate the victim and his family members. Undeterred by the threat the victim kept on writing various investigative news articles and reports in respect of murder of the three sons of one Siwan resident which eventually led to the arrest of Shahabuddin and thereafter conviction to undergo life imprisonment under section 302 IPC.

During the trial of the said case, Shahabuddin and his henchmen had constantly

21A AIR 1990 SC 273.

22 AIR 2017 SC 1079.

threatened the petitioner's husband with death threats to him and the family members. Eventually on May 13, 2016 petitioner's husband was shot dead.

In the course of investigation of this murder two accused persons, namely, Mohammed Kaif and Mohammad Javed were declared as proclaimed offenders. Meanwhile, Shahabuddin was released on bail and the aforesaid proclaimed offenders were seen in his company. However, no police official dared to arrest them. Further, petitioner saw the pictures of the proclaimed offenders Mohammed Kaif and Mohammad Javed with Shri Tej Pratap Yadav, Health Minister of Bihar on all media channels. Feeling insecure, terrorized and helpless and concerned with her safety and security and of her two minor children, the petitioner filed a petition in Supreme Court.

The seminal issue raised in this case was whether the Supreme Court in exercise of power under article 32 and article 142 of the Constitution, direct transfer of an accused from one State to another and direct conducting of pending trials by way of video conferencing. On behalf of the victim a chart showing the cases in which the accused was convicted or acquitted or where cases were pending was produced before the Court. The chart contains 75 cases out of which the accused was convicted in 10 cases and 45 cases were still pending before the Court.[23] Further, the accused has been a Member of Legislative Assembly for two times and Member of Parliament from Siwan on four occasions.

In this backdrop it was contended that it is absolutely difficult, nay, impossible to get justice because of prevailing utmost fear and nerve-wrecking terror reigns supreme in the locality. Therefore, to protect the constitutional rights of the victim the apex court was requested to transfer of the accused to a jail outside Bihar wherever trial by video conferencing would be possible.

However, on behalf of the accused it was argued that to transfer the accused from Bihar to any other place requires an existing law permitting such transfer. In the absence of such law, transfer to any other place is not permissible in law. Transferring an under trial prisoner from to outside the State would violate his fundamental rights under articles 14 and 21, that too when the accused was facing 45 criminal cases, his transfer would cause a greater prejudice to the accused.

Further, it was argued that though article 142 was to do complete justice, but it cannot assume a legislative character. As a result, article 142 does not enable the

23 The chart shows that the accused has been involved in numerous cases; that he has been booked in at least 75 cases, out of which he stands convicted in 10 cases; that he is facing life imprisonment in two, which include murder case of the Petitioners two sons, and 10 years rigorous imprisonment in one; that out of 45 pending cases, at least 21 are those where maximum sentence is 7 years and more, including 9 for murder and 4 for attempt to murder; that apart from the murder of the Petitioners two sons, there are at least 15 out of total 45 pending cases which have been registered against him while he was in jail and out of these 15 pending cases, one is for the murder of the Petitioners third son and two are for attempt to murder. He has been declared a history-sheeter Type A (who is beyond reform).

Court to enact a law. In the absence of any law permitting such transfer, if the Court directs the transfer, that would amount to Court enacting the law.

Section 3 of the Prison Act, 1950 permits the transfer of prisoners from one prison to other on certain grounds.[24] However, the present case does not come within any of the circumstances spelled out under section 3. So the issue was where no provision exists in law, could the accused be transferred from the prison in Bihar to any other prison situated in another State while exercising the jurisdiction under article 142. Further, whether such transfer would vitiate the basic tenet of article 21 of the Constitution? The court emphasized that any decision to transfer the prisoner from one jail to another is judicial order and not ministerial. The court expressed its awareness of the fact that transfer of an under trial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relations as settled by the decision of this court in *Sunil Batra (II)* v. *Delhi Administration*[25] and *State of Maharashtra* v. *Saeed Sohail Sheikh*.[26]

After considering the decisions of both the cases extensively, the Court arrived at the conclusion that any order that the court may make for transfer of a prisoner is bound to affect him prejudicially. Hence, it is necessary for the court to apply its mind fairly, objectively and judiciously and take a considered view regarding the transfer.

A careful examination of the both these cases show that transfer in certain cases may be punitive in effect and such actions may tantamount to affliction on liberty or life in the wider sense. Therefore, such affliction or abridgement cannot be sustained unless article 21 is satisfied for which there has to be a proper legal procedure, and the procedure has to be fair, just and reasonable. As a result, the discretion should not be exercised in any unguided or unreasonable manner.

It is absolutely necessary that such a transfer must comply with article 21. However, the right under article 21 is not absolute. It can be curtailed in accordance with the procedure laid down by law. Therefore, the submission that transfer of the accused from jail outside the State of Bihar would automatically violate his right to fair trial is untenable. The court need to take the cognizance of the fact that if the

24 S. 3. Removal of prisoners from one State to another: (1) Where any person is confined in a prison in a
State-
(a) under sentence of death, or
(b) under or in lieu of a sentence of imprisonment or transportation or
(c) in default of payment of a fine, or
(d) in default of giving security for keeping the peace or for maintaining good behaviour; the Government of that State may, with the consent of the Government of any other State, by order, provide for the removal of the prisoner from that prison to any prison in the other State.
(2) The officer in charge of the prison to which any person is removed under sub-section (1) shall receive and detain him, so far as may be, according to the exigency of any writ, warrant or order of the court by which such person has been committed, or until such person is discharged or removed in due course of law.

25 (1980) 3 SCC 488.

26 (2012) 13 SCC 192.

accused is not transferred out of Bihar, the trials of pending cases against the accused would result in complete farce as no witness would be in a position to depose against him. In such a situation, the Supreme Court need to balance the rights between the accused and the victims by weighing on the scale of fair trial and decide whether shifting is necessary or not.

It was observed that the accused has right to fair trial as a fundamental right under article 21, and similarly the victim also has a fundamental right for a fair trial. Thus, both have legitimacy to claim or assert the right. In such a situation the court suggests that when there is intra-conflict of the right conferred under the same article, like fair trial in this case, the test that is required to be applied would be paramount collective interest or sustenance of public confidence in the justice dispensation system.

Fair trial in criminal cases is an integral part of article 21. "The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes Rule of Law. It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law".

By looking in to the factual situation in this case the accused was able to create threat to the safety of the witness by his mere presence and the witness and the victims were made to suffer as the Majesty of Justice does not allow the transfer as it would amount to travesty of justice. Therefore, the argument of the accused that in the absence of any provision in the 1950 Act, court has no jurisdiction to direct the shifting of the accused was not acceptable.

While explaining the power under article 142 court said that prohibitions or limitations or provisions contained in ordinary laws cannot, *ipso facto*, act as prohibitions or limitations on the constitutional powers under article 142. In exercising the jurisdiction under article 142, the Court considers any limitations or prohibitions only when such statutory prohibitions or limitations are based on sound fundamental principles of public policy. Under article 142 the court would look at what is or is not complete justice of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. Hence no question of lack of jurisdiction or of nullity can arise in exercising its jurisdiction under article 142.

Section 3 of the 1950 Act need to be complied only when a State consulting another State for shifting. The requirements of section 3 would not in any way impose any impediments on the exercise of jurisdiction by the apex court where the issue is relating to fair trial. In such situations the statutory power cannot negate or curtails power of the court to act in the interest of justice, and ensure free and fair trial, which is of paramount importance for the Rule of Law. In other words, section 3 only controls the power of the executive.

Further, it was observed that the concept of fair trial cannot be perceived only from the perspective of the accused. Constitutional right to fair trial protected under article 21 and also the statutory protections are also available to victims. There could

be yet times this may create conflict between the rights of the accused and the rights of the victim or the collective right of the society. When such conflict arises it is the obligation of the constitutional courts to weigh the balance considering the interest of the society as a whole.

The court rightly points out that "a fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings. A wrongful act of an individual cannot derogate the right of fair trial as that interest is closer, especially in criminal trials, to the Rule of Law. An accused cannot be permitted to jettison the basic fundamentals of trial in the name of fair trial".

In view of the above observations the apex court directed the State of Bihar to transfer the accused M. Shahabuddin, from Siwan Jail, District Siwan to Tihar Jail, Delhi and hand over the prisoner to the competent officer of Tihar Jail after giving prior intimation for his transfer in Delhi.

All pending trials shall be conducted by video conferencing by the concerned trial court. The competent authority in Tihar Jail and the competent authority of the State of Bihar shall make all essential arrangements so that the accused and the witnesses would be available for the purpose of trial through video conferencing.

State through Central Bureau of Investigation v. *Shri Kalyan Singh*[27] is another case where the interpretation of Supreme Court's powers to give directions to provide complete under article 142 was raised. In the present case, the order of transferring the cases from one special judge to another special judge was challenged. It so happened in this case that the Special Judge is a magistrate and the other Special Judge to whom the case was committed is a Court of Sessions. The bone of contention was that due to this transfer of cases the right of appeal from a Magistrate to the Sessions Court would be effected and thereby cause injustice to the accused.

It was the contention of the petitioners that the powers under article 142[28] cannot be used to supplant the law. The petitioner relied on several judgments have been cited the celebrated Supreme Court judgments including *Supreme Court Bar Association* v. *Union of India*[29] in which the Constitution Bench held that article 142

27 AIR 2017 SC 2020.

28 Art. 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc. (1) The Supreme complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall,

as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

29 1998 (4) SCC 409.

cannot authorize the court to ignore the substantive rights of a litigant while dealing with the cause pending before it and cannot be used to supplant the substantive law applicable to the cause before this court.

While explaining the nature of jurisdiction under article 142, the court held that under article 142 the Supreme Court applied justice-oriented approach as against the strict rigours of the law.[30] Relying on several cases[31] the Court pointed out that the directions issued by the court can normally be categorized into one, in the nature of moulding of relief and the other, as the declaration of law. The court explained the difference between articles 142 and 141. It pointed out that the directions issued under article 142 unlike under 141 do not constitute a binding precedent. The directions under article 142 are directions issued to do proper justice hence they cannot be considered as law laid down by the Supreme Court under article 141 of the Constitution.

Explaining the importance of article 142, it was observed that no other constitution in the world has such a provision. The Latin maxim *fiat justitiaruatcaelum*[32] is what comes to mind on a reading of article 142. Under this article Supreme Court enjoys wide power to provide complete justice as it is the ultimate arbitrator of the dispute. Therefore, equity has been given precedence over law under article 142. However, while issuing directions under article 142 by such equity one cannot disregard mandatory substantive provisions of law. The court may while providing relief can relax the application of law to the parties or exempting altogether the parties from the rigors of the law in view of the peculiar facts and circumstances of the case. Such a power is necessary as it being apex court and duty bound to provide complete justice in a case when found necessary. Hence looking at the present case where the special circumstances need transfer of the proceedings from the court of the special judicial magistrate to the court of additional sessions judge is justifiable.

VI APPOINTMENT OF CHIEF MINISTER

Governor's discretion in appointing Chief Minister of a State is limited as he is bound to invite the leader of majority party. However, when no party secured majority in the election the role of Governor becomes utmost important. Though few constitutional conventions are developed over a period of time to guide the Governor in such circumstances, no two Governors follow the same. In *Chandrakant Kavlekar* v. *Union of India through its Secretary*[33] a similar situation had raised.

The factual matrix of this case shows that in the general elections to Goa State Assembly no party secured clear majority. Goa State Assembly comprises of 40 elected

30 See, *State of Punjab* v. *Rafiq Masih*, (2014) 8 SCC 883.

31 *Indian Bank* v. *ABS Marine Products (P) Ltd.,* (2006) 5 SCC; *Ram Pravesh Singh* v. *State of Bihar,* (2006) 8 SCC 381 : 2006 SCC (L&S) 1986 and *State of U.P.* v. *Neeraj Awasthi,* (2006) 1 SCC 667 : 2006 SCC (L&S) 190.

32 Let justice be done though the heavens fall.

33 AIR 2017 SC 1435.

members. Therefore, the party having secured at least 21 elected members would obviously have majority. However, the people of Goa had given a split verdict where in the Congress Party emerged as single largest party with 17 members and Bharatiya Janata Patry won 13 members.

Governor of Goa invited Shri Manohar Parrikar of Bharatiya Janata Patry to form the government as BJP claimed the support of 21 MLAs 13 from BJP, 3 members from the Maharashtrawadi Gomantak Party, Goa, another 3 members from the Goa Forward Party and two elected independent members. The petitioner who was the leader of the Congress Legislative Party challenged the decision of the Governor of the State of Goa challenging the factual position of support of the other parties to BJP. The petitioner alleges that BJP had mis-represented the fact about the support of other parties.

Therefore, the issue was whether Governor's decision to invite Shri Manohar Parrikar to form the government is constitutionally valid. After hearing the argument of the petitioner the court held that the issue raised on behalf of the petitioner, can be resolved by a simple direction, requiring the holding of a floor test at the earliest. The holding of the floor test would remove all possible ambiguities, and would result in giving the democratic process, the required credibility. Accordingly, the Court directed that Governor to conduct the floor test immediately and holding the floor test shall be the only agenda for the day to determine whether Shri Manohar Parrikar enjoys the support of the majority of the MLAs.

VII ARTICLE 164: APPOINTMENT OF PARLIAMENTARY SECRETARIES

An interesting question was raised in *Bimolangshu Roy* v. *State of Assam*.[34] The Constitution (Ninety-first Amendment) Act, 2003 imposed a cap on the number ministers at Parliament and Legislative Assemblies of each State. As per the Amendment the total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the Legislative Assembly of that State. Many States tried to circumvent this rule by appointing Parliamentary Secretaries with a minister rank.

In the same direction the Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Ordinance, 2004 was promulgated. Subsequently the Legislative Assembly of Assam passed the same as an Act. Under the Act the Chief Minister was empowered to appoint Parliamentary Secretaries.[35] Section 4 declares that Parliamentary Secretary should be of the rank and status of a Minister of State and exercise such powers, discharge such functions and perform such duties as may be assigned to him by the Chief Minister.

34 AIR 2017 SC 3552.

35 S. 3: The Chief Minister may, having regard to the circumstances and the need of the situation, at any time appoint such number of Parliamentary Secretaries and assign to each of them such duties and functions as he may deem fit and proper.

A writ petition by way of Public Interest Litigation was filed before the High Court of Gauhati challenging the constitutional validity of the Act. The High Court of Gauhati adjourned the hearing of the petition as a similar matter had come up before the Supreme Court of India in *State of Himachal Pradesh* v. *Citizen Rights Protection Forum*.

Meanwhile eight Parliamentary Secretaries were appointed by the Chief Minister in exercise of the power under the Act. Supreme Court allowed the Transfer of the Petition filed by the Petitioners under article 139A of the Constitution. Further, the Petitioners moved an inter locutory application to stay the operation of the Act. The petitioner raised following contentions:

i. The legislature of State of Assam does not have competence to enact the Act;
ii. The Act is violative of the constitutional mandate under article 164 (1A) which stipulates an upper limit of 15% as the strength of the Council of Ministers;
iii. That the Act is intended to over-reach the mandate of the Constitution Amendment Act and hence a fraud upon constitution;
iv. Responsible government is a basic feature of the Constitution and the Act is violative of the basic structure of the Constitution.

On the other hand, respondents argued that the State of Assam has the legislative competence to make the impugned legislation under Entry 39 of the List II of the Seventh Schedule to the Constitution. Further the functions of Parliamentary Secretary under the Act are different from the functions of a Minister. Parliamentary Secretaries are not collective responsible to the Legislative Assembly; hence the mandate of the Constitution under the Constitution 91st Amendment is violated.

With regards to the question of violation of basic structure of the Constitution can be raised only against an amendment to the constitution but not against legislation. The court framed the following issues based on the contentions of both petitioner and the respondent.

i. Whether the Legislature of Assam is competent to make the Act?
ii. Whether the creation of the office of Parliamentary Secretary would amount to a violation of the constitutionally prescribed upper limit of 15% on the total number of Council of Ministers?
iii. Whether the concept of a Responsible Government envisaged under various provisions of the Constitution is in any way violated by the impugned enactment and therefore unconstitutional as being violative of the basic structure of the Constitution.
iv. Whether the theory of basic structure could be invoked at all to invalidate an enactment which is otherwise not inconsistent with the text of the Constitution.

It was pointed out that article 246 deals with the various entries for the three lists of the Seventh Schedule and they occupy the fields of legislation. These entries merely show the legislative heads of each government. They are only enabling character and designed only to demarcate the areas in which the governments can legislate. They neither impose any restrictions on the legislative power nor prescribe any duty

for exercise of the legislative power in any particular manner. Therefore, one must understand that the function of the lists is not to confer powers but they merely demarcate the legislative field.

In the present case, the legislative competency of the State can be identified by looking at the text of article 194(3) and entry 39. A careful examination of the scheme of article 194 does not denote that it authorizes the State Legislature to create offices such as Parliamentary Secretary. Article 194 basically deals with the privileges of the members of the legislature and the language used in entry 39 also expressly deals with the privileges of the state Legislature. Therefore, they do not authorize the state to create new offices by legislation. Any such interpretation would be a wholly irrational. Such a construction would be enabling the legislature to make a law which has no rational connection with the subject matter of the entry.

Therefore, the apex court held that the State of Assam lacks the competence to make the impugned Act. In view of the above conclusion, it was felt that it was unnecessary to examine the various other issues identified. The impugned Act was declared unconstitutional.

VIII INDEPENDENCE OF JUDICIARY

Kamini Jaiswal v. *Union of India*[36] is a case where the Supreme Court termed the contentions of the petitioner as very disturbing. The facts show that the petitioner moved two petitions one on November 8, 2017 and the second one on November 9, 2017. The first petition was filed by the Commission for Judicial Accountability and Reforms (CJAR) and the other by Ms. Kamini Jaiswal, Advocate of this Court, who is a member of CJAR. Both the petitions are identically worded. The first petition was to be listed on 10.11.2017 before a Bench presided by A.K. Sikri and Ashok Bhushan. The second petition was made before Court no.2 and a prayer was made to Court no.2 to hear the matter on the same day due to its nature of urgency. Accordingly, the matter was taken on Board and enquired about what is the urgency. The petitioner brought to the notice of the court that Central Bureau of Investigation (CBI) registered a case against a retired high court Judge implicating the said Judge and the Judge's name was shown as an accused in the FIR. FIR was filed under section 8 and section 120 B of the Prevention of Corruption Act, 1988. The FIR contained serious allegations regarding functioning of the Supreme Court.

By considering the circumstances, it was felt that this matter need to be heard by the constitution bench and according an order was passed directing the case to be referred to a Constitution Bench of the first five judges in the order of seniority of the Supreme Court. Further, considering the importance of the case a further order was issued to list the case on 13th November, 2017 before the Constitution Bench. Meanwhile in the first petition before the Bench presided by A.K. Sikri, J., it passed

36 AIR 2017 SC 5334.

the order placing the matter before the Chief Justice for passing appropriate orders for listing this matter. At this juncture R.S. Suri, senior advocate/President, Supreme Court Bar Association (SCBA) expressed his desire to implead as a party respondent and render assistance. On an oral request of Suri, the prayer was allowed and the SCBA was impleaded as a party respondent.

Both the petitions requested the court to constitute a Special Investigation Team (SIT), under the chairmanship of a retired Chief Justice of India, to investigate the offences arising out of FIR. A further request for directing the CBI to produce all the evidences/materials collected so far to hand over to the SIT to be constituted by Supreme Court.

The FIR mentioned in the petitions is relating to criminal conspiracy and of taking illegal gratification to influence the outcome of a pending case before Supreme Court. The gratification allegations reveal a nexus between the middlemen, Hawala dealers and senior public functionaries, including persons in the judicial field. The facts show that FIR has been registered with respect to case of one Prasad Education Trust at Lucknow. The medical college set up by this Trust was debarred by the Government from admitting students for two academic years 2017-18 and 2018-19. In the FIR, CBI named a retired judge of the high court as an accused. It alleges that this retired Judge is negotiating through a middleman to get a favorable order in the petition pending before the Supreme Court.

Interestingly the petition that was pending before the Supreme Court was heard by a Bench headed by Chief Justice of India. As the FIR casts a cloud on the judiciary at the highest level the petitioners requested investigation by SIT headed by retired Chief Justice of India. Further, it was the contention of the petitioners that Chief Justice of India should not deal with the present petition either on the judicial side, or even on the administrative side. That means the petitioners wish that the Chief Justice must recuse himself not only from hearing present case but also assigning the case to any Bench.

However, the order passed by a bench consisting of A.K. Sikri, J. that the matter be placed before Chief Justice of India for listing the matter. Accordingly, Chief Justice of India constituted a 5-Judge Constitution Bench presided over by Chief Justice of India himself. The issue before this Constitution Bench was whether the listing the case by judicial order before senior-most 5 Judges in order of seniority passed in the present petition was valid. Who can assign a case to a bench and decide on the difference between the orders of two Benches one headed by A.K. Sikri J. and another by Court No.2?

The Constitution Bench unequivocally held that the Chief Justice of India is the master of the roster. To come to that conclusion Supreme Court heavily relied on *State of Rajasthan* v. *Prakash Chand*,[37] wherein the Court had laid down the following:

37 (1998) 1 SCC 1.

1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.
(2) That the Chief Justice is the master of the roster. He alone has the prerogative to constitute benches of the Court and allocate cases to the benches so constituted.
(3) That the *puisne* Judges can only do that work as is allotted to them by the Chief Justice or under his directions.
(4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.
(6) That the *puisne* Judges cannot pick and choose any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.
(7) That no Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given by the Chief Justice.

Though these rules are relating to high court, the Constitution Bench of Supreme Court also held in the case that what has been laid down above would apply *propriovigore* as regards the power of the Chief Justice of India. As a result, Chief Justice of India would be first among equals as far as the roster is concerned, hence, it is his prerogative to constitute the Benches of the Court and allocate cases to the Benches so constituted. Accordingly, the order passed by court no.2 was ineffective and only a bench constituted by the Chief Justice can hear the case.

However, it was urged on behalf of the petitioners that the present Constitutional Bench though there was no allegation against one of the Judges comprising this Bench, A.M. Khan wilkar, J. who was a member of the Bench which disposed of the matter of Prasad Education Trust must recuse from the matter.

Ms. Kamini Jaiswal argued that the intention and objective the petition was indeed to protect the independence, integrity and reputation of the Institution. Under article 144 of the Constitution it was impermissible to overrule an order passed by one Bench by another Bench as orders passed by the Supreme Court are binding, under article 144 of the Constitution, all other Benches of the Supreme Court.[38] She again reiterated that Khanwilkar, J. must recuse himself, as he was one of the judge hearing the case relating to medical bribery fraud alleged in the FIR registered by the CBI.

38 She relied on *Rupa Ashok Hurra* , (2002) 4 SCC 388.

On the other hand, on behalf of the Respondent it was submitted that the present petition could not be entertained as the petitioners simply cast doubt on the entire system. An unconnected person demand bribe on the name of a judge the whole system cannot be brought under disrepute. That to there is no indication of name of the judge and no other material to link the highest judiciary of the country to the bribery case. Further, it is completely inappropriate on behalf of the petitioners to file two successive identical petitions for the same cause of action with same reliefs sought. This practice could be terms as forum hunting.

The President of the Supreme Court Bar Association (SCBA) submitted that they opposed these petitions and it was their stand that, such petitions bring disrespect to the institution and a firm action must be taken against the petitioners.

In reply to all these contentions, the Supreme Court held that with regards to constituting the Bench it is clearly the prerogative of the chief justice. Chief Justice of India is the master of the roster hence any order passed contrary to the order of chief justice in constituting the Bench would be ineffective in law.

With regards to article 144 of the Constitution of India, it was observed that once a Constitution Bench of Supreme Court has decided the question that no such order, constituting a particular Bench, can be passed by any Bench and that is the prerogative of the chief justice, hence, the order passed by court no.2 is invalid. Therefore, there is no question of applicability of article 144 or 142 in this case.

With regards to the need for second petition, it was informed that the Registry had informed petitioner that the first petition was not to be listed before Court No. 2 on Friday, but before A.K. Sikri, J., as per the administrative instructions of Chief Justice of India. Hence, a fresh petition was filed by Ms. Kamini Jaiswal. Ms. Kamini Jaiswal also contended that even though she is a member of Commission for Judicial Accountability and Reforms who is the petitioner in the first case, she is also entitled to exercise her right to file a petition separately from the organization. However, the Court felt that the method and the manner of filing second petition personally on the very next day amounts to forum hunting. It was observed that whether she was a member of CJAR was not relevant but filing a petition that was similar and identically worded and requesting the court no. 2 to take up the matter was not proper. The right manner would have been requesting her petition to list along with the matter filed by CJAR before Sikri, J.

Further, the court pointed out a dichotomy in the arguments of the petitioner that they want the chief justice to recuse himself both judicially and administratively and at the same time insisting that the order passed by Court No. 2 to be implemented. The order passed by court no. 2 constituted a Constitutional Bench with five senior judges among whom the chief justice is one. There is a contradiction in the order passed by court no. 2 and in their submission.

It was also pointed that even when there is an allegation against Chief Justice of India, it is he, who has to assign the case to a Bench, as considered appropriate by him. This has not only been settled in the matter of *Dr. D C Saxena* v. *Chief Justice of*

India.[39] In this case, it was clearly held that it is the Chief Justice who assign judicial work to brother judges. By doing so, he did not become a Judge in his own cause. Further it was observed that contemplating that Chief Justice would assign it to a Bench which would not pass an order adverse to him would amounts to contempt of the court. Even contemplating that the Bench assigned by the Chief Justice would amenable not to pass adverse judgment against Chief Justice aimed at bringing the administration of justice in disrepute.

The court felt that filing two successive petitions brought the entire judicial system into disrepute for no good reason. No name of any Judge of the Supreme Court was reflected in the FIR. To register an FIR against sitting judge of high court, there is a need to take permission from the Supreme Court. Similarly, to name the Chief Justice of India the decision has to be taken by the President of India.[40] Such a requirement is necessary to ensure the independence of the judiciary. Therefore, the contention of the petitioner that the investigation involves higher judiciary is misconceived.

Thus, the instant petitions, as filed, are a misconceived venture in as much, as the petition wrongly presupposes that investigation involves higher judiciary, *i.e.* this courts functionaries are under the scanner in the aforesaid case; that independence of judiciary cannot be left at the mercy of the CBI or that of the police is a red herring. Moreover, when a Judge come to know that any party to the case trying to influence the judgment, it is incumbent upon the Judge to take cognizance and deal with it rather than recuse himself.

While dealing with the issue of forum shopping the Court by relying on *Union of India* v. *M/s. CIPLA Ltd.*,[41] opined that making allegations of a per se conflict of interest so that the case could be transferred to another Bench, is another form of forum shopping. Such form of forum shopping was recognized by the Court in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[41A] where Khehar, J. held that making allegation of conflict of interest against a judge by a litigant and requesting to recuse from the case so that the proceeding be placed before another judge amounts to forum shopping.

In view of the above observations the court held that the submission raised against the Chief Justice of India, that he should not hear the matter or should not assign it to any other bench is highly improper. The Bench constituted by the Chief Justice is the right forum to deal with this matter. Filing second successive petition amount to an attempt of choosing a forum. Request to recuse from the case by Justice A. M. Khanwilkar was nothing but another attempt of forum hunting which cannot be permitted. Such kind of prayer was held to be contemptuous, aggravating the contempt. Court finally opined that, "We cannot fall prey to such unscrupulous devices adopted by the litigants, so as to choose the Benches, as that is a real threat to very

39 (1996) 5 SCC 216.
40 See, *K. Veeraswami* v. *Union of India,* (1991) 3 SCC 655.
41 (2017) 5 SCC 262.
41A (2016) 5 SCC 808.

existence of the system itself and it would be denigrated in case we succumb to such pressure tactics". Accordingly, both the petitions were dismissed.

IX CONCLUSION

Providing complete justice is the paramount obligation of the judiciary. Absence of law cannot be a ground to ignore injustice. Considering such possibility, Indian Constitution empowered Supreme Court to pass any order or orders to provide complete justice. In such cases equity and good conscience are the guiding principles to provide complete justice. The history of Indian Judiciary amply reflects that they are not bogged down by procedural constrains when the Court perceived any injustice. Further, the history also shows how zealously Indian Judiciary protected its independence and reputation. In *Vitusah Oberoi* and *In Re: Mohit Chaudhary* court grappled with issues of contempt. Contempt jurisdiction looks *per se* violation of principles of natural justice. However, to protect the independence and the sanctity of the Court such a jurisdiction is necessary. Highest Court is expected to use such jurisdiction cautiously and sparingly. Contrasting judgments in these two cases show how impartially court dealt with contempt. Supreme Court is severe in *Mohit's case* as it rightly felt that the actions of the advocate in question amount to bench-hunt whereas in *Vitusah's case*, the court expressed that it is capable of taking care of contempt against itself and no High Court could take cognizance of such cases.

While in *Rajesh Goyal* case, sticking to its well-known stand the court cautioned against granting of relief under article 226 in case of delay. Such a caution is necessary as any direction or issuing of writ in such cases may affect many other persons' rights. Article 226 provides very wide discretionary powers to the high court. However, it is left to the high court to use such power judiciously. Though the lines are not clearly drawn on what to entertain and what not under article 226 self-restriction is the best way to regulate the jurisdiction under article 226. The judgment of the high court of Rajasthan is an example of a matter where the court should not have entertained. This case shows how some time over enthusiasm could lead to unnecessary interference in other branches of State. The wide discretionary powers enjoyed by the High Courts are to apply only when violation of law takes place. Using this jurisdiction in this case for conferring a privilege to judges of high court at airports goes against the spirit of article 226. Supreme Court rightly set aside the directions issued by the Rajasthan high court. *Satpal Saini* is another example of judicial overreach under article 226. Legislative supremacy in law making is one of the basic features of any democratic constitution. Therefore, directing the state government to amend a specific law within a period of 90 days is direct interference with the law making power of the state Legislature. Article 226 never empowers any high court to give directions to the executive to make law. Supreme Court again rightly held that three organs of the state are co-equal; hence the courts cannot frame any policy.

Of late, doing complete justice under article 142 had been center of many judgments. *Nidhi Kaim* is one of such judgments wherein the real scope of article 142 was in discussion. The core dispute was when a candidate acquired admission in

MBBS by an unlawful means, can they be allowed to practice for the benefit of society and can the Court under 142 issues such direction. Though there were valid reasons for such directions proposed by Justice Chelameswar, the final judgment of the larger bench not allowing them to practice makes sense. J. Chelameswar's observation that he is legitimizing only the knowledge acquired by the students but not their actions seem plausible but such a move also undermines the trust of the people on judiciary. Such move may be perceived by the public as a manifestation of injustice. *Asha Ranjan* is a classic example where Supreme Court used article 142 to provide complete justice. Transfer of accused from one state to another cannot be perceived as violation of his rights. Where the circumstances clearly establish that the accused had considerable influence with the administration and becomes a threat to the witness, court would not under the pretext of violation of fundamental rights keep quiet. This case reinforces our faith in Indian Judiciary. Court balanced well between the rights of the accused and the victim.

Appointment of chief minister is a constitutional function of the Governor of the State. Mostly such appointments, when there is no clear majority in the Legislative Assembly, is decided more on political lines than on constitutional conventions. Several guidelines in this regard could be found in various Supreme Court judgments and also in Sarkaria Commission Report. However, such guidelines are sometimes obeyed and sometimes ignored depending on what would benefit the political mileage of the party in power at Central Government.

Chandrakant Kavlekar is another classic example of not following such guidelines as it suits the party in power at the Central Government. Even though Congress emerged as single largest party in the Assembly election, the Governor conveniently ignored the constitutional convention and the recommendations of both Supreme Court and Sarkaria Commission and invited BJP to form the government. Though the Supreme Court settled the issue of appointment by directing to conduct the floor test early, time has come to provide stricter guidelines regarding choice of the Governor in inviting any party to form government when no party secured majority. It is an open secret that the party invited to form the government would have an immense advantage to win the floor test due to advantage of Governor's invite. Further, such situations also result in 'Resort' politics that is not healthy for democracy. *Goa* could potentially become a dangerous trend in future to establish governments who lost the support of the majority of the people.

Kamini Jaiswal is an unfortunate episode in Indian Judiciary. As termed by Supreme Court, it was really a disturbing case against the independency of the Judiciary. Both petitions raised unnecessary contentions. Mere mentioning in the FIR that a retired judge of high court was involved in illegal gratification to influence the outcome of the judgment of the Supreme Court in a pending case cannot by itself a reason for asking chief justice not to judge the case and even appoint the Bench on the ground that chief justice is hearing the pending case. A similar request on the same grounds requesting another judge to recuse from the case is not rational. If such a request is to

be accepted, any person can make any wild allegation to avoid a judge to decide his case. Such a practice was rightly termed by the Supreme Court as forum shopping.

On the whole this year's survey indelibly suggest that it is the Indian Judiciary that is at its peak in protecting the rights of the citizens by restraining the legislature and executive and to some extent even the judiciary within the constitutional frame work. The apex court gracefully carried its constitutional obligation of keeping the state firmly under rule of law.