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CONSTITUTIONAL LAW – I

(Fundamental Rights)

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I INTRODUCTION

THREE MOST leading cases relating to fundamental rights decided during the year 2017 dealt with right to privacy as a part of right to life under article 21,[1] the extent of freedom of speech and expression under articles 19(1)(a) and 25 with reference to election speeches[2] and the constitutional validity of triple *talaq* (*talaq-al-biddat*)[3] practised in Muslims under articles 13, 14, 15(1), 21 and 25 of the Constitution of India.

In the year 2016, it had been stated by this author while commenting on a decision[4] that fundamental rights cannot be waived and, therefore, even if an employee had accepted the arbitrary and discriminatory terms and conditions of service at the time of his engagement, he could not be said to have waived his fundamental right to challenge the same under article 14 of the Constitution of India[5] and the decision in that case was not correct. The Supreme Court has once again reiterated with reference to right to privacy that fundamental rights cannot be waived.[6]

During the current year, a number of cases raising the issue of violation of fundamental rights or interpretation of other constitutional provisions[7] were referred

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1 *Justice K.S. Puttaswamy* v. *Union of India*, AIR 2017 SC 4161 :(2017) 10 SCC 1 : 2017 (10) SCALE 1 : JT 2017 (9) SC 141.

2 *Abhiram Singh* v. *C.D. Commadien*, AIR 2017 SC 401 : (2017) 2 SCC 629: 2017 (1) SCALE 1: JT 2017 (1) SC 196. The decision was given by a seven-judge bench (by a majority of 4 : 3) on a reference by a five-judge bench (2014) 14 SCC 382.

3 *Shayara Bano* v. *Union of India*, AIR 2017 SC 4609 :(2017) 9 SCC 1 : 2017 (9) SCALE 178 : JT 2017 (8) SC 313.

4 *State of Maharashtra* v. *Anita*, AIR 2016 SC 3333.

5 See S N Singh, "Constitutional Law-I (Fundamental Rights)", LII *ASIL* 203 at 233-34 (2016).

6 *Supra* note 1 at 87 (of SCALE) (per Dr. D.Y. Chandrachud J).

7 Thus, in *Govt. of NCT of Delhi* v. *Union of India*, 2017 (7) SCALE 289, question referred under art. 143(3) was thus: "We are of the opinion that these appeals need to be heard by a

to larger benches for adjudication. The question of reservation of seats in educational institutions and appointments in public offices has been perpetually raising its head in various forms; one aspect or the other always escaping the attention of the courts. In *State of Tripura* v. *Jayant Chakraborty*,[8] it was contended that *M. Nagraj* v. *Union of India*,[9] which had considered the question of backwardness of scheduled castes and scheduled tribes, required re-consideration as it did not notice an earlier decision given in *E.V. Chinnaiah* v. *State of A.P.*,[10] which had considered the same question. The contention was that the test of backwardness ought not to be applied to SC/ST in view of *Indra Sawhney*[11] and *Chinnaiah* cases. Moreover, the question of application of the concept of creamy layer in cases of competing claims within the same races, communities, groups or parts of SC/ST as notified under articles 341 and 342 was also raised. In view of the importance of the questions raised, the matter was referred to a Constitution Bench.

Another case[12] referred to a larger bench raised the question regarding the entry of female devotees between the age group of 10 to 50 at the Lord Ayappa Temple at Sabarimala (Kerala). The female devotees between the above age group had been denied entry inside the temple on the basis of certain custom and usage and the petition prayed for declaring rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 framed in exercise of powers conferred by section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 as unconstitutional being violative of articles 14, 15, 25 and 51A(e) of the Constitution of India and further to pass directions for safety of women pilgrims.

A very significant question with regard to education raised in *S. Krishna Sradhar* v. *State of A.P.*,[13] was whether awarding of merely compensation to a meritorious student who had wrongfully been denied admission in a college for the fault of the

Constitution Bench as these matters involve substantial questions of law as to the interpretation of art. 239AA of the Constitution." Likewise, important questions relating to demonetization announced on 8th November, 2016 requiring consideration, keeping in view general public importance and far reaching implications, was referred to a larger bench in *Vivek Narayan Sharma* v. *UOI*, AIR 2017 SC 221. A seven-judge bench in *State of U.P.* v. *Jai Bir Singh*, 2017 (1) SCALE 292 : (2017) 3 SCC 311 referred to a nine-judge bench the question of re-consideration of the term "industry" under s. 2(j) of the Industrial Disputes Act, 1947 as interpreted in *Bangalore Water Supply &Severage Board* v. *A. Rajappa*, AIR 1978 SC 548. In *Kalpana Mehta* v. *Union of India* (2017) 7 SCC 295, the question of reliance by the courts on the parliamentary standing committee reports for the purpose of fact-finding and issuing of writs or directions based on them was referred to a Constitution Bench.

8 (2017) 13 SCALE 524. Relying on this reference, *State of Maharashtra* v. *Vijay Ghogre*, 2017 (13) SCALE 564, was also referred to the Constitution Bench for consideration of the same questions.

9 2006 (10) SCALE 301.

10 2004 (9) SCALE 316.

11 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217.

12 *Indian Young Lawyers Association* v. *State of Kerala*, 2017 (12) SCALE 574.

13 2017 (2) SCALE 78 : (2017) 4 SCC 516 : JT 2017 (3) SC 51.

authorities and had approached the court expeditiously/diligently instead of admission was the only proper relief in all situations. A division bench of the apex court referred the matter to a larger bench holding that *Chandigarh Administration* v. *Jasmine*,[14] required re-consideration as it had distinguished another case,[15] in which it had been held that denying relief of admission would be completely unjust and unfair. In *D.T.C.* v. *Balwan Singh*,[16] the question whether the period of leave without pay could be counted towards qualifying service in the absence of any notice treating the same as unauthorized absence, for the purposes of pension was referred to a larger bench.

The institution of judiciary is revered most among all the three organs of the State. But the end of the year 2017 brought to surface certain uneasy, rather distressing, developments in the history of the judiciary. Till now, none had questioned the authority of the Chief Justice of India to constitute benches and decide the roaster for deciding cases. During the current year, however, a petition was filed questioning the authority of the Chief Justice to allocate cases to various benches and constitute benches.[17] So far as the High Courts are concerned, the apex court had settled that the Chief Justice of the High Court was the sole depository of power to allocate cases and no judge can *suo motu* take cognizance of a case on his own.[18] A Constitution Bench of the apex court, clarifying the position, ruled that the principle applied in the case of Chief Justice of High Court was equally applicable to the Chief Justice of Supreme Court and any order, contrary to this order, passed by any bench was to be "treated as ineffective in law and not binding on the Chief Justice of India."

The malpractice of "forum hunting" on the part of counsels may not be new; it might have been in existence throughout, in a subtle manner without being noticed but the same was deprecated in one case reported during the year when it surfaced in the limelight.[19] Likewise, relying on *Kamini Jaiswal*, another petition was dismissed by a full bench of the apex court with exemplary cost of Rs. 25 lakh on the petitioner for frivolous litigation which had sought constitution of a Special Investigation Team (SIT) to investigate an alleged conspiracy and payment of bribe for procuring a favourable order in a case pending before the apex court.[20]

The limit of judicial aberration was found in one case reported during the year.[21] In this case, an additional sessions judge had passed an order acquitting the accused

14 (2014) 10 SCC 521. In this case, while distinguishing *Asha* case, it was held that there could be no telescoping of unfilled seats of one year with sanctioned seats of another year. Thus there could be no carry forward of seats how much meritorious and deserving a candidate was.

15 *Asha* v. *B.D. Sharma University of Health Sciences* (2012) 7 SCC 389.

16 AIR 2017 SC 396.

17 *Campaign for Judicial Accountability and Reforms* v. *Union of India*, 2017 (13) SCALE 381.

18 *State of Rajasthan* v. *Prakash Chand* (1998) 1 SCC 1.

19 *Kamini Jaiswal* v. *Union of India*, 2017 (13) SCALE 308, 417 : (2018) 1 SCC 194.

20 *Campaign for Judicial Accountability and Reforms* v. *Union of India*, 2017 (14) SCALE 18 : (2018) 1 SCC 589.

21 *Ajay Singh* v. *State of Chhattisgarh* (2017) 3 SCC 330.

persons of offences punishable under sections 304-B, 498-A, 34 and 328, IPC and sections 3 and 4 of Dowry Prohibition Act, 1961 involving murder of a woman within less than two years of her marriage. The order-sheet stated, "The judgment has been typed separately. The same has been dated, signed and announced. Resultantly, accused T.P. Ratre is acquitted of the charge under section 306 IPC." But factually, there was no such judgment. After enquiry, the case was transferred to another judge by the High Court, passing an order on the administrative side, for fresh trial which was challenged in the present case. The Supreme Court deprecated the conduct of the trial judge in deciding the case without a judgment. But for a complaint made by a member of the state bar council, grave injustice done to the victim would not have come to light. This case shows the extent to which a judge can be casual in the decision-making process.

II RIGHT TO EQUALITY

Validity of 'talaq-al-biddat' (triple talaq)

A very significant question of constitutional importance relating to an age old religious practice among Muslims raised in *Shayara Bano*[22] was whether 'talaq al-biddat' (triple talaq) was violative of the fundamental rights guaranteed to citizens in India under articles 14, 15 and 21 of the Constitution. The petitioner Shayara Bano had approached the apex court assailing the divorce pronounced by her husband – Rizwan Ahmad on 10.10.2015 affirming "…in the presence of witnesses saying that I gave 'talak, talak, talak', hence like this I divorce from you from my wife. From this date there is no relation of husband and wife. From today I am 'haraam', and I have become 'naamharram'. In future you are free for using your life …". The aforesaid divorce was pronounced before Mohammed Yaseen (son of Abdul Majeed) and Ayaaz Ahmad (son of Ityaz Hussain) – the two witnesses. The petitioner had prayed for a declaration that the 'talaq-al-biddat' pronounced by her husband on 10.10.2015 be declared as void *ab initio*. It was contended that such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly under section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was unconstitutional and not protected under the rights granted to religious denominations under articles 25(1), 26(b) and 29 of the Constitution. Khehar CJI, for himself and on behalf of Nazeer J, held that article 14 forbade the state from acting arbitrarily. The learned CJI, however, rejected the contention that the Muslim Personal Law (Shariat) Application Act, 1937 did not alter the 'personal law' status of 'Shariat'; after the enactment of the Act, the subjects covered by it ceased to be 'personal law' and became 'statutory law'. The Muslim personal law – Shariat – was not based on any state legislative action, the same could not be tested on the touchstone of being a state action. 'Talaq-al-biddat' was a matter of religious faith and not a state action and, therefore, there was no question of violation of any fundamental right. Rohinton Fali

22 *Shayara Bano* v. *Union of India*, 2017 (9) SCALE 178.

Nariman, J (on behalf of Uday Umesh Lalit, J also), however, after analysing all the judicial precedents on the question of arbitrariness and unreasonableness, observed:[23]

> The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. …The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.
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> To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution.
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> (I)t was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.
>
> Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in Fyzee's book, the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God.
>
> Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital

23 *Id.* at 392, 397, 398, 399.

> tie, cannot ever take place. … Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara. This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases.

Kurian J, however, disagreed with Nariman J's view that 1937 Act was a legislation regulating triple talaq and could be tested on the anvil of article 14 though he agreed with Nariman J that both plenary as well as subordinate legislation could be tested on the touchstone of article 14.

Discrimination

The question whether the state action classifying the state aided and un-aided colleges in two different categories for the purpose of giving effect to the revised pay scales to the teaching and non-teaching staff was constitutionally permissible was answered by the Supreme Court in the negative. It held that such classification violated the mandate of article 14 of the Constitution. The court held that no doubt state aided and un-aided colleges, both categories of colleges affiliated to the University, formed two separate classes but the classification done under the Maharashtra Non-Agricutural Universities and Affiliated Colleges Standard Code (Non-Teaching Employees Revised Pay) Rules, 2009 made under the Maharashtra University Act, 1994 for the purpose of giving benefit of the revised pay scales only to the state aided colleges had no nexus to the object of classification between the two category of colleges.[24]

Section 375 of the Indian Penal Code, 1860 defines "rape" and carves out two exceptions. It states that "rape" as defined in the section will include sexual intercourse "with or without consent, when she (woman) is under eighteen years of age". However, exception 2 reads: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape". The question in *Independent Thought* v. *Union of India*,[25] was whether the distinction between wife and any other woman with reference to age (between 15 and 18 years) as provided in exception 2

24 *Secretary Mahatma Gandhi Mission* v. *Bhartiya Kamgar Sena*, 2017 (1) SCALE 325 : (2017) 4 SCC 449.

25 (2017) 10 SCC 800 : AIR 2017 SC 4904.

above was discriminatory under article 14 of the Constitution. Madan B. Lokur, J answered the question in the affirmative in the following words, while quashing exception 2 to section 375, IPC:[26]

> (I)n our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The Exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of article 15(3) of the Constitution as well as contrary to article 21 of the Constitution and our commitment in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to the trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

Under the Muslim law, marriage of a girl below eighteen years is valid but in the light of the above decision, sexual intercourse with legally wedded wife between 15 and 18 years of age will constitute "rape" which is not the correct proposition of law. The court did not deal with this aspect of the matter and, therefore, the decision needs to be re-considered at the earliest.

In *Manohar Lal Sharma* v. *Union of India*,[27] the Supreme Court had *inter alia* passed the following order:

> 10. All cases pending before different courts in Delhi pertaining to Coal Block Allocation matters shall stand transferred to the Court of the Special Judge…. We also make it clear that any prayer for stay or impending the progress in the investigation/trial can be made only before this Court and no other court shall entertain the same.

The question in *Girish Kumar Suneja* v. *CBI*,[28] was whether the aforesaid direction was arbitrary or discriminatory under article 14 of the Constitution. The order was held to be justified in public interest and for fair and speedy trial of cases involving corruption. This shows as to how the court can nullify statutory provisions at its discretion. Likewise, in *Gohil Vishvaraj Hanubhai* v. *State of Gujarat*,[29] the Supreme Court upheld the action of the respondent in cancelling the entire examination

26 *Id.* at 820.

27 (2014) 9 SCC 516.

28 (2017) 14 SCC 809. In this regard, reference may be made to the directions issued in *R.S. Nayak* v. *A.R. Antulay* (1984) 2 SCC 183 which were later on modified in *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602..

29 2017 (5) SCALE 433 : JT 2017 (6) SC 1.

held by it for recruitment to the post of revenue talati, under the control of the revenue department. Revenue talatis are to maintain revenue records, collect revenue, *etc*. The examination was cancelled on the ground of large scale malpractices adopted in the examination. It was contended that this was arbitrary and unfair to innocent examinees and the action had been taken without proper investigation. It was argued that legality of the government action must be tested on the touchstone of the principle of 'Wednesbury reasonableness' and the 'principle of proportionality' and while thus tested, the action was liable to be quashed. Rejecting the argument, the court held:[30]

> Purity of the examination process - whether such examination process pertains to assessment of the academic accomplishment or suitability of candidates for employment under the State - is an unquestionable requirement of the rationality of any examination process. Rationality is an indispensable aspect of public administration under our Constitution. The authority of the State to take appropriate measures to maintain the purity of any examination process is unquestionable. It is too well settled a principle of law in light of the various earlier decisions of this Court that where there are allegations of the occurrence of large scale malpractices in the course of the conduct of any examination process, the State or its instrumentalities are entitled to cancel the examination. This Court has on numerous occasions approved the action of the State or its instrumentalities to cancel examinations whenever such action is believed to be necessary on the basis of some reasonable material to indicate that the examination process is vitiated. They are also not obliged to seek proof of each and every fact which vitiated the examination process.
>
> Coming to the case on hand, there were allegations of large scale tampering with the examination process. Scrutiny of the answer sheets (OMR) revealed that there were glaring aberrations which provide prima facie proof of the occurrence of a large scale tampering of the examination process. Denying power to the State from taking appropriate remedial actions in such circumstances on the ground that the State did not establish the truth of those allegations in accordance with the rules of evidence relevant for the proof of facts in a Court of law (either in a criminal or a civil proceeding), would neither be consistent with the demands of larger public interest nor would be conducive to the efficiency of administration. No binding precedent is brought to our notice which compels us to hold otherwise. Therefore, the 1st submission is rejected.

30 *Id.* at 438-40 (of SCALE); also see *Indian Oil Corpn*. v. *State of Bihar*, JT 2017 (11) SC 261; *Mangalam Organics Ltd*. v. *Union of India* (2017) 7 SCC 221; *Excel Crop Care Ltd*. v. *Competition Commission of India*, AIR 2017 SC 2734.

> The next question is whether the impugned decision could be sustained judged in the light of the principles of 'Wednesbury unreasonableness'. In the language of Lord Diplock, the principle is that "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Having regard to the nature of the allegations and the prima facie proof indicating the possibility of occurrence of large scale tampering with the examination process which led to the impugned action, it cannot be said that the impugned action of the respondent is "so outrageous in its defiance of logic" or "moral standards". Therefore, the 2nd submission of the appellant is also required to be rejected.

Regularization in service

There can be no pick and choose policy while granting regularization of service to the employees who had served for ten years. The order to this effect was passed by the apex court in view of the fact that many employees, even those appointed subsequent to the appointment of the appellants, had been regularized on completion of ten years of service.[31] There can be no parity between full-time and part-time employees in considering regularization. If the government directs regularization of services of employees working in all government departments who had rendered ten years of service as on 01.01.2006 by appointing them against the posts provided they were otherwise qualified, the benefit of such a decision cannot be given to an employee who had worked on a part-time basis as masalchi and had attended to menial work in the department as such.[32] In *Yash Pal* v. *Union of India*,[33] 29 porters working in the Indian army as casual labour or daily-wage employees petitioned the Supreme Court under article 32 of the Constitution of India complaining that they have not been treated as regular employees and denied the benefit of minimum pay scales despite working for long years in arduous conditions in a difficult terrain and prayed that they be treated as "regular civilian employees in the Indian Army and extend them all benefits which are given to the regularly appointed/recruited porters discharging … identical work by treating already rendered services by the petitioners as … by regularly appointed/recruited porters." The court noted that the Indian army engages twelve thousand porters as casual labour to work in "highly risk/highly active field areas" having life-threatening conditions and they provide valuable support to the Indian

31 *Jivanlal* v. *Pravin Krishna, Principal Secretary*, 2017 (1) SCALE 426; also see *Jagpal Singh Thakur* v. *State of M.P.*, 2017 (8) SCALE 585.

32 *Secy. to Commercial Taxes and Registration* v. *A. Singamuthu*, 2017 (3) SCALE 365; also see *Committee of Management* v. *Director of Higher Education*, 2017 (14) SCALE 45.

33 AIR 2017 SC 680 : (2017) 3 SCC 272 : JT 2017 (1) SC 382. In a way, this was the third litigation on the issue. Earlier, the porters had lost their case of regularization: *Isher Singh* v. *Union of India*, CA Nos. 6248-49 of 2010 decided on 14.05.2013 and the contempt petition *Isher Singh* v. *Radha Krishna Mathur*, Con Pet. (C) Nos. 2-3 of 2014, Order dated 23.09.2015.

Army and were an integral requirement of operation in border areas. The work done by the porters and their condition is well depicted by the court thus:[34]

> (T)he porters provide valuable support to the Indian Army and are an integral, if not indispensable, requirement of operations in border areas. They are engaged for the carriage of stores, stocking of posts, collection of water, replenishment of ammunition, clearance of tracks and evacuation of casualties. In high altitudes of the north and north-east, the porters trudge along with their mules, ponies and donkeys in terrain inaccessible to any other form of transport. They belong to the poorest strata of society. Many of the porters may not possess educational qualifications. However, the value addition which they provide to the Indian Army in terms of their knowledge of conditions makes them a sure footed ally in hostile conditions. To look at their work from a metro centric lens is to miss the wood for the trees. They work, albeit as casual labour, for long years with little regard of safety. Faced with disability, injury and many times death, their families have virtually no social security. Such a situation cannot be contemplated having regard to the mandate in Articles 14 and 16 of the Constitution.

Despite the above narration, the court denied regularization to the petitioners adding that "that does not prevent the Government from taking a robust view of reality in consultation with the Armed Forces whom the porters serve with diligence and loyalty." The court mentioned a scheme proposed by the government regarding porters which it considered to be an improvement over the present state of affairs. Relying on an earlier decision relating to equal pay for equal work,[35] the court directed:

> There are three areas where we propose to issue directions to the Union government, and accordingly do so in the following terms. Firstly, the scheme as proposed provides for the payment of minimum wages at the prevailing 'Nerrik Rates'. This aspect requires a fresh look so that the porters are paid wages at par at the lowest pay-scale applicable to multi- tasking staff. Further, if there are provisions enabling additional payments to be made (either by way of allowances or otherwise) for work in high altitude areas or in high risk/active field areas, such payments shall be allowed under the scheme. Secondly, the scheme must provide for regular medical facilities including in the case of injury or disability. Thirdly, the amount of compensation in the case of death or permanent disability should also be looked at afresh and suitably enhanced. The present scheme provides for an interim relief

34 (2017) 3 SCC 272 at 277-78.

35 *State of Punjab* v. *Jagjit Singh*, AIR 2016 SC 5176 : 2016 (10) SCALE 446 : (2017) 1 SCC 148; see S N Singh, "Constitutional Law – I (Fundamental Rights)", LII *ASIL* 199 at 213-15 (2016).

> of rupees twenty thousand to be sanctioned at the discretion of the local formation commander. A maximum payment of Rupees two lakhs as applicable under the Workmen's Compensation Act, 1923 is contemplated. The provision for compensation shall be enhanced to provide for dignified payments in the event of death or disability. Fourthly, a one time severance grant of rupees fifty thousand is provided in the proposed scheme subject to a minimum service of ten years. This measly payment on severance does not fulfil the mandate of fairness, on the part of the State. We direct that the terminal benefits should be enhanced so as to provide for compensation not less than at a rate computed at fifteen days' salary for every completed year of service. The Union government shall bear in mind these directions in the course of the finalization of the scheme which shall be done within the next three months.

The court also noted that the government was also formulating a proposal for regularization of services of porters who had rendered service for a stipulated period up to five per cent of the sanctioned strength of multi-tasking staff but the court directed enhancement of the proportion of the sanctioned strength for regularization so that a reasonable proportion of persons completing the stipulated minimum tenure of service are benefitted.

III DISTRIBUTION OF STATE LARGESSE

The principles of judicial review are applicable in all administrative actions including distribution of state largesse. The Supreme Court in *Tata Cellular* v. *Union of India*[36] had held:

> It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State*. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

36 (1994) 6 SCC 651 at 675.

> Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

Likewise, the court also indicated the principles of judicial restraints in contractual matters as follows:[37]

> The principles deducible from the above are:
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> (1) The modern trend points to judicial restraint in administrative action.
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> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
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> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because *the invitation to tender* is in the realm of contract.Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

The exercise of power of judicial review thus cannot be denied in contractual matters but judicial restraint has always to be kept as the guiding principle; it is intended to prevent arbitrariness or favouritism and exercised in the larger public interest or, if in awarding a contract, power has been exercised for any collateral purpose.The Supreme Court had an occasion to apply the above principles of judicial restraint *in JSW Infrastructure Ltd.* v. *Kakinada Seaports Ltd*.[38] In this case, the Paradip Port Trust, issued Request For Qualification (RFQ) inviting global invitations for

37 *Id.* at 687-88.

38 JT 2017 (3) SC 216.

Mechanisation of EQ-1-2 and EQ-3 berths at Paradip Port Trust of 30 MTPS Capacity on BOT basis under PPP mode for concession period of Thirty (30) years. Four parties including the first and second consortium, submitted their bids as all the four were duly qualified and asked to participate in the next stage of bid, that is, Request For Proposal (RFP) and submit their offers with regard to revenue sharing. Only the first consortium and the second consortium submitted the RFP, 31.70% and 28.70% bid, respectively. The appellant, being the highest bidder, was recommended for acceptance by the tender committee of the Paradip Port Trust. The second consortium objected to the consideration of the application of the appellant on the ground that in terms of the Policy Clause against creation of monopoly, the appellant was not entitled to take part in the entire bidding process as it was already operating one berth for dry cargo. The Policy Clause read thus:

> *Policy.* If there is only one private terminal/berth operator in a port for a specific cargo, the operator of that berth or his associates shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port." It would also be pertinent to mention that specific cargo in this very Policy has been defined to be (i) containers, (ii) liquid, (iii) dry bulk. Letter of Award was issued in favour of the appellant of the first Consortium by the Paradip Port Trust on 29.02.2016.

The court reiterated that the words used in the tender document cannot be treated to be surplusage or superfluous or redundant and must be given some meaning and weightage[39] and the document must be read as a whole. While so reading, the court upheld the action of the respondent in accepting the tender of the appellant, observing:[40]

> On a bare reading of the Policy Clause some weightage and meaning has to be given not only to the word "next" as done by the High Court but also to the words "only one private operator" appearing in the opening part of the Clause. The words "only one private operator" cannot be treated as surplusage. The entire clause has to be read as a whole in the context of the purpose of the policy which is to avoid and restrict monopoly. In our opinion, this Clause will apply only when there is one single private operator in a port. If this single private operator is operating a berth, dealing with one specific cargo then alone will he not be allowed to bid for next berth for handling the same specific cargo. The High Court erred in interpreting the clause only in

39 The court made reference to three recent judgments on this aspect: *Central Coalfields Ltd.* v. *SLL – SML* (*Joint Venture Consortium*), AIR 2016 SC 3815; *Afcons Infrastructure Ltd* v. *Nagpur Metro Rail Corporation*, JT 2016 (9) SC 165; and *Montecarlo Ltd.* v. *N.T.P.C. Ltd*., AIR 2016 S C 4946.See S N Singh, "Constitutional Law – I (Fundamental Rights)", LII *ASIL* 199 at 224-25 (2016).

40 JT 2017 (3) SC 216 at 219-20.

> the context of the word "next" and ignored the opening part of the Clause which clearly indicates that the Clause is only applicable when there is only one private berth operator. It appears to us that the intention is that when a port is started, if the first berth for a specific cargo is awarded in favour of one private operator then he cannot be permitted to bid for the next berth for the same type of cargo. However, once there are more than one private operators operating in the port then any one of them can be permitted to bid even for successive berths. In the present case, as pointed out above there already 5 private operators other than the first consortium.

To what extent the court can scan and interpret the eligibility conditions prescribed in a tender document in exercise of its power of judicial review? There are a number of decisions on this issue but misfortune is that one bench does not make any reference to the decisions of 2017 given by other benches though, coincidentally, there is uniformity in the application of the same principles of law, i.e. judicial restraint in technical matters pertaining to tenders. The decision in *Sam Built Well Pvt. Ltd.* v. *Deepak Builders*[41] is a good example of judicial restraint shown by the court. This was an appeal against the decision of a division bench of the high court in appeal. The notice of tender by the director of the Institute of Nano Science and Technology, Mohali invited percentage rate composite bids from eligible contractors in a two bid system for construction of the Institute of Nano Science and Technology Campus in Mohali, consisting of research, academic and administrative buildings together with hostel, residential, amenity and utility buildings. Several persons including the appellant and respondent no. 1 submitted the bids. The technical evaluation report had stated that the respondent no. 1 was not eligible though it had claimed that it had done similar work.[42]

Two expert bodies (Tata Consultancy Services and Building Works Committee of the Institute) also held the same view that respondent no. 1 was not eligible. The respondent no. 1 was accordingly informed about its ineligibility. In a writ petition filed by the respondent no. 1, the single judge dismissed the petition but the division

41 2017 (14) SCALE 275. The court relied upon the decisions noted in *supra* note 39.

42 Clause 8 of the NIT prescribed the following conditions:

"8. Contractors/bidders who fulfil the following minimum criteria shall be eligible to apply. Joint ventures/consortium are not accepted.

(a) Should have satisfactorily completed the works as mentioned below during the last date of submission of bids.

(i) Three similar completed works each costing not less than Rs.64.9 crores, or

(ii) Two similar completed works each costing not less than Rs.97.3 crores,

(iii) One similar completed work of aggregate cost not less than Rs.129.7 crores.

Similar work shall mean work of "construction of institutional/educational buildings campus with minimum five storeys RCC framed structure building including electrical, plumbing, fire fighting, HVAC works under composite contract executed in India in a single contract."

bench allowed the appeal holding that the respondent no. 1 was eligible. The contract was eventually awarded to the respondent no. 1 as per the direction of the high court in appeal. The Supreme Court, quashing the decision of the division bench of the high court in appeal, held that when three expert committees had already considered the eligibility of the respondent no. 1 and found it to be ineligible, it was not permissible for the high court to take upon itself the task of deciding technical matters pertaining to technical ability and the financial feasibility relating to a tender. "Not having found malafides or perversity in the technical expert reports, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical evaluation, best left to technical experts, would be outside its ken", R.F. Nariman, J ruled. Similar view was held by Dipak Misra, J in *T.N. Generation and Distribution Corpn. Ltd.* v. *CSEPDI-TRISHE Consortium*.[43] In this case, the appellant had floated a tender for setting up of two units of 660 MW Ennore SEZ Supercritical Thermal Power Project in Chennai. Out of four bidders, two were disqualified as they had failed to meet the Bid Qualification Requirements (BQR) with the result that the bids of the Consortium of Trishe Energy Infrastructure Services Private Limited (CSEPDI) and Bharat Heavy Electrical Ltd (BHEL) were considered. But before the opening of the price bid, CSEPDI and BHEL submitted supplementary price bids which were opened by the appellant in the presence of the representatives of the above two respondents who were the qualified bidders.The price bids were evaluated by the Consultant whose report was challenged as being prima facie erroneous, requiring interference within the parameters of judicial review. Dipak Misra, J, while quashing the impugned order passed in appeal by the high court, observed:[44]

> (I)t is vivid that the Consultant has analysed the offers regard being had to the tender conditions. Be it ingeminated that the analysis and determination made by the financial consultant has been carried out before receipt of any additional document from either side. The documents were called for by the owner from both the qualifying bidders in a transparent manner and the same have been considered at the time of evaluation by the Consultant. …. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's

43 (2017) 4 SCC 318.

44 *Id.* at 338-39.

> assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd. x xxx
>
> The respondent, before finalization of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ court which directed for consideration of the representations. We are disposed to think that the High Court at that stage should have exercised caution. If the courts would exercise power of judicial review in such a manner it is most likely to cause confusion and also bring jeopardy in public interest. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently. But the present case is not one of such nature. Once the price bid was opened, a bidder could not have submitted representations on his own and seek a mandamus from the Court to take certain aspects into consideration. We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint.
>
> In view of our preceding analysis we are of the considered opinion that the Division Bench through the delineation has adopted the approach of an appellate forum or authority and extended the principle of judicial review to certain areas to which it could not have and, therefore, the judgment and order of the Division Bench followed the path of error in continuum. Consequently, the inevitable conclusion is unsettlement of the impugned order and we so direct.

In *Reliance Telecom Ltd*. v. *Union of India*,[45] the challenge was to terms and conditions of the Notice Inviting Application (NIA), 2015 (clause 5.3) to be bidded for minimum 4.4 MHz, IN 900 MHz band in the North East service area. Clause 2 prescribed the eligibility criteria.[46] The court was called upon to interpret clause 5.3 of NIA which dealt with spectrum cap, *i.e*. the quantum of spectrum an operator can

45 AIR 2017 SC 337 : (2017) 4 SCC 269 : JT 2017 (1) SC 603.

46 Clause 3 of NIA read as follows: "3.2 Associated Eligibility Conditions

(i) Existing Unified Licence (Access Service)/Exiting UASL/CMTS/UL licensees shall be treated as 'New Entrant' in those service area(s) for the frequency bands in which they do not hold spectrum at present. In other words, UAS/CMTS/UL(AS)/UL licensees who hold spectrum only in a particular Service Area are also allowed to participate in the auction as 'New Entrant' in that service area for the frequency band in which they do not hold spectrum at present.* Their eligibility to bid for spectrum blocks in that particular service area will be that of a new entrant. They will also need to comply with conditions for spectrum allotment and other prescribed conditions such as rollout obligations, FBG, etc.

*for the Purpose, 1800 MHz and 900 MHz Bands are considered as same band

(ii) Existing UASL/CMTS/UL(AS)/UL licensees shall be treated as 'Existing Licensee' in those service areas for the frequency band(s) in which they already hold spectrum. Their

hold in a Total Spectrum Assigned (LSA).[47] The main grievances of the petitioners were that the principle of capping adopted by the respondent kept them away from bidding in respect of a particular quantum making the bid non-competitive and reduction of overall spectrum caps despite availability of commercially viable spectrum amounted to hoarding; the calculation of overall spectrum which reducing the quantum

eligibility to bid for spectrum blocks will be that of an existing operator. For the limited purpose of this provision, 900MHz band, 1800 MHz band will be treated as the same band.

(iii) Bidders whose licences are due for expiry of 2015-16 and whose spectrum in 900 and 1800 MHz band has been put to auction will also be treated as 'New Entrants'.

(iv) Entities (not an existing licensee) will be treated as 'New Entrants' and will have to obtain a Unified License.

(v) Licensees covered by the note under Clause 1.4 of UAS licence condition are allowed to bid only for the spectrum band which they currently hold. For the limited purpose of this provision, 900 MHz and 1800 MHz will be treated as same band.

(vi) For the purpose of this auction, a cap of 25% of the 'total spectrum assigned' in 800/900/ 1800/2100/2300/2500 MHz bands with applicable paired band put together and 50% within a given band in each of the access service area shall apply for total spectrum holding by each operator. For the purpose of calculation of the cap in this auction, the spectrum put to auction would be included in the 'total spectrum assigned'. This cap will be applicable as on the last date of application for participating in Auction. Total Spectrum assigned for unpaired and both unlink and downlink spectrum in case of paired spectrum is taken into account."

47 Clause 5.3 of NIA which dealt with spectrum cap read as follows: "5.3 Spectrum Holding Capping Rule. For the purpose of this Auction the bidding by the bidders for each of the Service Areas in each of the bands will be restricted by a Cap which would depend on the Spectrum assigned in the respective band (1800 MHz/900 MHz/ 800 MHz) and also on the Total Spectrum assigned in all the bands namely 800 MHz/ 900 MHz/ 1800 MHz/ 2.1 GHz/ 2.3 GHz/ 2.5 GHz along with respective paired frequencies.

5.3.1 Overall Cap

The Overall Cap for each of the Service Areas is calculated as 25% of the Total Spectrum Assigned for Telecom services in above mentioned frequency bands (including the Spectrum put for these auctions).

** For the purpose of arriving at Overall Cap, the Total Spectrum Assigned in a Service Area is considered as the sum total of the current holdings of all the Telecom Service Providers across all bands in the respective Service Area PLUS the Spectrum put to auction in that particular Service Area.

** It may be noted that the Spectrum which is expiring in 2015-16 will not be considered in the Current Holdings. The same spectrum will only be considered as the Spectrum put to auction.

5.3.3. Cap in 900 MHz band

The Spectrum Cap for each operator in each of the Service Areas in 900 MHz band is calculated as 50% of the Total Spectrum assigned, both uplink and downlink, for Telecom services in 900 MHz band.

** For the purpose of arriving at Spectrum Cap in 900 MHz band, the Total Spectrum Assigned in a Service Area in 900 MHz band is considered as the sum total of the current holdings of all the telecom operators in 900 MHz band in the respective Service Area PLUS the Spectrum put to auction in 900 MHZ band in that particular Service Area.

** It may be noted that the Spectrum which is expiring in 2015-16 will not be considered in the Current Holdings. The same spectrum will only be considered as the Spectrum put to auction."

of spectrum put to auction was erroneous; some of the petitioners were debarred from holding what they were holding in *praesenti*; the available quantum should have been notionally added for the purpose of determining the cap which had not been done as a consequence of which the auction became wholly arbitrary; that the exclusion of the surrendered spectrum from the process of calculation was irrational and unreasonable and that there was no transparency in the auction. Rejecting the contentions of the petitioners that the impugned clause created different classes of bidders without any justification, Dipak Misra, J held:[48]

> (T)he condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. It allowed new entrants and enabled the existing entities to increase their cap to make the service more efficient. The Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. As the stipulation in the tender was reasonable and not based on any extraneous considerations, the Court cannot interfere in the NIA in exercise of the power of judicial review. The contention is that the State cannot hoard the spectrum as per the 2G case. We are disposed to think that in the case at hand, it cannot be said that there has been hoarding. The directions given in the 2G case had been complied with and the auctions have been held thereafter from year to year. The feasibility of communication, generation of revenue and its maximization and subserving of public interest are to be kept in view. The explanation given by the Union of India for not putting the entire spectrum to auction is a reasonable one and it is put forth that an endeavour would be made to put it to auction when it becomes available in sufficient quantum. The Court cannot interfere with the tender conditions only on the ground that certain amount of spectrum has not been put to auction. The submission is that whatever has been put to auction and is available should have been notionally added so that the entities which have certain quantum of spectrum in praesenti could have participated in the auction and put forth their bids for a higher quantum. This argument may look attractive on a first blush but pales into insignificance on a studied scrutiny. As is evincible, one of the petitioners had earlier more than 65 MHz in a band and because of the limited auction and non-addition of available spectrum on notional basis, it has obtained less quantum. With this submission, the contention of legitimate expectation has been associated. We have already repelled the submission pertaining to legitimate expectation. If there has been a reduction for a particular entity because of the terms and conditions of

48 AIR 2017 SC 337 at 372-73.

> the tender, it has to accept it, for he cannot agitate a grievance that he could have obtained more had everything been added notionally. Notionally adding up or not adding up, we think, is a matter of policy and that too a commercial policy and in a commercial transaction, a decision has to be taken as prudence would command…. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service.
>
> It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the Courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable.

Dipak Misra, J relied upon his above decision in *Consortium of Titagarh Firema Adsler SPA* v. *Nagpur Metro Rail Corpn. Ltd*.,[49] in which the respondent had issued a Notice Inviting Tender (NIT) for the work of design, manufacture, supply, testing, commissioning of 69 passenger rolling stock (Electrical Multiple Units) and training of personnel at Nagpur Metro Rail Project. Since the project was funded by KfW Development Bank, Germany, it was stipulated under clause ITS 35.8 that at all stages of bid evaluation and contract, award would have to be subject to no-objection from KfW Development Bank. Out of three bids received, one was technically disqualified. The appellant and respondent no. 2 had given the bid of Rs. 852 crores and Rs. 851 crores, respectively. On the basis of report of the tender evaluation committee, the lowest offer of respondent No. 2 was accepted and the work order was to be issued after compliance of certain technical requirements. Before the issue of work order, the appellant filed writ petition before the high court contending that respondent no. 2 was not technically qualified and, therefore, its financial bid could not have been opened.The appellant contended that clause 26 of the tender document prevented a person from getting any information about the technical qualification of the competitor, till the contract was awarded, which was arbitrary, unreasonable and violative of article 14 of the Constitution. Moreover, respondent no. 2 was not having the requisite experience as required under the NIT, for it did not meet the eligibility criteria on its own, but was relying on the experience of its subsidiary. According to Misra, J the respondent corporation had perceived the offer of the respondent no. 2 in the light of tender conditions. The papers relating to the financial bid along with report were forwarded to KfW which gave its no-objection. Respondent no. 2 was a company

49 (2017) 7 SCC 486.

owned by the People's Republic of China and, therefore, came within the ambit of Clause 4.1 of the bid document as a government owned entity. A single entity could bid for itself and it might consist of its constituents, wholly owned subsidiaries, having experience in relation to the project. Where the singular or unified entity claimed that as a consequence of merger, all the subsidiaries formed a homogenous pool under its immediate control in respect of rights, liabilities, assets and obligations, the integrity of the singular entity as owning such rights, assets and liabilities could not be ignored and must be given effect. The term "Government owned entity" would include a government owned entity and its subsidiaries and there could be no matter of doubt that the identity of the entities as belonging to the Government when established could be treated as a Government owned entity and the experience claimed by the parent of the subsidiaries could be taken into consideration. Misra, J held that there was no bar, express or implied, in the tender document to treat the parent company along with its 100% wholly owned subsidiaries as one entity. Therefore, the scope of judicial review was limited in adjudging the decision taken by the corporation in the best interest of the project and the public. The learned judge noted the following submission of the 1st respondent regarding capability, experience and expertise of respondent No.2:[50]

> (N)o project, (prejudice) whatsoever, has been caused to the project or to other bidders including the Petitioner by the above understanding of the tender conditions by R 1. It is humbly submitted that R 2 fulfilled all the technical requirements. The bid-document itself provided for bidding as a consortium, and did not require in such a case fulfilment of any material condition, which if not fulfilled would prejudice any parties or the project. Moreover, the scheme of the bid-document is such that it itself provides for a Parent Company Guarantee. According to this Parent Company Guarantee Form, a parent company would have to perform the works under the agreement in case the subsidiary failed. Therefore, the objections raised by the Petitioner are hyper-technical and have been raised only to stall the project once it was found to be unsuccessful.

Misra, J, therefore, held:[50a]

> (T)here is material on record that the respondent No. 2, a Government company, is the owner of the subsidiaries companies and subsidiaries companies have experience. The 1st respondent, as it appears, has applied its commercial wisdom in the understanding and interpretation which has been given the concurrence by the concerned Committee and the financing bank. We are disposed to think that the concept of "Government owned entity" cannot be conferred a narrow construction.

50 *Id.* at 510-11.
50a *Id.* at 511.

> It would include its subsidiaries subject to the satisfaction of the owner. There need not be a formation of a joint venture or a consortium. In the obtaining fact situation, the interpretation placed by the 1st respondent in the absence of any kind of perversity, bias or mala fide should not be interfered with in exercise of power of judicial review. Decision taken by the 1st respondent, as is perceptible, is keeping in view the commercial wisdom and the expertise and it is no way against the public interest. Therefore, we concur with the view expressed by the High Court.

It has unequivocally been held by the Supreme Court that even though public auction is not the only way to dispose of public property[51] but no public property can be disposed secretly by private negotiations.[52] Likewise, in a contract, equity has no role to play as the parties are governed by the terms of the contract.[53] Is it mandatory for the state to accept the highest bid given at an open auction? The answer is obviously no as merely by giving a bid, the bidder does not acquire any vested rights without acceptance of the bid by the competent authority,[54] there is no concluded contract but should the government agency pass a reasoned order while rejecting the highest bid? In *Haryana Urban Development Authority* v. *Orchid Infrastructure Developers P. Ltd*.,[55] the respondent was the highest bidder for the commercial tower situated in Sector 29, Urban Estate, Gurgaon, in area admeasuring 9.527 acres and had deposited 10% of the bid amount but no letter of acceptance was issued in its favour. When the bid had not been accepted, there was no question of its cancellation. The government or its authorities could retain power to accept or reject the highest bid in public interest. In the present case, the court held that in the absence of a concluded contract, i.e. in the absence of allotment letter and acceptance of highest bid, the court cannot enforce the non-existent contract. The court further held that the competent authority had rejected the highest bid on the report and recommendations of five-member auction committee on the ground that similar properties in other towns had fetched much higher price and the acceptance of the present bid would result in serious loss of revenue to the state; mere non-production of report was not of any significance. The rejection, therefore, could not be considered to be without sufficient reasons. In *Chhatisgarh State Industrial Deve. Corpn. Ltd.* v. *M/s. Amar Infrastructure Ltd*.,[56] the award of a contract to M/s. Raipur Construction Pvt. Ltd. by the appellant for the

51 *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* (2012) 10 SCC 1; see S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVIII *ASIL* 173 at 181-84 (2012).

52 *Jaykrishna Industries Ltd*. v. *State of Maharashtra*, 2017 (13) SCALE 406; see *also Indian Oil Corpn.* v. *Shashi Prabha Shukla*, 2017 (14) SCALE 395.

53 *M/s. Sharma and Associates Contractors (P) Ltd.* v. *Progressive Constructions Ltd*., 2017 (2) SCALE 326 : JT 2017 (3) SC 256

54 See *Uttar Pradesh Avas Evam Vikas Parishad* v. *Om Prakash Sharma* (2013) 5 SCC 182.

55 AIR 2017 SC 882 : JT 2017 (1) SC 503.

56 JT 2017 (3) SC 531.

work of "upgradation of infrastructure i.e. roads, drainage system and water supply in Sirgitti under Modified Industrial Infrastructure Up-gradation Scheme (MIIUS) at Sirgitti, Bilaspur" by inviting online bids was challenged by M/s. Amar Infrastructure Ltd., which had been disqualified on the ground that "its construction experience was not found as per the requisite criteria indicated in experience certificate, quantity of DLC (M-10) i.e. 3194 cum submitted under the key activities of construction experience of requisite quantity of work done was not in accordance with the nomenclature of PWD SOR. In the nomenclature of DLC in SOR there was no M-20 type of concrete, as such the amount of DLC as presented in the certificate had been rejected", on the ground that manipulation in the technical evaluation bid sheet and the pre-qualification criteria had not been fulfilled while awarding the contract. The apex court did not find any manipulation as alleged. Moreover, more than fifty per cent of the work had already been done and as per an earlier decision,[57] the court should be slow in interfering with a contract as retendering would delay the project.

IV RESERVATIONS IN ADMISSIONS AND SERVICES

As in the previous years, the issue of reservation took its toll of judicial time in the current year also. Besides reservations statutorily prescribed for benchmark disabilities under the Rights of Persons with Disabilities Act, 2016, the question of reservation was raised and decided during the current year in varied situations. It was laid down a couple of years back in *Jitender Kumar Singh*[58] that relaxation in age and concession in fee do not have any impact on a reserved category candidate seeking appointment to a public office if he has qualified for a post securing marks/ranks obtained by a general category candidate; such a candidate, even though belonging to a reserved category, will be adjusted against the general category. This decision was applied in a few cases reported during the year 2017. In *Gaurav Pradhan* v. *State of Rajasthan*,[59] the Rajasthan Public Service Commission issued two advertisements for recruitment to the posts of constables and sub-inspectors under the Rajasthan Police Subordinate Service Rules, 1989. During the selection process, the state government issued a circular providing that the candidates belonging to BC/SBC/SC/ST shall be migrated against open category vacancies if they have secured more marks than the last candidate of open category irrespective of whether they have availed of any concession including relaxation in age. After the issue of select list, writ petitions were filed by the general category candidates questioning the aforesaid circular and the select list contending that the reserved category candidates who had taken concession of relaxation of age in competition cannot be migrated to general category vacancies. Aslok Bhan J, accepting the argument, held :[59a]

57 *Tejas Constructions and Infrastructure Pvt. Ltd*. v. *Municipal Council, Sendhwa* (2012) 6 SCC 464.

58 *Jitender Kumar Singh* v. *State of U.P*., AIR 2010 SC 1851 : (2010) 3 SCC 119; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLIX *ASIL* 159 at 173-74 (2010);

59 2017 (9) SCALE 584 : JT 2017 (9) SC 501.

59a *Id.* at. 604 (of SCALE)

> In view of the foregoing discussion, we are of the considered opinion that the candidates belonging to SC/ST/BC who had taken relaxation of age were not entitled to be migrated to the unreserved vacancies, the State of Rajasthan has migrated such candidates who have taken concession of age against the unreserved vacancies which resulted displacement of a large number of candidates who were entitled to be selected against the unreserved category vacancies. The candidates belonging to unreserved category who could not be appointed due to migration of candidates belonging to SC/ST/BC were clearly entitled for appointment which was denied to them on the basis of the above illegal interpretation put by the State. We, however, also take notice of the fact that the reserved category candidates who had taken benefit of age relaxation and were migrated on the unreserved category candidates and are working for more than last five years. The reserved category candidates who were appointed on migration against unreserved vacancies are not at fault in any manner. Hence, we are of the opinion that SC/ST/BC candidates who have been so migrated in reserved vacancies and appointed should not be displaced and allowed to continue in respective posts. On the other hand, the unreserved candidates who could not be appointed due to the above illegal migration are also entitled for appointment as per their merit. The equities have to be adjusted by this Court.
>
> We thus for adjusting the equity between the parties issue following directions:
>
> (1) The writ petitioners/appellants who as per their merit were entitled to be appointed against unreserved vacancies which vacancies were filled up by migration of SC/ST/BC candidates who had taken relaxation of age should be given appointment on the posts. The State is directed to work out and issue appropriate orders for appointment of such candidates who were as per their merit belonging to general category candidates entitled for appointment which exercise shall be completed within three months from the date copy of this order is produced.
>
> (2) The State shall make appointments against the existing vacancies, if available, and in the event there are no vacancies available for the above candidates, the supernumerary posts may be created for adjustment of the appellants which supernumerary posts may be terminated as and when vacancies come into existence.

In *Vikas Sankhala* v. *Vikas Kumar Agarwal*,[60] the challenge was to the validity of relaxation of marks given to reserved category (SC/ST/OBC) and women candidates in passing Teachers Eligibility Test (TET). The rationale for including TET as minimum

60 (2017) 1 SCC 350.

qualification was spelt out in the guidelines thus: (i) To bring national standards and benchmark of teacher quality in the recruitment process; (ii) To induce teacher education institutions and students from these institutions to further improve their performance standards; and (iii) To send a positive signal to all stakeholders that the Government lays special emphasis on teacher quality. It is a mandatory condition that a person must pass in TET for being eligible to participate in the recruitment process for appointment as a teacher. TET is conducted by the state government in accordance with guidelines framed by National Council for Teacher Education (NCTE) which is competent to lay down the minimum qualifications which a person must possess making him eligible for appointment as a teacher. The guidelines issued in 2010, as amended in 2011, by NCTE specified that the minimum pass percentage of TET was 60. The guidelines provided for relaxation up to 5% in the qualifying marks to the candidates belonging to reserved categories, such as SC/ST/OBC/PH. The guidelines in para 9 further enabled the state governments to give concessions to persons belonging to SC/ST/OBC/differently abled persons, etc. 'in accordance with their extant reservation policy'. Subsequent to the guidelines issued by the NCTE, the State of Rajasthan issued a letter to the concerned authorities conveying its decision to grant relaxation in minimum pass marks in the TET to reserved category candidates thus: (a) 10% to persons belonging to SC, ST, OBC, SBC and all women belonging to the general category; (b) 15% to all women belonging to SC, ST, OBC, SBC and widowed and divorced women; and (c) 20% to persons covered under the definition of "persons with disability" under clause (t) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Consequently, the candidates belonging to SC/ST, OBC, SBC and women belonging to general category were given 10% relaxation in pass marks in TET which enabled them to pass TET with 50% marks. They were allowed to appear in the selection process undertaken thereafter in 2012. Many persons in these categories were found eligible and given appointment letters and issued joining orders. This relaxation was challenged before the high court by the general category candidates left out of the reservation policy which allowed the petitions. The state and candidates selected on the basis of relaxed marks challenged the decision of the high court by way of appeal before the Supreme Court. Many reserved category candidates, securing higher marks than the last selected candidates from the general category, were allowed to migrate in general category, thereby occupied the post meant for general category. It was contended that this was not permissible as these reserved category candidates had been selected after availing certain concessions and, therefore, they could not have been allowed to shift to general category. After sermonising at length with the help of observations of V.R. Krishna Iyer J,[61] Sikri J held that relaxation prescribed by the state government in pass marks in TET examination for different reserved categories mentioned therein was legal and valid in law, to meet and balance two constitutional goals of "rendering quality education on the one hand and providing "equality of

61 *Dr. Jagadish Saran* v. *Union of India* (1980) 2 SCC 768.

opportunity" to the unprivileged class on the other hand." Relying on *Jitender Kumar Singh* v. *State of U.P.*,[62] Sikri J observed:[63]

> In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of article 16(1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the preliminary test as also in the physical test. It is only thereafter that successful candidates have been permitted to participate in the open competition. It is stated at the cost of repetition that provision of giving 20% marks of TET score was applied to all candidates irrespective of the category to which he/she belongs and, therefore, no concession or relaxation or advantage or benefit was given in this behalf which could disturb the level playing field and tilt advantage in respect of reserved category candidate. On the contrary, the reserved category candidates who had secured less marks in TET examination are given lesser marks in the recruitment process on the application of the formula of allocating 20% marks of TET score.

While allowing the appeals, Sikri J held that the reserved category candidates securing pass marks on the application of relaxed standards as contained in the extant policy of the government in its communication be treated as having qualified TET examination and eligible to participate in the selection undertaken by the state government and migration from reserved category to general category shall be admissible to the reserved category candidates securing more marks obtained by the last unreserved category candidates who are selected, subject to the condition that such reserved category candidates did not avail any other special concession. The learned judge clarified that concession of passing marks in TET was not to be treated as concession falling in the aforesaid category.

62 AIR 2010 SC 1851.

63 *Vikas Sankhala* v. *Vikas Kumar Agarwal* (2017) 1 SCC 350.

The above decision was followed in *V. Lavanya* v. *State of T.N.*,[64] in which the issue related to the appointment of secondary grade teachers and B.T. assistants in the State of Tamil Nadu as per the Guidelines prescribed by National Council for Teacher Education. In this case, the dispute related to the relaxation of 5% marks to the reserved category candidates [scheduled caste, schedule tribes, backward classes, backward classes (Muslim), most backward classes, de-notified communities and persons with disability (PWD)] in the TET approved by the state government. The court upheld the relaxation prescribed by the state government in pass marks in TET for different reserved categories relying on *Vikas Sankhala* case.

In *Deepa E.V* v. *Union of India*,[65] the decision in *Jitender Kumar Singh* was distinguished. In this case, the appellant had applied under OBC category for the post of laboratory assistant grade II in Export Inspection Council of India under the Ministry of Commerce and Industry, Government of India by availing age relaxation and also attended the interview under the OBC category claimed right to be appointed under the general category as she had secured 82 marks as against 70 fixed as qualifying marks for general category which had not been obtained by any general category candidate. There was only one post reserved for OBC which was filled up by another OBC candidate securing 93 marks. The appellant approached the high court for a declaration that the minutes dated 1.7.1998[66] were not binding in her case. It would be seen from the minutes dated 1.7.1998 that there was an express prohibition on adjusting a reserved category candidate against a non-reserved post if he/she had availed any kind of relaxation including relaxation in age in the written test and/or interview, as in the present case. The Supreme Court, while distinguishing *Jitender Kumar Singh*, pointed out that the appellant had merely sought for a declaration that the proceedings dated 1.7.1998 were not binding on her; she had not challenged the constitutional validity of the said proceedings. As she had availed the relaxation in age, *Jitender Kumar Singh* case was not applicable as in that case there was no such prohibition and was based on the statutory interpretation of the U.P. Public Services

64 (2017) 1 SCC 322.

65 2017 (5) SCALE 424.

66 G.I. Dept. of Per. & Trg., O.M. No. 36012/13/88-Estt. (SCT), dated 22.5.1989 and OM No.36011/1/98-Estt. (Res.), dated 1.7.1998 "*Subject:- Reserved vacancies to be filled up by candidates lower in merit or even by released standards- candidates selected on their own merits not to be adjusted against reserved quota*.

2. The above OM and the O.M. No.36012/2/96-Estt.(Res.) dated 2.7.1997 provide that in cases of direct recruitment, the SC/ST/OBC candidates who are selected on their own merit will not be adjusted against reserved vacancies. 3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standards as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies."

(Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Government order dated 25.3.1994 which contained entirely a different scheme. The kind of distinction drawn is microscopic and does not support the real spirit of the decision in *Jitender Kumar Singh* case.

In *Union of India* v. *Ramesh Ram*,[67] a Constitution Bench of the apex court had decided an important question on reference whether candidates belonging to reserved category, who get recommended against general/unreserved vacancies on account of their merit (without the benefit of any relaxation/concession), can opt for a higher choice of service earmarked for reserved category and thereby migrate to reservation category. The court had held that having regard to the specific characteristics of the UPSC examinations, the reserved category candidates (belonging to OBC, SC or ST) selected on merit and placed in the list of general/unreserved category candidates can choose to migrate to the respective reserved categories at the time of allocation of services and the seats vacated by such candidates in the general pool would be offered to general category candidates.

Reservation and relaxation for persons with "benchmark disabilities"

The Supreme Court had issued detailed directions in two cases for effective implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.[68] But on one pretext or the other, the physically challenged persons were being deprived of their statutory rights to reservations and relaxation in eligibility and every year they or their association have to knock the doors of the courts for protection. The physically challenged persons, now addressed as persons with "benchmark disabilities" under the Rights of Persons with Disabilities Act, 2016 (2016 Act) enforced w.e.f. 19.04.2017,[69] are not being treated fairly despite

67 (2010) 7 SCC 234. A similar issue was considered in *Controller of Exams., Patna* v. *Nidhi Sinha*, AIR 2017 Pat 1 (FB) by a full bench of the High Court of Patna. The issue was:What would be the impact of migration of a meritorious reserved category (MRC) candidate, if for the purpose of getting admission to a medical course/institution, he/she opts and is treated to be a reserved category candidate for the limited purpose of allotment of a medical course/ institution, on a candidate, who has been placed at the bottom in the merit list of reserved category to which the said MRC candidate belongs. The full bench of the court, without disturbing the admissions made long back, directed that in future, "while extending special reservation for women, the respondents shall first fill up the quota of reserved category in order of merit and then they will find out the number of candidates among them who belong to the special reservation group, viz. women, handicapped etc. Once the number of special reservation is found to be equal to for more than the special reservation quota, no further selection of candidates on the basis of special reservation shall be required. Only in case of shortfall, the requisite number of Patna High Court LPA No.433 of 2000 candidates in the category of special reservation shall be taken up by deleting the corresponding number of candidates from the bottom of the concerned list."

68 See *Union of India* v. *National Federation of the Blind* (2013) 10 SCC 772; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLIX *ASIL* 247 at 301-303 (2013); *Justice Sunanda Bhandare Foundation* v. *Union of India* (2014) 14 SCC 383.

69 The Act was enacted to give effect to the Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly on the 13th December, 2006. This Act repealed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

detailed statutory protection given to them. Section 3 of the Act provides for equality and non-discrimination.[70] Under the 2016 Act, more rights have been conferred on the disabled persons and more categories have been added as compared to the 1995 Act, besides providing for access to justice, free education, role of local authorities, national fund and the state fund for persons with disabilities. Under section 32, all government institutions of higher education and other higher education institutions receiving aid from the government are required to reserve *not less than five per cent seats* for persons with benchmark disabilities[71] and also give an upper age *relaxation of five years* for admission in institutions of higher education. Moreover, section 34 provides for reservation of posts for benchmark disabilities: (1) Every appropriate Government shall appoint in every Government establishment, *not less than four per cent* of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one *per cent* each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d)

70 S. 3. *Equality and non-discrimination*: (1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.

(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.

71 Under s. 34(1) of the Act, "benchmark disabilities" means: "(a) blindness and low vision; (b) deaf and hard of hearing; (c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy; (d) autism, intellectual disability, specific learning disability and mental illness; (e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities: Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time: Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section." This is to be read with s. 2(r) which provides that "person with benchmark disability" means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority. Moreover, s. 2(s) further reads: (s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others. Persons with less than 40% disability were not entitled to the benefits of the 1995 Act: see *Rima Taipodia* v. *Arunachal Pradesh Public Service Commission*, 2017 (12) SCALE 126 (the provision of s. 2(r) of the 2016 Act being the same, this decision will equally apply thereunder).

and (e). Under section 89, punishment has been prescribed by way of fine for contravention of provisions of Act and the rules and regulations made thereunder. A full bench of the apex court once again directed all the states and the union territories to file compliance report keeping in view the provisions of the 2016 Act within twelve weeks stating the steps taken in this regard.[72] In yet another PIL,[73] filed on behalf of the disabled persons for proper and adequate access to public places, in particular, providing all accessibility requirements to meet the needs of visually disabled persons in respect of safe access to roads and transport facilities. After an analysis of the 2016 Act, A.K. Sikri, J passed detailed directions for effective implementation of the Act.[74]

72 *Sunanda Bhandare Foundation* v. *Union of India* (2017) 5 SCC 13; also see *All India Confederation of the Blind* v. *Union of India* (2017) 3 SCC 525, which shows how the Union of India has given effect to the reservation for physically challenged persons and also the relaxation given to them in teaching posts in the Universities and colleges pursuant to s. 33 of the 1995 Act.

73 *Rajive Raturi* v. *Union of India*, 2017 (14) SCALE 412 : (2018) 2 SCC 413.

74 *Id.* at 457-59.The directions were: (i) Making 20-50 important government buildings in 50 cities fully accessible December 2017 (State Govt. Buildings) Since, this deadline is set by the AIC itself, this should be met. In any case, as per the provisions of s. 46 of the Disabilities Act, 2016, all Government buildings providing any services to the public are to be made fully accessible by June, 2019 which has to be adhere to.

(ii) Making 50% of all the govt. buildings of the national capital and all the state capitals fully accessible by December 2018.

(iii) Completing accessibility audit of 50% of govt. buildings and making them fully accessible in 10 most important cities/towns of states/UTs not covered in targets (i) and(ii) by December 2019.

(iv) Central Govt. buildings.Having regard to the comments given by the petitioner in its affidavit dated August 23, 2017 on this aspect, time frame of August, 2018 is given for completing this target.

(v) Accessibility in airports. Completing accessibility audit of all the international airports and making them fully accessible by December 2016.The demand of the petitioner that Civil Aviation Ministry should follow the prescribed template i.e. IIT Roorkee template on the Government website appears to be justified which should be implemented as expeditiously as possible. The Union of India should thereafter conduct the accessibility and audit and upload the same on the website by June, 2018.

(vi) Accessibility in Railways. Ministry of Railways was required to make all A1, A and B category railway stations fully accessible by July 2016. 50% of all railway stations to made fully accessible by March 2018.

(vii) 10% of government owned public transport carriers are to be made fully accessible by March 2018.

(viii) Comprehensive revision of target deadliness under accessibility of knowledge and ICT Ecosystem. At least 50% of central and state govt. websites are to meet accessibility standards by March 2017. At least 50% of the public documents are to meet accessibility standards by March 2018.

(ix) Bureau of Indian Standards to embed disability aspect in all relevant parts of revised National Building Code.

(x) The target of training additional 200 sign language interpreters by March 2018.

In another PIL,[75] three important issues pertaining to physically challenged persons were raised: (i) non-implementation of 3% reservation of seats in educational institutions as prescribed in section 39 of the 1995 Act and section 32 of the 2016 Act; (ii) to provide proper access to orthopaedic disabled persons so that they are able to freely move in the educational institution and access the facilities; and (iii) issue pertaining to pedagogy, *i.e.* making adequate provisions and facilities of teaching for disabled persons, depending upon the nature of their disability, to enable them to undertake their studies effectively. A.K. Sikri, J disposed of the petition with the direction that 3% of seats in the educational institutions shall be reserved with a further direction that law colleges shall send intimation about their action to the Bar Council of India (BCI) and other educational institutions will notify the compliance, each year, to the UGC who may carry out inspections of such educational institutions to verify as to whether the provisions were complied with or not. Moreover, the suggestions given by the petitioner in the form of "Guidelines for Accessibility for Students with Disabilities in Universities/Colleges" shall be considered in a time bound manner by UGC by constituting a Committee including persons from amongst central advisory board, state advisory boards, chief commissioner of state commissioners appointed under the Disabilities Act.

In *Union of India* v. *M. Selvakumar*,[76] the court considered the question of unequals being treated equal in violation of equality clause under article 14 of the Constitution of India. In this case, the petitioners, physically handicapped candidates belonging to Other Backward Classes (OBC), had approached two high courts claiming that they were entitled to avail ten attempts instead of seven in the civil services examination on the ground that since the attempts for physically handicapped candidates belonging to general category had been increased from four to seven since 2007, there should be a proportionate increase in attempts to be taken by them. The court noted that all physically handicapped category candidates had been granted uniform relaxation of upper age by 10 years. The court held that a physically handicapped candidate of general category had been given equal chance as compared to a physically handicapped candidate belonging to OBC; no discrimination could be read when the number of attempts for both the above categories has been made equal, *i.e*. 7. The reservation for physically handicapped was a kind of horizontal reservation and the physically handicapped persons belonging to any category (i.e. General, OBC, SC/ST) have to be given opportunity "to come up and compete in the mainstream, and enjoy all the benefits and developments." Rejecting the contention of the petitioners, Ashok Bhushan, J held:[77]

(xi) As per the provisions of s. 60 and 66 of the Disabilities Act, 2016, all States and Union Territories are required to constitute the Central and State Advisory Boards.

75 *Disabled Rights Group* v. *Union of India*, 2017 (14) SCALE 496.

76 (2017) 3 SCC 504 : AIR 2017 SC 740 : 2017 (1) SCALE 725 : JT 2017 (1) SC 468.

77 *Id.* at 748 (of AIR).

> When the attempts of Physically Handicapped candidates of OBC Category and Physically Handicapped candidates of General Category, who appeared in the Civil Services Examination are made equal, and a Physically Handicapped candidate belonging to OBC Category, in addition to 10 years relaxation in age also enjoys 3 years more age relaxation for appearing in the examination, we cannot agree with the High Court that there is discrimination between Physically Handicapped candidates of OBC Category and Physically Handicapped Candidates of General Category. The reserved category candidate belonging to OBC are separately entitled for the benefit which flow from vertical reservation, and the horizontal reservation being different from vertical reservation, no discrimination can be found when Physically Handicapped candidates of both the above categories get equal chances *i.e.* 7 to appear in the examination.

It was also argued by the petitioners that physically handicapped candidates of OBC category were allowed only 7 attempts which was equal to physically-abled candidates of OBC category and thus physically handicapped and physically-abled OBC category candidates had to compete which amounted to equality between unequals violative of article 14. Moreover, the physically handicapped candidates of general category and candidates of physically handicapped OBC category had been permitted equal attempts, which amounted to treating unequals as equals violating article 14. Rejecting the argument, Ashok Bhushan, J held:[78]

> The present case is not a case of treating unequals as equal. It is a case of extending concessions and relaxations to the Physically Handicapped candidates belonging to General Category as well as Physically Handicapped belonging to OBC Category. Physically Handicapped Category is a Category in itself, a person who is physically handicapped be it Physically Handicapped of a General Category or OBC Category, suffering from similar disability has to be treated alike in extending the relaxation and concessions. Both being provided 7 attempts to appear in Civil Services Examination, no discrimination or arbitrariness can be found in the above scenario.

Finally, the court refused to interfere with the policy decision of the government in making horizontal reservation and relaxation for physically handicapped category candidates as the same had been done by the government after considering the relevant materials pertaining to the physically handicapped candidates belonging to the reserved category as well as general category. The court did not find the policy framed by the government to be capricious and non-informed by reasons, or totally arbitrary, offending the basic requirement of article 14 of the Constitution.

78 *Id.* at 750.

In *A.P. State Road Transport Corpn.* v. *B.S. Reddy*,[79] the question was whether the benefit of section 47[80] of the 1995 Act, was available to those covered by section 2(i) of that Act[81] alone or applied even to persons not covered under that provision. The petitioners in this case had suffered disability during employment. They had sought benefit of section 47 of the Act to the effect that their services could neither be dispensed with on account of the said disability nor their rank could be reduced and they could only be shifted to some other post, with same pay-scale and service benefits. The apex court, without any detailed analysis, rejected the argument holding that:[82]

> We do not find any reason to hold that expression "disability" in s. 47 of the Act is used in a different context so as not to go by the definition given in section 2(i) of the Act. We also note that even though section 2(i) of the Act may not cover every disabled, scheme of the Andhra Pradesh and Telangana Transport Corporations covers even those employees who are not covered by section 2(i) of the Act. Thus, those who are disabled within the meaning of section 2(i) are not without any benefit whatsoever. They are, thus, entitled to invoke such schemes but not section 47 of the Act.

In *Pranay Kumar Poddar* v. *State of Tripura*,[83] the question was whether a person suffering from colour blindness was eligible to be admitted into the MBBS course against the seats reserved for physically challenged persons. As per the decision of the Medical Council of India, 3% of seats were reserved in the MBBS course only to those persons who were suffering with disability of lower limbs between 50% to 70%. In case the 3% quota remains unfilled on account of unavailability of candidates in this category, 3% quota shall be filled up with those having locomotive disability of lower limbs between 40% to 50%. The Medical Council had made no reservation for visually impaired or hearing impaired persons; reservation was made only for

79 AIR 2017 SC 1621.

80 S. 47 of the 1995 Act read thus: (1) No establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service. Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits. Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability: Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

81 S. 2(i) of the 1995 Act (since repealed) defined "disability" thus: "Disability" means- (I) Blindness; (ii) Low vision; (iii) Leprosy-cured; (iv) Hearing impairment; (v) Loco motor disability; (vi) Mental retardation; (vii) Mental illness. The definition of "benchmark disabilities" under the 2016 Act is wider: see *supra* note 71.

82 AIR 2017 SC 1621 at 1622-23.

83 JT 2017 (4) SC 414.

persons with disability in the lower limb between 50% to 70%. Anybody having disability of more than 70% to the lower limb was not eligible to get a seat in the MBBS course. The apex court directed the Medical Council of India to constitute a committee of experts with representatives of the Medical Council of India, experts from genetics, ophthalmology, psychiatry and medical education, from outside the members of the Medical Council of India to examine the issue. Based on the recommendations of the committee that "Colour blindness has been dealt adequately as an impediment but Colour Vision Deficiency does not have any embargo of any type whatsoever," the court exercising its powers under article 142 of the Constitution of India, keeping in view the "transcendental importance of justice", directed the appellants to be admitted in the M.B.B.S. course of the College for the academic year 2018-2019, reducing the quota by two seats for that year.

V RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

Limits of political speech

Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression to all citizens subject to restrictions permissible under clause (2) of that article. The question considered by a seven-judge bench of the Supreme Court in *Abhiram Singh* v. *C.D. Commachen*,[84] was as to what was the extent of this freedom in so far as election speech was concerned. Section 123 of the Representation of People Act, 1951 defines "corrupt practices". The relevant provisions of this section read:

> (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 any candidate shall be deemed to be a religious or a national symbol for the purposes of this Act.

In a verdict divided by 2 + 1 + 1 by 3, Madan B. Lokur J, for the majority, held that section 123(3) must be given a purposive and broad interpretation by bringing within the sweep of corrupt practice "any or for appeal made to an elector by a candidate or his agent or by any other person with the consent of a candidate or his agent to vote or refrain from voting for the furtherance of the prospects of the election of that candidate on the ground of his religion, race, caste, community or language of (i) any candidate, or (ii) his agent, or (iii) any other person making the appeal with the consent

84 (2017) 2 SCC 629 : JT 2017 (1) SC 196 : 2017 (1) SCALE 1.

of the candidate, or (iv) the elector." Lokur J further held that it was a matter of evidence whether any such appeal had been made or not and whether the same was in violation of section 123. So far as the constitutional validity of the provision was concerned, the learned judge merely quoted an earlier Constitution Bench decision in which the provision was held to be constitutionally valid in which it was held:[85]

> The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. The appellants have no fundamental right to be elected members of Parliament. If they want that, they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections (sections123(5) and 124(5) of RP Act) do not stop them. We hold that these sections are intra vires.

While concurring with Lokur J, T.S. Thakur, CJI held that an appeal in the name of his religion, race, caste, community or language was impermissible and amounts to corrupt practice to justify annulment of the election in which such an appeal was made "regardless whether the appeal was in the name of the candidate's religion or the religion of the election agent or that of the opponent or that of the voter." S.A. Bobde J, while concurring with Lokur J held that an appeal made on the ground of religion of the candidate *etc*. or of the voter was covered within the term corrupt practice. On the other hand, D.Y. Chandrachud J, on behalf of two other judges, held a contrary view. Relying on earlier decisions interpreting the section, Chandrachud J held that "the expression "his" in section 123(3) mean the religion, race, community or language of the candidate in whose favour an appeal to cast a vote was made or that of another candidate against whom there is an appeal to refrain from voting on the ground of the religion, race, caste, community or language of that candidate." The learned judge found no justified reason to deviate from the already settled interpretation of section 123(3) that the word "his" did not refer to voter. In fact, if one goes by the intention behind the drafting of section 123(3), the interpretation given by the majority seems more logical and purposive. Any appeal to vote or refrain from voting on the ground of religion, race, caste, community or language must encompass appeal to and of the stakeholders, be they the candidate, agent, opponent or the voter.

Contempt of court

The freedom of speech and expression is subject to reasonable restrictions on grounds mentioned in clause (2) of article 19 of the Constitution of India. This restriction includes contempt of court which aims at protecting the independence of judiciary and maintain public confidence in the administration of justice. How did the Supreme Court invoke its power to punish a contemnor can be seen from a few

85 *Jamuna Prasad Mukhariya* v. *Lachhi Ram*, AIR 1954 SC 686 at 688.

cases decided during the year. In an un-precedented incident,[86] a sitting judge of the High Court of Madras was punished by a seven-judge bench of the apex court by way of six months imprisonment for committing contempt of the court. The contemnor had made serious allegations regarding corruption and his own ragging, discrimination, harassment, etc. against several sitting and retired judges of the Supreme Court, Chief Justices of High Courts and judges of the High Court of Madras alleging that he was being treated for his belonging to an under-privileged caste. The apology tendered by the contemnor was rejected by the court even though in another case,[87] the court had held that apology should not be rejected merely on the ground that it was qualified or tendered at belated stage so long as it was bona fide. This case should open a new debate about the power of contempt exercised by the court. This should also start a debate as to whether by such orders of punishment the image of the judiciary has enhanced in any manner. What action was taken on the allegations made by the contemnor and whether he had substantiated his allegations with any documentary proof. These are the matters which remained un-answered.

The Supreme Court has consistently been applying the principles of natural justice while judging administrative actions as well as judicial decisions. But the principle of *nemo judex* in *causa sua* (no-one should be a judge in his own case) which is a basic principle of judicial review, was being ignored unfortunately, in contempt cases. Thus, *In re Blog Published by Justice Markandey Katju dated 17th September, 2016 – Titled 'Soumya Murder Case'*[88] a contempt notice was issued by a three-judge bench of the Supreme Court[89] against a retired judge of that court for his blog, while commenting on a decision of the court, he had written,[90] "But the statements of PW4 and PW 40 were hearsay evidence. PW 4 and PW 40 do not say that they themselves saw Saumya jumping off the train. And hearsay evidence is inadmissible in evidence vide section 6 of the Indian Evidence Act, except in certain limited circumstances e.g. a dying declaration or opinion of an expert. None of those limited circumstances existed in this case. So how could the Court rely on this hearsay

86 In *re C.S. Kanan*, 2017 (7) SCALE 324 read with 2017 (6) SCALE 123 and (2017) 2 SCC 756.

87 *Het Ram Beniwal* v. *Raghuveer Singh* (2017) 4 SCC 340.

88 *In re Blog Published by Justice Markandey Katju dated 17th September, 2016 – Titled 'Soumya Murder Case'*, 2016 (12) SCALE 275.

89 The bench consisted of Ranjan Gogoi, Prafulla C. Pant and Uday U. Lalit, JJ.

90 *Govindaswamy* v. *State of Kerala* (2016) 16 SCC 295 (known as Soumya murder case).The bench consisted of Ranjan Gogoi, Prafulla C. Pant and Umesh Udit Lalit, JJ and the judgment was delivered by Ranjan Gogoi, J. The court had rejected the review petition on 11.11.2016 (*Govindaswamy* v. *State of Kerala* (2016) 16 SCC 304) and also the curative petition in the case. The review petitions were filed by the State of Kerala and the mother of the victim and the court had also reviewed the decision *suo motu* and all were dismissed and the Order dismissing the review petitions at the end records, "We record our deep appreciation to Mr. Justice Markandey Katju, former judge of this Court for the assistance rendered to this Court." In the Order, however, it is clearly stated that "The views of Justice Katju are in no way in addition to or different from what has been argued by … and …in the review petition…."

evidence? This was a grave error in the judgment, not expected of judges who had been in the legal world for decades. Even a student of law in a law college knows this elementary principle that hearsay evidence is inadmissible." In RE - THE INTELLECTUAL LEVEL OF SUPREME COURT JUDGES" dated 18th September, 2016, it was stated thus: "Justice Gogoi, who is in line to become the Chief Justice of India on the basis of seniority, has shown that he does not know an elementary principle of law, namely that hearsay evidence is not admissible (see paragraph 16 of his judgment in the Soumya murder case)." The contempt notice was issued by the same judges constituting the bench who had delivered the judgment which was clearly a case of judging a contempt case by the same judges against whose judgment contempt was alleged. The contempt proceedings were ultimately dropped on the basis of unconditional apology tendered by the judge concerned. But this approach is a clear violation of the principles of natural justice. It is necessary that in contempt cases, the judges whose judgments are the subject of contempt should not hear the contempt case as it is a salutary principle of law that no one should be a judge in his own case.

The court extended its power to punish a person for committing contempt of the court by making serious allegations against the registry of the court in listing cases before various benches. In that case,[91] the court did not accept the apology tendered by the advocate-on-record for making the allegations against the registry of the apex court and the court directed that the contemnor be not permitted to practice as an advocate-on-record for a period of one month. In that case, a battery of lawyers was present to represent the contemnor including many senior advocates and Attorney General, President, Supreme Court Bar Association, President, Advocate-on-Record Association and others. It is difficult to say whether there was any written authorization from the contemnor to represent him. This approach stands in direct contrast to the stern warning given to the lawyers in *Kanan* case, "Since contempt proceedings are a matter strictly between the Court and the alleged contemnor, any one who appears appearance and disrupts the proceedings of this case in future, should understand that he/she can be proceeded against, in accordance with law. All that we need to say is that no one should appear in this matter without due consent and authorization." How can a battery of lawyers represent one contemnor at the same time? Has not in the present case the court adopted an approach which was clearly different from *Kanan* case?

VI RIGHT TO LIFE AND PERSONAL LIBERTY

Right to privacy

Several un-written rights[92] have been read into right to life under article 21 of the Constitution of India but the attempt to bring 'right to privacy' within the parameters

91 *In re Mohit Chaudhary*, 2017 (9) SCALE 65.

92 (i) Right to go abroad – *Satwant Singh Sawhney* v. *Ramarathnam APO, New Delhi* (1967) 3 SCR 525; (ii) Right against solitary confinement, prison torture and custodial death – *Sunil Batra* v. *Delhi Administration* (1978) 4 SCC 494; (iii) Right of prisoners against bar fetters – *Charles Sobraj* v. *Supdt. Central Jail* (1978) 4 SCC 104; (iv) Right to legal aid – *M H Hoskot*

of right to life as a constitutionally protected value had not succeeded in the past. A reference could be made to two significant decisions of the apex court.[93] In *Justice K.S. Puttaswamy* v. *Union of India*,[94] a nine-judge bench, however, overruling the above two decisions (to the extent of denying the right to privacy), unequivocally held the right to privacy as a part of the right to life under article 21. Dr. D.Y. Chandrachud, J rejected the submission that the statutory right to access to information such as the one provided under the Right to Information Act, 2005 did not deny right to privacy as a constitutional right which was not a common law right. Chandrachud J observed:[95]

> The submission betrays lack of understanding of the reason why rights are protected in the first place as entrenched guarantees in a Bill of Rights or, as in the case of the Indian Constitution, as part of the fundamental rights. Elevating a right to the position of a constitutionally protected right places it beyond the pale of legislative majorities. When a constitutional right such as the right to equality or the right to life assumes the character of being a part of the basic structure of the Constitution, it assumes inviolable status: inviolability even in the face of the power of amendment. Ordinary legislation is not beyond the pale of legislative modification. A statutory right can be modified, curtailed or annulled by a simple enactment of the legislature. In other words, statutory rights are subject to the compulsion of legislative majorities. The purpose of infusing a right with a constitutional element

v. *State of Maharashtra* (1978) 3 SCC 544; (v) Right to speedy trial – *Hussainara Khatoon* v. *Home Secretary, State of Bihar,* (1980) 1 SCC 8; (vi) Right against handcuffing – *Prem Shankar Shukla* v. *Delhi Administration* (1980) 3 SCC 526; (vii) Right against custodial violence – *Sheela Barse* v. *State of Maharashtra* (1983) 2 SCC 96; (viii) Right against public hanging – *A G of India* v. *Lachma Devi* (1989) Suppl. (1) SCC 264; (ix) Right to emergency medical aid – *Paramanand Katara* v. *Union of India* (1989) 4 SCC 286; (x) Right to shelter – *E.R. Kumar* v. *Union of India*, 2016 (12) SCALE 19; (xi) Right to a healthy environment – *Virender Gaur* v. *State of Haryana* (1995) 2 SCC 577; (xii) Right to compensation for unlawful arrest – *Rudal Sah* v. State of Bihar (1983) 4 SCC 141; (xiii) Right to freedom from torture – *Sunil Batra* v. *Delhi Administration* (1978) 4 SCC 494; (xiv) Right to reputation – *Umesh Kumar* v. *State of Andhra Pradesh* (2013) 10 SCC 591; (xv) Right to earn a livelihood – *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545; Right to fair investigation and fair trial – *Sanjiv Rajendra Bhatt* v. *Union of India* (2016) 1 SCC 1 (investigation into Gujarat riots cases); Right to access to justice – *Anita kushwaha* v. *Pushap Sadan*, AIR 2016 SC 3506: (2016) 8 SCC 509; Right to clean environment – *M.C. Mehta* v. *Union of India* (1997) 1 SCC 388; Right to marriage - *Lata Singh* v. *State of U.P.* (2006) 5 SCC 475; Right to make reproductive choices – *Suchita Srivastava* v. *Chandigarh Administration* (2009) 9 SCC 1.

93 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 (8-judge bench (2009) 9 SCC 1) and *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 (6-judge bench). Both these decisions were overruled in *Justice K.S. Puttaswamy* v. *Union of India*, AIR 2017 SC 4161 : (2017) 10 SCC 1 : 2017 (8) SCALE 38 : JT 2017 (9) SC 141.

94 AIR 2017 SC 4161 : (2017) 10 SCC 1 : 2017 (10) SCALE 1 : JT 2017 (9) SC 141.

95 *Id.* at 141 (of SCALE).

> is precisely to provide it a sense of immunity from popular opinion and, as its reflection, from legislative annulment. Constitutionally protected rights embody the liberal belief that personal liberties of the individual are so sacrosanct that it is necessary to ensconce them in a protective shell that places them beyond the pale of ordinary legislation. To negate a constitutional right on the ground that there is an available statutory protection is to invert constitutional theory. As a matter of fact, legislative protection is in many cases, an acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws.
>
> For instance, the provisions of section 8(1)(j) of the Right to Information Act, 2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual.
>
> But the important point to note is that when a right is conferred with an entrenched constitutional status in Part III, it provides a touchstone on which the validity of executive decision making can be assessed and the validity of law can be determined by judicial review. Entrenched constitutional rights provide the basis of evaluating the validity of law. Hence, it would be plainly unacceptable to urge that the existence of law negates the rationale for a constitutional right or renders the constitutional right unnecessary.

Chandrachud, J (also on behalf of three other judges) held that privacy represents the "core of human personality." While holding the right to privacy as a part of right to life, Chandrachud J concluded:[96]

> 1 The judgment in *M P Sharma* holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20(3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. *M P Sharma* is overruled to the extent to which it indicates to the contrary.
>
> 2 *Kharak Singh* has correctly held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. *Kharak Singh* also correctly

96 *Id.* at 163-166.

laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in *Kharak Singh* which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, *Kharak Singh's* reliance upon the decision of the majority in *Gopalan i*s not reflective of the correct position in view of the decisions in *Cooper* and in *Maneka*. *Kharak Singh* to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.

3(A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity

of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

(G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touch stone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and

(I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

4 Decisions rendered by this Court subsequent to *Kharak Singh*, upholding the right to privacy would be read subject to the above principles.

5 Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the

> state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data.

Chandrachud J dealt with the essential nature of privacy thus:[97]

> Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the

97 *Id.* at 155-56.

individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are in separably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be

> fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

In separate judgments delivered by J. Chelmeswar, S.A. Bobde, R.F. Nariman, Abhay Manohar Sapre and Sanjay Kishan Kaul, JJ, all judges unanimously held right to privacy as a part of right to life under article 21 of the Constitution of India. The Order of the court was as follows:-

(i) The decision in *M P Sharma* which holds that the right to privacy is not protected by the Constitution stands over-ruled;

(ii) The decision in *Kharak Singh* to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;

(iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

(iv) Decisions subsequent to *Kharak Singh* which have enunciated the position in (iii) above lay down the correct position in law.

Right to food

Right to food is a part of the right to life. In *Swaraj Abhiyan (I)*,[98] the Supreme Court had passed detailed directions to tackle the grave problem of draught in the country and effective enforcement of the National Ford Security Act, 2013 which was a social justice and welfare legislation. The situation did not change and the petitioner

98 *Swaraj Abhyan (I)* v. *Union of India*, AIR 2016 SC 2929. This case was discussed in S N Singh, "Constitutional Law – I (Fundamental Rights)", LII *ASIL* 203 at 253-54 (2016).

kept a continuous vigil at the implementation of the Act. Unfortunately, what was brought to the notice of the court by the petitioner was total apathy of several state governments in the implementation of the Act; they had not been properly co-operating with the central government in implementing a central legislation. The court noted that some of the state governments had not (i) framed rules under section 40 of the Act for effective implementation, (ii) district grievance redressal officer as required under section 15 had not been appointed, (iii) food commission as required under section 16 had not been constituted, (iv) social audit as required under section 28 had not been conducted, and (v) vigilance committee as required under section 29 had not been constituted. With a view to fulfil the constitutional obligation, the court issued several directions for effective implementation of the Act.[99] While issuing the directions, the court also pointed out the obligation of the state governments imposed under

99 *Swaraj Abhyan (V)* v. *Union of India*, 2017 (8) SCALE 97 at 107-08. These directions were: "(1) The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India should convene one or more meetings on or before 31st August, 2017 of the concerned Secretaries of all the State Governments and Union Territories to take stock of the implementation of the NFS Act and brainstorm over finding ways and means to effectively implement the provisions of the NFS Act in letter and spirit. A law enacted by Parliament as a part of its social justice obligation must be given its due respect and must be implemented faithfully and sincerely and positively before the end of this year; (2) The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India should emphatically request and commend to every State Government and Union Territory to notify appropriate rules for a Grievance Redressal Mechanism under the provisions of the NFS Act and designate appropriate and independent officials as the District Grievance Redressal Officer within a fixed time frame and in any case within this year. Adequate publicity should be given to the appointment and designation of District Grievance Redressal Officers so that any aggrieved person can approach them without any fear and with the expectation that the grievance will be redressed; (3) The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India will emphatically request and commend to the State Governments and Union Territories to constitute, establish and make fully functional a State Food Commission under the provisions of the NFS Act before the end of the year. The NFS Act specifies a very large number of functions that a State Food Commission is required to perform - there is no dearth of work for the State Food Commission. Therefore, the said Secretary should require the Chief Secretary to ensure that adequate arrangements are made by each State Government and Union Territory to provide adequate infrastructure, staff and other facilities for the meaningful functioning of the State Food Commission including preparation of annual reports required to be laid before the State Legislature. In our opinion, it would not be appropriate for reasons that we have already indicated to appoint another statutory commission or body to function as the State Food Commission unless it is absolutely necessary and completely unavoidable and only as a last resort; (4) The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India will emphatically commend and request every State Government and Union Territory to constitute and establish a functioning Vigilance Committee in terms of s. 29 of the NFS Act before the end of the year for the purposes of carrying out the duties and responsibilities mentioned in that section; and (5) The Secretary in the Ministry of Consumer Affairs, Food and Public Distribution of the Government of India will ensure that the social audit machinery postulated by s. 28 of the NFS Act and which is already in place in so far as the MGNREGA Act is concerned is established at the earliest with appropriate modifications to enable every State Government and Union Territory so that a periodic social audit is conducted and the NFS Act is purposefully implemented for the benefit of the people."

article 256 of the Constitution of India which mandates that the "executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose." It is a matter of grave concern that the governments at the central as well as the state level show no concern to the implementation of laws passed by the Parliament though it is their bounden duty to ensure that right to life is given full effect and no one in the country dies out of hunger caused by draught, flood or any other reason whatsoever.

Right to speedy trial

Speedy trial of a criminal case is a facet of right to life under article 21 of the Constitution of India.[100] In *Hussain* v. *Union of India*,[101] the Supreme Court, while emphasizing that speedy trial was a part of reasonable, fair and just procedure guaranteed under article 21, requested the high courts to issue directions to all subordinate courts within their jurisdiction to dispose of bail applications preferably within one week and the magisterial trials, where accused were in custody, be normally

100 See *Abdul Rehman Antulay* v. *R.S. Nayak* (1992) 1 SCC 225; *P. Vijayan* v. *State of Kerala* (2010) 2 SCC 398; *Sajjan Kumar* v. *C.B.I.* (2010) 9 SCC 368; *Hardeep Singh* v. *State of M.P.* (2012) 1 SCC 748; *Lokesh Kumar Jain* v. *State of Rajasthan* (2013) 11 SCC 130; *Imtiyaz Ahmad* v. *State of U.P.*, AIR 2012 SC 642, in which the Supreme Court indicated the course of action to be taken by the courts while granting or continuing stay of criminal proceedings; see S N Singh, "Constitutional Law – I (Fundamental Rights)", LXIX *ASIL* 247 at 315 (2013); XLVIII *ASIL* 173 at 202-206 (2012); XLVII *ASIL*171 at 203 and (2011) XLVI *ASIL*159 at 183 (2010).

101 AIR 2017 SC 1362 : (2017) 5 SCC 702 21 : JT 2017 (3) SC 276. For a detailed judgment on the question of expeditious trial of civil and criminal cases, see *Asian Resurfacing of Road Agency Pvt. Ltd.* v. *Central Bureau of Investigation*, 2018 (5) SCALE 269 at 286-87, Adarsh Kumar Goel, J (for the majority of two judges, with separate concurring judgment of R.F. Nariman, J) held that, "To give effect to the legislative policy and the mandate of art. 21 for speedy justice in criminal cases, if stay is granted, matter should be taken on day-to-day basis and concluded within two-three months. Where the matter remains pending for longer period, the order of stay will stand vacated on expiry of six months, unless extension is granted by a speaking order showing extraordinary situation where continuing stay was to be preferred to the final disposal of trial by the trial Court. This timeline is being fixed in view of the fact that such trials are expected to be concluded normally in one to two years." The learned judge further held, "In view of above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up… (W)e consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized. The trial court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced:"*id*. at 288.

concluded within six months and sessions trials where accused were in custody be normally concluded within two years and efforts be made to dispose of all five years old cases by the end of the year. It may, however, be remembered that mere delay in trial is not a ground to quash the criminal proceedings.[102] While on one hand, the Supreme Court lamented the delay in disposal of cases primarily on account of inadequate strength of judges,[103] it has, on the other hand, not considered other factors responsible for delay in the disposal of cases. This author, from his personal experience, while practising as an advocate for the last about one decade, can vouch that delay in disposal of cases, besides inadequate number of courts and judges, is primarily on account of the attitude of the Bar and the 'liberal' approach of the Bench.[104]

102 *Virender Singh Rawat* v. *Rakesh Kumar Gupta* (2017) 13 SCC 312.

103 *Imitiaz Ahmad* v. *State of U.P*. (2017) 3 SCC 658.

104 In this connection, a letter dated 21.09.2016 sent by this author to the then Chief Justice of India (T.S. Thakur, CJI) may be noted here: "I am writing here in connection with the problem of pendency of cases in all the courts in India about which you are so much concerned, and rightly so, as all of us are. Besides inadequate number of judges at all levels of judiciary, one of the common and basic factors for prolonging the disposal of cases is the attitude of the Bar. At the High Court level, advance copy of every petition is required to be served on the respondent State and its agencies. But when the case is taken up, the State counsel's first statement before the court is that he/she would seek instructions. Why was not the instruction sought immediately after receipt of advance copy of the petition? Because, for every date, fee is paid to the counsel. The counsel for the State rarely file counter affidavits within time and they keep praying, and liberally getting, date from the court(s). Why, because they are paid for every appearance. There are also "liberal" judges who leave no occasion to adjourn a case on slightest pretext. They are in fact very good in doing so. They have developed that skill. There are also judges who never sit in the court at the scheduled time at 10.30 a.m. There are also judges who leave the court in between 10.30 – 1.15 for tea, smoking or something else. A lot of time can be saved by sitting in the court strictly according to the time schedule.

I am enclosing herewith copy of a case history recently filed and decided by the High Court of Delhi to show what can be done to give speedier justice. This was a writ petition [W.P. (C) 6817/2016 - *Vishal Kharbanda* v. *Irrigation and Flood Control Department, Govt. of NCT of Delhi*] concerning a tender matter. The petition was ready for filing, the lowest tenderer's bid offered by the petitioners was unilaterally and arbitrarily rejected by the respondent which not only threatened to forfeit 50% of the earnest money but also debarred the petitioners from participating in the re-tendering process for which last date and time was 05.08.2016 at 3.00 p.m. Since hardly any time was left, I mentioned the matter before D.B. II (consisting of Mr. Justice Badar Durrez Ahmed and Mr. Justice Ashutosh Kumar) at 10.30 a.m. on 03.08.2016 which allowed the matter to be listed on 04.08.2016 on account of urgency of the matter. The same day, petition was filed along with CD as E-filing was necessary. The matter was taken up on 04.08.2016 by D.B. II as per roaster. After some arguments, the respondent's counsel sought adjournment "to take instructions". The case was adjourned and listed on the very next day, i.e. 05.08.2016 for further proceedings. After arguments the court was pleased to grant stay and fixed 22.08.2016 for further proceedings. In the meanwhile, the respondent was given time of one week to file counter affidavit and the petitioners were likewise given one week time to file rejoinder. When the matter was taken up on 22.08.2016, the pleadings were complete. After some arguments, at the request of the respondent's counsel, the matter was directed to be re-notified on 24.08.2016. When the matter was taken up in the forenoon on 24.08.2016, the court directed the respondent to produce certain records in original at 2.15 p.m. the same day. The court took up the matter as the last item for the day at about 4.15 p.m. when the respondent produced the original records as directed by the court in the forenoon. After hearing detailed

VII RIGHT TO RELIGIOUS FREEDOM

Validity of 'talaq-al-biddat' under article 25

Does 'talaq-al-biddat', violate the freedom of religion guaranteed under article 25 of the Constitution of India was one of the questions raised in *Shayara Bano* v. *Union of India*.[105] At the outset, Khehar CJI stated that the constitutional protection to tenets of 'personal law' could not be interfered with as long as the same did not infringe "public order, morality and health", or any other provisions of Part III of the Constitution. While examining the validity of the practice of 'talaq-al-biddat', the learned CJI held that the practice did not impinge on 'public order' or 'health'. Likewise, it had no nexus to 'morality'. Therefore, the practice of 'talaq-al-biddat' could not be struck down on any of the three grounds prescribed under article 25. Similarly, the learned CJI held that 'talaq-al-biddat' could not be held to be violative of any other provision of Part III of the Constitution.

VIII CONCLUSION

At times, one wonders as to in which direction, our judicial process is going? To err is human and, the judges are also human beings but then there is and ought to be a limit. After reading the judgments relating to fundamental rights for the last one decade, one comes across cases where a full bench refers the case for decision to a larger bench but without re-calling that order, decides the case itself[106] or an accused is convicted more than two years after his death[107] or a judge recusing himself at the time of trial of a criminal case "for personal reason" decides the same case while hearing revision against the decision of the trial court in that case[108] but it is very rare

arguments and perusal of the records, the court started dictating the final Order/judgment which took about an hour. The court rose for the day at about 5.15 p.m.

Who says there is delay in the administration of justice? If there is a will nothing is difficult. In the above case, the entire gamut of procedure was complied with and within three weeks the case was finally decided. I wish the learned judges at all the levels, instead of throwing files without hearing the counsel, adjourning cases on slightest and flimsy grounds/pretext or giving of long dates, could take the trouble as the learned judges took in the above case. This will definitely reduce the pendency and prolongation of cases in the courts. The counsel take the court for granted in seeking and getting adjournments. If the court wants, the counsel would definitely co-operate." As expected, the letter remained un-acknowledged, not to talk of any action being taken on it.

105 AIR 2017 SC 4609 : 2017 (9) SCALE 178 : JT 2017 (8) SC 313. In this case, several issues such as polygamy and 'halala' were also raised but the court decided to limit its consideration to the issue of constitutional validity of 'talaq-al-biddat' or triple talaq only.

106 *Society for Un-aided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 102 and *Society for Un-aided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 1; S N Singh, "Constitutional Law – I (Fundamental Rights)", L *ASIL* 239-40 (2014).

107 *Ms. S* v. *Sunil Kumar*, 2015 (4) SCALE 483 and 2015 (13) SCALE 44; see S N Singh, "Constitutional Law – I (Fundamental Rights)", LI *ASIL* 237 at 247 (2015).

108 *Narinder Singh Arora* v. *State (NCT of Delhi)*, AIR 2012 SC 1642; S N Singh, "Constitutional Law – I (Fundamental Rights)", XLVIII *ASIL* 173 at 202 (2012).

and indeed gravely disappointing to note a case in which the accused were acquitted after trial without there being any judgement in the case![109]

If urgent matters are not considered on a priority and urgent basis, there is no fun in considering them as the very purpose of approaching the court is frustrated and the matter becomes virtually infructuous. In *Vivek Narayan Sharma* v. *Union of India*[110] the petition under article 32 of the Constitution of India raised questions regarding demonetization of currency notes of Rs. 500 and Rs. 1000, time limit fixed by the government for using these currency notes, bar imposed on the cooperative banks on accepting deposits and exchange of these currency notes and restriction on withdrawal of money from the banks. The restrictions were imposed on 8.11.2016 and a division bench of the Supreme Court, while admitting the petition, referred the matter for decision by a five-judge bench as the petition raised important questions of general public importance and far reaching implications. The matter kept pending till the end of the year 2017. What purpose would now be served by the decision of the court when all the harassment and trouble has already been suffered by the individuals and all banned currency notes have already been seized by the government for their destruction and new notes circulated after spending huge money in their printing? Likewise, the question of constitutional validity of aadhaar was raised in *Justice K.S. Puttaswamy* v. *Union of India*[111] in a petition filed in 2012 and the court passed over half a dozen interim orders during September, 2013 and 15 December, 2017. The Government of India on its part kept on prescribing the requirement of providing aadhaar no. for a number of activities, *e.g*. PAN (Permanent Account Number), bank account, mobile verification, EPF, LPG subsidy – *pahal*, academic scholarship, ration card, crop insurance for farmers and filing of income tax return. Subsequent to the filing of the petition, the Parliament enacted the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. Under this Act, the Government of India collects and compiles both demographic and biometric data of the residents in India for use for various purposes. A nine-member bench of the court also decided in July, 2017 that right to privacy was part of the right to life under article 21 of the Constitution of India.[112] In another case, the court also upheld the requirement of providing aadhaar no. with income tax returns prescribed under section 139AA of the Income Tax Act, 1961.[113] The Supreme Court further extended to 30.06.2018 as the last date for Aadhaar linking of bank accounts.[114] Despite these

109 2017 (1) SCALE 400 : JT 2017 (1) SC 167 : (2017) 3 SCC 330. The case was marked to another judge and retrial was ordered. Retrial was also ordered in *Dinubhair Boghabhai Solanki* v. *State of Gujarat*, JT 2017 (10) SC 523.

110 AIR 2017 SC 221.

111 *Justice K.S. Puttaswamy* v. *Union of India*, AIR 2015 SC 3081.

112 *Justice K.S. Puttaswamy* v. *Union of India,* (2017) 10 SCC 1 : 2017 (8) SCALE 38 : AIR 2017 SC 4161 : JT 2017 (9) SC 141 and 2017 (14) SCALE 375.

113 *Binoy Viswam* v.*Union of India*, AIR 2017 SC 2967 : (2017) 7 SCC 59 : JT 2017 (6) SC 520.

114 *Justice K.S. Puttaswamy* v. *Union of India*, 2018 (4) SCALE 541.

piecemeal interim directions and decisions, the main issue raised in the writ petition kept pending till the end of the year 2017. Once the details of individuals have already passed on in a big way, what remains to be decided? If tomorrow the court decides the scheme unconstitutional, how will the sanctity and secrecy of information already passed on would be restored with certainty so as to protect the privacy of the individuals?

After reading and analyzing a large number of cases decided by the Supreme Court during last several years, one wonders as to why the court has not been adopting a consistent approach in penalizing the petitioners who have abused judicial process by filing writ petitions under article 32 of the Constitution of India and has shown a soft corner in some cases. In this connection, one may note the observations made in *Manohar Lal Sharma* v. *Sanjay Leela Bhansali*,[115] The petitioner, a practising advocate of the Supreme Court, filed a petition under article 32 praying that the film "Padmavati" should not be exhibited in other countries without obtaining certificate from the Central Board of Film Certification (CBFC) under the Cinematograph Act, 1952 and the Rules and guidelines framed thereunder and to issue a writ of mandamus to the Central Bureau of Investigation (CBI) to register FIR against the respondent nos. 1 and 2 and their team members for offence punishable under section 7 of the Act read with sections 153A, 295, 295A, 499 and 500 of the Indian Penal Code, 1860 and section 4 of the Indecent Representation of Women (Prohibition) Act, 1986 and to investigate and prosecute them in accordance with law. The court found that the "reliefs sought are not only extremely ambitious but also the nature of pleadings in the petition have the effect of potentiality that can erode the fundamental conception of pleadings in a Court of Law. It needs to be stated that neither laxity nor lack of sobriety in pleadings is countenanced in law. The assertions in a petition cannot show carelessness throwing all sense of propriety to the winds. Rambling of irrelevant facts only indicates uncontrolled and imprecise thinking and exposes the inability of the counsel. On certain occasions, it reflects a maladroit design to state certain things which are meant to sensationalize the matter which has the roots in keen appetite for publicity. When these aspects are portrayed in a nonchalant manner in a petition, it is the duty of the Court to take strong exception to the same and deal it with iron hands." The court also noted that a similar matter was filed in a different manner by the same petitioner, viz. Writ Petition (Criminal) No. 186/2017[116] in which the Court had already directed that such pleadings were unwarranted and substantial portion of the pleadings was struck off. The same pleadings had been reiterated in the present petition again. The scrutiny of the film was pending for consideration before the CBFC and, therefore, the prayer

115 2017 (13) SCALE 776 :(2018) 1 SCC 770.

116 In this case, the court had held: *"In the course of hearing, we have been apprised that t*he film in question, i.e., 'Padmavati' has not yet received the Certificate from the Central Board of Film Certification. In view of the aforesaid, our interference in the writ petition will tantamount to pre-judging the matter which we are not inclined to do. The writ petition is accordingly disposed of:" *id*. at 779-80 (of SCALE).

made in the petition was held to have no foundation. The court expressed its anguish in the following strong words:[117]

> At this stage, we are obligated to state that writ petitions are being filed even before the CBFC, which is the statutory authority, takes a decision. This is a most unfortunate situation showing how public interest litigation can be abused. The hunger for publicity or some other hidden motive should not propel one to file such petitions. They sully the temple of justice and intend to create dents in justice dispensation system. That apart, a petition is not to be filed to abuse others. The pleadings, as we have stated earlier, are absolutely scurrilous, vexatious and untenable in law, and we, accordingly, strike them off the record.
>
> We must say in quite promptitude the rule of law. When the matter is pending for grant of certification, if responsible people in power or public offices comment on the issue of certification pending consideration before the statutory authority, that is a violation of the rule of law. All concerned shall be guided by the basic premise of the rule of law and ought not to venture into violating the same. We say nothing more and nothing less, for the present.

After cursing the counsel and repenting on his conduct, all of a sudden, the court became soft by observing, "Ordinarily, we would have imposed costs. As the petitioner-in-person is a practising counsel in this Court, we refrain from doing so. However, we caution him to be careful in future." This soft approach of the court does not seem justified as the petitioner knew all the implications of what he had done, being a lawyer practicing before the Supreme Court. In fact, this case deserved imposition of exemplary cost on the petitioner advocate.

Another noticeable case was *Anindita* v. *Pranab Kumar Mukherjee*,[118] which does not even indicate as to what was the issue before the court and who all were the parties in the petition. The court was irked as the name of the President of India was included as the respondent. Notice may be taken to the following passage, where the court rebuked the petitioners:[119]

> Their individual grievances do not confer any right on them to file a writ petition of the present nature. It is an assault on the Constitution, more so, when the high constitutional authorities are involved. They have, with incurable audacity, made allegations against the respondent Nos. 2 and 3 which are absolutely unacceptable and, in fact, can never be conceived of. No litigant can be permitted to browbeat or malign the system. This is essential for maintaining the integrity of the

117 2017 (13) SCALE 776 at 780.
118 2017 (2) SCALE 76.
119 *Id*. at 78.

> institution and the public confidence in the delivery of justice. It is sheer malice. The question of issuance of any kind of writ does not arise. On the contrary, we are disposed to think that the grievance that has been agitated is absolutely unjusticiable. … The petition, to say the least, is vexatious and, in fact, is an expression of pervert proclivity.
>
> We would have dismissed the writ petition with exemplary costs but we do not intend to do so. However, we observe that in future the petitioners shall be debarred from filing any kind of public interest litigation in any constitutional court and none of their petition under article 226 or article 32 of the Constitution shall be entertained unless they are personally grieved. If the petitioners deviate from this direction, they shall be liable for contempt of this Court.
>
> We repeat at the cost of repetition that the petition is absolutely malicious, vexatious and unjusticiable and accordingly has to pave the path of singular consequence, that is, dismissal.

When the court considered this petition as an abuse of the judicial process, it was under a duty to punish the petitioners, rather than simply debarring them from filing PILs in future.

In contrast to the above two cases, one may note another case in which exemplary cost was imposed on the petitioners for abusing the judicial process. In *Swami Om Ji* v. *Union of India*,[120] two individuals had approached the apex court at the last moment, keeping in mind as the oath ceremony of Dipak Misra J as Chief Justice of India was scheduled after just one working day of the hearing challenging the appointment procedure, to the office of Chief Justice of India though the same was not based on any adverse material concerning Misra J. The division bench held that the petition was a purely motivated publicity stunt, and deserved to be "deprecated in unequivocal terms, in such a manner that persons similarly situated as the petitioners are not encouraged to follow the practice adopted by the petitioners herein." The court held the action of the petitioners in approaching it as "rash, irresponsible and reckless besides being imprudent and thoughtless." The court, therefore, dismissed the petition with costs of Rs. ten lakh each.

120 2017 (12) SCALE 519.