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CONSTITUTIONAL LAW – II

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I INTRODUCTION

IT IS but quite natural that most of the nations have written constitutions, as people want the written rules to govern the affairs of the state. A fundamental reason for such preference for a written Constitution is that the Constitution is adopted for ages to come and hence it need to communicate across times. Further, the Constitution being viewed as an agreement freely entered by the people with government, it consists of demarcated roles for legislature, executive and judiciary. The Constitution imposes checks and balances on the roles played by the legislature, executive and judiciary.

In that sense one has to agree that the written constitution is a fundamental and paramount law of the nation and all other laws are subordinate to Constitution. Consequently, every act of the government, and an act of the legislature, repugnant to the constitution, is void.[1] Thus, judicial review of administrative and legislative action becomes integral part of the Constitution. However, the power of judicial review imposes an obligation on the judges to interpret the constitutional text to the circumstances that are not even in contemplation of the framers at the time of writing the Constitution. This coupled with the fact that Constitution prefers a constrained government; it becomes a difficult task for the judges to strike a balance.[2]

Sovereign will of the people is voiced through constitutional polices;but legislative agents engaged in popular policies result in potential litigation. Courts need to do a delicate balance between actions of democratically elected representatives and constitutionality of their actions. The annual survey of this year would focus on how far judiciary maintained that balance while interpreting the Constitution.

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1 *Marbury* v. *Madison*, 5 U.S. at 176 (1803).

2 *Douglas H. Ginsburg* on Constitutionalism, First Annual B. Kenneth Simon Lecture in Constitutional Thought, were delivered at the Cato Institute on Sep.17, 2002.

II ARTICLE 80

Free and fair election is a *sine qua non* to democracy.Based on the ruling of Supreme Court of India, the Election Commission of India added the option of 'None of the Above' (NOTA) to provide an option to the voters to reject all the candidates.[3] This was necessitated due to the fact that a voter wanted to exercise his/her constitutional right of participating in the voting but they have to vote for someone, as electronic voting machine(EVM) has no other option. Under the old system of ballot, the voter can choose not to vote by simply dropping the ballot paper without marking on any one. Thus the 'NOTA' option enables the voters to exercise their right even if they do not wish to vote for any of the candidates that too without violation of the secrecy of their decision. However, the question that was raised was whether NOTA can be added as an option in the election of Rajya Sabha in *Shailesh Manubhai Parmar* v. *Election Commission of India*.[4]

The writ petition was filed under article 32 of the Constitution of India, the Chief Whip of the Indian National Congress party (petitioner) in Gujarat Legislative Assembly challenged the circular dated August, 1 2017 issued by the Secretary, Gujarat Legislature Secretariat, (respondent no. 3) in relation to the conduct of elections for the Council of States. He has challenged the availability of the option 'None of the Above' (NOTA).

In this case the Election Commission of India had issued directions to the Chief Electoral Officers of all the states and the Union Territories (except Andaman & Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu and Lakshadweep) directing that the option of NOTA could be applicable for elections in the RajyaSabha in pursuance of sub-rule (1) of Rule 22 and sub-rule (1) of Rule 30 read with Rule 70 of the Conduct of Election Rules, 1961 (for short, 'the Rules'). The petition challenged this circular as violation of the mandate of article 80(4) of the Constitution of India

A counter affidavit has been filed by the respondent no 1 contending that

i. the constitutional courts do not interdict in the election process and challenge can only be made after the election is over by filing an election petition.

ii. that as per the pronouncement in *People's Union for Civil Liberties* v.*Union of India*,[5] there is no distinction between direct and indirect elections and hence, the provision of NOTA in the ballot paper of the elections has been made applicable by the Election Commission to RajyaSabha to effectuate the right of electors guaranteed to them under section 79A of the Act;

iii. that though there is no need for secrecy in Rajya Sabha elections as the law provides for open voting, yet that does not take away the right of the elector to not vote by expressing the option of NOTA;

iv. that even assuming the position that the judgment in *People's Union for Civil Liberties* does not indicate that this Court ever intended to apply the option of

3 *People's Union for Civil Liberties* v. *Union of India* 2013 (10) SCC 1.

4 (2018) 9 SCC 100

5 *Supra* note 3.

NOTA to Rajya Sabha elections, yet the Election Commission has issued letter dated January 24, 2014 and further reiterated by letter dated November 12, 2015 that the option of NOTA would be applicable to elections in Rajya Sabha; and

v. that elections had already been held by applying the said option and, therefore, there is no justification to challenge the said directions at a belated stage.

The Election Commission has drawn the strength to pass this circular from *People's Union for Civil Liberties*(PUCL). However, it is important to note that the decision in PUCL relates to direct elections. The court, in fact, has clearly observed that the directions pertain to the Parliament and state legislative assemblies which is constituency based and grants an option to the voters to exercise the benefit of NOTA. There has been distinction between direct and indirect elections.

In *Kuldip Nayar* v. *Union of India*[6] the Constitution Bench has drawn the distinction by expressing thus:[7]

> Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimization. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations.
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> The distinguishing feature between "constituency-based representation" and "proportional representation" in a representative democracy is that in the case of the list system of proportional representation, members are elected on party lines. They are subject to party discipline. They are liable to be expelled for breach of discipline. Therefore, to give effect to the concept of proportional representation, Parliament can suggest "open ballot". In such a case, it cannot be said that "free and fair elections" would stand defeated by "open ballot". As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes. This distinction is indicated also in the Australian judgment in *R. v. Jones (1972) 128 CLR 221*. In constituency-based representation, "secrecy" is the basis whereas in the case of proportional representation in a representative democracy the basis can be "open ballot" and it would not violate the concept of "free and fair elections", which concept is one of the pillars of "democracy".

The court pointed out the following important requirements of vibrant democracy;

6 2006 (7) SCC 1.

7 *Id*., para 454.

i. Open ballot is to sustain the foundational values of party discipline and to avoid any kind of cross voting thereby ensuring purity in the election process. They have been treated as core values of democracy and fair election.

ii. The nature of voting by an elector in these election is a grave concern.

iii. The presence of party whip and the elector is bound to obey the command of the party.

iv. The party discipline in this kind of election is of extreme significance, for that is the fulcrum of the existence of political parties. It is essential in a parliamentary democracy. The thought of cross voting and corruption is obnoxious in such a voting

v. The quintessential idea of democracy is abhorrent to corruption and laws emphasize on prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance

vi. The purity of democracy does not withstand anything that has the potential to create an incurable chasm in the backbone of a democratic setup.

NOTA creates an anomalous situation and brings in horse trading, corruption and use of extra constitutional methods which were sought to be avoided by the introduction of the *Tenth Schedule in the Constitution by the Constitution (Fifty-Second Amendment) Act, 1985*. The said amendment was introduced to eradicate the evil of political defection. The Statement of Objects and Reasons to the said amendment provides thus, "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an Anti- Defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance." The following objects and reasons will be defeated indirectly by introduction of NOTA

Voting to elect members of Rajya Sabha stands in a different footing than of Lok Sabha as an elector, though a single voter, has a quantified value of his vote and the surplus votes are transferable in case of Rajya Sabha election. The concept of vote being transferable has a different connotation. It further needs to be stated that a candidate after being elected becomes a representative of the state and does not represent a particular constituency. The cumulative effect of all these aspects clearly conveys that the introduction of NOTA to the election process for electing members of the Council of States will be an anathema to the fundamental criterion of democracy which is a basic feature of the Constitution.

Therefore, the court declared the circular as unconstitutional on the following grounds

i. The introduction of NOTA in such an election will run counter to the discipline that is expected from an elector under the Tenth Schedule to the Constitution

ii. It is counterproductive to the basic grammar of the law of disqualification of a member on the ground of defection.

iii. What cannot be done directly; cannot be done indirectly. To elaborate, if NOTA is allowed in the election of the members to the Council of States, the prohibited aspect of defection would indirectly usher in with immense vigour.

iv. NOTA will destroy the concept of value of a vote and representation and encourage defection that shall open the doors for corruption which is a malignant disorder.

v. The citizenry trust can be gained and sustained only on the foundational pillars of purity, integrity, probity and rectitude and such stronghold can be maintained only by ensuring that the process of elections remains unsullied and unpolluted

vi. NOTA completely ignore the role of an elector in such an election and fully destroy the democratic value. It may be stated with profit that the idea may look attractive but its practical application defeats the fairness ingrained in an indirect election.

vii. More so where the elector's vote has value and the value of the vote is transferrable. It is an abstraction which does not withstand the scrutiny of, to borrow an expression from KRISHNA IYER, J., the "cosmos of concreteness."

viii. NOTA may serve as an elixir in direct elections but in respect of the election to the Council of States which is a different one it would not only undermine the purity of democracy but also serve the Satan of defection and corruption.

There is no doubt that NOTA was introduced to be exercised by individual voters in direct elections. Introduction of NOTA in indirect election may result in using the same of extra constitutional methods to defeat a party candidate. Further the tenth schedule is already in place to enforce party discipline and adherence to party's choice of candidate in the elections to the Rajya Sabha. Therefore, allowing NOTA option in Rajya Sabha election may run counter to the provisions of anti-defection law under Tenth Schedule. They are subject to party discipline. They are liable to be expelled for breach of discipline. Hence, Parliament suggested open ballot in case of proportion representation and such open ballot system may not be termed as violation of free and fair elections. Further, there is no doubt that there is difference between constituency based representation and proportional representation. But the argument that in system of proportional representation, members are elected on party lines though true but it is same in constituency based representation.

If NOTA is envisioned as enabling the voters not to vote for any candidate and there by showing their disapproval for the candidates fielded by various political parties or expressing their disappointment of current political system in the country, there is no reason why the option of NOTA cannot be given in indirect elections. Whether they are direct or indirect elections, the very purpose of the election is to elect right people on whom the electorate has confidence. NOTA option was also introduced to compel the political parties to nominate a good candidate and such option may have an impact in the long run to cleanse the political system.The apex

court in *Indira Nehru Gandhi* v *Raj Narain*[8] held that democracy through free and fair elections is part of the basic structure of the Indian Constitution. Right of an electoral to cast his/her vote without fear of reprisal, constraint or coercion is an integral part of free and fair elections.

NOTA is expected to increase political participation of the polity, bring reform in political process and enable the voters to express their dissatisfaction about the candidates chosen by the political parties. This in turn believed that it may put pressure on political parties to nominate good candidates. As right to vote also includes not to vote providing NOTA in all elections would be long way in protecting the right to choose by voters

The issue of tenth schedule seems to be one of the major reason for the court in not accepting NOTA in Rajya Sabha election that need a relook. The very base of the tenth schedule is anti-democratic in a sense that it would not permit the individual member in choosing the candidate he/she would like to. Once elected under a party would deny them in voting against the whip of the party. This run counter to the very idea of democracy which is based on free exercise of choice. Though one cannot deny the fact that the absence of restrictions under anti-defection law would result in run riot of elected persons, the voters should have been the ultimate deciders of their fate rather than the tenth schedule.

III PARLIAMENTARY PRIVILEGES - ARTICLE 105

Parliamentary privileges are necessary to protect the authority and dignity of the house. Further, the House needs to enjoy certain privileges so as to work fearlessly and without any interference or obstruction. Ordinarily courts should not interfere with these privileges. However, there shall be a limited judicial review available to courts to see whether it is a privilege or not and so whether any public interest is involved so as to interfere with the privilege.

In *Kalpana Mehta* v. *Union of India,*[9] the case was initially filed before a Division Bench of Supreme Court of India. In the writ petitions the contention was on justifiability of the action taken by the Drugs Controller General of India and the Indian Council of Medical Research (ICMR) regarding the approval of a vaccine, called Human Papilloma Virus (HPV). This vaccine was manufactured by the respondents, for preventing cervical cancer in women. The experimentation of the vaccine was done as an immunization by the governments of Gujarat and Andhra Pradesh.

The major issue that was raised is about untimely death of certain persons and the grant of compensation and also that theexperiment of the drugs was conducted on young girls who had not reached the age of majority and without the consent of their parents/guardians. In essence, the submissions were advanced pertaining to the hazards of the vaccination and obtaining of consent without making the persons aware of the possible after effects and the consequences of the administration of such vaccine.

8 1975 AIR 865.

9 (2018) 7 SCC 1.

In the course of hearing before the two-judge bench, the court's attention was invited to a report of the Parliamentary Standing Committee (PSC). The division bench directed the governments to file affidavits regarding the steps taken keeping in view the various instructions given from time to time including what has been stated in the report of the PSC. Accordingly, certain affidavits were filed by the respondents stating about the safety of the vaccination and the steps taken to avoid any kind of hazard or jeopardy. The division bench referred the matter to a constitutional bench.[10]

The reference placed before the court raised the following issues:

(i) Whether in a litigation filed before this court either under article 32 or, article 136 of the Constitution of India, the court can refer to and place reliance upon the report of the PSC ?

(ii) Whether such a report can be looked at for the purpose of reference and, if so, can there be restrictions for the purpose of reference regard being had to the concept of parliamentary privilege and the delicate balance between the constitutional institutions that articles 105, 121 and 122 of the Constitution conceive?

The counsel for the respondent submitted that this court, while exercising the power of judicial review or its jurisdiction under article 32 of the Constitution of Indiadealing with public interest litigation, cannot advert to the report of the PSC and on that basis, exercise the power of issue of a writ in the nature of *mandamus* and issue directions. The contention of the respondent is that the report of the PSC cannot be summoned as it would breach the privileges of the Parliament.

It was held that the reports of Parliamentary Committees usually state the position of the government on its policies and knowing such policies would immensely help the court in understanding the context in which such policy being made. Therefore, there is no reason in principle to exclude recourse by a court to the report of the committee at least as a reflectionof the fact that such a statement was made before the committee. Further it was observed that when the court adjudicating the issues having public interest, court do not discharge a function which is adversarial.Such adjudication cannot be viewed as interference with the functioning of the Parliament. As a result, it cannot be said thatthe doctrine of separation prohibits the court relying upon the report of a Parliamentary Committee. Any way the court neitheradjudges thevalidity of the report nor embark into scrutiny to test the correctness.

The court says that there is a functionalcomplementarity between the purpose of the investigation by the Parliamentary Committee and the adjudication by the court. Depriving such valuable insight of a Parliamentary Committee would amount to excluding animportant source of information from the purview of the court. And that to on the assumption that it would a breach the privileges of the parliamentary.

In addition, once the report had been published it is in public domain and once it is in public domain there is no issue regarding parliamentary privilege could be raised. When a report is sought for understanding of an issue, there is no reason or

10 *Kalpana Mehta* v. *Union of India* (2017) 7 SCC 307.

justification to exclude the report from the purview of the court. The court while considering the report would not go into determination of the validity of the report which constitutes advice tendered to Parliament.

Further, the Supreme Court held that by accepting PSC on the record in this case and considering the report by this court, the respondents right to dispel conclusions and findings in the report are not taken away and they are free to prove their case in accordance with law. When issues, facts come before a court of law for adjudication, the court is to decide the issues on the basis of evidence and materials brought before it and in which adjudication PCR may only be one of the materials, what weight has to be given to one or other evidence is the adjudicatory function of the court which may differ from case to case. In conclusion the court pointed out the following:

(i) According to article 105(2) of the Constitution, no Member of Parliament can be held liable for anything said by him in Parliament or in any committee. The reports submitted by Members of Parliament are also fully covered by protection extended under this article.

(ii) The publication of the reports is not only permitted, but also encouraged by the Parliament. The general public are keenly interested in knowing about the parliamentary proceedings including parliamentary reports which are steps towards the governance of the country. The right to know about the reports only arises when they have been published for use of the public in general.

(iii) Section 57(4) of the Indian Evidence Act, 1872 makes it clear that the course of proceedings of Parliament and the Legislature, established under any law are facts of which judicial notice shall be taken by the court.

(iv) Parliament has already adopted a report of privilege committee, that for those documents which are public documents within the meaning of Indian Evidence Act, 1872 there is no requirement of any permission of Speaker of Lok Sabha for producing such documents as evidence in court.

(v) That mere fact that document is admissible in evidence whether a public or private document does not lead to draw any presumption that the contents of the documents are also true and correct.

(vi) When a party relies on any fact stated in the PCR as the matter of noticing an event or history no exception can be taken on such reliance of the report. However, no party can be allowed to question or impeach report of Parliamentary Committee. The Parliamentary privilege, that it shall not be impeached or questioned outside the Parliament shall equally apply both to a party who files claim in the court and other who objects to it. Any observation in the report or inference of the committee cannot be held to be binding between the parties. The parties are at liberty to lead evidence independently to prove their stand in a court of law.

(vii) Both the parties have not disputed that Parliamentary Reports can be used for the purposes of legislative history of a Statute as well as for considering the statement made by a minister. When there is no breach of privilege in

considering the Parliamentary materials and reports of the committee by the court for the above two purposes, we fail to see any valid reason for not accepting the submission of the petitioner that courts are not debarred from accepting the Parliamentary materials and reports, on record, before it, provided the court does not proceed to permit the parties to question and impeach the reports.

(viii) The Constitutiondoes not envisage supremacy of any of the three organs of the state. But, functioning of all the three organs is controlled by the Constitution. Wherever, interaction and deliberations among the three organs have been envisaged, a delicate balance and mutual respect are contemplated. All the three organs have to strive to achieve the constitutional goal set out for -We the People. Mutual harmony and respect have to be maintained by all the three organs to serve the Constitutionunder which we all live.

(x) The function of adjudicating rights of the parties has been entrusted to the constituted courts as per Constitutional Scheme, which adjudication has to be made after observing the procedural safeguards which include right to be heard and right to produce evidence. Parliament, however, is not vested with any adjudicatory jurisdiction which belong to judicature under the Constitutional scheme.

(xi) Admissibility of a PCR in evidence does not mean that facts stated in the report stand proved. When issues of facts come before a court of law for adjudication, the court is to decide the issues on the basis of evidence and materials brought before it.

It is a known fact that not only in India but worldwide trend that more reliance is placed on the committees to conduct the business of the Parliament. This trend is attributed to the fact that Parliaments are not in a position to deal with the demands of the modern society. As a whole house it is difficult if not impossible to perform its legislative function effectively and efficiently. In such scenario the Parliamentary Committee systems have emerged as a creative way of parliaments to perform their basicfunctions. Today Parliamentary Committees have emerged as vibrant and central institutions ofdemocratic processes. Further the advantage of these committees is that often the committees have a multi-party composition and able to represent the diversity.

With such an important role to play by the committees, their reports also earn its importance in understanding the policies of the Legislature. Protecting and promoting of individual rights and human freedoms are paramount in a democracy. If it is so the contention in the present case presents no difficulty. Supreme Court rightly took precedence in protecting the individuals access to remedy injustice. Considering that the report by the court cannot be said to infringe privileges of parliament as the proceedings before the court is not to find liability of any Member of Parliament or breach of duty or violation of law by the members. Further, the court rightly pointed out that the findings of the Parliamentary Committee cannot constitute substantive evidence before the court in deciding the matter at hand.

IV SPECIAL LEAVE TO APPEAL: ARTICLE 136

Article 136 provides a special remedy in the form of special leave. Though any one can invoke this jurisdiction, Supreme Court often exercises restraint in accepting frivolous appeals under this article. In *Pankaj Kumudchandra Phadnis* v.*Union of India*[11] the appellant asked the Supreme Court to reopen Mahatma Gandhi assassination case.

Mahatma Gandhi was assassinated on January 30, 1948; about 70 years ago. The accused were tried for the conspiracy and murder of Gandhiji. After trial the judgment was delivered by Special Judge, Delhi on February 10, 1949 convicting seven accused and acquitting one. Accused Nathuram Godse and Narayan Apte were given death sentence, four of the accused were given life sentence and remaining one was given a sentence of seven years of Imprisonment. The conviction was challenged in High Court of Punjab in appeal, high court *vide* judgment dated June 21, 1949 upheld the conviction for five of the accused persons and acquitted two of the accused persons. None of the accused are alive today

The delay with which the petitioner has raised this issue is gross. According to the petitioner, he moved the court after doing some research about the circumstances in which Gandhiji's assassination took place and got convinced about the involvement of an unseen hand in the assassination. That the assassination of Gandhiji was an event of far reaching consequences in the world and the nation has the right to know the truth. It was held that:

i. The court was not satisfied that new research into a long concluded matter justifies a re-initiation of criminal investigation or that anything that might be stated should be allowed to reopen a case such as this.

ii. Criminal cases which result in conviction and even execution of death sentences and the demise of those who have served life sentences ought not to be reviewed, neither is there a provision in law for review.

iii. Undoubtedly the nation has right to know the truth, such a right cannot be invoked where the truth is already well known merely because some academic research raises a different perspective in law. This would amount to reopening issues based on hearsay

In addition,the court observed that Nathuram Godse was convicted on the basis of the evidence of eye-witnesses who were present at the prayer meeting. The meeting itself was attended by innumerable people. Each one of the eye-witnesses described how Godse moved forward and shot Gandhiji. All the evidence reveals that three shots entered the body. It further revealed that:

(i) The weapon of assault was semi-automatic Berreta Pistol with a magazine that could carry seven cartridges at a time. The pistol was recovered with four live cartridges by PW-31.

(ii) Two empty cartridge cases were found at the place of occurrence; the third was found in the shawl when the last ritual bath was given to the body of Gandhiji.

11 2018 (5) SCC 785.

(iii) The death report mentions three bullet wounds:

(a) One injury on the right side of the chest near nipple.

(b) One injury below the chest on the right side.

(c) One injury on the right side of the abdomen.

There were two exit wounds, one bullet did not exit the body. Thus, only two spent bullet were found at the place of occurrence. No fourth spent bullet or empty cartridge

Further, the Constitution bench declined to act on the findings in the report of Commission of Inquiry: [12]

> Court opined that it is not inclined to enter into the correctness or fairness of the findings in this report. That would be another exercise in futility and would none the less pan new fires of controversy. Court rejected the fourth bullet theory propounded by the petitioner. As no merit was found in the special leave petition, it was dismissed.

Review of judgements: Article 137

The power of the Supreme Court to review its own judgments is recognized under article 137 of the Indian Constitution.Supreme Court being highest court of justice, the judgement by itself shall be treated final. However, under article 137 an exception is carved out to this general rule. Therefore, to exercise such jurisdiction the review must involve some compelling circumstances to justify the review. In *Vinay Sharma* v. *The State of NCT of Delhi*[13] review petitions have been filed by two applicants. Both the petitioners were tried for rape and murder of a 23 years old lady -Nirbhaya (changed name). The trialcourt convicted the petitioners and awarded death sentence to all the four accused. The same was challenged in High Court of Delhi and the high court confirmed the death penalty of all the four convicts including petitioners. Appeals were made to the Supreme Court challenging the decision of the high court. Supreme Court dismissed those appeals.Thereafter, the appellants filed these review petitions praying for reviewingof its judgment under article 137.

While explaining the scope andgrounds available for exercise of jurisdiction by this court under article 137 the court held that an application to review a judgment is not to be lightly entertained. A review of a judgment is a serious step and such review could be undertaken only where there is a glaring omission or patentmistake or like grave error has crept in earlier by judicial fallibility.

It was held that the court cannot re-appreciate the evidence in a review petition. Once the court appreciate the evidence produced and records a finding of a fact and reached a conclusion, such conclusion cannot be reassessed in review petition unless it has been established that there is an error apparent on the face of the record. In the present case there was no contention that there is any error apparent on the face of the

12 *Id.*, para 8.

13 2018 (8) SCC 186.

record. Permitting to re-appreciate the evidence would amount to converting a review petition into an appeal in disguise.

The court held that in the following circumstance the review will be maintainable:[14]

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within

(ii) knowledge of the petitioner or could not be produced by him;

(iii) Mistake or error apparent on the face of the record;

(iv) Any other sufficient reason.

Court also listed the following circumstance in which review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

In the present case it was observed that the submissions and arguments made by the appellants are general in nature and not based on any substantial ground so as to point out any such error in the trial so as to furnish any ground to review any judgment. As there is no merit inthese review petitions and consequently, the review petitions were dismissed

Transfer of cases: Article 139 A

In *Santhini* v. *Vijaya Venkatesh*[15] the three judge bench was constituted to decide the correctness of a judgment rendered by two judges of this court in *Krishna Veni Nagam*v. *Harish* Nagam.[16] The issue in the case was regarding transfer of proceedings under article 139 A in cases for divorce where in the spouses were residing under

14 *Id.*, para 20.1-20.2.

15 (2018) 1 SCC 1.

16 (2017) 4 SCC 150.

different jurisdictions of courts. This reference to a larger bench was occasioned by an order of a bench of two judges in *Santhini.*

In *Krishna Veni*, the court directed that while issuing summons in a matrimonial proceeding, the court where proceedings have been initiated, may examine whether appropriate safeguards could be introduced to protect the interest of the spouse who resides outside the jurisdiction and to whom the summons are being issued. Among those safeguards, is the availability of a video conferencing facility.

Expressing its reservations on the use of video conferencing in family matters, the bench in *Santhini* held that:[17]

> To what extent the confidence and confidentiality will be safeguarded and protected in video-conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. Hence the matter was referred to the larger bench.

The majority of the judges held that under section 11 parties consent is mandatory and without the consent of the parties video conferencing would be contrary to Section 11. In matrimonial cases *in camera* proceedings are allowed to protect the confidentiality and privacy of the parties. Allowing video conferencing would not only infringe such right but also may dent the chances of amicable settlement of matrimonial dispute.

Family courts are established with a motive of promoting conciliation and secure speedy settlement of matrimonial dispute. Therefore the judge's role is different from the role of a judge in regular court. The judge of family court has to be very sensitive towards the parties and the dispute. In the initial stage of dispute the family court is expected to take conciliatory mode to settle the dispute and only when such attempts failed the court shall resort to adjudication. Further parties have a right to ask the court to conduct the trial in camera proceedings under section 11.This right being statutory in nature court must oblige such request. Further even the judge himself/ herself by *suo motu* can hold the proceedings in camera.

Reconciliation necessitates the presence of both parties at the same place. If the parties apart by distance it would be difficult to the judge to interact in the manner the law commands. Therefore, if the video conferencing is conducted at the request of one party accepting such request would be contrary to the language used by section. 11.

Hence when a matter was referred to the family court conducting conciliation through video conferencing is not advisable as emotional bond cannot be established in virtual meeting. However, an exception was recognized when the conciliation failed and the case is further proceeded for adjudication and when both parties agree for

17 *Supra* note 15, para 19.

videoconferencing then the family court can exercise its discretion to grant the permission. As far as transfer of cases is concern the discretion has to rest with the family court. Based on the discussion the following conclusions were drawn:

i. Under section 11 the hearing of matrimonial disputes may have to be conducted *in camera.*

ii. After the failure of the settlement, on joint application by both the parties, videoconferencing of further proceeding of the court may be allowed at the discretion of the family court.

iii. After the failed of the settlement if the family courts feels it is appropriate that videoconferencing will sub-serve the cause of the justice, the court may allow videoconferencing.

iv. In a transfer petition, videoconferencing not permitted.

In dissent, Justice D Y Chandrachud, held that the Family Courts Act,1984 envisages an active role for the family court to foster settlements. Under the provisions of section 11, the family court has to endeavour to assist and persuade parties to arrive at a settlement. Section 9 clearly recognises discretion in the family court to determine how to structure the process. It does so by adopting the words where it is possible to do so consistent with the nature and circumstances of the case. Moreover, the high courts can frame rules under section 9(1) and the family court may, subject to those rules, follow such procedure as it deems fit. In the process of settlement, Section 10(3) enables the family court to lay down its own procedure. the above provisions - far from excluding the use of video conferencing - are sufficiently enabling to allow the family court to utilize technological advances to facilitate the purpose of achieving justice in resolving family conflicts

The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act, 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the family court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialized court has been set up.

An *in-camera* trial is contemplated under section 11 in two situations: the first where the family court so desires; and the second if either of the parties so desires. There is a fallacy in the hypothesis that an in camera trial is inconsistent with the usage of video conferencing techniques. A trial in-camera postulates the exclusion of the public from the courtroom and allows for restraints on public reporting. Video conferencing does not have to be recorded nor is it accessible to the press or the public. The proper adoption of video conferencing does not negate the postulates of

an *in-camera* trial even if such a trial is required by the court or by one of the parties under section 11.

There is no basis either in the Family Courts Act, 1984 or in law to exclude recourse to video conferencing at any stage of the proceedings. Whether video conferencing should be permitted must be determined as part of the rational exercise of judgment by the family court.

The high courts, under section 9(1) of the Family Courts Act,1984 should lay down guidelines in regard to video conferencing in matrimonial matters.Video-conferencing facilities allow parties to communicate with each other in situations where it would be expensive, inconvenient or otherwise not desirable for a person to attend the court procedure. The overriding factor is that the use of video conferencing in any particular case must be consistent with furthering the interests of justice and should cause minimal disadvantage to the parties.

The high courts will be well advised to formulate rules to guide the process. Family courts must encourage the use of technology to facilitate speedy and effective solutions. Above all, it must be acknowledged that a wholehearted acceptance of technology is necessary for courts to meet societal demands for efficient and timely justice.

V INDEPENDENCY AND ACCOUNTABILITY OF JUDICIARY

Dispensation of justice is the highest and noblest virtue. Justice should not only be done but should manifestly and undoubtedly be seen to be done.[18] Legal regulations are meant for social function but the purpose behind such rules are to serve the value that is to be achieved by the rule. The role of the Chief Justice of India in administration of Supreme Court is pivotal. However, several doubts were raised on the role of the Chief Justice particularly in constituting the benches and referring certain cases to those benches. Though the rules give him the ultimate authority for determining the distribution of judicial work load, this power is to be exercised in a manner that is fair, just and transparent. In *Shanti Bhushan* v. *Supreme Court of India*[19] through its Registrar Supreme Court was asked to determine the validity of said power and also for providing clear guidelines in exercising such power.

In this case the petitioner filed a writ seeking to clarify administrative authority of chief justice as master of roster and for laying down procedure to be followed in preparing roster for allocation of cases. The petitioner has prayed for the following directions:[20]

> (a) That this Hon'ble Court may be pleased to issue a writ of declaration or a writ in the nature of declaration or any other appropriate writ, order or direction holding and declaring that listing of matters must strictly adhere to the Supreme Court Rules, 2013 and Handbook on Practice and Procedure and Office Procedure, subject to the following clarification:

18 Justice Gordon Hewart.

19 (2018) 8 SCC 396; [2018] 6 MLJ 647.

20 *Id.*, para 3.

> i) The words 'Chief Justice of India' must be deemed to mean a collegium of 5 senior judges of this Hon'ble court.
>
> (b) That this Hon'ble court may be pleased to issue a writ of declaration of a writ in the nature of declaration or any other appropriate writ, order or direction holding and declaring that the consultation by the Registry Officials for listing purposes, if any with the Chief Justice of India must include consultation with such number of senior-most judges as this Hon'ble court may fix in the interest of justice.
>
> (c) That this Hon'ble Court may be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction prohibiting the Hon'ble Chief Justice of India and concerned respondents from listing any matter contrary to the Supreme Court Rules, 2013 and Handbook on Practice and Procedure and Office Procedure or picking and choosing Benches for the purpose of listing contrary thereto, with the above modification of replacing 'Chief Justice of India' with the collegium of 5 senior most judges of this Hon'ble Court.
>
> (d) That this court may clarify that when matters are mentioned for urgent hearing/listing, only a date/time of hearing would be fixed but the Bench to hear the matter would be determined in accordance with the Rules.
>
> (e) That this Hon'ble Court may be pleased to grant such other and further relief as may be deemed fit in the facts and circumstances of the case and as may be required in the interests of justice.

The basic issues raised in the case are whether expression 'Chief Justice' in Supreme Court Rules made under article 145 to be read as 'Collegium' of first five Judges? Whether power of constituting Benches and listing cases be exercised by Collegium and not Chief Justice alone?

Advocate K.K.Venugopal strongly refuting this suggestion, argued that such an interpretation was not only impractical, it would even result in a chaos if day to day administrative work, including the task of constituting the benches and allocating cases to the benches, is allowed to be undertaken by the 'Collegium'. His submission was that such matters of constituting the benches and allocating cases to the respective benches has to be left to the sole discretion of the 'chief justice' acting in his individual capacity, for the smooth functioning of the court, by reposing faith and trust in the 'chief justice' who occupies the highest constitutional position in the judiciary.

The petitioner contended that functions as 'Framing of Roster' and 'listing of important and sensitive matters' are extremely crucial and cannot be left to the sole discretion of the Chief Justice as per the law laid down in the *S.P. Gupta* v. *Union of India*.[21] In any case, such exclusive discretion is anathema to the constitutional scheme. It is, therefore, imperative that the expression 'Chief Justice' must mean the Supreme

21 (1981) Supp. SCC 87.

Court or, as held by this court in series of judgments, the 'Collegium' of five senior most judges, to provide appropriate checks and balances against any possible abuse.

The chief justice performs his function in an administrative capacity. He also submitted that applicability of the principle of bias is to be judged by applying the test of reasonable apprehension of bias in the mind of a party, as held in the case of *Ranjit Thakur* v. *Union of India*.[22]

When such an important task is assigned to the judiciary, power of listing the cases has to be exercised in a fair and transparent manner so as to instill confidence in the public at large that the matter shall be decided by the court (or for that matter, by a particular bench) strictly on legal principles to ensure that rule of law, which is a part of the basic structure of the Constitution, prevails. In this context, it was argued that the power to allocate the cases should not be with one individual and this could be taken care of by applying the principle laid down in the *Supreme Court Advocates-on-Record Association* v. *Union of India*.[23]

The court held that 'Chief Justice' in his individual capacity is master of roster and cannot read as collegium of first three or five judges. Supreme Court is given authority to frame Rules for regulating practice and procedure of court under article 145 (1). Rules framed in exercise of such power empowered chief justice to constitute benches and list particular matters before such benches. Thus, it is chief justice's prerogative to constitute benches and allocate subjects which would be dealt with by respective benches.

The manner and procedure for transaction of court work is elaborately dealt with Supreme Court Rules, 2013. Further, handbook on practice and procedure and office procedure also laid down sufficient guidelines and elaboration of the procedure which is to be followed in this court. Thus, for transaction of business of the court, there are elaborate rules and procedure and it cannot be said that procedure and practice of the court is unguided and without any criteria. Manner and procedure for exercising the power should be put in public domain to allay any kind of misapprehension and to instill confidence in public in general.

The views as expressed above are fortified by a recent Constitution Bench judgment of this court in *Campaign for judicial Accountability and Reforms* v. *Union of India,*[24] and three judge bench judgment of this court in *Asok Pande* v. *Supreme Court India through its Registrar.*[25]

In *AsokPande*a similar question was raised. The court held that the submission that Constitution does not specifically mention chief justice to exercise power of allocation of cases and constitution of benches, hence, chief justice is not empowered to do the same, is not a valid submission.

22 AIR 1987 SC 2386.

23 AIR 1994 SC 268 : (1993) 4 SCC 441.

24 (2018) 1 SCC 196.

25 (2018) 5 SCALE 481 : (2018) 5 SCC 341.

Under the constitutional scheme itself as contained in article 145, the practice and procedure of the Supreme Court is to be regulated by the rules made by the Supreme Court with approval of the President. The rules framed under article 145 specifically empower the chief justice to nominate benches for hearing cases or appeal. Non-containing of any specific provision in the Constitution empowering the chief justice to frame the roster to allocate the cases is inconsequential since the entire subject was to be covered by rules made under article 145.

The decisions seem to be sound and inconformity with the rules laid down in this regard but the concern is the manner in which the Chief Justice of India was constituting benches for important cases. Though it is necessary that the power to constitute benches in a multi numbered courts to be vested with someone, the moot point is whether such a power shall be conferred to chief justice or it would be better and more transparent and democratic to confer such power to the collegium.

To answer the question one need to take note of the events that necessitated these cases. When there is a revolt against the chief justice and that to the revolt from four senior judges next to him needs a deeper look into the spirit rather the text of the rules.[26] Such power is conferred on the chief justice as a matter of convenience rather than conferring any superiority to the chief justice as he is one among all other judges first amongst the equals. Further, it is the seniority alone that decides who is the chief justice.

The apprehension expressed is that keeping in view the predisposition of particular judges, the chief justice may assign cases to those judges to achieve a predetermined outcome. This apprehension is not baseless as a similar concern was raised by the four senior judges and keeping this in view the court should have consider in devising a more rational and transparent system of listing and re-allocation of the matters to avoid any such possibilities. Unfortunately, this important issue of constituting benches for important and politically significant cases still in controversy and raised serious doubts about the role of the chief justice. When such doubts were raised the Supreme Court being highest constitutional court must take immediate measures to restore the faith of the people in the judiciary.

Judges serve none except to law and justice. Then what about their accountability? Are they required to be transparent while discharging their duties? Transparency and accountability being two sides of the same coin of neutrality of judiciary the role of the judge in ascertaining their powers becomes a vanishing point of judicial activism.

The actions of the judges in refereeing a matter directly to a five judge bench was questioned in *Campaign for Judicial Accountability*[27] In the present case is the bench of two judges has, in terms, doubted the correctness of a decision of a bench of three judges and therefore, referred the matter directly to a bench of five judges. In the normal course two judge bench is bound by the decision of three judge bench. In

26 See Supreme Court Crisis: All not okay, democracy at stake, say four senior-most judges, *The Hindu*, Jan. 12, 2018.

27 (2018) 1 SCC 196.

case for any reasons the division bench is of the opinion that the earlier decision of three judges bench is incorrect and it cannot follow the said judgement then the division bench must refer the matter before it to a sitting bench of three judges.

Therefore, the question raised validity of such reference to five judge bench. Court referred to Order VI Rule 2 of the Supreme Court Rules, 2013 reads as follows:

> 2. Where in the course of the hearing of any cause, appeal or other proceeding, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it.

The court had held in *State of Rajasthan* v. *Prakash Chand*[28] That the chief justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted. That the puisne judges can only do that work as is allotted to them by the chief justice or under his directions. That no judge or judges can give directions to the registry for listing any case before him or them which runs counter to the directions given by the chief justice.

Court referred to *Official Liquidator* v. *Dayanand,*[29] wherein it was held, "judicial discipline and propriety demands that a bench of two Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified."

Considering the above judgements, the court held that the same principle must apply *propriovigore* as regards the power of the Chief Justice of India. The law laid down in *Prakash Chand* has to apply to the Supreme Court so that there will be smooth functioning of the court and there is no chaos in the administration of justice dispensation system. If any such order has been passed by any bench, that cannot hold the field as that will be running counter to the order passed by the Constitution Bench. Needless to say, no Judge can take up the matter on his own, unless allocated by the Chief Justice of India, as he is the master of the roster. In view of the aforesaid, any order passed which is contrary to this order be treated as ineffective in law and not binding on the Chief Justice of India.

VI ARTICLE 145

The year 2018 has witnessed an unprecedented number of cases on constitution of benches in Supreme Court. *Asok Pande*[30] is another case where the Supreme Court was asked to relook into the constitution of benches.

28 (1998) 1 SCC 1.
29 (2008) 10 SCC 1.
30 (20018) 5 SCC 341.

This petition was filed demanding to issue a writ of mandamus to Supreme Court of India to evolve the set procedure for constituting the benches and allotment of jurisdiction to different benches in Supreme Court. This petition also demands to make a specific rule in Supreme Court Rules that the three judges bench in chief justice court shall consist of the chief justice and two senior most judges and the constitutional bench shall consist of five senior most judges or three senior most judges and two junior most judges.

As a third relief the petitioner demanded constituting Supreme Criminal Court, Supreme PIL Court, Supreme Tax Court, Supreme Service Court, Supreme Land Dispute Court, Supreme Miscellaneous Matter Court *etc*.

In addition to these issues, many personal issues were raised by the petitioner, as he was convicted under Contempt of Court Act, 1971 by High Court of Allahabad. His grievance was change of a judge in the bench trying him, who seemed to be inclined towards the petitioner. He is demanding rules to be framed and same need to be followed by the High Court of Allahabad.

The bench quotes article 145 of the Indian Constitution and different orders under Supreme Court Rules, 2013 and quotes that the chief justice can take cognizance of an application laid before him under Rule 55 and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case and therefore, in the present case the principles of Constitution and spirit of law is followed. This has been also the convention of this court, and the convention has been so because of the law and the principles of law and because of judicial discipline and decorum.

Chief Justice being the master of the roster, he alone has the prerogative to constitute benches. No judge is allowed to allocate the matter to themselves or direct the composition for constitution of a bench. It further added that, this also means that there cannot be any direction to the Chief Justice of India as to who shall be sitting on the bench. Such order cannot be passed. It is not countenanced in law and not permissible.

The bench accepted the principles laid regarding the same under *Prakash Chand*,[31] It further quotes the well settled principle that no *mandamus* can be issued to direct a body or authority which is vested with a rule making power to make rules or to make them in a particular manner.

Rejecting the petitioners demand for constituting three judge bench in a particular manner held that, there is no constitutional foundation on the basis of which such a suggestion can be accepted. Questioning the petitioners demand for combination of senior and junior judges, court held that every judge appointed under article 124 of the Constitution is having equal duty to adjudicate cases which come to the court and are assigned by the chief justice. Seniority in terms of appointment has no bearing on which cases a Judge should hear. The judgment speaks for the court not for the judge (except dissenting opinion).

31 (1998) 1 SCC 1.

To suggest that any Judge would be more capable of deciding particular cases or that certain categories of cases should be assigned only to the senior-most among the judges of the Supreme Court has no foundation in principle or precedent.

High courts periodically publish a roster of work under the authority of the chief justice. The roster indicates the constitution of benches, division and single. The roster will indicate the subject matter of the cases assigned to each bench. Different high courts have their own traditions in regard to the period for which the published roster will continue, until a fresh roster is notified.

Rejecting the prayer of the petitioners the court highlighted the important considerations taken by the chief justice while deciding the cases. Individual judges have their own strengths in terms of specialization. This specialization is kept in mind while deciding the bench. However, specialization is one of several aspects which weigh with the chief justice. A newly appointed judge may be rotated in a variety of assignments to enable the judge to acquire expertise in diverse branches of law. Along with specialization, it is important for judges to have a broad-based understanding of diverse areas of law.

Chief justices have to determine the number of benches which need to be assigned to a particular subject matter keeping in view the inflow of work and arrears have regard to factors such as the pendency of cases in a given area, the need to dispose of the oldest cases, prioritizing criminal cases where the liberty of the subject is involved and the overall strength, in terms of numbers, of the court.

Different high courts have assigned priorities to certain categories of cases such as those involving senior citizens, convicts who are in jail and women litigants. impending retirements have to be borne in mind since the assignment given to a judge who is due to demit office would have to be entrusted to another bench when the vacancy arises. These are some of the considerations which are borne in mind. The chief justice is guided by the need to ensure the orderly functioning of the court and the expeditious disposal of cases.

Dispelling the arbitrariness aspirations,the court held that, in his capacity as a judge, the chief justice is *primus inter pares*: the first among equals. In the discharge of his other functions, the Chief Justice of India occupies a position which is *sui generis*. Article 124(1) postulates that the Supreme Court of India shall consist of a Chief Justice of India and other judges. Article 146 reaffirms the position of the chief justice.

The court also made following observations, the Chief Justice is placed at the helm of the Supreme Court and the Chief Justice has an exclusive prerogative in allotment of work and constitution of bench. He is a repository of constitutional trust and because of that he is an institution in himself. The authority which is conferred is vested as a high constitutional functionary. The entrustment of authority is a necessity for the efficient transaction of the administrative and judicial work of the court. The ultimate purpose for such entrustment of authority is to ensure that the Supreme Court is able to fulfil and discharge the constitutional obligations which govern and provide the rationale for its existence. The entrustment of functions to the Chief Justice as the head of the institution, is with the purpose of securing the position of the Supreme

Court as an independent safeguard for the preservation of personal liberty. There cannot be a presumption of mistrust. The oath of office demands nothing less. With the above observations the petition was dismissed.

Appointment of district judges:Article 233

In *Dheeraj Mor* v. *High Court of Delhi*[32] petitions were pertaining to the interpretation of article 233 of the Constitution of India in the matter of appointment of district judges by way of direct recruitment.The appointment of district judges by respective high courts is from two sources. These sources are: (i) judicial service; and (ii) the advocate/pleader or in other words from the Bar.

It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as district judge if he has been an advocate or a pleader for not less than seven years. In other words, in the case of candidates who are not members of a judicial service they must have been advocates or pleaders for not less than seven years and they have to be recommended by the high court before they may be appointed as district judges, while in the case of candidates who are members of a judicial service the seven years rule has no application but there has to be consultation with the high court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously.

In *Deepak Aggarwal* v. *Keshav Kaushik*[33] three-judge bench of this court held that the appellants did not cease to be advocates while working as assistant district attorney/public prosecutor/deputy advocate general. In arriving at this decision, this court also dealt with the expression, if he has been for not less than seven years an advocate in article 233(2).

The text of article 233(2) only prohibits the appointment of a person as a district judge, if such person is already in the service of either the Union or the state. A person who is in the service of either the Union or the state would still have the option, if selected, to join the service as a district judge or continue with his existing employment. Compelling a person to resign from his job even for the purpose of assessing his suitability for appointment as a district judge, in our opinion, is not permitted either by the text of article 233(2) nor contemplated under the scheme of the Constitution as it would not serve any constitutionally desirable purpose.

However, one of the basic contention raided by the case is whether the eligibility for appointment as district judge is to be seen only at the time of appointment or at the time of application or both. Various previous judgements analyzed in the present case shows diverse opinion by the different benches of the Supreme Court hence the matter was place before the Chief Justice of India as these cases involve substantial questions of law as to the interpretation of article 233 of the Constitution of India.

32 (2018) 5 SCC 619.
33 (2013) 5 SCC 277.

Writ jurisdiction article 226

Article 226 of the Indian Constitution gives wide powers to the high court including power to issue writs. The very purpose of article 226, is to provide an effective and quick remedy. However, it is a settled law that though the high courts power to issue writs is wide it must be used judiciously. In *Authorized Officer, State Bank of Travancore* v. *Mathew K.C.*[34] the respondent's loan account was declared as a Non-Performing Asset (NPA). In spite of repeated notices, the respondent failed to pay the dues. A statutory notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) was issued to the respondent and objections raised under the Act were considered and the same was rejected. Accordingly, a possession notice was issued under section 13(4) of the Act read with Rule 8 of The Security Interest (Enforcement) Rules, 2002. Respondent preferred a writ petition to high court on the notice despite an alternative remedy under the SARFAESI Act is available. Section 17 of the Act provides a remedy of appeal by the aggrieved before the debt recovery tribunal, followed by a right to appeal before the appellate tribunal under section 18. The question before the Supreme Court is whether the high court erred in entertaining the writ petition when a statutory remedy is already available to the respondent.

The Supreme Court rightly held that the jurisdiction under article 226 being discretionary high court must exercise it judiciously. The normal rule is that a petition under article226 of the Constitution ordinarily not to be entertained if alternate statutory remedies are available. Such a jurisdiction can be invoked only on well-defined exceptions.

It pointed out that in *Commissioner of Income Tax* v. *Chhabil Dass Agarwal*[35] the following exceptions were carved out to the rule of alternative remedy:

Where the statutory authority has

i. not acted in accordance with the provisions of the enactment in question,

ii. in defiance of the fundamental principles of judicial procedure,

iii. has resorted to invoke the provisions which are repealed,

iv. when an order has been passed in total violation of the principles of natural justice.

However, the high court overlooked the settled law that ordinarily high court shall not entertain a petition under article 226 of the Constitution if an effective statutory remedy is available to the aggrieved person. Court opined that particularly high court must have taken greater care in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. It of the view that in matters of recovery of the public dues, the high court must keep in mind that the legislations enacted by Parliament and state l egislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial

34 2018 (3) SCC 85.

35 2014 (1) SCC 603.

bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases it incumbent on the high court not to entertain any petition under article 226 unless the petitioner exhausted all the remedies available under the relevant statute.

In the present case the high courts ignored the availability of statutory remedies under the DRT Act, 1993 and the SARFAESI Act, 2002 and exercise jurisdiction under article 226 for passing orders. This would seriously impact on the rights of the Bank in recovering their financial dues. The court relying on several cases[36] held that thought alternative remedy is not a bar to the exercise of writ jurisdiction it is the solemn duty of the Court to apply the correct law especially when the law stands well settled. It opined that any departure from such settled law would be permissible only if the case is falling under a defined exception, duly discussed after noticing the relevant law. Further it observed that granting an ex-parte interim order in financial matters would have adverse ramifications as loans by financial institutions are granted from public money. Therefore, timely recovery of the payment requires to facilitate loan to other and blocking such recovery with frivolous litigation should not be allowed.

Finally, the court observed that once the position in law is well settled by various judicial pronouncement it would be judicial impropriety on the part of high court to ignore such position and entertain the writ petition contrary to the settled legal position. The court termed such conduct as judicial adventurism and said that it cannot be permitted and strongly deprecate the tendency of the subordinate courts in passing whimsical orders.

Power of superintendence: Article 227

In *Raj Kumar Bhatia* v. *Subhash Chander Bhatia*[37]the Supreme Court examined the nature of superintendence power of the high court over the subordinate courts. In this case the trial court allowed an application filed by the appellant for amendment of the written statement. The respondent filed a review under article 227. While deciding the nature of proceedings under article 227 the Supreme Court held that whether an amendment should be allowed are not cannot dependent on whether the case which is proposed to be set up will eventually succeed at the trial. The supervisoryjurisdiction of the high court under article 227 is confined only to verify whether an inferior court or tribunal has proceeded within the parameters of its jurisdiction. Hence under article 227, the high court has no power to act as an appellate court. As a result, it is not open to the high court to review or reexamine the evidence upon which the inferior court has passed an order. Once the trial court exercised its powers within its jurisdiction high court has no power to interfere with such decision under article 227.

Special provisions in respect to Delhi: Article 239 AA

Government of NCT of Delhi v. *Union of India*[38] is a reference from appeals to the Constitution Bench on issue that pertains tothe powers conferred on the Legislative

36 *Union Bank of India* v. *Panchanan Subudhi* 2010 (15) SCC 552; *Kanaiyalal Lalchand Sachdev* v. *State of Maharashtra* 2011 (2) SCC 782; *Punjab National Bank* v. *Imperial Gift House*(2013) 14 SCC 622.

37 2018 (2) SCC 87.

38 2018 (8) SCC 501.

Assembly of the National Capital Territory of Delhi and the executive power exercised by the elected Government of NCT of Delhi. The issue concerns the interpretation of article 239AA of the Constitution of India. The fundamental issueis the extent of the authority of the Lieutenant Governor of the National Capital Territory and its Council of Ministers headed by the Chief Minister. The historical facts clearly establish that Delhi was never intended to be a complete state like other states in the country.

Lieutenant Governor of Delhi is bound by the aid and advice of his Council of Ministers in matters for which the Delhi Legislative Assembly has legislative powers as per article 239AA.However, under clause 4 the Lieutenant Governor can refer it to the President in case there is a difference between him and Council of Ministers. In fact, clause 4 confers this power on the Lieutenant Governor even matter falling under the legislative domain of the Delhi Assembly. This overriding power of the Union to legislate *qua* other Union Territories is exposited under, article 246 (4).

As a result, NCT of Delhi is not accorded the status of a state under constitutional scheme. Similarly, the status of the Lieutenant Governor of Delhi is not that of a governor of a state. He remains an administrator, in a limited sense, working with the designation of Lieutenant Governor.

A closer look at article 239AA (3)(a) reveals that the Parliament has the power to make laws for the National Capital Territory of Delhi not only on the matters enumerated in the Concurrent List but also under State List. However, this does not mean that the Legislative Assembly of Delhi has no power. It also has the power to make laws over all those subjects which figure in the Concurrent List and all, but three excluded subjects, in the State List.

A combined reading of clauses (3) (a) and (4) of article 239AA reveals that the executive power of the Government of NCTD is co-extensive with the legislative power of the Delhi Legislative Assembly. Hence, the executive power of the Council of Ministers of Delhi extend to all subjects in the Concurrent List and all, but three excluded subjects, in the State List. However, the rider is that if the Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the state must conform to the law made by the Parliament.

In that sense executive power of the Union of India with respect to the NCT of Delhi is extended to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This, however, is subject to the proviso to article 239AA(4) of the Constitution .

The meaning of the words ‘aid and advise’ used in article 239AA (4) has to be construed to mean that the Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers until and unless the Lieutenant Governor exercise his power under the proviso to clause (4) of,article 239AA.This doesn’t mean that the Lieutenant Governor has been entrusted with independent decision-making power. He has to either act on the ‘aid and advice’ of Council of Ministers or he is bound to implement the decision taken by the President on a reference being made by him.

The court by majority held that NCT Delhi is in a different footing compared to other states. The following conclusions were drawn by the court.

i. The Parliament has power to make laws for NCTD in respect of any of the matters enumerated in State List and Concurrent List. The Legislative Assembly of NCTD has also legislative power with respect to matters enumeratedin the State List (except excepted entries) and in the Concurrent List.

ii. Executive power is co-extensive with the legislative power. Legislative power is given to give effect to legislative enactments. The policy of legislation can be given effect to only by executive machinery.

iii. Executive power of the Union is co-extensive on all subjects referable to List II and III on which Legislative Assembly of NCTD has also legislative powers.

iv. The "aid and advice" given by Council of Ministers as referred to in sub-clause (4) of article 239AA is binding on the LG unless he decides to exercise his power given in proviso to sub-clause (2) of , article 239AA.

v. The Legislative Assembly of NCTD being representing the views of elected representatives, their opinion and decisions have to be respected in all cases except where LG decides to make a reference to the President.

vi. The power given in proviso to sub-clause (4) to Lieutenant Governor is not to be exercised in a routine manner rather it is to be exercised by the Lieutenant Governor on valid reasons after due consideration, when it becomes necessary to safeguard the interest of the Union Territory.

vii. For the executive decisions taken by the Council of Ministers/Ministers of GNCTD, proviso to sub-clause (4) gives adequate safeguard empowering the Lieutenant Governor to make a reference to the President in the event there is difference of opinion between decisions of the ministers and the Lieutenant Governor, but the constitutional scheme does not suggest that the decisions by the council of ministers/ministers require any concurrence of the Lieutenant Governor.

viii. The scheme as delineated by 1991 Act and 1993 Rules clearly indicates that Lieutenant Governor has to be kept informed of all proposals, agendas and decisions taken. The purpose of communication of all decisions is to keep him posted with the administration of Delhi. The communication of all decisions is necessary to enable him to go through so as to enable him to exercise the powers as conceded to him under proviso to sub-clause (4) as well as under 1991 Act and 1993 Rules. The purpose of communication is not to obtain concurrence of Lieutenant Governor.

With these observations the Supreme Court directed to place the matter for further resolution before the appropriate bench for hearing after obtaining orders from the chief justice.

The status of Delhi can be equated neither with states nor with Union Territories.Though representative government is a hallmark of Indian Constitutionas constitution adopts democracy as a form of government, NCT Delhi stand in a different

footing. The clause 4 of, article 239AA is constitutional indicator of such difference. Keeping in mind that Delhi is not only a special state but also capital of the nation the constituent power was provided by a special constitutional provision. As a result, areas of police, public order and land was carved out from the sphere of legislative authority of the legislative assembly. Therefore, the court rightly pointed out that Delhi is unlike state or Union Territory and is an amalgamation between national concern and representative democracy. That necessitate the power of the Lieutenant Governor need to be wider than the power of the governor of a state. Further, such control by the Parliament is vital in the national interest irrespective of whether the subject matter is in the state field or Union field.

Inconsistency between laws: Article 254

Constitutional scheme of legislative powers in India is unique. Under the scheme there are yet times different legislations could operate and it could happen that one is passed by the Parliament and the other by a state legislature. To resolve such conflicts constitution envisaged article 254. In *K. A. Annamma* v.*The Secretary, Cochin Co-operative Hospital Society Ltd*.[39] the appeal is directed against the final judgment and order passed by the High Court of Kerala at Ernakulam in a writ petition whereby the high court allowed the writ petition filed by the respondent and set aside the award of the Labour Court, Ernakulam.

The respondent is the Cooperative Society registered under the Kerala Co-operative Societies Act, 1969 (KCS Act). The appellant was an employee of the respondent-society. By order, the respondent-society dismissed the appellant from service. The appellant, filed a complaint with the state government against the respondent-society under the Industrial Dispute Act, 1947 (ID Act). The conciliation having failed, the appropriate government made an industrial reference to thelabour court, Ernakulum under section 10 of the ID Act for deciding the legality and correctness of the appellant's dismissal. The labour court, held that the dismissal order is bad in law and was accordingly set aside. Further, it was held that during the pendency of the reference, the appellant has attained the age of superannuation, therefore, she was entitled to get all monetary and other service benefits as are permissible in law.

The respondent, filed a writ petition in the High Court of Kerala and questioned the legality and correctness of the award passed by the labour court. The high court set aside the award of the labour court. An appeal was preferred to Supreme Court.

The question was whether a service dispute arising between the cooperative society's employee and his employer is capable of being tried by the forum prescribed under the KCS Act or by the machinery provided under the ID Act or it is capable of being tried under both the Acts leaving the aggrieved person to select one forum under any of the acts of his choice out of the two for getting his/her service dispute decided by such forum.

39 2018 (2) SCC 379.

Article 254 is attracted in cases where the law is enacted by the Parliament and the State Legislature on the same subject, which falls in list III - Concurrent List.In such a situation arising in any case, if any inconsistency or/and repugnancy is noticed between the provisions of the central and the state Act, which has resulted in their direct head on collusion with each other which made it impossible to reconcile both the provisions to remain in operation inasmuch as if one provision is obeyed, the other would be disobeyed, the state act, if it has received the assent of the President will prevail over the central act in the concerned state by virtue of article 254 (2) of the Constitution.

If the state act has received the assent of the governor, then the central act would prevail over the state act by virtue of article 254 (1) of the Constitution.It was accordingly held that the KCS Act and the ID Act both possess and enjoy the concurrent jurisdiction to decide any service dispute arising between the co-operative society's employee and his/her employer (co-operative society).It was also held that it is the choice of the employee concerned to choose any one forum out of the two forums available to him/her under the two Acts (the KCS Act and the I.D. Act) to get his/her service dispute decided.

Also in *M S Innoventive Industries Ltd* v. *ICICI Bank,*[40] the appellant is a multi-product company catering to applications in diverse sectors. From August, 2012, owing to labour problems, the appellant began to suffer losses. Since the appellant was suffering loss, corporate debt restructuring was proposed. All 19 banking entities who provided the financial assistance to the appellant accepted for corporate debt restructuring. However, later an application was made by ICICI Bank Limited before the NCLT., alleging that the appellant defaulted the loan within the meaning of the Insolvency and Bankruptcy Code of 2016 and requested insolvency resolution be set in motion. To this application, a reply was filed by means of an interim application on behalf of the appellant in which the appellant claimed that there was no debt legally due as per two notifications dated July 22, 2015 and July 18, 2016, issued under the Maharashtra Relief Undertakings (Special Provisions Act), 1958 (hereinafter referred to as the Maharashtra Act). As a result, all liabilities of the appellant, except certain liabilities and remedies for enforcement thereof were temporarily suspended for a period of one year in the first instance under the first notification of July 22, 2015 and another period of one year under the second notification of July 18, 2016.

The NCLT held that the Insolvency and Bankruptcy Code of 2016 would prevail against the Maharashtra Act in view of the non-obstante clause in section 238 of the Code. It, therefore, held that the parliamentary statute would prevail over the state statute and this being so, it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared.

From the aforesaid order, an appeal was carried to the NCLAT, which met with the same fate. The NCLAT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other.

40 2018 (1) SCC 407.

Supreme Court agreed to the contention that the later non-obstante clause of the parliamentary enactment will also prevail over the limited non- obstante clause contained in aection 4 of the Maharashtra Act pursuant to reading of article 254 of the Constitution of India. The appeals, accordingly,were dismissed.

Similarly, in *Jayant Verma* v. *Union of India*[41] the writ petition, assails the constitutional validity of section 21A of the Banking Regulation Act, 1949. It has been filed by certain public spirited citizens, based on the report of the Parliamentary Standing Committee on Agriculture for the year 2006-2007 to say that section 21A should be abolished, insofar as it applies to rural indebtedness.

Section 21A prohibits the reopening by courts of a debt between a banking company and its debtor, on the ground that excessive rate of interest charged by the banking company. The section seeks an exemption from Usurious Loans Act, 1918 and/or any other state legislation relating to indebtedness, and then declares that no such loan transaction shall be reopened by any court on the ground of charging of excessive rates of interest.

By way of Usurious Loans Act, 1918 and various State Debt Relief Acts, every state has taken measures to reduce the interest rate and there by the burden on the farmers by way of legislations restricting or regulating the percentage of interest that could be charged on agricultural loans. As a result there is a potential conflict between Usurious Loans Act, 1918, various State Debt Relief Acts and Banking Regulation Act.

The issues involved in the present case are:

i. if any installment of a debt is not paid on the due date; what is the scope of Entry 45, List I *vis-à-vis* Entry 30, List II of the Seventh Schedule to the Constitution?

ii. Whether section 21A of the Banking Regulation Act, 1949 which is a central legislation can prevail over State Debt Reliefs Acts?

iii. Is it possible to harmonize Entry 45, List I and Entry, 30 List II in the light of article 246 of the Constitution?

The court observed that pith and substance of the Banking Regulation Act fall within Entry 45, List I under the heading of 'Banking'. However, Entry 30, List II of the Seventh Schedule deals with money lending, money lenders, and relief of agricultural indebtedness.It is clear that, insofar as relief of agricultural indebtedness is concerned its being in the List II, section 21A certainly encroaches upon Entry 30, List II. The doctrine of pith and substance is used only to view a legislation as a whole and see whether, as a whole, it falls within one or other entry of a List I or List II. But that doesn't mean even if the whole act coming under one list cannot be in conflict with an entry of another list.

Article 246 confers federal supremacy and an entry in List I would prevails on List II. The court made a following observation interpretation of lists for the purpose of resolving the conflict between two entries:[42]

41 2018 (4) SCC 743.

42 *Id.,* para 40.

> Once the spheres of both the entries have been delineated, the doctrine of pith and substance comes in to test whether a particular legislation is referable, as a whole, to an entry in List I or to the competing entry in List II. Once it is found that the legislation as a whole is referable to an entry in List I, but it incidentally encroaches upon an entry in List II, there is no reason for the doctrine of unoccupied field not to apply to federal legislation. The expression with respect to appears in all the sub-articles of Article 246, which expression, so far as sub-articles (1) to (3) are concerned, imports the twin doctrines of incidental trenching and unoccupied field, which applies, therefore, to legislation made under sub-articles (1) to (3) of Article 246, thus making it clear that incidental encroachment by Parliament cannot be tolerated when the exclusive field allotted to the State legislature is not unoccupied.

A closer look of above observation reveals that once the State has the exclusive right to pass a legislation under any of the entry of List II, a legislation made under List I though fall squarely under its entry but incidentally encroach upon state legislation, the central legislation cannot operate to the extent it encroaches into the sphere of state legislation.

Finally, it was held thatsection 21A of the Banking Regulation Act thoughvalid as it is part of an enactment which, in pith and substance, is relatable to Entry 45, List I, but insofar as section 21A incidentally encroaches upon the field of agricultural indebtedness, will not operate in any states where there is a State Debt Relief Act which deals with relief of agricultural indebtedness. This would hold good even where the State Debt Relief Act covers debts due to banks, as defined in those Acts. Suppose inn states where the State Debt Relief Act does not apply to banks then section 21A would apply. But if applies only to certain specified banks, section 21A willapply in such states to loans taken from the banks other than the banks specified or covered by the concerned State Debt Relief Act.

VII IDENTIFICATION OF SCHEDULED CASTES AND SCHEDULED TRIBES: ARTICLE 341 AND 342

President of India is empowered to declare persons or group of persons as scheduled castes and scheduled tribes. Such an identification assumes importance due to the fact that the persons identified in the list would be entitled to certain benefits which are commonly known as reservations. However, identification of scheduled castes and scheduled tribes poses several difficulties. One of the difficulty is that whether a scheduled caste/tribe in one state entitled the benefits in another state as scheduled caste/tribe?

Such a question was raised in *Bir Singh* v. *Delhi Jal Board.*[43] In a decision of fivejudge bench, under special leave appeal, Chief Justice of India Ranjan Gogoi wrote the majority judgment for himself and three others), Justice Banumathi wrote a

43 (2018) 10 SCC 312.

judgment agreeing with the finding that Pan India Reservation Policy is invalid and disagreed with the majority on the point of exception given to Delhi.

Facts of the case are that in *State of Uttaranchal* v. *Sandeep Kumar Singh*[44] the following question arose for consideration of this court:[45]

> Whether a person belonging to a Scheduled Caste in relation to a particular State would be entitled or not, to the benefits or concessions allowed to Scheduled Caste candidate in the matter of employment, in any other State?

A very important question of law as to interpretation of articles 16 (4), 341 and 342 arises for consideration in this appeal. Whether the presidential order issued under, article 341 (1) or, article 342 (1) of the Constitution has any bearing on the state's action in making provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state? The extent and nature of interplay and interaction among, articles 16 (4), 341 (1) and 342 (1) of the, Constitution is required to be resolved.

Previously the Supreme Court in *Marri Chandra Shekhar Rao* v. *Dean, Seth GS Medical College*[46] and *Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra* v. *Union of India*[47] had held that a person belonging to a scheduled caste in one state cannot be deemed to be a scheduled caste person in relation to any other state to which he migrates for the purpose of employment or education.

Relying on the above judgements the court held that a person belonging to a scheduled caste in one state cannot be deemed to be a scheduled caste person in relation to any other state to which he migrates for the purpose of employment or education. The expressions in relation to that state or union territory and for the purpose of this Constitution used in articles 341 and 342 of the Constitution of India would mean that the benefits of reservation provided for by the, Constitution would stand confined to the geographical territories of a state/union territory in respect of which the lists of scheduled castes/scheduled tribes have been notified by the presidential orders issued from time to time. A person notified as a scheduled caste in state A cannot claim the same status in another state on the basis that he is declared as a scheduled caste in state A.

It is an unquestionable principle of interpretation that interrelated statutory as well as constitutional provisions have to be harmoniously construed and understood so as to avoid making any provision nugatory and redundant. If the list of scheduled castes/scheduled tribes in the presidential orders under article 341 /342 is subject to alteration only by laws made by Parliament, operation of the lists of scheduled castes

44 (2010) 12 SCC 794.

45 *Id*., para 1.

46 (1990) 3 SCC 130.

47 (1994) 5 SCC 244.

and scheduled tribes beyond the classes or categories enumerated under the presidential order for a particular state/union territory by exercise of the enabling power vested by, article 16 (4) would have the obvious effect of circumventing the specific constitutional provisions in, articles 341 /342. In this regard, it must also be noted that the power under, article 16 (4) is not only capable of being exercised by a legislative provision/enactment but also by an executive order issued under, article 166 of the Constitution.

It will, therefore, be in consonance with the constitutional scheme to understand the enabling provision under, article 16 (4) to be available to provide reservation only to the classes or categories of scheduled castes/scheduled tribes enumerated in the presidential orders for a particular state/union territory within the geographical area of that state and not beyond. If in the opinion of a state it is necessary to extend the benefit of reservation to a class/category of scheduled castes/scheduled tribes beyond those specified in the lists for that particular state, constitutional discipline would require the state to make its views in the matter prevail with the central authority so as to enable an appropriate parliamentary exercise to be made by an amendment of the lists of scheduled castes/scheduled tribes for that particular state. Unilateral action by states on the touchstone of, article 16 (4) of the Constitution could be a possible trigger point of constitutional anarchy and therefore must be held to be impermissible under the, Constitution.

As regards National Capital Territory of Delhi is concerned the pan India Reservation Rule in force is in accord with the constitutional scheme relating to services under the Union and the states/Union Territories.Dissenting with the majority view which carved an exception for National Capital, Justice Banumathi observed that extending Pan India reservation to the employment falling under the services of Union Territories including Union Territory of Delhi, will be against the constitutional scheme.

> *When the Scheduled Castes or Scheduled Tribes are specified for each State in relation to one State or Union Territory, neither the State legislature, the administration of the Union Territories and nor the courts can include or exclude other Scheduled Castes or Scheduled Tribes so notified in the Presidential Order. Providing all India reservation to the services of Union Territories 159 including Union Territory of Delhi, would be against the mandate of Articles 341 and 342 and the Presidential Orders issued thereon. If that is permitted, it would amount to addition or alteration of the Presidential Order which is impermissible and violative of the Constitutional Scheme.", the judge said.*

Elaborately referring to Service Rules, Justice Banumathi observed:

> *Services under the Union Territories though they are Central Government services, they are services under the respective Union Territories and not under the direct control of Union of India/different Ministries…. Such services under Union Territories cannot be said to be Central Civil Services that is services under Union of India to extend*

the benefit of PAN India reservation for recruitment to the services under respective Union Territories including Union Territory of Delhi.

Thought the judgement seems to be on sound principles Justice Bhanumati dissent make sense. Once it is ruled that the central list would apply only to a particular state/union territory within the geographical area of that state and not beyond, the same rule should have been applied to all Union Territories including Union Territory of Delhi.

VIII CONCLUSION

Constitutional interpretation is a balancing task. The value of the Constitution as a document of social change and thereforeits need to be an organic document is beyond dispute. Once it is accepted that the very purpose of the Constitution is to bring social change, the national policies need to evolve in that direction. In case of any doubt about the national policies being against the constitutional values it becomes incumbent on the constitutional courts to interpret in the best interest of the society. While interpreting the constitution the correct path is that any such interpretation must strengthen the democracy and democratic process.

As a result, Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. We adopted both rights and duty oriented constitution. In the light of this, the constitutional courts need to strike a balance between judicial activism and restraint. The judicial restraint need to beself-discipline. That does not meanthat it is suggested that the courts must use literal interpretation of constitutional text. The Constitution being living document, judges must have constitutional sensibility and a progressive outlook. *Kalpana Mehta* is a classics case where in the Supreme Court exhibited its constitutional sensibility in upholding that report of the standing committee can be accessed by the court. Supreme Court being final arbiter of the Constitution, it properly balanced the concepts of privileges and judicial review.

It is being hailed that the constitutional courts in India enjoyperhaps the widest and the mostextensive judicial review known to the world of law. Such a power also imposes an enormous responsibility on the court to guard the independence of the judiciary. However, lack of transparency in appointments and in constitution of benches at Supreme Court level had witnessed an unprecedented revolt and several cases were filed in Supreme Court asking it to provide guidelines in particular to constitution of benches. A golden opportunity to set right several things at the apex court was lost. In *Shanti Bhushan, Campaign for Judicial Accountability* and *Asok Pande,* constitution of benches at Supreme Court was extensively discussed but at the end the preference was given to the literal interpretation. The interpretation should have been made to strengthen the democracy and democratic process. Transparency being the basic principle for survival of democracy, giving uncontrolled discretionary power to the chief justice to constitute benches does not augur well as a sound constitutional practice.

One need to concur with Justice D. Y. Chandrachud's words in *Government of NCT of Delhi* case, "if the moral values of our Constitution were not upheld at every

stage, the text of the, Constitution may not beenough to protect its democratic values. In order to truly understand what constitutional morality reflects, it is necessary to answer what it is that the, Constitution is trying to say" and to identify "the broadest possible range to fix the meaning of the text."