BEFORE THE NATIONAL GREEN TRIBUNAL (EZ), KOLKATA

(Under Section 18(1) read with Sections 14 & 15 of National Green Tribunal

Act, 2010)

O.A. No. 93 & 95 of 2024 (EZ)

Ashish Kothari ....Applicant

Vs.

The Ministry of Environment, Forest
and Climate Change and Anr. …Respondents

CASE COMPILATION
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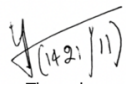
//Certified to be True Copies of the respective originals//
Dated this the 20th day of November, 2025 at Chennai



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(2023) 11 Supreme Court Cases 401

3J

(BEFORE N.V. RAMANA, C.J. AND SURYA KANT AND HIMA KOHLI, JJ.)

MANOHAR LAL SHARMA (PEGASUS SPYWARE) .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (Crl.) No. 314 of 2021† with WPs (C) Nos. 826, 829, 848-51, 853, 855, 861, 890 and 909 of 2021, decided on October 27, 2021

A. **Constitution of India — Art. 21 — Right to privacy — Reiterated, not absolute, and is subject to restrictions which must meet the threefold requirements, as laid down by nine-Judge Bench in *K.S. Puttaswamy (Privacy-9 J.)*, (2017) 10 SCC 1 — Said threefold requirements are: (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them**

B. **Constitution of India — Arts. 21, 14 and 19 — Right to privacy — Surveillance or spying on individuals by Government or intelligence agencies to gather information — When and extent to which permissible — Pegasus spyware case**

— Held, such surveillance or spying infringes privacy right of individuals, except when it is done in State's interest to ensure life, liberty and security — Considerations for usage of surveillance or spying technology must be based on evidence and it must be resorted to when absolutely necessary — Indiscriminate spying cannot be allowed except with sufficient statutory safeguards by following procedure established by law

C. **Constitution of India — Arts. 21 and 19(1)(a) — Right to privacy — Freedom of press — Trade-off between right to privacy of individuals and security interest of State — Must be fair to both sides — Allied to the concerns of privacy is freedom of press — Protection of journalistic sources is a basic condition for freedom of press**

D. **Constitution of India — Arts. 21, 14 and 19 — Right to privacy — Evolution, extent, reasonable expectation and State restrictions, re-stated**

E. **Constitution of India — Art. 32 — PIL — Based only on newspaper reports should be discouraged — Such reports should not be in ordinary course be taken to be readymade pleadings that may be filed in Court — They leave further burden on Court to determine preliminary facts**

† Under Article 32 of the Constitution of India

F. **Constitution of India — Art. 32 — Government affidavit — Use of Pegasus spyware by Union of India alleged — "Limited affidavit" filed on behalf of UOI without clarifying their stand on facts of the matter which touches fundamental rights of citizens, held, inappropriate**

— Burden of protection of fundamental rights is primary duty of State which should reveal all facts and information in its possession to Court — Free flow of information from petitioners and State in writ proceedings needed

G. **Constitution of India — Arts. 21 and 19(2) — Writ petition alleging use of Pegasus spyware by UOI causing violation of fundamental right to privacy of citizens — Government claiming exception from divulgence of information on ground of national security — Scope of judicial review**

— Mere invocation of ground of national security not sufficient to call for prohibition against judicial review — State must plead and prove necessity of secrecy of information in national interest

H. **Constitution of India — Art. 32 — Technical Committee constituted by Supreme Court in Pegasus spyware case**

— Supreme Court has practice of appointing such Committee/Commission in particular circumstances of the case, taking into account public importance and alleged scope and nature of large scale violation of fundamental rights of citizens — Compelling circumstances which weigh the Court to pass order for constitution of the Committee, stated

I. **Constitution of India — Art. 32 — Judicial review — Object — Court's objective is to protect fundamental rights of all without entering into political arena**

In September 2018, Citizen Lab, which is a laboratory based out of the University of Toronto, Canada, released a report detailing the software capabilities of a "spyware suite" called Pegasus that was being produced by an Israeli Technology firm viz. the NSO Group. The report indicated that individuals from nearly 45 countries were suspected to have been affected. The Pegasus suite of spywares can allegedly be used to compromise the digital devices of an individual through zero click vulnerabilities i.e. without requiring any action on the part of the target of the software. Once the software infiltrates an individual's device, it allegedly has the capacity to access the entire stored data on the device, and has real time access to emails, texts, phone calls, as well as the camera and sound recording capabilities of the device. Once the device is infiltrated using Pegasus, the entire control over the device is allegedly handed over to the Pegasus user who can then remotely control all the functionalities of the device and switch different features on or off.

The NSO Group purportedly sells this extremely powerful software only to certain undisclosed Governments and the end user of its products are "exclusively government intelligence and law enforcement agencies" as per its own website. In 2019 there was a news disclosing that the devices of certain Indians were also affected, which fact was acknowledged by the then Hon'ble Minister of Law and Electronics and Information Technology in a statement made in Parliament. In

1920 Citizen Lab, in collaboration with the international human rights organisation, Amnesty International uncovered another spyware campaign which allegedly targeted nine individuals in India, some of whom were already suspected targets in the first spyware attack.

In 2021 a consortium of nearly 17 journalistic organisations from around the world, including one Indian organisation, released the results of a long investigative effort indicating the alleged use of the Pegasus software on several private individuals. Initially, it was discovered that nearly 300 of these numbers belonged to Indians, many of whom are senior journalists, doctors, political persons, and even some Court staff. At the time of filing of the writ petitions, nearly 10 Indians' devices were allegedly forensically analysed to confirm the presence of the Pegasus software. The above reports resulted in large-scale action across the globe. Respondent Union of India, through the Minister of Railways, Communications and Electronics and Information Technology, took the stand in Parliament on 18-7-2021, when asked about the alleged cyberattack and spyware use, that the reports published had no factual basis. The Minister also stated that the Indian statutory and legal regime relating to surveillance and interception of communication is extremely rigorous, and no illegal surveillance could take place.

Some of the writ petitioners before the Supreme Court alleged to be direct victims of the Pegasus attack, while others are public interest litigants. They raise the issue of the inaction on the part of the respondent Union of India to seriously consider the allegations raised, relating to the purported cyberattack on citizens of this country. Additionally, the apprehension expressed by some petitioners relates to the fact that, keeping in mind the NSO Group disclosure that it sold its Pegasus software only to vetted Governments, either some foreign Government or certain agencies of the respondent Union of India are using the said software on citizens of the country without following the due procedure established under law. Therefore, to ensure credibility of the process, most of the petitioners are seeking an independent investigation into the allegations.

On 6-8-2021 the Solicitor General placed on record, a "limited affidavit" in view of limited time at disposal "while reserving liberty to file further affidavit hereafter in detail". It was, further stated that the petitions "are based on conjectures and surmises or on other unsubstantiated media reports or incomplete or uncorroborated material. It is submitted that the same cannot be the basis for invoking the writ jurisdiction of this Hon'ble Court". It was, however, submitted that "with a view to dispel any wrong narrative spread by certain vested interests and with an object of examining the issue raised, the Union of India will constitute a Committee of Experts in the field which will go into all aspects of the issue". The matter was adjourned on that day.

On the next date of hearing when the Court insisted that the "limited affidavit" was insufficient, the Solicitor General indicated his apprehension that the disclosure of certain facts might affect the national security and defence of the nation. The Court at that juncture emphasised that the respondent Union of India could still place on record facts pertaining to the events highlighted by the petitioners, without disclosing information adjudged to be sensitive by the relevant authorities. On 13-9-2021 when the matter was listed after an adjournment, the Solicitor General submitted that the information sought by the petitioners could

not be made a matter of public debate as the same could be used by terror groups to hamper national security and that to assuage the concerns of the public and to dispel any wrong narratives, considering the technical nature of the issues, the respondent Union of India would be willing to constitute an Expert Committee which will go into all aspects and file a report before the Supreme Court.

Appointing an Expert Committee, the Supreme Court

Held :

Historically, privacy rights have been "property centric" rather than people centric. This approach was seen in both the United States of America as well as in England. In India, privacy rights may be traced to the "right to life" enshrined under Article 21 of the Constitution. When the Supreme Court expounded on the meaning of "life" under Article 21, it did not restrict the same in a pedantic manner. An expanded meaning has been given to the right to life in India, which accepts that "life" does not refer to mere animal existence but encapsulates a certain assured quality. (Paras 30 and 33)

Semayne case, In re, (1604) 5 Co Rep 91 a : 77 ER 194 (KB), *referred to*

Lord Brougham: Historical Sketches of Statesmen who Flourished in the Time of George III First Series, Vol. 1 (1845); Samuel Warren and Louis Brandeis: The Right to Privacy, Harvard Law Review, Vol. 4(5), 193 (15-12-1890); Cooley: *Cooley on Torts*, 2nd Edn. (1888), p. 29, *referred to*

Members of a civilised democratic society have a reasonable expectation of privacy. Privacy is not the singular concern of journalists or social activists. Every citizen of India ought to be protected against violations of privacy. It is this expectation which enables us to exercise our choices, liberties, and freedom. Although declared to be inalienable, the right to privacy of course cannot be said to be an absolute, as the Indian Constitution does not provide for such a right without reasonable restrictions. As with all the other fundamental rights, the Supreme Court therefore must recognise that certain limitations exist when it comes to the right to privacy as well. However, any restrictions imposed must necessarily pass constitutional scrutiny. It was held in *K.S. Puttaswamy (Privacy-9 J.)*, (2017) 10 SCC 1: "An invasion of life or personal liberty must meet the threefold requirement of: (*i*) legality, which postulates the existence of law; (*ii*) need, defined in terms of a legitimate State aim; and (*iii*) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them." (Paras 35, 37 and 36)

K.S. Puttaswamy (Privacy-9 J.) v. *Union of India*, (2017) 10 SCC 1, *followed*

We live in the era of information revolution, where the entire lives of individuals are stored in the cloud or in a digital dossier. We must recognise that while technology is a useful tool for improving the lives of the people, at the same time, it can also be used to breach that sacred private space of an individual. The right to privacy is directly infringed when there is surveillance or spying done on an individual, either by the State or by any external agency. Of course, if done by the State, the same must be justified on constitutional grounds. The State's interest is to ensure that life and liberty is preserved and must balance the same. In today's world, information gathered by intelligence agencies through surveillance is essential for the fight against violence and terror. To access this information, a need may arise to interfere with the right to privacy of an individual, provided it is carried out only when it is absolutely necessary

for protecting national security/interest and is proportional. The considerations for usage of such alleged technology, ought to be evidence based. In a democratic country governed by the rule of law, indiscriminate spying on individuals cannot be allowed except with sufficient statutory safeguards, by following the procedure established by law under the Constitution. This trade-off between the right to privacy of an individual and the security interests of the State, has been recognised world over. (Paras 34 and 39 to 41)

Ellen Alderman and Caroline Kennedy: *The Right to Privacy* (1995), p. 223; Daniel J. Solove: *Nothing to Hide: The False Tradeoff Between Privacy and Security* (Yale University Press, 2011), *referred to*

Somewhat allied to the concerns of privacy, is the freedom of the press. It is undeniable that surveillance and the knowledge that one is under the threat of being spied on can affect the way an individual decides to exercise his or her rights. Such a scenario might result in self-censorship. This is of particular concern when it relates to the freedom of the press, which is an important pillar of democracy. Such chilling effect on the freedom of speech is an assault on the vital public watchdog role of the press, which may undermine the ability of the press to provide accurate and reliable information. (Paras 42 and 43)

Anuradha Bhasin v. *Union of India*, (2020) 3 SCC 637; *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641, *followed*

An important and necessary corollary of such a right is to ensure the protection of sources of information. Protection of journalistic sources is one of the basic conditions for the freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect that snooping techniques may have, the Supreme Court's task in the present matter, where certain grave allegations of infringement of the rights of the citizens of the country have been raised, assumes great significance. (Paras 44 and 45)

Rohit Pandey v. *Union of India*, (2005) 13 SCC 702, *affirmed*

The Supreme Court has generally attempted to discourage writ petitions, particularly public interest litigations, which are based entirely on newspaper reports without any additional steps taken by the petitioner. While it is true that the allegations made in these petitions pertain to matters about which ordinary citizens would not have information except for the investigating reporting done by news agencies, looking to the quality of some of the petitions filed, but individuals should not file half-baked petitions merely on a few newspaper reports. Such an exercise, far from helping the cause espoused by the individual filing the petition, is often detrimental to the cause itself. This is because the Court will not have proper assistance in the matter, with the burden to even determine preliminary facts being left to the Court. It is for this reason that trigger happy filing of such petitions in Courts, and more particularly in the Supreme Court which is to be the final adjudicatory body in the country, needs to be discouraged. This should not be taken to mean that the news agencies are not trusted by the Court, but to emphasise the role that each pillar of democracy occupies in the polity. News agencies report facts and bring to light issues which might otherwise not be publicly known. These may then become the basis for further action taken by an active and concerned civil society, as well as for any subsequent filings made in Courts. But newspaper

reports, in and of themselves, should not in the ordinary course be taken to be readymade pleadings that may be filed in Court. (Paras 46 and 47)

However, various other petitions have been filed in Court, including by individuals who were purportedly victims of the alleged Pegasus spyware attack. These subsequently filed petitions, as well as additional documents filed by others, have brought on record certain materials that cannot be brushed aside, such as the reports of reputed organisations like Citizen Lab and affidavits of experts. Additionally, the sheer volume of cross-referenced and cross-verified reports from various reputable news organisations across the world along with the reactions of foreign Governments and legal institutions also moved the Court to consider that this is a case where the jurisdiction of the Supreme Court may be exercised. (Para 48)

The Supreme Court gave ample opportunity to the respondent Union of India to clarify its stand regarding the allegations raised, and to provide information to assist the Court regarding the various actions taken by it over the past two years, since the first disclosed alleged Pegasus spyware attack. The Court had made it clear to the Solicitor General that it would not push the respondent Union of India to provide any information that may affect the national security concerns of the country. However, despite the repeated assurances and opportunities given, ultimately the respondent Union of India has placed on record what they call a "limited affidavit", which does not shed any light on their stand or provide any clarity as to the facts of the matter at hand. If the respondent Union of India had made their stand clear it would have been a different situation, and the burden on the Supreme Court would have been different. Such a course of action taken by the respondent Union of India, especially in proceedings of the present nature which touches upon the fundamental rights of the citizens of the country, cannot be accepted. The effort of the Supreme Court is to uphold the constitutional aspirations and rule of law, without allowing itself to be consumed in the political rhetoric. The Supreme Court has always been conscious of not entering the political thicket. However, at the same time, it has never cowered from protecting all from the abuses of fundamental rights. (Paras 49, 50 and 3)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *followed*

Ram Jethmalani v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310, *affirmed*

Free flow of information from the petitioners and the State, in a writ proceeding before the Court, is an important step towards governmental transparency and openness, which are celebrated values under our Constitution. Of course, there may be circumstances where the State has a constitutionally defensible reason for denying access to certain information or divulging certain information. It is a settled position of law that in matters pertaining to national security, the scope of judicial review is limited. However, this does not mean that the State gets a free pass every time the spectre of "national security" is raised. National security cannot be the bugbear that the judiciary shies away from, by virtue of its mere mentioning. Although the Supreme Court should be circumspect in encroaching upon the domain of national security, no omnibus prohibition can be called for against judicial review. (Paras 51 to 53)

Anuradha Bhasin v. *Union of India*, (2020) 3 SCC 637, *followed*

Ram Jethmalani v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310, *affirmed*

Of course, the respondent Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute. However, it is incumbent on the State to not only specifically plead such constitutional concern or statutory immunity but they must also prove and justify the same in Court on affidavit. The respondent Union of India must necessarily plead and prove the facts which indicate that the information sought must be kept secret as their divulgence would affect national security concerns. They must justify the stand that they take before a Court. The mere invocation of national security by the State does not render the Court a mute spectator. (Para 54)

In the present matter, as is indicated above, the petitioners have placed on record certain material that prima facie merits consideration by the Supreme Court. There has been no specific denial of any of the facts averred by the petitioners by the respondent Union of India. There has only been an omnibus and vague denial in the "limited affidavit" filed by the respondent Union of India, which cannot be sufficient. In such circumstances, there is no option but to accept the prima facie case made out by the petitioners to examine the allegations made. (Para 55)

Different forms of surveillance and data gathering by intelligence agencies to fight terrorism, crime and corruption in national interest and/or for national security, are accepted norms all over the world. The petitioners do not contend that the State should not resort to surveillance/collection of data in matters of national security. The complaint of the petitioners is about the misuse or likely misuse of spyware in violation of the right to privacy of citizens. The respondent Union of India also does not contend that its agencies can resort to surveillance/collection of data relating to its citizens where national security and national interest are not involved. The apprehension of the respondent Union of India is that any inquiry in this behalf should not jeopardise national security and the steps taken by it to protect national security. There is thus a broad consensus that unauthorised surveillance/accessing of stored data from the phones and other devices of citizens for reasons other than nation's security would be illegal, objectionable and a matter of concern. (Para 56)

The only question that remains then is what the appropriate remedy in this case would be. In the circumstances of the present case, when the respondent Union of India has already been given multiple opportunities to file an affidavit on record, and looking to the conduct of the respondent Union of India in not placing on record any facts through their reliance on the "national security" defence, no useful purpose would be served by directing the Cabinet Secretary to put certain facts on an affidavit, apart from causing a further delay in proceeding. (Paras 57 and 58)

Instead, the Court is inclined to pass an order of appointing an Expert Committee whose functioning will be overseen by a retired Judge of the Supreme Court. Such a course of action has been adopted by the Supreme Court in various other circumstances when the Court found it fit in the facts and circumstances of the case to probe the truth or falsity of certain allegations, taking into account the public importance and the alleged scope and nature of the large-scale violation of the fundamental rights of the citizens of the country. (Para 59)

G.S. Mani v. *Union of India*, (2023) 11 SCC 429, *followed*

Ram Jethmalani v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310; *Extra-Judicial Execution Victim Families Assn.* v. *Union of India*, (2013) 2 SCC 493 : (2013) 2 SCC (Cri) 799, *affirmed*

The compelling circumstances that have weighed with the Court to pass such an order are as follows. Right to privacy and freedom of speech are alleged to be impacted, which needs to be examined. The entire citizenry is affected by such allegations due to the potential chilling effect. No clear stand has been taken by the respondent Union of India regarding actions taken by it. Seriousness accorded to the allegations by foreign countries and involvement of foreign parties. Possibility that some foreign authority, agency or private entity is involved in placing citizens of this country under surveillance. Allegations that the Union or the State Governments are party to the rights' deprivations of the citizens. Limitation under writ jurisdiction to delve into factual aspects. For instance, even the question of usage of the technology on citizens, which is the jurisdictional fact, is disputed and requires further factual examination. Therefore, the respondent Union of India's plea to allow them to appoint an Expert Committee for the purposes of investigating the allegations is declined, as such a course of action would violate the settled judicial principle against bias i.e. that "*justice must not only be done, but also be seen to be done*". (Paras 60 and 61)

Accordingly, a Technical Committee is constituted comprising of three members, including those who are experts in cyber security, digital forensics, networks and hardware, whose functioning will be overseen by Justice R.V. Raveendran, former Judge, the Supreme Court of India. The learned overseeing Judge will be assisted in this task by a former IPS officer and a globally recognised cyber security expert. (Para 63)

Vineet Narain v. *Union of India*, (1998) 1 SCC 226 : 1998 SCC (Cri) 307, *referred to*

The constitution of the three member Technical Committee, matters to be enquired, investigated and determined by it, points on which recommendations to be made by it and procedure of the Committee and also the functions of the overseeing Judge stated by the Supreme Court. (Paras 64 to 66)

The Committee is requested to prepare the report after a thorough inquiry and place it before the Supreme Court, expeditiously. (Para 67)

Manohar Lal Sharma v. *Union of India*, 2021 SCC OnLine SC 1066; *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1067; *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1068; *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1069; *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1070, *referred to*

R-D/68206/SR

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Chronological list of cases cited ***on page(s)***

1. (2023) 11 SCC 429, *G.S. Mani* v. *Union of India* 425*c*
2. 2021 SCC OnLine SC 1070, *Manohar Lal Sharma* v. *Union of India* 413*b-c*
3. 2021 SCC OnLine SC 1069, *Manohar Lal Sharma* v. *Union of India* 413*b*
4. 2021 SCC OnLine SC 1068, *Manohar Lal Sharma* v. *Union of India* 412*e-f*
5. 2021 SCC OnLine SC 1067, *Manohar Lal Sharma* v. *Union of India* 411*g*
6. 2021 SCC OnLine SC 1066, *Manohar Lal Sharma* v. *Union of India* 411*f-g*
7. (2020) 3 SCC 637, *Anuradha Bhasin* v. *Union of India* 419*f-g*, 423*d-e*
8. (2017) 10 SCC 1, *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India* 416*f*, 417*d-e*
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12. (1998) 1 SCC 226 : 1998 SCC (Cri) 307, *Vineet Narain* v. *Union of India* 413*g-h*
13. (1985) 1 SCC 641, *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* 419*d*
14. (1973) 4 SCC 225, *Kesavananda Bharati* v. *State of Kerala* 409*g-h*
15. (1604) 5 Co Rep 91 a : 77 ER 194 (KB), *Semayne case, In re* 415*g-h*

ORDER

1. The Court is convened through videoconferencing.

2. "If you want to keep a secret, you must also hide it from yourself."

—George Orwell, 1984

The present batch of writ petitions raise an Orwellian concern, about the alleged possibility of utilising modern technology to hear what you hear, see what you see and to know what you do. In this context, this Court is called upon to examine an allegation of the use of such a technology, its utility, need and alleged abuse.

3. We make it clear that our effort is to uphold the constitutional aspirations and rule of law, without allowing ourselves to be consumed in the political rhetoric. This Court has always been conscious of not entering the political thicket. However, at the same time, it has never cowered from protecting all from the abuses of fundamental rights. All that we would like to observe in this regard is a reiteration of what had already been said by this Court in *Kesavananda Bharati* v. *State of Kerala*[1] (opinion of Khanna, J.): (SCC p. 821, para 1535)

> "*1535.* ... Judicial review is not intended to create what is sometimes called judicial oligarchy, the aristocracy of the robe, covert legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative

1 (1973) 4 SCC 225

authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that Judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision."

4. A short conspectus of the events leading up to the present batch of petitions would not be misplaced to highlight the scope of the issues at hand. In September 2018, Citizen Lab, which is a laboratory based out of the University of Toronto, Canada, released a report detailing the software capabilities of a "spyware suite" called Pegasus that was being produced by an Israeli Technology firm viz. the NSO Group. The report indicated that individuals from nearly 45 countries were suspected to have been affected.

5. The Pegasus suite of spywares can allegedly be used to compromise the digital devices of an individual through zero click vulnerabilities i.e. without requiring any action on the part of the target of the software. Once the software infiltrates an individual's device, it allegedly has the capacity to access the entire stored data on the device, and has real time access to emails, texts, phone calls, as well as the camera and sound recording capabilities of the device. Once the device is infiltrated using Pegasus, the entire control over the device is allegedly handed over to the Pegasus user who can then remotely control all the functionalities of the device and switch different features on or off. The NSO Group purportedly sells this extremely powerful software only to certain undisclosed Governments and the end user of its products are "exclusively government intelligence and law enforcement agencies" as per its own website.

6. In May 2019, the global messaging giant WhatsApp Inc. identified a vulnerability in its software that enabled Pegasus spyware to infiltrate the devices of WhatsApp users. This news was followed by a disclosure that the devices of certain Indians were also affected, which fact was acknowledged by the then Hon'ble Minister of Law and Electronics and Information Technology in a statement made in Parliament on 20-11-2019.

7. On 15-6-2020, Citizen Lab, in collaboration with the international human rights organisation, Amnesty International uncovered another spyware campaign which allegedly targeted nine individuals in India, some of whom were already suspected targets in the first spyware attack.

8. On 18-7-2021, a consortium of nearly 17 journalistic organisations from around the world, including one Indian organisation, released the results of a long investigative effort indicating the alleged use of the Pegasus software on several private individuals. This investigative effort was based on a list of some 50,000 leaked numbers which were allegedly under surveillance by clients

of the NSO Group through the Pegasus software. Initially, it was discovered that nearly 300 of these numbers belonged to Indians, many of whom are senior journalists, doctors, political persons, and even some Court staff. At the time of filing of the writ petitions, nearly 10 Indians' devices were allegedly forensically analysed to confirm the presence of the Pegasus software.

9. The above reports resulted in large-scale action across the globe, with certain foreign Governments even diplomatically engaging with the Israeli Government to determine the veracity of the allegations raised, while other Governments have initiated proceedings internally to determine the truth of the same.

10. Respondent Union of India, through the Hon'ble Minister of Railways, Communications and Electronics and Information Technology, took the stand in Parliament on 18-7-2021, when asked about the alleged cyberattack and spyware use, that the reports published had no factual basis. The Minister also stated that the Amnesty report itself indicated that the mere mention of a particular number in the list did not confirm whether the same was infected by Pegasus or not. Further, the Minister stated that NSO had itself factually contradicted many of the claims made in the Amnesty report. Finally, he stated that the Indian statutory and legal regime relating to surveillance and interception of communication is extremely rigorous, and no illegal surveillance could take place.

11. Some of the writ petitioners before this Court allege to be direct victims of the Pegasus attack, while others are public interest litigants. They raise the issue of the inaction on the part of the respondent Union of India to seriously consider the allegations raised, relating to the purported cyberattack on citizens of this country. Additionally, the apprehension expressed by some petitioners relates to the fact that, keeping in mind the NSO Group disclosure that it sold its Pegasus software only to vetted Governments, either some foreign government or certain agencies of the respondent Union of India are using the said software on citizens of the country without following the due procedure established under law. Therefore, to ensure credibility of the process, most of the petitioners are seeking an independent investigation into the allegations.

12. Before considering the issues at hand on merits, it is necessary for this Court to summarise the events that transpired in the courtroom proceedings, to give some context to the order being passed.

13. On 10-8-2021[2], it was recorded by this Court that a copy of some of the petitions in this batch had been served on the learned Solicitor General. The learned Solicitor General took an adjournment at that time to get instructions.

14. On 16-8-2021[3], a "limited affidavit" was placed on record by the learned Solicitor General that was filed by the Additional Secretary, Ministry of Electronics and Information Technology, Union of India. The relevant parts of the limited affidavit filed by the respondent Union of India are as follows:

2 *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1066
3 *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1067

"2. I state and submit that *due to the limited time at the disposal of the deponent/respondents, it is not possible to deal with all the facts stated and the contentions raised in the batch of petitions before this Hon'ble Court. I am therefore, filing this limited affidavit at this stage while reserving liberty to file further affidavit hereafter in detail.*

I, however, respectfully submit that my not dealing with any of the petitions para wise may not be treated as my having admitted the truthfulness or otherwise of any of the contents thereof.

3. At the outset, it is submitted that I hereby unequivocally deny any and all of the allegations made against the respondents in the captioned petition and other connected petitions. A bare perusal of the captioned petition and other connected petitions makes it clear that the same are based on conjectures and surmises or on other unsubstantiated media reports or incomplete or uncorroborated material. It is submitted that the same cannot be the basis for invoking the writ jurisdiction of this Hon'ble Court.

4. It is submitted that this question stands already clarified on the floor of Parliament by the Hon'ble Minister of Railways, Communications and Electronics & Information Technology of India, Government of India. A copy of the statement of the Hon'ble Minister is attached herewith and marked as Annexure R-1. In that view of the matter, in the respectful submission of the deponent, nothing further needs to be done at the behest of the petitioner, more particularly when they have not made out any case.

5. It is, however, submitted that *with a view to dispel any wrong narrative spread by certain vested interests and with an object of examining the issue raised, the Union of India will constitute a Committee of Experts in the field which will go into all aspects of the issue*." (emphasis supplied)

15. On that day, we heard the learned Senior Counsel appearing on behalf of the petitioners and the learned Solicitor General at some length and adjourned the matter for further hearing.

16. On the next date of hearing, on 17-8-2021[4], this Court indicated to the learned Solicitor General, while issuing notice to the respondent Union of India, that the limited affidavit filed by them was insufficient for the Court to come to any conclusion regarding the stand of the respondent Union of India with respect to the allegations raised by the petitioners. As the limited affidavit itself recorded that the detailed facts were not adverted to due to a paucity of time, we indicated to the learned Solicitor General that we were willing to give them further time to enable the respondent Union of India to file a more detailed affidavit. The learned Solicitor General indicated his apprehension that the disclosure of certain facts might affect the national security and defence of the nation.

17. This Court clarified at that juncture that it was not interested in any information that may have a deleterious impact on the security of the country. However, the respondent Union of India could still place on record

4 *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1068

facts pertaining to the events highlighted by the petitioners, without disclosing information adjudged to be sensitive by the relevant authorities.

18. Mr Kapil Sibal, learned Senior Counsel appearing for the petitioners in Writ Petitions (C) Nos. 826 and 851 of 2021, fairly stated that the petitioners were also concerned about the national interest and would not press for any such information. The learned Solicitor General again took some time to seek instructions.

19. When the matter was next listed on 7-9-2021, the learned Solicitor General requested an adjournment, and we directed[5] that the matter be listed on 13-9-2021.

20. On 13-9-2021[6], we were again informed by the learned Solicitor General that placing the information sought by the petitioners on an affidavit would be detrimental to the security interests of the nation. The learned Solicitor General submitted that such information could not be made a matter of public debate as the same could be used by terror groups to hamper national security. He reiterated the statement dated 18-7-2021 made by the Hon'ble Minister of Railways, Communications and Electronics and Information Technology on the floor of Parliament regarding the statutory mechanism surrounding surveillance and interception in the country which ensures that unauthorised surveillance does not take place. He finally submitted that, to assuage the concerns of the public and to dispel any wrong narratives, considering the technical nature of the issues, the respondent Union of India would be willing to constitute an Expert Committee which will go into all aspects and file a report before this Court.

21. Mr Kapil Sibal, learned Senior Counsel appearing on behalf of the petitioners in Writ Petitions (C) Nos. 826 and 851 of 2021, submitted that the respondent Union of India should not act in a manner that would prevent the Court from rendering justice and should not withhold information from the Court in a matter concerning the alleged violation of fundamental rights of citizens. He submitted that in the year 2019, when certain reports of Pegasus hacking WhatsApp came to light, the then Hon'ble Minister of Law and Information Technology and Communication had acknowledged the reports of hacking in Parliament, but the respondent Union of India had not indicated what actions were taken subsequently, which information they could have disclosed on affidavit. The learned Senior Counsel submitted that such inaction by the respondent Union was a matter of grave concern, particularly when reputed international organisations with no reason for bias against the nation had also accepted the fact of such an attack having been made. Mr Sibal finally submitted that an independent probe into the alleged incident required to take place under the supervision of retired Judges of this Court, as was ordered by this Court in *Jain Hawala case*[7]. He objected to the suggestion of the learned

5 *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1069
6 *Manohar Lal Sharma* v. *Union of India*, 2021 SCC OnLine SC 1070
7 **Ed.**: The reference appears to be to *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226 : 1998 SCC (Cri) 307

Solicitor General that the respondent Union of India itself be allowed to form a Committee on the ground that any Committee formed to probe the allegations raised by the petitioners should be completely independent from the respondent Union of India.

22. Mr Shyam Divan, learned Senior Counsel appearing on behalf of the petitioner in Writ Petition (C) No. 849 of 2021 who claims to be one of the parties whose phone was directly affected by Pegasus, submitted that Pegasus enabled an entity to not only surveil or spy on an individual, but also allowed them to implant false documents and evidence in a device. He relied on affidavits filed by two experts in the field of cyber security to buttress his submission regarding the nature and function of the software. Mr Divan submitted that once such a large-scale cyberattack and threat had been made public and brought to the knowledge of the respondent Union of India, it was the State's responsibility to take necessary action to protect the interests and fundamental rights of the citizens, particularly when there existed the risk that such an attack was made by a foreign entity. Mr Divan pressed for the interim relief sought in Writ Petition (C) No. 849 of 2021, whereby a response was sought on affidavit from the Cabinet Secretary. Mr Divan also supported the prayer made by Mr Sibal regarding the constitution of a special Committee or Special Investigation Team to probe the allegations.

23. Mr Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the petitioners in Writ Petition (C) No. 853 of 2021 submitted that the petitioners are senior journalists who are victims of the Pegasus attack. He submitted that if the respondent Union of India had made a statement on affidavit that it had not used a malware or spied on the petitioners in an unauthorised manner, that would have been the end of the matter. Instead, the respondent Union of India had not provided any information on affidavit. He therefore urged the Court to constitute an independent Committee under its supervision rather than allowing the respondent Union of India to constitute a Committee, as suggested by the learned Solicitor General, to avoid any credibility issues. He further submitted that requiring the petitioners to hand over their phones to a Committee appointed by the respondent Union of India, when certain allegations had been raised against the respondent Union of India, would amount to a secret exercise whose results would not be trusted by the petitioners or the public.

24. Mr Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the petitioner in Writ Petition (C) No. 848 of 2021 submitted that his client is a respected journalist whose device had been infected with the Pegasus malware. The main thrust of his submission was that if any pleading was not specifically denied, it would be deemed to have been admitted. As the respondent Union of India had not specifically denied the petitioner's allegation, the same should therefore be deemed to be admitted by the respondent Union of India. The learned Senior Counsel submitted that such an attack on the privacy of the petitioner was not only a violation of his fundamental right, but also amounted to chilling his freedom of speech as a journalist.

25. Ms Meenakshi Arora, learned Senior Counsel appearing on behalf of the petitioner in Writ Petition (C) No. 829 of 2021, supported the prayer made by Mr Kapil Sibal regarding the constitution of an independent Special Investigation Team headed by a retired Judge to investigate the matter.

26. Mr Colin Gonsalves, learned Senior Counsel appearing on behalf of the petitioners in Writ Petition (C) No. 909 of 2021, wherein Petitioner 1 is a journalist, lawyer and human rights activist who is an affected party, while Petitioner 2 is a registered society which works on the promotion and protection of digital rights and digital freedom in India, submitted that a number of such digital interceptions were being conducted by the States and the respondent Union of India. He submitted that, in light of the allegations raised against the respondent Union of India in the present matter, it would not be appropriate to allow the respondent Union of India to form a Committee to investigate the present allegations. Further, the learned Senior Counsel pointed to the actions taken by various foreign Governments in light of the purported spyware attack to highlight the veracity of the reports by news agencies and the seriousness with which the allegations were being viewed in other countries.

27. Mr M.L. Sharma, petitioner-in-person in Writ Petition (Crl.) No. 314 of 2021, submitted that the Pegasus suite of spywares was different from other spyware as it allowed an agency to gain complete control over an individual's device. He submitted that the software could be used to plant false evidence into an individual's device, which could then be used to implicate the said person. He therefore submitted that the alleged use of Pegasus on the citizens of the country, was of grave concern.

28. The learned Solicitor General rebutted the arguments of the petitioners and submitted that there was no reason to question the credibility of any Committee that might be constituted by the respondent Union of India as only experts independent of any association with the respondent Union of India would be a part of the same. He further stated that all technologies had the capability of either being used or abused, and it could not be said that the use of such a software was per se impermissible, particularly when a robust legal mechanism existed to check the use of the same. He finally reiterated that this Court should allow the respondent Union of India to constitute an Expert Committee which would be under its supervision.

29. We have considered the submissions of the learned Senior Counsel for the petitioners, petitioner-in-person, and the learned Solicitor General for the respondent Union of India.

30. At the outset, certain nuances of the right to privacy in India — its facets and importance, need to be discussed. Historically, privacy rights have been "property centric" rather than people centric. This approach was seen in both the United States of America as well as in England. In 1604, in the historical *Semayne case, In re*[8] it was famously held that "*every man's house is his castle*". This marked the beginning of the development of the law protecting people against unlawful warrants and searches.

8 (1604) 5 Co Rep 91 a : 77 ER 194 (KB)

31. As William Pitt, the Earl of Chatham stated in March 1763[9]:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it —the storm may enter, the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!"

32. As long back as in 1890, Samuel Warren and Louis Brandeis observed in their celebrated article "The Right to Privacy"[10]:

> "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls[11] the right "to be let alone."... numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops"."

33. However, unlike the "property centric" origin of privacy rights in England and under the Fourth Amendment in the Constitution of the United States of America, in India, privacy rights may be traced to the "right to life" enshrined under Article 21 of the Constitution. When this Court expounded on the meaning of "life" under Article 21, it did not restrict the same in a pedantic manner. An expanded meaning has been given to the right to life in India, which accepts that "life" does not refer to mere animal existence but encapsulates a certain assured quality.

34. It is in this context that we must contextualise the issues that are being raised in this batch of petitions. We live in the era of information revolution, where the entire lives of individuals are stored in the cloud or in a digital dossier. We must recognise that while technology is a useful tool for improving the lives of the people, at the same time, it can also be used to breach that sacred private space of an individual.

35. Members of a civilised democratic society have a reasonable expectation of privacy. Privacy is not the singular concern of journalists or social activists. Every citizen of India ought to be protected against violations of privacy. It is this expectation which enables us to exercise our choices, liberties, and freedom.

36. This Court in *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India*[12], has recognised that the right to privacy is as sacrosanct as human existence and is inalienable to human dignity and autonomy. This Court held that: (SCC pp. 508-509, paras 320 & 325)

> "*320. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution*. Elements of privacy also arise in varying contexts from

9 Lord Brougham, Historical Sketches of Statesmen who Flourished in the Time of George III First Series, Vol. 1 (1845).
10 Samuel Warren and Louis Brandeis, The Right to Privacy, Harvard Law Review, Vol. 4(5), 193 (15-12-1890).
11 Cooley, *Cooley on Torts*, 2nd Edn. (1888), p. 29.
12 (2017) 10 SCC 1

the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.

* * *

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

37. Although declared to be inalienable, the right to privacy of course cannot be said to be an absolute, as the Indian Constitution does not provide for such a right without reasonable restrictions. As with all the other fundamental rights, this Court therefore must recognise that certain limitations exist when it comes to the right to privacy as well. However, any restrictions imposed must necessarily pass constitutional scrutiny.

38. In *K.S. Puttaswamy (Privacy-9 J.)*[12], this Court considered the need to protect the privacy interests of individuals while furthering legitimate State interests. This Court therefore directed the State to embark upon the exercise of balancing of competing interests. This Court observed as follows: (SCC p. 504, para 310)

"*310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21.* The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but

12 *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India*, (2017) 10 SCC 1

is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. *The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms*." (emphasis supplied)

39. The right to privacy is directly infringed when there is surveillance or spying done on an individual, either by the State or by any external agency. Ellen Alderman and Caroline Kennedy, in "Right to Privacy"[13], foresaw this threat to privacy in 1995, while referring to governmental eavesdropping in the United States of America, in the following words:

> "Perhaps the scariest threat to privacy comes in the area known as "informational privacy". Information about all of us is now collected not only by the old standbys, the IRS and FBI, but also by the MTB, MIB, NCOA, and NCIC, as well as credit bureaus, credit unions, and credit card companies. We now have cellular phones, which are different from cordless phones, which are different from what we used to think of as phones. We worry about e-mail, voice mail, and junk mail. And something with the perky name Clipper Chip — developed specifically to allow governmental eavesdropping on coded electronic communications — is apparently the biggest threat of all."

40. Of course, if done by the State, the same must be justified on constitutional grounds. This Court is cognizant of the State's interest to ensure that life and liberty is preserved and must balance the same. For instance, in today's world, information gathered by intelligence agencies through surveillance is essential for the fight against violence and terror. To access this information, a need may arise to interfere with the right to privacy of an individual, provided it is carried out only when it is absolutely necessary for protecting national security/interest and is proportional. The considerations for usage of such alleged technology, ought to be evidence based. In a democratic country governed by the rule of law, indiscriminate spying on individuals cannot be allowed except with sufficient statutory safeguards, by following the procedure established by law under the Constitution.

13 Ellen Alderman and Caroline Kennedy, *The Right to Privacy* (1995) p. 223.

41. This trade-off between the right to privacy of an individual and the security interests of the State, has been recognised world over with the renowned scholar Daniel Solove[14] commenting on the same as follows:

> "The debate between privacy and security has been framed incorrectly, with the trade-off between these values understood as an all-or-nothing proposition. *But protecting privacy need not be fatal to security measures; it merely demands oversight and regulation. We can't progress in the debate between privacy and security because the debate itself is flawed.*
>
> The law suffers from related problems. It seeks to balance privacy and security, but systematic problems plague the way the balancing takes place....
>
> Privacy often can be protected without undue cost to security. In instances when adequate compromises can't be achieved, the trade-off can be made in a manner that is fair to both sides. We can reach a better balance between privacy and security. We must. There is too much at stake to fail." (emphasis supplied)

42. Somewhat allied to the concerns of privacy, is the freedom of the press. Certain observations made by this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[15] may be extracted: (SCC p. 660, para 25)

> "*25.* The freedom of press, as one of the members of the Constituent Assembly said, is one of the items around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutions prevail. The said freedom is attained at considerable sacrifice and suffering and ultimately it has come to be incorporated in the various written constitutions."

43. It is undeniable that surveillance and the knowledge that one is under the threat of being spied on can affect the way an individual decides to exercise his or her rights. Such a scenario might result in self-censorship. This is of particular concern when it relates to the freedom of the press, which is an important pillar of democracy. Such chilling effect on the freedom of speech is an assault on the vital public watchdog role of the press, which may undermine the ability of the press to provide accurate and reliable information. Recently, in *Anuradha Bhasin* v. *Union of India*[16], this Court highlighted the importance of freedom of the press in a modern democracy in the following words: (SCC p. 709, para 159)

> "*159.* In this context, one possible test of chilling effect is comparative harm. *In this framework, the Court is required to see whether the impugned restrictions, due to their broad-based nature, have had a restrictive effect on similarly placed individuals during the period.* It is the contention

14 Daniel J. Solove, *Nothing to Hide: The False Tradeoff Between Privacy and Security* (Yale University Press, 2011).
15 (1985) 1 SCC 641
16 (2020) 3 SCC 637

of the petitioner that she was not able to publish her newspaper from 6-8-2019 to 11-10-2019. However, no evidence was put forth to establish that such other individuals were also restricted in publishing newspapers in the area. Without such evidence having been placed on record, it would be impossible to distinguish a legitimate claim of chilling effect from a mere emotive argument for a self-serving purpose. On the other hand, the learned Solicitor General has submitted that there were other newspapers which were running during the aforesaid time period. In view of these facts, and considering that the aforesaid petitioner has now resumed publication, we do not deem it fit to indulge more in the issue than to state that responsible Governments are required to respect the freedom of the press at all times. *Journalists are to be accommodated in reporting and there is no justification for allowing a sword of Damocles to hang over the press indefinitely*." (emphasis supplied)

44. An important and necessary corollary of such a right is to ensure the protection of sources of information. Protection of journalistic sources is one of the basic conditions for the freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.

45. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect that snooping techniques may have, this Court's task in the present matter, where certain grave allegations of infringement of the rights of the citizens of the country have been raised, assumes great significance. In this light, this Court is compelled to take up the cause to determine the truth and get to the bottom of the allegations made herein.

46. Initially, this Court was not satisfied with the writ petitions that were filed as the same were completely reliant only upon certain newspaper reports. This Court has generally attempted to discourage writ petitions, particularly public interest litigations, which are based entirely on newspaper reports without any additional steps taken by the petitioner. In this respect, it may be relevant to quote the observations of this Court in *Rohit Pandey* v. *Union of India*[17], which are as follows: (SCC p. 703, paras 1-2)

"*1.* ... The *only basis for the petitioner coming to this Court are two newspaper reports* dated 25-1-2004, and the other dated 12-2-2004. This petition was immediately filed on 16-2-2004 after the aforesaid second newspaper report appeared. ...

2. We expect that when such a petition is filed in public interest and particularly by a member of the legal profession, it would be filed with all seriousness and after doing the necessary homework and enquiry. If the petitioner is so public-spirited at such a young age as is so professed, the least one would expect is that an enquiry would be made from the authorities concerned as to the nature of investigation which may be going

17 (2005) 13 SCC 702

on before filing a petition that the investigation be conducted by the Central Bureau of Investigation. Admittedly, no such measures were taken by the petitioner. There is nothing in the petition as to what, in fact, prompted the petitioner to approach this Court within two-three days of the second publication dated 12-2-2004, in the newspaper *Amar Ujala*. Further, the State of Uttar Pradesh had filed its affidavit a year earlier i.e. on 7-10-2004, placing on record the steps taken against the accused persons, including the submission of the charge-sheet before the appropriate court. Despite one year having elapsed after the filing of the affidavit by the Special Secretary to the Home Department of the Government of Uttar Pradesh, nothing seems to have been done by the petitioner. The petitioner has not even controverted what is stated in the affidavit. Ordinarily, we would have dismissed such a misconceived petition with exemplary costs but considering that the petitioner is a young advocate, we feel that the ends of justice would be met and the necessary message conveyed if a token cost of rupees one thousand is imposed on the petitioner." (emphasis supplied)

47. While we understand that the allegations made in these petitions pertain to matters about which ordinary citizens would not have information except for the investigating reporting done by news agencies, looking to the quality of some of the petitions filed, we are constrained to observe that individuals should not file half-baked petitions merely on a few newspaper reports. Such an exercise, far from helping the cause espoused by the individual filing the petition, is often detrimental to the cause itself. This is because the Court will not have proper assistance in the matter, with the burden to even determine preliminary facts being left to the Court. It is for this reason that trigger happy filing of such petitions in Courts, and more particularly in this Court which is to be the final adjudicatory body in the country, needs to be discouraged. This should not be taken to mean that the news agencies are not trusted by the Court, but to emphasise the role that each pillar of democracy occupies in the polity. News agencies report facts and bring to light issues which might otherwise not be publicly known. These may then become the basis for further action taken by an active and concerned civil society, as well as for any subsequent filings made in Courts. But newspaper reports, in and of themselves, should not in the ordinary course be taken to be readymade pleadings that may be filed in Court.

48. That said, after we indicated our reservations to the petitioners regarding the lack of material, various other petitions have been filed in Court, including by individuals who were purportedly victims of the alleged Pegasus spyware attack. These subsequently filed petitions, as well as additional documents filed by others, have brought on record certain materials that cannot be brushed aside, such as the reports of reputed organisations like Citizen Lab and affidavits of experts. Additionally, the sheer volume of cross-referenced and cross-verified reports from various reputable news organisations across the world along with the reactions of foreign Governments and legal institutions also moved us to consider that this is a case where the jurisdiction of the Court may be exercised. Of course, the learned Solicitor General suggested that many

of these reports are motivated and self-serving. However, such an omnibus oral allegation is not sufficient to desist from interference.

49. It is for this reason that this Court issued notice to the respondent Union of India and sought information from them. We would like to re-emphasise what is already apparent from the record of proceedings. This Court gave ample opportunity to the respondent Union of India to clarify its stand regarding the allegations raised, and to provide information to assist the Court regarding the various actions taken by it over the past two years, since the first disclosed alleged Pegasus spyware attack. We had made it clear to the learned Solicitor General on many occasions that we would not push the respondent Union of India to provide any information that may affect the national security concerns of the country. However, despite the repeated assurances and opportunities given, ultimately the respondent Union of India has placed on record what they call a "limited affidavit", which does not shed any light on their stand or provide any clarity as to the facts of the matter at hand. If the respondent Union of India had made their stand clear it would have been a different situation, and the burden on us would have been different.

50. Such a course of action taken by the respondent Union of India, especially in proceedings of the present nature which touches upon the fundamental rights of the citizens of the country, cannot be accepted. As held by this Court in *Ram Jethmalani* v. *Union of India*[18], the respondent Union of India should not take an adversarial position when the fundamental rights of citizens are at threat. This Court in that case observed as follows: (SCC pp. 34-35, paras 75-78)

> "*75*. In order that the right guaranteed by clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by clause (1) of Article 32.
>
> *76*. Further, inasmuch as, by history and tradition of common law, judicial proceedings are substantively, though not necessarily fully, adversarial, *both parties bear the responsibility of placing all the relevant information, analyses, and facts before this Court as completely as possible. In most situations, it is the State which may have more comprehensive information* that is relevant to the matters at hand in such proceedings. …
>
> *77*. It is necessary for us to note that the burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, *the burden of protection of fundamental rights is primarily the duty of the State.*

18 (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310

Consequently, unless constitutional grounds exist, the State may not act in a manner that hinders this Court from rendering complete justice in such proceedings. Withholding of information from the petitioners, or seeking to cast the relevant events and facts in a light favourable to the State in the context of the proceedings, even though ultimately detrimental to the essential task of protecting fundamental rights, would be destructive to the guarantee in clause (1) of Article 32,...

78. In the task of upholding of fundamental rights, the State cannot be an adversary. The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision-making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights." (emphasis supplied)

51. This free flow of information from the petitioners and the State, in a writ proceeding before the Court, is an important step towards governmental transparency and openness, which are celebrated values under our Constitution, as recognised by this Court recently in *Anuradha Bhasin*[16] judgment.

52. Of course, there may be circumstances where the State has a constitutionally defensible reason for denying access to certain information or divulging certain information as was recognised by this Court in *Ram Jethmalani case*[18], as extracted below: (SCC p. 35, para 80)

"*80. Withholding of information from the petitioners by the State*, thereby constraining their freedom of speech and expression before this Court, *may be premised only on the exceptions carved out, in clause (2) of Article 19, 'in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence' or by law that demarcate exceptions, provided that such a law comports with the enumerated grounds in clause (2) of Article 19*, or that may be provided for elsewhere in the Constitution." (emphasis supplied)

53. It is on the strength of the above exception carved out that the respondent Union of India has justified its non-submission of a detailed counter-affidavit viz. by citing security concerns. It is a settled position of law that in matters pertaining to national security, the scope of judicial review is limited. However, this does not mean that the State gets a free pass every time the spectre of "national security" is raised. National security cannot be the

16 *Anuradha Bhasin* v. *Union of India*, (2020) 3 SCC 637
18 *Ram Jethmalani* v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310

bugbear that the judiciary shies away from, by virtue of its mere mentioning. Although this Court should be circumspect in encroaching upon the domain of national security, no omnibus prohibition can be called for against judicial review.

54. Of course, the respondent Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute. However, it is incumbent on the State to not only specifically plead such constitutional concern or statutory immunity but they must also prove and justify the same in Court on affidavit. The respondent Union of India must necessarily plead and prove the facts which indicate that the information sought must be kept secret as their divulgence would affect national security concerns. They must justify the stand that they take before a Court. The mere invocation of national security by the State does not render the Court a mute spectator.

55. In the present matter, as we have indicated above, the petitioners have placed on record certain material that prima facie merits consideration by this Court. There has been no specific denial of any of the facts averred by the petitioners by the respondent Union of India. There has only been an omnibus and vague denial in the "limited affidavit" filed by the respondent Union of India, which cannot be sufficient. In such circumstances, we have no option but to accept the prima facie case made out by the petitioners to examine the allegations made.

56. Different forms of surveillance and data gathering by intelligence agencies to fight terrorism, crime and corruption in national interest and/or for national security, are accepted norms all over the world. The petitioners do not contend that the State should not resort to surveillance/collection of data in matters of national security. The complaint of the petitioners is about the misuse or likely misuse of spyware in violation of the right to privacy of citizens. The respondent Union of India also does not contend that its agencies can resort to surveillance/collection of data relating to its citizens where national security and national interest are not involved. The apprehension of the respondent Union of India is that any inquiry in this behalf should not jeopardise national security and the steps taken by it to protect national security. There is thus a broad consensus that unauthorised surveillance/accessing of stored data from the phones and other devices of citizens for reasons other than nation's security would be illegal, objectionable and a matter of concern.

57. The only question that remains then is what the appropriate remedy in this case would be. Mr Shyam Divan, learned Senior Counsel appearing on behalf of the petitioner in Writ Petition (C) No. 849 of 2021 sought an interim order from this Court directing the Cabinet Secretary to put certain facts on an affidavit. On the other hand, most of the other Senior Counsel appearing on behalf of the other writ petitioners sought an independent investigation or inquiry into the allegations pertaining to the use of Pegasus software either by constituting a Special Investigation Team headed by a retired Judge or by a Judges' Committee.

58. We are of the opinion that in the circumstances of the present case, when the respondent Union of India has already been given multiple opportunities to file an affidavit on record, and looking to the conduct of the respondent Union of India in not placing on record any facts through their reliance on the "national security" defence, no useful purpose would be served by issuing directions of the nature sought by Mr Shyam Divan, apart from causing a further delay in proceedings.

59. Instead, we are inclined to pass an order appointing an Expert Committee whose functioning will be overseen by a retired Judge of the Supreme Court. Such a course of action has been adopted by this Court in various other circumstances when the Court found it fit in the facts and circumstances of the case to probe the truth or falsity of certain allegations, taking into account the public importance and the alleged scope and nature of the large-scale violation of the fundamental rights of the citizens of the country [see *Ram Jethmalani*[18]; *Extra-Judicial Execution Victim Families Assn.* v. *Union of India*[19]; *G.S. Mani* v. *Union of India*[20]].

60. The compelling circumstances that have weighed with us to pass such an order are as follows:

60.1. Right to privacy and freedom of speech are alleged to be impacted, which needs to be examined.

60.2. The entire citizenry is affected by such allegations due to the potential chilling effect.

60.3. No clear stand taken by the respondent Union of India regarding actions taken by it.

60.4. Seriousness accorded to the allegations by foreign countries and involvement of foreign parties.

60.5. Possibility that some foreign authority, agency or private entity is involved in placing citizens of this country under surveillance.

60.6. Allegations that the Union or the State Governments are party to the rights' deprivations of the citizens.

60.7. Limitation under writ jurisdiction to delve into factual aspects. For instance, even the question of usage of the technology on citizens, which is the jurisdictional fact, is disputed and requires further factual examination.

61. It is for the reason given in para 60.6, above that we decline the respondent Union of India's plea to allow them to appoint an Expert Committee for the purposes of investigating the allegations, as such a course of action would violate the settled judicial principle against bias i.e. that "*justice must not only be done, but also be seen to be done*".

62. At this juncture, it would be appropriate to state that in this world of conflicts, it was an extremely uphill task to find and select experts who are free from prejudices, are independent and competent. Rather than relying

18 *Ram Jethmalani* v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310
19 (2013) 2 SCC 493 : (2013) 2 SCC (Cri) 799
20 (2023) 11 SCC 429

upon any Government agencies or any, we have constituted the Committee and shortlisted expert members based on biodatas and information collected independently. Some of the candidates politely declined this assignment, while others had some conflict of interest. With our best intentions and efforts, we have shortlisted and chosen the most renowned experts available to be a part of the Committee. Additionally, we have also left it to the discretion of the learned overseeing Judge to take assistance from any expert, if necessary, to ensure absolute transparency and efficiency, as directed in para 66.3, below.

63. With the above observations, we constitute a Technical Committee comprising of three members, including those who are experts in cyber security, digital forensics, networks and hardware, whose functioning will be overseen by Justice R.V. Raveendran, former Judge, Supreme Court of India. The learned overseeing Judge will be assisted in this task by:

(*i*) Mr Alok Joshi, former IPS officer (1976 batch) who has immense and diverse investigative experience and technical knowledge. He has worked as the Joint Director, Intelligence Bureau, the Secretary (R), Research and Analysis Wing and Chairman, National Technical Research Organisation.

(*ii*) Dr Sundeep Oberoi, Chairman, ISO/IEC JTC1 SC7 (International Organisation of Standardisation/International Electro-Technical Commission/Joint Technical Committee), a sub-committee which develops and facilitates standards within the field of software products and systems. Dr Oberoi is also a part of the Advisory Board of Cyber Security Education and Research Centre at Indraprastha Institute of Information Technology, Delhi. He is globally recognised as a cyber security expert.

64. The three-member Technical Committee (hereinafter referred to as "the Committee") shall comprise of:

(*i*) Dr Naveen Kumar Chaudhary, Professor (Cyber Security and Digital Forensics) and Dean, National Forensic Sciences University, Gandhinagar, Gujarat. Dr Chaudhary has over two decades of experience as an academician, cyber security enabler and cyber security expert. He specialises in cyber security policy, network vulnerability assessment and penetration testing.

(*ii*) Dr Prabaharan P., Professor (School of Engineering), Amrita Vishwa Vidyapeetham, Amritapuri, Kerala. He has two decades of experience in computer science and security areas. His areas of interest are malware detection, critical infrastructural security, complex binary analysis, AI and machine learning. He has many publications in reputed journals.

(*iii*) Dr Ashwin Anil Gumaste, Institute Chair Associate Professor (Computer Science and Engineering), Indian Institute of Technology, Bombay, Maharashtra. He has been granted 20 US patents and has published over 150 papers and authored 3 books in his field. He has

received several National awards including the Vikram Sarabhai Research Award (2012) and Shanti Swarup Bhatnagar Prize for Science and Technology (2018). He has also held the position of Visiting Scientist at the Massachusetts Institute of Technology, USA.

65. The terms of reference of the Committee are as follows:

65.1. To enquire, investigate and determine:

65.1.1. Whether the Pegasus suite of spyware was used on phones or other devices of the citizens of India to access stored data, eavesdrop on conversations, intercept information and/or for any other purposes not explicitly stated herein?

65.1.2. The details of the victims and/or persons affected by such a spyware attack.

65.1.3. What steps/actions have been taken by the respondent Union of India after reports were published in the year 2019 about hacking of WhatsApp accounts of Indian citizens, using the Pegasus suite of spyware.

65.1.4. Whether any Pegasus suite of spyware was acquired by the respondent Union of India, or any State Government, or any Central or State agency for use against the citizens of India?

65.1.5. If any governmental agency has used the Pegasus suite of spyware on the citizens of this country, under what law, rule, guideline, protocol or lawful procedure was such deployment made?

65.1.6. If any domestic entity/person has used the spyware on the citizens of this country, then is such a use authorised?

65.1.7. Any other matter or aspect which may be connected, ancillary or incidental to the above terms of reference, which the Committee may deem fit and proper to investigate.

65.2. To make recommendations:

65.2.1. Regarding enactment or amendment to existing law and procedures surrounding surveillance and for securing improved right to privacy.

65.2.2. Regarding enhancing and improving the cyber security of the nation and its assets.

65.2.3. To ensure prevention of invasion of citizens' right to privacy, otherwise than in accordance with law, by State and/or non-State entities through such spywares.

65.2.4. Regarding the establishment of a mechanism for citizens to raise grievances on suspicion of illegal surveillance of their devices.

65.2.5. Regarding the setting up of a well-equipped independent premier agency to investigate cyber security vulnerabilities, for threat assessment relating to cyberattacks and to investigate instances of cyberattacks in the country.

65.2.6. Regarding any ad hoc arrangement that may be made by this Court as an interim measure for the protection of citizen's rights, pending filling up of lacunae by Parliament.

65.2.7. On any other ancillary matter that the Committee may deem fit and proper.

66. The procedure of the Committee shall be as follows:

66.1. The Committee constituted by this order is authorised to—

(*a*) devise its own procedure to effectively implement and answer the Terms of Reference;

(*b*) hold such enquiry or investigation as it deems fit; and

(*c*) take statements of any person in connection with the enquiry and call for the records of any authority or individual.

66.2. Justice R.V. Raveendran, former Judge, Supreme Court of India will oversee the functioning of the Committee with respect to the methodology to be adopted, procedure to be followed, enquiry and investigation that is carried out and preparation of the report.

66.3. The learned overseeing Judge is at liberty to take the assistance of any serving or retired officer(s), legal expert(s) or technical expert(s) in discharge of his functions.

66.4. We request the learned overseeing Judge to fix the honorarium of the members of the Committee in consultation with them, which shall be paid by the respondent Union of India immediately.

66.5. The respondent Union of India and all the State Governments, as well as agencies/authorities under them, are directed to extend full facilities, including providing support with respect to infrastructure needs, manpower, finances, or any other matter as may be required by the Committee or the overseeing former Judge to effectively and expeditiously carry out the task assigned to them by this Court.

66.6. Mr Virender Kumar Bansal, Officer on Special Duty/Registrar, Supreme Court of India, is directed to coordinate between the Committee, the learned overseeing Judge and the Central/State Governments to facilitate communication and ensure smooth functioning and expeditious response to, and implementation of, requests made by the Committee, the learned overseeing Judge or those named in para 63 above, tasked to assist him.

67. The Committee is requested to prepare the report after a thorough inquiry and place it before this Court, expeditiously.

68. List the matter after 8 weeks.

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(2023) 20 Supreme Court Cases 486

2J

(BEFORE DR D.Y. CHANDRACHUD AND HIMA KOHLI, JJ.)

CDR AMIT KUMAR SHARMA AND OTHERS .. Appellants;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Civil Appeals Nos. 841-43 of 2022† with Nos. 846 of 2022‡, 844, 847-858, 2059-60, 2216, 2457 of 2022, 7788 of 2022 (Diary No. 20730 of 2022)†† and 7789 of 2022 (Diary No. 23503 of 2022)†‡, decided on October 20, 2022

A. **Constitution of India — Art. 14 — Tribunals — Adjudication by, of selection proceedings based on material disclosed only to it in a sealed cover — Adjudication by Armed Forces Tribunal on denial of Permanent Commission (PC) to naval officers, on the basis of such material — Impermissibility**

— Held, all material relied upon by either party in course of judicial proceedings must be disclosed, even if adjudicating authority does not rely on said material while arriving at the finding

— Further held, information relevant to dispute, which has "reasonable probability" of influencing decision of authority must be disclosed

— On facts held, non-disclosure of material to affected party and its disclosure to adjudicating authority in sealed cover sets a dangerous precedent since it denies aggrieved party their legal right to effectively challenge order because adjudication had proceeded on basis of unshared material, perpetuating culture of opaqueness and secrecy by bestowing absolute power in hands of adjudicating authority

— It also tilts the balance of power in favour of dominant party which has control over the information

— Moreover, though not all information needs to be disclosed, but such non-disclosure in exceptional circumstances must be proportionate to object sought to be achieved

† Arising from the Final Judgment and Order in *Amit Kumar Sharma* v. *Union of India* (Armed Forces Tribunal, OA No. 2167 of 2021, dt. 3-1-2022) sub nom *Tarun* v. *Union of India* (Armed Forces Tribunal, OA No. 432 of 2016, dt. 3-1-2022), 2022 SCC OnLine AFT 5345 **[Reversed]**

‡ Arising out of Civil Appeals Nos. 845-46 of 2022

†† Arising from Final Judgment and Order in *Vinita Chahal* v. *Union of India*, 2022 SCC OnLine AFT 9498 (Armed Forces Tribunal, OA No. 1973 of 2021, dt. 1-7-2022)

†‡ Arising from Final Judgment and Order in MA No. 343 of 2022 (Armed Forces Tribunal, dt. 4-3-2022)

— Respondents were not required to disclose deliberations on selection of PC within Board proceedings but were required to disclose merit position of appellants vis-à-vis parameters devised on basis of which selection process could be challenged

— Failure to disclose relevant material caused substantial prejudice to appellants — Matter remanded to AFT for consideration afresh

— Armed Forces — Navy — Armed Forces Tribunal Act, 2007 — Ss. 14, 15 and 17 — Powers of AFT — Administrative Law — Natural Justice — Audi Alteram Partem — Right to Hearing — Adverse material, awareness/supply of — Non-disclosure of relevant material to affected party which was disclosed only to adjudicating authority in a sealed cover — Departmental Enquiry — Natural justice — Supply of documents — In sealed cover only to adjudicating authority — Impropriety of

— Service Law — Tribunals — Administrative and Regulatory Bodies — Administrative Tribunals — Compliance with Natural Justice (Paras 25 to 27, 29 and 30)

Khudiram Das v. *State of W.B.*, (1975) 2 SCC 81 : 1975 SCC (Cri) 435; *T. Takano* v. *SEBI*, (2022) 8 SCC 162 : (2022) 4 SCC (Civ) 248 : (2022) 3 SCC (Cri) 306, *relied on*

Union of India v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169, *considered*

Tarun v. *Union of India*, 2022 SCC OnLine AFT 5345, *reversed*

Annie Nagaraja v. *Union of India*, 2015 SCC OnLine Del 11804; *Priya Khurana* v. *Union of India*, 2016 SCC OnLine AFT 798; *T. Rajkumar* v. *Union of India*, 2021 SCC OnLine SC 3396; *Nitisha* v. *Union of India*, (2021) 15 SCC 125 : (2023) 1 SCC (L&S) 706; *Amit Kumar Sharma* v. *Union of India*, 2022 SCC OnLine SC 1649, *referred to*

B. **Courts, Tribunals and Judiciary — Judicial Process — Exercise of power — Natural Justice/Reasons/Application of mind — Reasoned decision — Necessity — Sealed cover procedure — Adoption of — Held, reasoned judicial order is hallmark of justice system which espouses rule of law — Sealed cover procedure places process by which decision is arrived at beyond scrutiny and affects functioning of justice delivery system both at individual and institutional level — Though not all information needs to be disclosed to public but non-disclosure in exceptional circumstances must be proportionate to purpose it seeks to serve — Exceptions should not become norms — Administrative Law — Natural Justice — Audi Alteram Partem — Right to Hearing — Adverse material, awareness/supply of (Para 26)**

Khudiram Das v. *State of W.B.*, (1975) 2 SCC 81 : 1975 SCC (Cri) 435; *T. Takano* v. *SEBI*, (2022) 8 SCC 162 : (2022) 4 SCC (Civ) 248 : (2022) 3 SCC (Cri) 306, *relied on*

C. **Armed Forces — Armed Forces Tribunal Act, 2007 — Ss. 14, 15 and 17 — Remand to AFT for decision afresh, instead of final disposal by Court — When warranted — Adjudication by AFT on basis of material disclosed only to it in a sealed cover set aside by Supreme Court — Submission by appellants that instead of remanding matter to AFT, Supreme Court itself may undertake**

said exercise — Rejected since primary fact-finding role is entrusted to AFT under the 2007 Act and it would be appropriate if Supreme Court has benefit of considered view of AFT while exercising its appellate jurisdiction — Besides, AFT while upholding determination of Naval Authorities regarding grant of Permanent Commission (PC) to certain naval officers did not have benefit of considering objections of appellants to manner in which exercise was carried out by authorities — Matter remanded to AFT for consideration afresh (Para 28)

The issue for determination is whether AFT could have adjudicated on validity of selection proceedings on basis of material disclosed to it in a sealed cover.

Remanding matter to AFT, the Supreme Court held as above.

P-D/69997/S

Advocates who appeared in this case :

Huzefa A. Ahmadi, C.U. Singh and Ms Meenakshi Arora, Senior Advocates [Ms Haripriya Padmanabhan, Ms Pooja Dhar (Advocate-on-Record), Mantavya Sharma, Ms Tanya Srivastava, Sudhanshu S. Pandey, Gaichangpou Gangmei (Advocate-on-Record), Arjun D. Singh, Yashvir Kumar, Abhishek R. Shukla, Brig (Retd.) Vivek Chhatre, Siddhant Buxy (Advocate-on-Record), Krishna Sumanth, Ms Kamini Jaiswal, Abhimanue Shrestha (Advocate-on-Record), Ms Rani Mishra, Divyansh Khurana, Anupam Raina, Nikhil Palli, Ms Kaunain Fatma and Deepak Goel (Advocate-on-Record), Advocates], for the Appellants;

Sanjay Jain, Additional Solicitor General, R. Balasubramanian, Senior Advocate [Ms Neela Kedar Gokhale, Anukalp Jain, Ms Swarupama Chaturvedi, Arkaj Kumar and Arvind Kr. Sharma (Advocate-on-Record), Advocates], for the Respondents;

Huzefa A. Ahmadi, Senior Advocate [Ms Shahrukh Alam, Alok Kr. Aggarwal, Ms Anushka Sharma, Ms Simran Arora and Gaurav Goel (Advocate-on-Record), for the Impleader.

Chronological list of cases cited ***on page(s)***

1. (2022) 8 SCC 162 : (2022) 4 SCC (Civ) 248 : (2022) 3 SCC (Cri) 306, *T. Takano* v. *SEBI* 503*d*, 503*g*, 504*d*
2. 2022 SCC OnLine AFT 5345, *Tarun* v. *Union of India* **(reversed)** 489*a*, 491*e*, 491*e-f*, 492*b-c*, 492*c*, 498*a-b*, 506*d-e*
3. 2022 SCC OnLine SC 1649, *Amit Kumar Sharma* v. *Union of India* 498*f*
4. (2021) 15 SCC 125 : (2023) 1 SCC (L&S) 706, *Nitisha* v. *Union of India* 490*f*, 499*c-d*, 500*g-h*
5. 2021 SCC OnLine SC 3396, *T. Rajkumar* v. *Union of India* 490*e-f*, 490*f-g*
6. (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169, *Union of India* v. *Annie Nagaraja* 489*c*, 489*c-d*, 490*c-d*, 490*e-f*, 494*a*, 496*a*, 494*a-b*, 498*c*, 499*b*, 501*c*, 502*a*, 502*c*, 502*c-d*
7. 2016 SCC OnLine AFT 798, *Priya Khurana* v. *Union of India* 490*c*
8. 2015 SCC OnLine Del 11804, *Annie Nagaraja* v. *Union of India* 489*g*, 490*b-c*
9. (1975) 2 SCC 81 : 1975 SCC (Cri) 435, *Khudiram Das* v. *State of W.B.* 502*f*

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.— Leave to appeal under Section 31(1) of the Armed Forces Tribunal Act, 2007 is granted. Delay condoned. This batch of appeals arises from a judgment dated 3-1-2022[1] of the Principal Bench of the Armed Forces Tribunal (AFT). AFT dismissed the applications challenging the denial of Permanent Commission (PC) in the Indian Navy. The principal issue is whether AFT could have adjudicated on the validity of the selection proceedings when relevant material was disclosed only to AFT in a sealed cover.

The facts

2. On 26-9-2008, the Ministry of Defence notified that women Short Service Commission (SSC) Officers would be eligible for grant of PC prospectively. In *Union of India* v. *Annie Nagaraja*[2], the issue for consideration before this Court was whether women who were inducted in various branches of the Indian Navy prior to 2008 were entitled to the grant of PC. By its judgment dated 17-3-2020[2], this Court observed, inter alia, that[3]:

> (*i*) As a result of the policy decision of the Union Government dated 25-2-1999, the terms and conditions of service of SSC Officers including women with regard to the grant of PC were governed by Regulation 203 of Chapter IV of Part III of the Naval Ceremonial, Conditions of Service and Miscellaneous Regulations, 1963 ("the Regulations");
>
> (*ii*) The stipulation in the policy letter dated 26-9-2008 making it prospective and applicable only to specified branches/cadres of the Indian Navy (Education, Law and Naval Construction) was not enforceable;
>
> (*iii*) All SSC Officers in the Education, Law and Logistics cadres, who were "presently in service" shall be considered for the grant of PCs;
>
> (*iv*) The officers were entitled to the grant of PC in view of the policy letter of the Union Government dated 25-2-1999 read with Regulation 203;
>
> (*v*) SSC women officers in the batch of cases before the High Court and AFT who are "presently in service" shall be considered for the grant of PC on the basis of the vacancy position as on the date of the judgment of the Delhi High Court[4] and AFT or as it "presently stands", whichever is higher;
>
> (*vi*) The applications of the serving officers for the grant of PC shall be considered on the basis of the norms contained in Regulation 203, namely,

1 *Tarun* v. *Union of India*, 2022 SCC OnLine AFT 5345
2 (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169
3 SCC paras 109.5, 109.6 and 109.7 of the judgment in *Annie Nagaraja* [*Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169].
4 *Annie Nagaraja* v. *Union of India*, 2015 SCC OnLine Del 11804

(*a*) availability of vacancies in the stabilised cadre at the relevant time;

(*b*) determination of suitability;

(*c*) recommendation of the Chief of Naval Staff; and

(*d*) empanelment shall be based on the inter se merit evaluated on the ACRs of the officers under consideration, subject to the availability of vacancies.

3. There are three points in time, which were taken into consideration by the authorities for the determination of vacancies, namely:

(*i*) *August 2015*, when the judgment of the High Court in *Annie Nagaraja*[4] was pronounced;

(*ii*) *September 2016*, when the decision of AFT in *Priya Khurana* v. *Union of India*[5] was pronounced; and

(*iii*) *March 2020*, when the decision of this Court in *Annie Nagaraja*[2] was pronounced.

4. Following the above directions, the process for implementing the judgment was carried out. The respondents worked out a total of 88 vacancies. 306 officers were considered for PC against the 88 vacancies after which 80 of them were granted PC. The second respondent [Integrated Headquarters of Ministry of Defence (Navy)] issued a signal order releasing many SSC officers from service on the ground that they had not obtained PC. The signal order only notes the date of commission, date of release and the unit of the officer without any reference to the process of selection that was undertaken or the relative merit. Many of the SSC officers, both men and women, who were not granted PC filed writ petitions before this Court challenging the rejection of their claim for PC. In the alternative, they sought directions for the grant of pension.

5. By an order dated 24-8-2021[6], this Court dismissed the writ petitions on the ground that the Court had already laid down the principles for granting PC in *Annie Nagaraja*[2] and *Nitisha* v. *Union of India*[7]. It was observed that the officers who were denied PC would assail the decision on the basis of individual facts and thus, it would be necessary for them to claim their reliefs before AFT. The relevant observations are extracted below: (*T. Rajkumar case*[6], SCC OnLine SC para 12)

"*12*. The petitioners who are considered for the grant of PC and were denied it would have to assail the decision not to grant them PC *on the*

4 *Annie Nagaraja* v. *Union of India*, 2015 SCC OnLine Del 11804
5 2016 SCC OnLine AFT 798
2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169
6 *T. Rajkumar* v. *Union of India*, 2021 SCC OnLine SC 3396
7 (2021) 15 SCC 125 : (2023) 1 SCC (L&S) 706

basis of the individual facts in each case. Bearing this in mind, it would be necessary for them to pursue their remedies before AFT where the facts of each case can be scrutinized. If the petitioners were to succeed on their plea for the grant of PC, the alternative claim for invoking the jurisdiction under Article 142 would cease to have any practical significance. It is only if the denial of PC is upheld that the alternate plea can be pressed and this can be pursued after the decision of AFT, by following the remedies available under the statute. Hence, on a considered view of the matter we are inclined not to entertain the petitions under Article 32 on merits." (emphasis supplied)

6. The second respondent, in the written submissions before AFT, filed in *Amit Kumar Sharma* v. *Union of India*[8] submitted that the vacancy calculation is more than an exercise of simple mathematics and that the "minute details of vacancy calculation cannot be put in the open domain for the obvious reasons. Accordingly, this Hon'ble Tribunal will be provided with a detailed note with respect to vacancy calculation in a *sealed envelope* (as and when sought)". It was also submitted that the fairness of the selection process "would be amply clear from the Selection Board proceedings which would be provided to this Hon'ble Tribunal for perusal in the *sealed cover*, if need for the same arises". Similarly, in the counter-affidavit filed in *Barsha Agarwal* v. *Union of India*[9], it was submitted:

> "Accordingly, this Hon'ble Tribunal has been provided with a detailed note with respect to vacancy calculation in a sealed envelope."

7. AFT by the impugned judgment dated 3-1-2022[1] disposed of the cases transferred to AFT pursuant to the order of this Court along with cases where the denial of PC was challenged before AFT. The impugned judgment[1] of AFT in para 54 indicates that the respondents submitted:

> (*i*) All the files connected with the Selection Board convened in December 2020;
>
> (*ii*) The previous Selection Boards held for the grant of PC;
>
> (*iii*) The management of SSC Officers; and
>
> (*iv*) The dossiers containing the confidential reports of 32 applicants before AFT.

8. In addition to the above, AFT noted in para 81 that on a perusal of "various records and files submitted by the respondents", the second respondent had considered the following issues:

> (*a*) Selection Boards held prior to 2020;

8 OA No. 2167 of 2021
9 OA No. 2008 of 2021
1 *Tarun* v. *Union of India*, 2022 SCC OnLine AFT 5345

(*b*) Baseline for consideration and batches to be considered;

(*c*) Categorisation of officers for consideration;

(*d*) Determination of vacancies;

(*e*) Suitability criteria;

(*f*) Inter se merit criteria;

(*g*) Conduct of Board and results; and

(*h*) Analysis of the Selection Board proceedings.

9. In para 99 of the judgment, it is observed that the Board conducted its proceedings on 18-12-2020 according to the criteria approved in the approach paper. Para 37 of the impugned judgment[1] extracts the selection procedure that was adopted by Indian Navy. Para 37 of the judgment is extracted below: (*Tarun case*[1], SCC OnLine AFT)

"*37*. The counsel then took us through the criteria for selection and said that marks were apportioned as given below to work out the inter se merit. He added that there was no "Value Judgment" mark as was applicable in promotion boards. He also stated that no one has been rejected based on medical criteria and all had been recommended by the CNS. He further added that the merit list was computer generated based on the criteria mentioned below; and that out of a total of 381 officers, 80 had been granted PC (41 women and 39 male officers). The counsel then elaborated on the factors and their weightage.

Sl. Nos.	*Factor*	*Weightage*	*Unsuitability Criteria*
(*a*)	ACR Merit	90%	
(*b*)	SLt Seniority	04%	
(*c*)	War	02%	Officer should not have been recommended G and below any time in the last five CR cycles held on record.
(*d*)	Peer	02%	Officer should not have been recommended G and below any time in the last five CR cycles held on record.
(*e*)	Recommendation for PC	02%	Officer should not have been graded "No" in recommendation for PC thrice or more in the last five CRs."

10. On perusing the records disclosed in a sealed cover, AFT recorded the status of the remaining applicants as follows:

1 *Tarun* v. *Union of India*, 2022 SCC OnLine AFT 5345

Sl. Nos	*OA Case Ref*	*Applicants*	*Current Status*	*Relief sought*	*Merit 1st Consideration*	*Merit 2nd Consideration*	*Disposal*
1.	OA No. 433 of 2016 SLPs(C) Nos 834-36 of 2021	Lt. Cdr Ravinder Pal Singh, Engineering/ NC, Batch-2005, Service-16	Retired Released 31-12-2020	PC/Pension	5/6 Low merit	No vacancy	Was considered only for first look. To be given second look.
2.	OA No. 435 of 2016 SLPs(C) Nos. 834-36 of 2021	Lt. Cdr Amit Khajuria, Engineering/ NC, Batch-2005, Service-16	Retired Released 31-12-2020	PC/Pension	6/6 Low merit	No vacancy	Was considered only for first look. To be given second look.
3.	OA No. 436 of 2016 SLPs (C) Nos. 834-36 of 2021	Lt.Cdr Manish Kumar Singh, Engineering/ NC, Batch-2005, Service-16	Retired Released 31-12-2020	PC/Pension	3/6 Low merit	No vacancy	Was considered only for first look. To be given second look.
4.	OA No. 1203 of 2017 WP No. 1471 of 2020 (Tfr-Rajkumar)	Cdr Saroj Singh, Exec/gs, Batch-2003, Service-18	Released 31-12-2020 Rel stayed in service	PC	5/10 Low merit	4/9 Low merit	Not eligible for PC Already granted pension.
5.	OA No. 838 of 2018 WP No. 1471 of 2020 (Tfr-Rajkumar)	Cdr Swati Bhatia, Education/GS, Batch-2004, Service-17	Released 31-12-2020 Rel stayed in service	PC	12/14 Low merit	18/20 Low merit	Not eligible for PC. Already granted pension.
6.	OA No. 840 of 2018 WP No 1478 of 2020 (Tfr-Rajkumar)	Cdr Vijayeta, Education GS, Batch-2004, Service-17	Released 31-12-2020 Rel stayed in service	PC	8/14 Low merit	14/20 Low merit	Not eligible for PC. Already granted pension.
7.	OA No. 1959 of 2018 Old matter	Cdr Kumar Dhiraj, Batch-2007, Service-14	Released 9-1-2019 Retired	PC	Not considered since not in service on date of judgment.	Not considered since not in service on date of judgment	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].

Sl. Nos.	*OA Case Ref*	*Applicants*	*Current Status*	*Relief sought*	*Merit 1st Consideration*	*Merit 2nd Consideration*	*Disposal*
8.	OA No. 2118 of 2018 WP No. 1478 of 2020 (Tfr-Rajkumar)	Cdr Mandip Kaur, Exec/Lgd, Batch-2005, Service-16	Released 31-12-2020 Rel stayed in service	PC	7/9 Low merit NR for PC in ACR	10/12 Low merit NR for PC in ACR	Not eligible for PC. Already granted pension.
9	OA No. 816 of 2019 WP No. 1269 of 2020 (Tfr-Rajkumar)	Cdr Y.K. Singh, Education/GS, Batch-2005, Service-16	Released 31-12-2020 Rel stayed in service	PC/Pension	15/20 Low merit	10/13 Low merit	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
10.	OA No. 1361 of 2021 Fresh case	Cdr Sarita Nagyach, Exec/Lgs, Batch-2007, Service-14	Released 5-8-2021 Retired	PC/Pension	07/15 Low merit NR for PC in ACR	13/20 Low merit NR for PC in ACR	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
11.	OA No 1454 of 2021 WP No. 646 of 2021 Dismissed as withdrawn by applicant.	Cdr Sandeep Singh, Exec/Lgs, Batch-2007, Service-14	Rel Order 24-3-2021 Released 6-8-2021	PC	4/15 Low merit	8/20 Low merit	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
12.	OA No. 1964 of 2021 WP No. 1471 of 2020 (Tfr-Rajkumar)	Cdr Pooja Rajput, Exec/Lgs, Batch-2002, Service-19	Released 31-12-2020 Rel stayed in service	PC	5/7 Low merit	7/14 Low merit	Not eligible for PC. Already granted pension.

2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169

Sl. Nos.	*OA Case Ref*	*Applicants*	*Current Status*	*Relief sought*	*Merit 1st Consideration*	*Merit 2nd Consideration*	*Disposal*
13.	OA No. 2008/2021 WP No. 704/2021 (Tfr-Rajkumar)	Cdr Barsha Agarwal & 03 Ors. Education/GS, Batch-2007, Service-14	Rel Order 5-8-2020 Released 5-8-2021	PC/Pension/ Permit to service till 20 yrs (Ref BP/N case)	9/11 Low merit	7/9 Low merit	Not eligible for PC and not grated pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
14.	Joint with Ser 13	Cdr Shweta Kapoor, Education/GS, Batch-2007, Service-14	Rel Order 5-8-2020 Released 5-8-2021	PC/Pension/ Permit to service till 20 yrs (Ref BP/N case)	11/11 Low merit	09/09 Low merit	Not eligible for PC and not grated pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
15.	Joint with Ser 13	Cdr Sapna C Lanjewar, Education/GS, Batch-2007, Service-14	Rel Order 5-8-2020 Released 5-8-2021	PC/Pension/ Permit to service till 20 yrs (Ref BP/N case)	7/11 Low merit	05/09 Low merit	Not eligible for PC and not grated pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
16.	Joint with Ser 13	Cdr S.S. Naik, Education/GS, Batch-2007, Service-14	Rel Order 5-8-2020 Released 5-8-2021	PC/Pension/ Permit to service till 20 yrs (Ref BP/N case)	8/11 Low merit	06/09 Low merit	Not eligible for PC and not grated pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
17.	OA No. 2064/2021 WP No. 1471/2020 (Tfr-Rajkumar)	Cdr Annie Nagaraja, Education/GS, Batch-1999, Service-22	Released 31-12-2020 Rel stayed-SC order 24-8-2020 In service	PC Reframe guidelines of 15-10-2020	5/8 NR for PC in ACR	6/9 NR for PC in ACR	Not eligible for PC. Already granted pension.

Sl. Nos.	OA Case Ref	Applicants	Current Status	Relief sought	Merit 1st Consideration	Merit 2nd Consideration	Disposal
18	OA No. 2065 of 2021 WP No. 1471 of 2020 (TIr-Rajkumar)	Lt. Cdr Barkha Rathore, Exec/ Lgs, Batch-2003, Service-18	Released 31-12-2020 Rel stayed in service	PC Reframe guidelines of 15-10-2020	10/10 Low merit NR for PC in ACR	9/9 Low merit NR for PC in ACR	Not eligible for PC. Already granted pension.
19.	OA No. 2066 of 2021 WP No. 1471 of 2020 (TIr-Rajkumar)	Cdr Urmila Bhat, Education/Met, Batch-1999, Service-22	Released 31-12-2020 Rel stayed in service	PC	7/8 Low merit NR for PC in ACR	8/9 Low merit NR for PC in ACR	Not eligible for PC Already granted pension.
20.	OA No. 2067 of 2021 WP No. 507 of 2021 (TIr-Rajkumar)	Cdr Puneet Pal Kaur, Exec/Lgs, Batch-2006, Service-14	Released 12-5-2021 Rel stayed in service	PC/Pension	5/12 Low merit	6/15 Low merit	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
21.	OA No. 2068 of 2021 WP No. 1471 of 2020 (TIr-Rajkumar)	Cdr Shruti Diwan, Education/ GS, Batch-1999, Service-22	Released 31-12-2020 Rel stayed in service	PC	6/8 NR for PC in ACR	7/9 NR for PC in ACR	Not eligible for PC Already granted pension.
22.	OA No. 2069 of 2021 Fresh case	Cdr Bhanu Pratap Singh, Exec/ Lgs, Batch-2007, Service-14	Released 31-12-2020 Retired	PC/Pension	10/15 Low merit NR for PC in ACR	15/20 Low merit NR for PC in ACR	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].

2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169

Sl. Nos.	*OA Case Ref*	*Applicants*	*Current Status*	*Relief sought*	*Merit 1st Consideration*	*Merit 2nd Consideration*	*Disposal*
23.	OA No. 2167 of 2021 (Tfr-RB Mumbai) WP No. 1269 of 2020 (Tfr-Rajkumar)	Cdr Amit Kumar Sharma, Education/ GS, Batch-2003, Service-18	Released 31-12-2020 Rel stayed in service	PC/Pension	2/3 NR for PC in ACR	9/14 Low merit NR for PC in ACR	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].
24.	OA No. 2168 of 2021 (Tfr-RB Mumbai) Old matter, transferred from AFT (RB) Mumbai)	Lt. Cdr Yogita Rani, Education/ GS, Batch-2003, Service-18	Released 31-12-2020	PC/Pension	3/3 Low merit	14/14 Low merit	Not eligible for PC. Already granted pension.
25.	OA No. 2169 of 2021 (OA No. 105 of 2017 RB Mumbai) WP No. 1269 of 2020 (Tfr-Rajkumar)	Cdr P.S. Soodan, Education/ GS, Batch-2004, Service-17	Released 31-12-2020 Rel stayed in service	PC/Pension Permit to serve till 20 yrs (Ref BP/N case)	13/14 Low merit NR for PC in ACR	19/20 Low merit NR for PC in ACR	Not eligible for PC and not granted pension being inadmissible under paras 109.10 and 109.11 of the judgment[2].

11. On an examination of the Board proceedings, AFT observed that there were no mala fides in the parameters which were prescribed or the procedure adopted. It was also observed that the officers were not granted PC because of their comparative merit against limited vacancies and, in certain cases, the officers were not found suitable. The relevant observations are extracted below: (*Tarun case*[1], SCC OnLine AFT paras 110 & 121)

> "*110*. Having heard all parties and examined various records, it is well established that the IN has formulated a proper procedure with suitable parameters, and has applied it uniformly to all eligible SSCOs, both men and women, of all affected Branches/Cadres in their consideration for grant of PC. We find no mala fide in the parameters laid down or the procedure adopted. No gender discrimination has been observed in the Selection Board held in December 2020 and those held prior to the decision of the Hon'ble Supreme Court in *Annie Nagaraja*[2].
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> * * *
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> *121*. The merit position and status of the rest of the applicants are given below. The inputs on recommendations for PC; Peer and War Report entries have all been verified from the CRs. It is seen from the records that the applicants have not been granted PC only because their comparative merit against limited vacancy and in certain cases, not being found suitable as per the laid down criteria."

12. The decision of AFT has led to the institution of twelve civil appeals before this Court. Twenty-six officers of the Indian Navy are appellants before this Court in the civil appeals. Of these twenty-six officers, thirteen are still in service pursuant to interim orders. The remaining thirteen officers are out of service since varying dates in 2020, 2021 and 2022. Apart from the twenty-six officers who are appellants before this Court in the twelve civil appeals, eight officers have filed IAs for intervention. Seven out of eight officers are protected by interim orders while the tenure of the eighth officer (Commander Navneet Sharma) is to end in the month of December 2022.

13. Notice was issued in this batch of civil appeals on 31-1-2022[10]. The grievance of the appellants is that the sealed cover procedure, which was followed by AFT, has resulted in substantial prejudice.

The submissions

14. Mr Huzefa A. Ahmadi and Mr C.U. Singh, Senior Counsel appearing on behalf of the appellants together with the other counsel Ms Kamini Jaiswal, Ms Haripriya Padmanabhan and Ms Puja Dhar have submitted that AFT, in the course of its decision, has extensively relied upon material which was submitted by the Naval Authorities in a sealed cover. It has been urged that this material was never disclosed to the appellants and if the material had been disclosed to

1 *Tarun* v. *Union of India*, 2022 SCC OnLine AFT 5345
2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169
10 *Amit Kumar Sharma* v. *Union of India*, 2022 SCC OnLine SC 1649

them, they would have been in a position to demonstrate that much of the data which has been relied upon is seriously in dispute and is not reflective of the correct position. Mr R. Balasubramaniam, Senior Counsel appearing on behalf of the respondent, submitted that it is not as if the respondents voluntarily chose to place the data in a sealed cover and the files which were produced were on the directions of AFT.

15. During the course of hearing, three principal submissions have been urged by Mr Huzefa A. Ahmadi, Senior Counsel:

15.1. In its decision in *Annie Nagaraja*[2], this Court directed that the highest number of vacancies were to be considered in determining the claims of the SSC officers for the grant of PC but this has not been done;

15.2. Several batches have been clubbed together as a consequence of which vacancies have not been considered batch-wise and inter se merit has been skewed; and

15.3. Consideration for the grant of PC was effected on the basis of ACRs which were written casually at a time when the officers concerned were not eligible for the grant of PC as observed in a subsequent decision of this Court (albeit in the case of the Army) in *Nitisha*[7].

16. While formulating the objections to the findings of AFT on merits, it has been submitted by the counsel for the appellants that:

16.1. The respondents have made no distinction between officers who were inducted prior to 2008 and those inducted after 2008;

16.2. Data submitted by the Navy shows that vacancies at the material time were not properly calculated;

16.3. There is sufficient data to indicate that many more vacancies exist in most cadres than what is depicted in the impugned order;

16.4. The adoption of the 60:40 ratio (PC: SSC Officers) based on the AV Singh Committee Report is flawed since various other aspects of the report are yet to be implemented by the Naval Authorities including the disbursal of monetary benefits;

16.5. The computation of yearly vacancies has proceeded on an arbitrary basis of 15 years' distribution;

16.6. The methodology of dividing the total number of vacancies by 15 is arbitrary;

16.7. The chart which has been set out in para 95 of AFT's decision shows that as many as 14 batches were considered together; and

16.8. The grievances of individual officers have not been adjudicated. For instance, in the case of Commanders Annie Nagaraj and Amit Sharma, though they were recommended for the grant of PC and would fall within the existing vacancies, they have been denied PC on the ground that they were not recommended.

2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169
7 *Nitisha* v. *Union of India*, (2021) 15 SCC 125 : (2023) 1 SCC (L&S) 706

17. On the other hand, Mr R. Balasubramaniam, Senior Counsel appearing on behalf of the respondents made the following submissions:

17.1. While computing the vacancies, the Naval Authorities have correctly borne in mind:

(*a*) The overall cadre structure of the Indian Navy;

(*b*) The policies which have been consistently followed; and

(*c*) The pattern of future inductions and retirements; and the need to maintain a youthful profile in the Indian Navy and a balanced cadre structure.

17.2. Grant of PC is governed by Regulation 203 according to which the availability of vacancies should be in the stabilised cadre;

17.3. While the stabilised cadre normally comprises only of Government sanctioned posts in the permanent cadre, in the spirit of the judgment of this Court, temporary vacancies and Training Drafting Leave Reserve (TDLR) vacancies were also added to the stabilised cadre;

17.4. The vacancies of the stabilised cadre were worked out with reference to August 2015, September 2016 and March 2020;

17.5. The ratio of 60:40 (PC:SSC) has been approved by the Government of India on 3-11-2008 based on the AV Singh Committee Report;

17.6. Based on the above, the deficiencies in each stream were divided by a 15 year cycle which is the difference between the life of a PC Officer and SSC Officer in service;

17.7. The deficiencies in manning strength cannot be given to any particular batch or a few batches because of the policy of the Navy to have a balanced cadre structure, a youthful profile and a proper induction/retirement pattern in the long run;

17.8. The vacancies assigned to each batch worked out in terms of the above model provided the maximum vacancies as on March 2020, the date of the judgment of this Court;

17.9. Pursuant to the directions given by AFT, the Navy carried out a fresh exercise and allotted seven more vacancies to the Naval Construction Cadre and seven officers were approved for the grant of PC;

17.10. In regard to the clubbing of batches, each SSC Officer was given two "looks" (the first and the second "look") pursuant to consistent practice. The first look is with officers of the preceding batch, who were not granted PC in their first look and the second look is with the available next fresh batch. Hence, each batch was given consideration separately and it would not be correct to postulate that 14 batches of the Logistics Cadre were clubbed together. The distribution of vacancies per batch on the basis of a 15-year cycle is justified;

17.11. The manner of writing ACRs is not erroneous. The judgment in *Nitisha*[7] pertained to the Indian Army which is distinguishable since:

(*a*) Unlike the Indian Army where male officers were being granted PC, in the case of the Indian Navy neither men nor women officers were granted PC;

7 *Nitisha* v. *Union of India*, (2021) 15 SCC 125 : (2023) 1 SCC (L&S) 706

(*b*) The ACRs written by officers in the last five years preceding the conduct of the Board were taken into consideration which had a specific column on whether or not a recommendation was being made for PC, since 2015; and

(*c*) If an officer has not been recommended for PC in three or more ACRs, it would be a disqualification and hence an officer would not be eligible for grant of PC, even if higher in merit.

18. The second respondent in the written submissions before this Court submitted that:

18.1. It is a norm for the Board proceedings to only be provided to AFT in a sealed cover;

18.2. AFT on a perusal of the proceedings of the Selection Board as well as confidential dossiers of the individual applicants found that the Navy had considered the claims of the officers for PC based upon the parameters laid down by this Court in *Annie Nagaraja*[2].

The analysis

19. AFT, inter alia, had to determine if:

(*i*) the Naval Authorities had correctly computed the vacancies against which the claims of the SSC Officers would be considered for the grant of PC; and

(*ii*) the Selection Board considered the applications for the grant of PC fairly.

The judgment of AFT indicates that in assessing the validity of the exercise undertaken to determine vacancies and the fairness of the selection process, it placed extensive reliance on material drawn from the data emerging from the files which were submitted by the Union Government and the Naval Authorities in a sealed cover. The judgment of AFT sets out in para 92, a summary of the cadre-wise strength and vacancies to be considered for granting PC to the affected SSC officers. In paras 93 and 94, AFT has set out, in a similar manner, tabulated statements in regard to the utilisation of vacancies. This data did not form the subject-matter of deliberations before AFT. In fact, the counter-affidavits in *Barsha Agarwal*[9] and *Amit Kumar Sharma*[8] indicate that the data was submitted in the form of a *sealed note*.

20. Similarly, the Board proceedings were not disclosed to the appellants. The written submissions before this Court and the submissions in *Amit Kumar Sharma*[8] before AFT indicate that the Board proceedings were not disclosed to the officers and were submitted to AFT in a sealed cover. AFT on a perusal of the Board proceedings has observed that the second respondent had adopted proper procedure and suitable parameters that it had uniformly applied. It was also observed on a perusal of the documents that there was no gender bias and

2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169
9 *Barsha Agarwal* v. *Union of India*, OA No. 2008 of 2021
8 *Amit Kumar Sharma* v. *Union of India*, OA No. 2167 of 2021

that the appellants' applications for PC were rejected only because they were lower in inter se merit.

21. This Court in *Annie Nagaraja*[2] had directed that the applications of the serving officers for PC shall be considered on the basis of norms in Regulation 203 and Para 4 of the implementation guidelines. The parameters that were directed to be considered were:

(*i*) availability of vacancies in stabilised cadre at the material time;

(*ii*) determination of suitability; and

(*iii*) recommendation of the Chief of Naval Staff.

In terms of Para 4 of the implementation guidelines, the empanelment has to be based on inter se merit evaluated on the ACRs of the officers. The Tribunal in para 105 of the judgment observed that on a perusal of record it was evident that the Indian Navy had considered the SSC officers for PC based on the parameters laid down in *Annie Nagaraja*[2]. However, the material that has been relied on to arrive at the finding that there was no infirmity in the process has not been disclosed to the appellants. AFT observed that the weightage to the individual parameters in the selection process for PC is the same as it existed before the judgment of this Court in *Annie Nagaraja*[2]. Even if the parameters for selection and the weightage of the individual parameters have been in the public domain, there is no material on record to determine if the selection has been made in accordance with the criteria. AFT has recorded that there are "no mala fides" and "no gender bias" in the selection process. However, there is no material available to the appellants to challenge these findings since the material was disclosed to AFT in a sealed envelope. The orders granting PC to other officers also did not contain any reasoning on the inter se merit of the applicants. AFT on a perusal of the files submitted in a sealed cover recorded the status of the applicants in a tabular format that has been extracted in the earlier part of the judgment. However, the appellants were not privy to such information.

22. Material prejudice has been caused by the process which has been followed of disclosing the information of vacancies and the board proceedings to AFT in a sealed cover. In *Khudiram Das* v. *State of W.B.*[11], this Court held that the test for determining if material must be disclosed is whether in all "reasonable probability", the material would influence the decision of the authority. Ruling in the context of preventive detention, a four-Judge Bench of this Court observed: (SCC p. 97, para 15)

> "*15. Now, the proposition can hardly be disputed that if there is before the District Magistrate material against the detenu which is of a highly damaging character and having nexus and relevancy with the object of detention, and proximity with the time when the subjective satisfaction forming the basis of the detention order was arrived at, it would be legitimate for the Court to infer that such material must have influenced the District Magistrate in arriving at his subjective satisfaction and in such*

2 *Union of India* v. *Annie Nagaraja*, (2020) 13 SCC 1 : (2021) 1 SCC (L&S) 169
11 (1975) 2 SCC 81 : 1975 SCC (Cri) 435

a case the Court would refuse to accept the bald statement of the District Magistrate that he did not take such material into account and excluded it from consideration. It is elementary that the human mind does not function in compartments. When it receives impressions from different sources, it is the totality of the impressions which goes into the making of the decision and it is not possible to analyse and dissect the impressions and predicate which impressions went into the making of the decision and which did not. Nor is it an easy exercise to erase the impression created by particular circumstances so as to exclude the influence of such impression in the decision-making process. Therefore, in a case where the material before the District Magistrate is of a character which would in all reasonable probability be likely to influence the decision of any reasonable human being, the Court would be most reluctant to accept the ipse dixit of the District Magistrate that he was not so influenced and a fortiori, if such material is not disclosed to the detenu, the order of detention would be vitiated, both on the ground that all the basic facts and materials which influenced the subjective satisfaction of the District Magistrate were not communicated to the detenu as also on the ground that the detenu was denied an opportunity of making an effective representation against the order of detention." (emphasis supplied)

23. In *T. Takano* v. *SEBI*[12], a two-Judge Bench of this Court held that the all *relevant information* must be disclosed. In this case, the issue for consideration before this Court was whether an investigation report under Regulation 9 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 must be disclosed to the person to whom a notice to show cause is issued. SEBI had not disclosed the investigation report. It was the contention of SEBI that it had not *relied* on the investigation report to issue the show-cause notice. The two-Judge Bench observed that disclosure of information to the parties to the adjudication serves three purposes:

(*i*) *Reliability*: The possession of information by both the parties can aid the courts in determining the truth of the contentions;

(*ii*) *Fair trial*: There is a legitimate expectation that parties are provided all the information for them to effectively participate in the proceedings;

(*iii*) *Transparency and accountability*: It is necessary that the adjudication is not opaque but transparent. Transparency aids in establishing accountability.

The observations on disclosure of information and its impact on transparency are extracted below: (*T. Takano case*[12], SCC p. 186, paras 28-29)

"*28.3*. … Keeping a party bereft of the information that influenced the decision of an authority undertaking an adjudicatory function also undermines the transparency of the judicial process. It denies the party concerned and the public at large the ability to effectively scrutinise the decisions of the authority since it creates an information asymmetry.

12 (2022) 8 SCC 162 : (2022) 4 SCC (Civ) 248 : (2022) 3 SCC (Cri) 306

29. The purpose of disclosure of information is not merely individualistic, that is to prevent errors in the verdict but is also towards fulfilling the larger institutional purpose of fair trial and transparency. Since the purpose of disclosure of information targets both the *outcome* (reliability) and the *process* (fair trial and transparency), it would be insufficient if only the material relied on is disclosed. Such a rule of disclosure, only holds nexus to the outcome and not the process. Therefore, as a default rule, all relevant material must be disclosed." (emphasis in original)

24. This Court observed that the right to disclosure is not absolute. Portions that involve information on third parties or confidential information on the securities market may be withheld by SEBI. The Court directed that the Board is duty-bound to disclose parts of the investigative report that concern the specific allegations that have been levelled in the show-cause notice. However, the Court also observed that it does not entitle a person to whom the notice is issued to receive unrelated sensitive information. The Court held that it must first be prima facie established by SEBI that the disclosure of the information would affect third-party rights. Once a prima facie case of sensitivity is established, the onus would then shift to the appellant to prove that the information is *necessary* to defend his case appropriately. The conclusions are extracted below: (*T. Takano case*[12], SCC pp. 202-203, paras 62-63)

"*62*. * * *

62.5. The right to disclosure is not absolute. The disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market. The respondent should prima facie establish that the disclosure of the report would affect third-party rights and the stability and orderly functioning of the securities market. The onus then shifts to the appellant to prove that the information is *necessary* to defend his case appropriately; and

62.6. Where some portions of the enquiry report involve information on third parties or confidential information on the securities market, the respondent cannot for that reason assert a privilege against disclosing any part of the report. The respondents can withhold disclosure of those sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market.

63. The Board shall be duty-bound to provide copies of such parts of the report which concern the specific allegations which have been levelled against the appellant in the notice to show cause. However, this does not entitle the appellant to receive sensitive information regarding third parties and unrelated transactions that may form part of the investigation report." (emphasis in original)

12 *T. Takano* v. *SEBI*, (2022) 8 SCC 162 : (2022) 4 SCC (Civ) 248 : (2022) 3 SCC (Cri) 306

25. The elementary principle of law is that all material which is relied upon by either party in the course of a judicial proceeding must be disclosed. Even if the adjudicating authority does not *rely* on the material while arriving at a finding, information that is *relevant* to the dispute, which would with "reasonable probability" influence the decision of the authority must be disclosed. A one-sided submission of material which forms the subject-matter of adjudication to the exclusion of the other party causes a serious violation of natural justice. In the present case, this has resulted in grave prejudice to officers whose careers are directly affected as a consequence.

26. The non-disclosure of relevant material to the affected party and its disclosure in a sealed cover to the adjudicating authority (in this case AFT) sets a dangerous precedent. The disclosure of relevant material to the adjudicating authority in a sealed cover makes the process of adjudication vague and opaque. The disclosure in a sealed cover perpetuates two problems. Firstly, it denies the aggrieved party their legal right to effectively challenge an order since the adjudication of issues has proceeded on the basis of unshared material provided in a sealed cover. The adjudicating authority while relying on material furnished in the sealed cover arrives at a *finding* which is then effectively placed beyond the reach of challenge. Secondly, it perpetuates a culture of opaqueness and secrecy. It bestows absolute power in the hands of the adjudicating authority. It also tilts the balance of power in a litigation in favour of a dominant party which has control over information. Most often than not this is the state. A judicial order accompanied by reasons is the hallmark of the justice system. It espouses the rule of law. However, the sealed cover practice places the process by which the decision is arrived beyond scrutiny. The sealed cover procedure affects the functioning of the justice delivery system both at an individual case-to-case level and at an institutional level. However, this is not to say that all information must be disclosed in the public. Illustratively, sensitive information affecting the privacy of individuals such as the identity of a sexual harassment victim cannot be disclosed. The measure of non-disclosure of sensitive information in exceptional circumstances must be proportionate to the purpose that the non-disclosure seeks to serve. The exceptions should not, however, become the norm.

27. During the course of the hearing, it has clearly emerged before this Court that material which was relied upon by AFT for determining the vacancies which were available and for assessing as to whether they were utilised correctly has not been disclosed to the appellants. Similarly, the Board proceedings that were relied upon by AFT to determine if the selection for PC was fair have not been disclosed to the appellants. We are cognizant of the wide range of sensitive information in the records of board proceedings. The respondents are not required to disclose the deliberations on the selection for PC within the closed Board setting. While AFT on a perusal of the records concluded that there was no gender bias or mala fides in the grant of PC, it must be borne in mind that the officers do not possess the material to challenge this observation. The respondents while protecting the confidentiality of the proceedings of the Board must disclose the position in merit of the appellants vis-à-vis the parameters and their weightage devised by the respondents.

28. We permitted the counsel to address the Court briefly on the nature of objections which arise on the basis of the data as disclosed. The counsel for the appellants submitted that instead of a remand to AFT, this Court may carry out the exercise. We are not inclined to do so for two reasons. Firstly, a primary fact-finding role is entrusted to AFT under the Armed Forces Tribunal Act, 2007. While exercising its appellate jurisdiction, it would be appropriate if this Court has the benefit of a considered view of AFT. To decide the issues for the first time in appeal, as a matter of first impression, would not be appropriate. Secondly, the issues which arise before AFT primarily turn upon the determination of vacancies, the manner of utilising them and the fairness of the selection process. This is an exercise which had to be carried out by the Naval Authorities while implementing the judgment of this Court. The correctness of that determination fell for consideration before AFT. In arriving at its conclusion upholding the determination, AFT has not had the benefit of considering the objections of the appellants to the manner in which the exercise was carried out by the authorities. The objections of the appellants noted above would have been set out before AFT if the material was disclosed to the appellants. The failure to disclose relevant material has caused substantial prejudice to the appellants. This case exposes the danger of following a sealed cover procedure.

29. For the above reasons we are of the view that a remand to AFT would be necessitated. We are conscious of the fact that AFT carried out a painstaking exercise while disposing of the OAs but there has been a clear breach of the principles of natural justice. We are of the considered opinion that AFT should be directed to reconsider the entire matter afresh.

30. We accordingly allow the appeals and set aside the impugned judgment[1] of AFT. The OAs corresponding to the appeals which are filed before this Court are restored for fresh adjudication by AFT. During the pendency of these proceedings, as already noted, some of the officers in this batch of appeals including some interveners have continued in service as a result of the protective orders operating in their favour while the tenure of one officer is to end in December 2022. We direct that the officers who are protected by interim orders of this Court shall continue to have the benefit of those orders pending the disposal of the proceedings before AFT and thereafter for a period of eight weeks from the date of the decision of AFT should it become necessary for them to assail the judgment before this Court in appeal. The officer whose tenure is to end in December 2022 shall also be entitled to the benefit of the same protection.

31. We request AFT to dispose of the OAs which have been restored to the file of AFT expeditiously and preferably by the end of February 2023. Pending applications, if any, including applications for impleadment/intervention, stand disposed of.

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1 *Tarun* v. *Union of India*, 2022 SCC OnLine AFT 5345

1981 (Supp) Supreme Court Cases 87

(BEFORE P.N. BHAGWATI, A.C. GUPTA, S. MURTAZA FAZAL ALI, V.D. TULZAPURKAR, D.A. DESAI, R.S. PATHAK AND E.S. VENKATARAMIAH, JJ.)

Transferred Case No. 19 of 1981†

S.P. GUPTA .. Petitioner;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

Transferred Case No. 20 of 1981†

V.M. TARKUNDE .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Transferred Case No. 21 of 1981†

J.L. KALRA AND OTHERS .. Petitioners;

Versus

UNION OF INDIA .. Respondent.

Transferred Case No. 22 of 1981†

IQBAL M. CHAGLA AND OTHERS .. Petitioners;

Versus

P. SHIVSHANKAR AND OTHERS .. Respondents.

Writ Petition No. 274 of 1981‡

MISS LILY THOMAS .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Transferred Case No. 2 of 1981†

A. RAJAPPA .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Transferred Case No. 6 of 1981†

UNION OF INDIA .. Petitioner;

Versus

P. SUBRAMANIAN .. Respondent.

Transferred Case No. 24 of 1981†

D.N. PANDEY AND OTHERS .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

And

SLP (Civil) No. 1509 of 1981§

R. PRASAD SINHA .. Petitioner;

Versus

K.B.N. SINGH AND OTHERS .. Respondents.

†Under Article 139-A(1) of the Constitution of India
‡Under Article 32 of the Constitution of India
§From the Judgment and Order dated February 2, 1981 of the Patna High Court in C.W.J.C. No. 312 of 1981

Transferred Cases Nos. 19, 20, 21, 22, 2, 6 and 24 of 1981 and W.P. No. 274 of 1981, decided on December 30, 1981

Facts:

The present case revolves around two main issues :

(1) Additional Judges: *their initial* appointment and further appointment on the expiry of their initial term ; and

(2) Transfer of Judges of High Court including that of a Chief Justice of High Court.

The matters have been raised *in two batches of writ petitions* filed in different High Courts which were transferred under Article 139-A to the Supreme Court since they raised common issues of great constitutional importance. One writ petition was also filed in the Supreme Court.

In the first batch of cases initially the petitioners were practising lawyers in the High Courts who felt independence of the judiciary threatened and attacked by two actions of the Union Government: (*i*) the issuance of a circular by the Union Law Minister on March 18, 1981 and (*ii*) the practice of granting short-term extensions to Additional Judges on the expiry of their initial term. The circular (full text in para 2, pp. 194-95) addressed to all the Chief Ministers requested them to secure from all Additional Judges *in the High Courts of their respective States prior* consent to be appointed as permanent judges in any other High Court for which they were to indicate three High Courts of their choice in order of preference. Similar prior consent was also to be obtained from proposed initial appointees. It was however clearly stated that obtaining of such consent did not imply any commitment for appointment or to a place of preference. In justification the circular relied on the recommendation of several bodies and commissions that to further national integration and to combat parochial tendencies bred by caste, kinship and other local affiliations one-third of the judges should be from outside the State.

Chronologically the various transferred cases involved personages and issues as follows :

Transferred Case No. 19 of 1981 arose out of writ petition filed at Allahabad by Shri S.P. Gupta, a Senior Advocate practising therein. As a citizen and a practising Advocate he claimed, linked with his fundamental rights to practise his profession, vital interest in the constitution of the High Court as per the Constitution of India and in the constitutionality of the appointment and status of the judges of the High Court. He apprehended serious erosion of the independence of the judiciary which is a basic feature of the Constitution. He prayed that a declaratory writ be issued that three additional judges of the High Court named by him be made permanent since at the time of their reappointment there were permanent vacancies; a mandamus to fill permanent vacancies and then to appoint Additional Judges. The constitutionality of the circular which had been issued meanwhile was also questioned.

Transferred Case No. 20 of 1981 arose out of a writ petition filed in Delhi High Court by Shri V.M. Tarkunde, Senior Advocate of the Supreme Court wherein it was alleged that the short-term extension of three months given to Justices O.N. Vohra, S.N. Kumar and S.B. Wad on March 7, 1981 was subversive of the independence of the judiciary which was essential to the preservation of civil liberties. He therefore claimed issuance of a mandamus directing the Central Government to convert the posts of Additional Judges into permanent judges in the various High Courts commensurate with the

regular business and arrears in those High Courts. Appointment of additional judges where permanent vacancy existed was also challenged. The writ petition was transferred to the Supreme Court on May 1, 1981. Since the extended term of the additional judges as to expire on June 6, 1981 and the Court was closing for vacation on May 9, 1981, the Court directed the Central Government to decide upon the extension. Ultimately Justice S.B. Wad was given an extension for one year while Justices O.N. Vohra and S.N. Kumar were dropped. An application to the Court for their continuance was rejected by the Vacation Judge on June 6, 1981. Both O.N. Vohra and S.N. Kumar were impleaded as respondents but O.N. Vohra did not appear at the hearing. S.N. Kumar appeared through counsel and contested the decision of the Central Government not to appoint him again. The circular of the Law Minister was challenged as being an indirect method of bypassing the consultative process under Article 222.

Transferred Case No. 21 of 1981 relates to writ petition filed in Delhi High Court by Shri J.L. Kalra, Advocate and others seeking reliefs similar to those in Transferred Case No. 19 of 1981 in respect of Additional Judges in the face of vacancies in the post of permanent judges. The petitioner pleaded against piecemeal extension and sought extension of the term of additional judges in the Delhi High Court and other High Courts as well.

The thrust of Transferred Case No. 22 of 1981 was entirely against the circular. It arose out of a writ petition filed in Bombay High Court by Shri Iqbal Chagla and other Advocates practising in that High Court. The petitioners took the circular as a direct attack on the independence of the judiciary and challenged its constitutionality, an attempt to persuade the Government to withdraw it having failed. They further sought a declaration that if consent has already been given by any additional judge or any incumbent, it should be held null and void.

In the second batch of cases the transfer orders dated January 19, 1981 of Chief Justice K.B.N. Singh of Patna High Court to Madras High Court and of Chief Justice M.M. Ismail of Madras High Court to Kerala High Court were questioned.

Writ Petition No. 274 of 1981 was filed under Article 32 by Miss Lily Thomas, an Advocate practising in the Supreme Court challenging the order transferring Chief Justice M.M. Ismail to Kerala. The petition was admitted on a concession by the Attorney-General of India that it raised important questions of law. Chief Justice Ismail who was impleaded in the writ petition as a respondent filed an affidavit that he did not want any relief and did not want anyone to litigate for him. Chief Justice Ismail later resigned. However, the petitioner was heard by the Court.

Transferred Case No. 2 of 1981 arose out of a writ petition filed in the Madras High Court by Shri A. Rajappa, an Advocate practising in that High Court. He challenged both the orders for transfer as not being in public interest and without full and effective consultation. Transferred Case No. 6 of 1981 arose out of a similar writ petition filed in the Madras High Court by P. Subramanian, a practising Advocate.

The last Transferred Case No. 24 of 1981 arose out of a writ petition filed in the Patna High Court by Shri D.N. Pandey and Thakur Ramapati Sinha, two Advocates practising in that High Court. They challenged both the orders of transfer and impleaded Chief Justice K.B.N. Singh as respondent 3. After the petition had been transferred to the Supreme Court,

Chief Justice K.B.N. Singh applied for being transposed as petitioner 3, which was allowed. He then filed an affidavit detailing in extenso what transpired between him and the Chief Justice of India and contended that the order for his transfer was unconstitutional and void as being based on irrelevant and insufficient grounds and not without full and effective consultation. This was disputed by the Government in an affidavit. The Chief Justice of India also filed a counter-affidavit which prompted a rejoinder by Chief Justice K.B.N. Singh.

Both batches of cases were heard by a Bench of seven Judges. Several more related issues were raised and discussed during the hearing. Each of the judges delivered a separate judgment and on certain issues they agreed with one or more of their brother judges sometimes with and sometimes without additional reasons. Also each of the issues raised in the Court have not been discussed by all the judgments.

Two very important issues that have been discussed in this case are: (1) Standing or locus standi to petition a matter of public interest; and (2) disclosure of documents relating to affairs of the State and claimed to be privileged.

Scheme of the Headnote

The various issues discussed in these cases have been dealt with in the following order in the headnote:

PART I — Art. 217(1) — Appointment of High Court Judges.

PART II — Arts. 217(1), 222(1) and 224(1) — Circular of Law Minister

PART III — Arts. 32 and 226 — Locus standi or Standing of petitioners

PART IV — Arts. 224(1) and 217(1) — Additional Judges

PART V — Arts. 217(1) & 224(1) and 74(2) & 163(3) and Evidence Act, Ss. 123 and 162 — Privilege against disclosure of State documents

PART VI — Art. 216 — Power and Duties of the President under Art. 216

PART VII — Arts. 224(1) & 217(1) — S.N. Kumar's case

PART VIII — Art. 222(1) — Transfer of Judges of High Courts — Legality of transfer of Justice K.B.N. Singh

PART IX — Miscellaneous

PART I — APPOINTMENT OF HIGH COURT JUDGES

Constitution of India — Article 217(1) — Nature, scope, history and applicability of — Power of appointment of Judges of the High Court — Held is executive in nature and rests in the President — Such location of power compatible with independence of the judiciary — Meaning and significance of the concept of independence of judiciary in the constitutional scheme explained — Qualifications and considerations to be seen before recommending — Factors and considerations relevant to evaluation of any proposal for appointment — Who can initiate the proposal for appointment —

The Judgments of the Court were delivered by

Bhagwati, J.—These writ petitions filed in different High Courts and transferred to this Court under Article 139-A of the Constitution raise issues of great constitutional importance affecting the independence of the judiciary and they have been argued at great length before us. The arguments have occupied as many as thirty-five days and they have ranged over a large number of issues comprising every imaginable aspect of the judicial institution. Voluminous written submissions have been filed before us which reflect the enormous industry and vast erudition of the learned counsel appearing for the parties and a large number of authorities, Indian as well as foreign, have been brought to our attention. We must acknowledge with gratitude our indebtedness to the learned counsel for the great assistance they have rendered to us in the delicate and difficult task of adjudicating upon highly sensitive issues arising in these writ petitions. We find, and this is not unusual in cases of this kind, that a considerable amount of passion has been injected into the arguments on both sides and some times passion may appear to lend strength to an argument, but, sitting as Judges, we have to be careful to see that passion does not blind us to logic and predilections pervert proper interpretation of the constitutional provisions. We have to examine the arguments objectively and dispassionately without being swayed by populist approach or sentimental appeal. It is very easy for the human mind to find justification for a conclusion which accords with the dictates of emotion. Reason is a ready enough advocate for the decision one, consciously or unconsciously, desires to reach. I will recall the brilliant fling of Shri Aurobindo in his poem "Savitri":

> An inconclusive play is Reason's toil;
> Each strong idea can use her as its tool;
> Accepting every brief she pleads her case,
> Open to every thought she cannot know.

We have therefore to rid our minds of any preconceived notions or ideas and interpret the Constitution as it is and not as we think it ought to be. We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation. We must also remember that the Constitution is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals and not in the light of how a particular Government may be acting at a given point of time. Judicial response to the problem of constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism which is likely to cloud the vision when judges are confronted with issues of momentous importance. We must constantly bear in mind the famous words of Holmes, J. in *Northern Securities Co.* v. *U. S.*[1] where that great illustrious Judge said:

> Great cases like hard cases make bad law. For great cases are

1. 193 US 197 (1904)

called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend.

With these prefatory words we may now proceed to state the facts of these writ petitions. We propose to take up these writ petitions in a slightly different order than that given in the cause-title.

2. The first writ petition is that filed by Iqbal Chagla and others in the High Court of Bombay. The petitioners in this writ petition are advocates practising in the High Court of Bombay and they have challenged a circular letter dated March 18, 1981, addressed by Shri Shiv Shankar, the Law Minister of the Government of India, to the Governor of Punjab and the Chief Ministers of the other States. Since the circular letter has formed the subject-matter of heated controversy between the parties and its constitutional validity has been assailed on behalf of the petitioners, it would be desirable to reproduce it in extenso in the words of the author himself:

D. O. No. 66/10/81-Jus.

Ministry of Law, Justice and Company Affairs, India,
New Delhi—110 001
March 18, 1981

My dear

It has repeatedly been suggested to Government over the years by several bodies and forums including the States Reorganisation Commission, the Law Commission and various Bar Associations that to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations, one-third of the Judges of a High Court should as far as possible be from outside the State in which that High Court is situated. Somehow, no start could be made in the past in this direction. The feeling is strong, growing and justified that some effective steps should be taken very early in this direction.

2. In this context, I would request you to—

(*a*) obtain from all the Additional judges working in the High Court of your State their consent to be appointed as permanent Judges in any other High Court in the country. They could, in addition, be requested to name three High Courts, in order of preference, to which they would prefer to be appointed as permanent Judges; and

(*b*) obtain from persons who have already been or may in the future be proposed by you for initial appointment their consent to be appointed to any other High Court in the country along with a similar preference for three High Courts.

3. While obtaining the consent and the preference of the persons mentioned in paragraph 2 above, it may be made clear to them that the furnishing of the consent or the indication of a preference does not imply any commitment on the part of the Government either in regard

any abuse or misuse of authority on the part of the Law Minister in issuing the circular letter. The circular letter does not violate the provisions of clause (1) of Article 217 or clause (1) of Article 222 nor does it offend against any other constitutional or legal provision and the challenge against the validity of the circular letter must, therefore, fail. We may, however, while affirming the validity of the circular letter, make it clear that since an Additional Judge has a right to be considered for appointment as an Additional Judge for a further term on the expiration of his original term, and in case of a vacancy in a permanent post, for appointment as a permanent Judge in his own High Court, he cannot be discontinued as an Additional Judge on the ground that he has not given his consent for being appointed as a permanent Judge in any other High Court. Such a ground for discontinuing an Additional Judge would be a wholly irrelevant ground and if, on the expiration of his original term, an Additional Judge is discontinued on any such ground, the decision of the President discontinuing him would be unconstitutional and void and the Union of India would be liable to be directed to reconsider his case on the basis of relevant considerations after excluding the irrelevant ground.

Disclosure of documents : Privilege

56. We now come to a very important question which was agitated before us at great length and which exercised our minds considerably before we could reach a decision. The question related to the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the non-appointment of O.N. Vohra and S.N. Kumar as Additional Judges. The learned counsel for the petitioners and S.N. Kumar argued before us with great passion and vehemence that these documents were relevant to the inquiry before the court and they should be directed to be disclosed by the Union of India. This claim of the petitioners and S.N. Kumar for disclosure was resisted by the Solicitor-General of India on behalf of the Union of India and Mr Mridul on behalf of the Law Minister. They contended that so far as O.N. Vohra was concerned his case stood on an entirely different footing from that of S.N. Kumar since, unlike S.N. Kumar who allied himself with the petitioners and actively participated in the arguments almost as if he was petitioner, O.N. Vohra though made a party respondent to the writ petition of V.M. Tarkunde did not appear and participate in the proceedings or seek any relief from the court in regard to his continuance as an Additional Judge. Mr Mridul on behalf of the Law Minister informed us that in fact O.N. Vohra had started practice in the Delhi High Court and his case could not be considered by us when he himself did not want any relief. So far as the case of S.N. Kumar was concerned the learned Solicitor-General on behalf of the Union of India conceded that the documents of which disclosure was sought on behalf of the petitioners and S.N. Kumar were undoubtedly relevant to the issues arising before the Court, but contended — and in this contention he was supported by Mr Mridul on behalf of the Law

Minister — that they were privileged against disclosure for a two-fold reason. One was that they formed part of the advice tendered by the Council of Ministers to the President and hence by reason of Article 74, clause (2) of the Constitution, the Court was precluded from ordering their disclosure and looking into them and the other was that they were protected against disclosure under Section 123 of the Indian Evidence Act since their disclosure would injure public interest. We propose to consider these rival arguments in the order in which we have set them out, first in regard to O.N. Vohra and then in regard to S.N. Kumar.

57. So far as O.N. Vohra is concerned, it it apparent that though he was joined as a party respondent to the writ petition filed by V.M. Tarkunde, he did not choose to appear and take part in the proceedings. He did not even file an appearance, presumably because he was not interested in wresting back the office of an Additional Judge through a judicial writ. He adopted a commendable attitude consistent with the dignity of the high office which he had the privilege to hold for over two years and scorned to be a party to any litigative adventure for getting back the office of a High Court Judge. He took the view that the office of a High Court Judge is no mean office for which one may canvas, lobby or fight but it is a high position which can only be offered and which one should regard as an honour to be invited to fill and if for any reason, justifiable or not, the Government chooses not to offer it to the deserving person, it may result in detriment to public interest for which the Government may have to account to the people through their elected representatives, but the person concerned should not litigate his claim to this high office. That would lower the dignity of the office by making it the subject-matter of litigative controversy. It was presumably for this reason that O.N. Vohra did not appear in the writ petition or seek any relief from the Court in regard to his continuance as an Additional Judge. In fact, we are told, O.N. Vohra has already started practice in the Delhi High Court. Now if O.N. Vohra has not come forward to seek any relief from the Court and is not claiming that he should be deemed to have been appointed a permanent Judge or that he should be reappointed as an Additional Judge for a further term, it is difficult to see how the Court can be called upon to examine his case for the purpose of determining whether he was wrongly discontinued as an Additional Judge. We have taken a broad and liberal view in regard to locus standi and held that any public-spirited advocate acting bona fide and not for private gain or personal profit or political motivation or any other oblique consideration, may file a writ petition in the High Court challenging an unconstitutional or illegal action of the Government or any other constitutional authority prejudicially affecting the administration of justice and in such writ petition he may claim relief not for himself personally but for those who are the direct victims of such unconstitu ional or illegal action, because granting such relief to them would repair the injury caused to administration of justice. But the persons for whom the relief is sought must be ready to accept it; they must appear

and make it known that they are claiming such relief; it cannot be thrust upon them unless they wish it. If, in the present case, O.N. Vohra does not seek to go back as an Additional Judge through judicial intervention, the petitioners cannot contend that he must still be continued as an Additional Judge irrespective of his inclination. The relief sought by the petitioners being primarily for the benefit of O.N. Vohra, it is for O.N. Vohra to decide whether he would have it and if he does not want it, it would be a fruitless exercise for the Court to determine whether the decision not to appoint him as an Additional Judge was unconstitutional and he should have been appointed as an Additional Judge for a further term. The Court does not decide issues in the abstract. It undertakes determination of a controversy provided it is necessary in order to give relief to a party and if no relief can be given because none is sought, the Court cannot take upon itself a theoretical exercise merely for the purpose of deciding academic issues, howsoever important they may be. The Court cannot embark upon an inquiry whether there was any misuse or abuse of power in a particular case, unless relief is sought by the person who is said to have been wronged by such misuse or abuse of power. The Court cannot take upon itself the role of a commission of inquiry — a knight errant roaming at will with a view to destroying evil wherever it is found. It was for this reason that we held that the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to non-appointment of O.N. Vohra was not relevant to the issues arising for determination in the writ petition and the Union of India could not be required to disclose it.

58. That takes us to the case of S.N. Kumar which stands on a totally different footing, because S.N. Kumar has appeared in the writ petition, filed an affidavit supporting the writ petition and contested, bitterly and vehemently, the decision of the Central Government not to continue him as an Additional Judge for a further term. Since S.N. Kumar has claimed relief from the Court in regard to his continuance as an Additional Judge, an issue is squarely joined between the petitioners and S.N. Kumar on the one hand and the Union of India on the other which requires to be determined for the purpose of deciding whether relief as claimed in the writ petition can be granted to S.N. Kumar. Now, as we have already pointed out while discussing the scope and ambit of Article 217, there are only two grounds on which the decision of the Central Government not to continue an Additional Judge for a further term can be assailed and they are, firstly, that there has been no full and effective consultation between the Central Government and the constitutional authorities required to be consulted under that Article and, secondly, that the decision of the Central Government is based on irrelevant grounds. It was on both these grounds that the petitioners and S.N. Kumar impugned the decision of the Central Government not to appoint S.N. Kumar as an Additional Judge for a further term and there can be no doubt that the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India would be

relevant qua both these grounds. The learned Solicitor-General on behalf of the Union of India and Mr. Mridul on behalf of the Law Minister, with the usual candour and frankness always shown by them, did not dispute the relevance of these documents to the issues arising in the writ petition in regard to S.N. Kumar, but contended that they were protected against disclosure under Article 74, clause (2) of the Constitution as also Section 123 of the Indian Evidence Act. This contention raised an extremely important question in the area of public law particularly in the context of the open society which we are trying to evolve as part of the democratic structure and it caused great concern to us, for it involved a clash between two competing aspects of public interest, but ultimately after inspecting these documents for ourselves and giving our most anxious thought to this highly debatable question, we decided to reject the claim for protection against disclosure and directed that these documents be disclosed by the Union of India. We now proceed to give our reasons for this decision taken by us by a majority of six against one.

59. The first ground on which protection against disclosure was claimed on behalf of the Union of India and the Law Minister was based on Article 74, clause (2) of the Constitution. It is clear from the constitutional scheme that under our Constitution the President is a constitutional Head and is bound to act on the aid and advice of the Council of Ministers. This was the position even before the amendment of clause (1) of Article 74 by the Constitution (42nd Amendment) Act, 1976, but the position has been made absolutely explicit by the amendment and Article 74, clause (1) as amended now reads as under:

> There shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

What was judicially interpreted even under the unamended Article 74, clause (1) has now been given Parliamentary recognition by the constitutional amendment. There can therefore be no doubt that the decision of the President under Article 224 read with Article 217 not to appoint an Additional Judge for a further term is really a decision of the Council of Ministers and the reasons which have weighed with the Council of Ministers in taking such decision would necessarily be part of the advice tendered by the Council of Ministers to the President. Now clause (2) of Article 74 provides:

> The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.

The court cannot, having regard to this constitutional provision, embark upon an inquiry as to whether any and if so what advice was tendered by the Council of Ministers to the President and since the reasons which have prevailed with the Council of Ministers in taking a particular decision not to continue an Additional Judge for a further term would form part of the advice tendered to the President, they would be beyond the ken of judicial inquiry. But the Government may in a given case choose to disclose these

reasons or it may be possible to gather them from other circumstances, in which event the Court would be entitled to examine whether they bear any reasonable nexus with the question of appointment of a High Court Judge or they are constitutionally or illegally prohibited or extraneous or irrelevant. But if these reasons are not disclosed by the Government and it is otherwise not possible to discover them, it would be impossible for the Court to decide whether the decision of the Central Government not to appoint an Additional Judge for a further term is based on irrelevant grounds. There would however not be much difficulty by and large in cases of this kind to gather what are the reasons which have prevailed with the Central Government in taking the decision not to continue an Additional Judge. Article 217 requires that there must be full and effective consultation between the President, that is, the Central Government on the one hand and the Chief Justice of the High Court, the Governor, that is, the State Government and the Chief Justice of India on the other and the "full and identical facts" on which the decision of the Central Government is based must be placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India. The reasons which the Central Government is inclined to take into account for reaching a particular decision have therefore necessarily to be communicated to the Chief Justice of the High Court, the State Government and the Chief Justice of India and in the circumstances, it should ordinarily be possible for the Court to gather from such communication, the reasons which have persuaded the Central Government to take its decision. Of course there may be cases where there are several reasons discussed between the Central Government and the three constitutional authorities and some of these reasons may be relevant, while some others may be irrelevant and without inquiring into the advice given by the Council of Ministers to President, it may not be possible to determine as to what are the reasons, relevant or irrelevant, which have weighed with the Central Government in taking its decision and in such a case, the Court may not be able to pronounce whether the decision of the Central Government is based on irrelevant grounds. But ordinarily the correspondence exchanged between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India would throw light on the question as to what are the reasons which have impelled the Central Government to take any particular decision regarding the continuance of an Additional Judge. This correspondence would also show whether the "full and identical facts" on which the decision of the Central Government is based were placed before the Chief Justice of the High Court, the State Government and the Chief Justice of India before they gave their opinion in the course of the consultative process. Of course if the communication between the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India has not taken place by correspondence but has been the subject-matter of only oral talk or discussion, it would become impossible for the Court to discover the reasons which have weighed with the Central Government in taking the

decision not be continue the Additional Judge for a further term, unless of course the Central Government chooses to disclose such reasons and it would also become extremely difficult for the Court to decide whether the "full and identical facts" on which the decision of the Central Government is based were placed before the other three constitutional authorities and there was full and effective consultation as required by Article 217. The court would then have to depend only on such affidavits as may be filed before it and the task of the court to ascertain the truth would be rendered extremely delicate and difficult, as it has been in the writ petitions challenging the transfer of Mr. Justice K.B.N. Singh, Chief Justice of Patna High Court. It is not at all desirable that when the Chief Justice of the High Court or the Chief Justice of India has to communicate officially with the State Government or the Central Government in regard to a matter where he is discharging a constitutional function, such communication should be only by way of oral talk or discussion unrecorded in writing. We think it absolutely essential that such communication must, as far as possible, be in writing, whether by way of a note or by way of correspondence. The process of consultation, whether under Article 217 or under Article 222, must be evidenced in writing so that if at any point of time a dispute arises as to whether consultation had in fact taken place or what was the nature and content of such consultation, there must be documentary evidence to resolve such dispute and an ugly situation should not arise where the word of one constitutional authority should be pitted against the word of another and the Court should be called upon to decide which of them is telling the truth. Oral talk or discussion may certainly take place between the Central Government and any other constitutional authority required to be consulted but it must be recorded immediately either in a note or in correspondence. Besides eliminating future dispute or controversy, the practice of having written communication or record of oral discussion ensures greater care and deliberation in expression of views and considerably reduces the possibility of improper or unjustified recommendations or unholy confabulations or conspiracies which might be hidden under the veil of secrecy if there were no written record. Moreover, such a practice would tend to promote openness in society which is the hallmark of a democratic polity. It would indeed be highly regrettable if, instead of following this healthy practice of having a written record of consultation, the Central Government or the State Government or the Chief Justice of the High Court or the Chief Justice of India were to carry on the consultation process either on the telephone or by personal discussion without recording it. But we find that fortunately in the present case, unlike K.B.N. Singh's case which falls for determination in the second batch of writ petitions, there was correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India in regard to the continuance of S.N. Kumar and the question is whether this correspondence forms part of the advice tendered by the Council of Ministers to the President so as to be protected against disclosure by reason of clause (2) of Article 74.

60. The argument of the learned Solicitor-General was that this correspondence formed part of the advice tendered by the Council of Ministers to the President and he sought to support this argument by adopting the following process of reasoning. He said that the Council of Ministers cannot advise the President to appoint or not to appoint an Additional Judge for a further term without consulting the Chief Justice of the High Court and the Chief Justice of India. It is only after consulting them that appropriate advice can be tendered by the Council of Ministers to the President. When advice is tendered by the Council of Ministers to the President, it is open to the President under the proviso to clause (1) of Article 74 not to immediately accept such advice but to require the Council of Ministers to reconsider the advice generally or otherwise. If in a given case the President finds that advice has been given by the Council of Ministers without consulting either the Chief Justice of the High Court or the Chief Justice of India or both or that there has been no full and effective consultation with them as required by the Constitution, he may, and indeed he must, send the case back to the Council of Ministers and require them to reconsider the advice after carrying out full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India. Now how can the President satisfy himself in regard to the fulfilment of the constitutional requirement of consultation with the Chief Justice of the High Court and the Chief Justice of India, unless the views expressed by the two Chief Justices are placed before him along with the advice tendered by the Council of Ministers. The exercise of the power of the President to appoint or not to appoint an Additional Judge is so integrally connected with the constitutional requirement of full and effective consultation with the Chief Justice of the High Court and the Chief Justice of India that at no stage can it be delinked from the views expressed by them on consultation and it would not be possible for the President to exercise this executive power in acccordance with the Constitution unless the views of the two Chief Justices are placed before him. On the basis of this reasoning and as a logical consequence of it, argued the learned Solicitor-General, the views of the Chief Justice of Delhi and the Chief Justice of India obtained on consultation must be regarded as forming part of the advice tendered by the Council of Ministers to the President. The learned Solicitor-General sought to draw support for his argument from the decision of a Constitution Bench of this Court in the *State of Punjab* v. *Sodhi Sukhdev*[27]. We shall presently refer to this decision but before we do so, let us examine the argument of the learned Solicitor-General on principle.

61. There can be no doubt that the advice tendered by the Council of Ministers to the President is protected against judicial scrutiny by reason of clause (2) of Article 74. But can it be said that the views expressed by the

27. (1961) 2 SCR 371 : AIR 1961 SC 493 : (1961) 2 SCJ 691

Chief Justice of the High Court and the Chief Justice of India on consultation form part of the advice. The advice is given by the Council of Ministers *after* consultation with the Chief Justice of the High Court and the Chief Justice of India. The two Chief Justices are consulted on "full and identical facts" and their views are obtained and it is after considering those views that the Council of Ministers arrives at its decision and tenders its advice to the President. The views expressed by the two Chief Justices precede the formation of the advice and merely because they are referred to in the advice which is ultimately tendered by the Council of Ministers, they do not necessarily become part of the advice. What is protected against disclosure under clause (2) or Article 74 is only the advice tendered by the Council of Ministers. The reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice, as held by this Court in *State of Rajasthan* v. *Union of India*[28]. *Vide* the observations of Beg, C.J. at page 46 (SCC p. 632), Chandrachud, J. (as he then was) at page 61 (SGC p. 645), Fazal Ali, J. at pages 120 and 121 (SCC pp. 693-94), where all the three learned Judges took the view that by reason of clause (2) of Article 74 the Court would be barred from inquiring into the grounds which might weigh with the Council of Ministers in advising the President to issue a proclamation under Article 356, because the grounds would form part of the advice tendered by the Council of Ministers. But the material on which the reasoning of the Council of Ministers is based and the advice is given cannot be said to form part of the advice. The point we are making may be illustrated by taking the analogy of a judgment given by a Court of Law. The judgment would undoubtedly be based on the evidence led before the Court and it would refer to such evidence and discuss it but on that account can it be said that the evidence forms part of the judgment? The judgment would consist only of the decision and the reasons in support of it and the evidence on which the reasoning and the decision are based would not be part of the judgment. Similarly the material on which the advice tendered by the Council of Ministers is based cannot be said to be part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material forming the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in clause (2) of Article 74.

62. We may now refer to the decision of the Constitution Bench of this Court in the *State of Punjab* v. *Sodhi Sukhdev Singh*[27] on which the greatest reliance was placed by the learned Solicitor-General in support of his plea based on clause (2) of Article 74. The respondent who was the District and Sessions Judge in the erstwhile State of Pepsu was removed from service by an order dated April 7, 1953 passed by the President who was then incharge of the Administration of the State. The respondent made a representation

28. (1978) 1 SCR 1 : (1977) 3 SCC 592 : AIR 1977 SC 1361

against the order of removal which was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end and the Council of Ministers expressed its views in a Resolution passed on September 28, 1955. But before taking any action it invited the Report of the Public Service Commission. On receipt of the Report of the Public Service Commission, the Council of Ministers considered the matter again and ultimately on August 11, 1956 it reached the final conclusion against the respondent and in accordance which the conclusion, the order was passed to the effect that the respondent must be re-employed on some suitable post. The respondent thereupon instituted a suit against the successor State of Punjab for a declaration that his removal from service was illegal and in that suit he filed an application for the production of certain documents which included inter alia the proceedings of the Council of Ministers dated September 28, 1955 and August 11, 1956 and the Report of the Public Service Commission. The State objected to the production of these documents and ultimately the matter came before this Court. Gajendragadkar, J. (as he then was) speaking on behalf of the majority of the Court upheld the claim of privilege put forward on behalf of the State and so far as the Report of the Public Service Commission was concerned, the learned Judge held that it was protected against disclosure both under clause (3) of Article 163, and Section 123 of the Indian Evidence Act. We are at present concerned only with the claim for protection under clause (3) of Article 163 because that is an Article which corresponds to clause (2) of Article 74 insofar as advice by the Council of Ministers to the Governor is concerned. The learned Judge speaking on behalf of the majority, accorded protection to the report of the Public Service Commission under clause (3) of Article 163 on the ground that it formed part of the advice tendered by the Council of Ministers to the Rajpramukh. This view taken by the majority does appear prima facie to support the contention of the learned Solicitor-General, but we do not think we can uphold the claim for protection put forward by the learned Solicitor-General by adopting a process of analogical reasoning from the majority view in this decision. In the first place, we do not know what were the circumstances in which the majority Judges came to regard the report of the Public Service Commission as forming part of the advice tendered to the Rajpramukh. There is no reasoning in the judgment of the learned Judge showing as to why the majority held that the report of the Public Service Commission fell within the terms of clause (3) of Article 163. The learned Judge has merely set out his ipse dixit, without any reasons at all, saying in just one sentence: "The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers." It is elementary that what is binding on the court in a subsequent case is not the conclusion arrived at in a previous decision but the ratio of that decision, for it is the ratio which binds as a precedent and not the conclusion. Secondly, we may point out that we find it difficult to accept the view taken by the majority in this case. We are unable to

appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers came to its decision as recorded in the proceedings dated August 11, 1956 could be said to form part of the advice tendered by the Council of Ministers to the Rajpramukh. We do not think the learned Solicitor-General can invoke the aid of this decision in support of his claim for protection under clause (2) of Article 74.

63. That takes us to the next question whether the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India is protected from disclosure under any other provision of law. We do not have in India any common law protection under the label of "Crown Privilege" as it was known a decade ago and now called "Public interest immunity" as there is in England and the only provision of law under which such immunity can be claimed is Section 123 of the Indian Evidence Act and therefore, it is this provision which we must now turn to consider. But, before we do so, we would like to indicate the socio-political background in the context of which this section has to be interpreted. It is true that this section was enacted in the second half of the last century but its meaning and content cannot remain static. The interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. The language of a statutory provision is not a static vehicle of ideas and concepts and as ideas and concepts change, as they are bound to do in a country like ours with the establishment of a democratic structure based on egalitarian values and aggressive developmental strategies, so must the meaning and content of the statutory provision undergo a change. It is elementary that law does not operate in a vacuum. It is not an antique to be taken down, dusted, admired and put back on the shelf, but rather it is a powerful instrument fashioned by society for the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interests. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice. We need not therefore be obsessed with the fact that Section 123 is a statutory provision of old vintage or that it has been interpreted in a particular manner some two decades ago. It is not as if it has once spoken and then turned into muted silence. It is an instrument which can speak again and in a different voice in the content of

a different milieu. Let us therefore try to understand what voice this statutory provision speaks today in a democratic society wedded to the basic values enshrined in the Constitution.

64. Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge" said James Madison, "will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it, is but a prologue to a force or tragedy or perhaps both." The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.

65. The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government — an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government.

66. There is also in every democracy a certain amount of public suspicion and distrust of government, varying of course from time to time according to its performance, which prompts people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the government must be actuated by public interest but even so we find cases, though not many, where governmental action is taken not for public good but for personal gain or other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures and at

times, there are also instances of misuse or abuse of authority on the part of the executive. Now, if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means of information available to the public, there would be greater exposure of the functioning of government and it would help to assure the people a better and more efficient administration. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government is clean government and a powerful safeguard against political and administrative aberration and inefficiency.

67. The Franks Committee of the United Kingdom also observed to the same effect while pleading for an open government. It said in its report at page 12:

> A totalitarian Government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them. A democratic Government, however, though it must compete with these other types of organisations, has a task which is complicated by its obligations to the people. It needs the trust of the governed. It cannot use the plea of secrecy to hide from the people its basic aims On the contrary it must explain these aims: it must provide the justification for them and give the facts both for and against a selected course of action. Now must such information be provided only at one level and through one means of communication. A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover. As a result matters will be revealed when they ought to remain secret in the interests of the nation.

So also we find observations in the same strain by Mathew, J. in *State of U.P.* v. *Raj Narain*[29]: (SCC p. 453, para 74)

> In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal

29. (1975) 3 SCR 333, 360: (1975) 4 SCC 428: AIR 1975 SC 865

> self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

The need for an open government where there is access to information in regard to the functioning of government has been emphasised and the arguments in support of it have been ably and succinctly summarised in the following passage from the book of Dr. S.R. Maheshwari on *Open Government in India* at pages 95 and 96 :

> Administrative India puts the greatest weight on keeping happening within its corridors secret, thereby denying the citizens access to information about them.
>
> Such orientations produce deep contradictions in the larger socio-political system of the land which itself is in a state requiring nourishment and care. As the latter is still relatively new and in its infancy, its growth processes inevitably get retarded for want of information about the government, which means from the government. Over-concealment of governmental information creates a communication gap between the governors and the governed, and its persistence beyond a point is apt to create an alienated citizenry. This makes democracy itself weak and insecure. Besides, secrecy renders administrative accountability unenforceable in an effective way and thus induces administrative behaviour which is apt to degenerate into arbitrariness and absolutism. This is not all.
>
> The government, today, is called upon to make policies on an ever-increasing range of subjects, and many of these policies must necessarily impinge on the lives of the citizens. It may sometimes happen that the data made available to the policy makers is of a selective nature, and even the policy makers and their advisers may deliberately suppress certain viewpoints and favour others. Such bureaucratic habits get encouragement in an environment of secrecy; and openness in governmental work is possibly the only effective corrective to it, also raising, in the process, the quality of decision-making. Besides, openness has an educational role inasmuch as citizens are enabled to acquire a fuller view of the pros and cons of matters of major importance, which naturally helps in building informed public opinion, no less than goodwill for the government.

This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(*a*). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest. It is in the context of this background that we must proceed to interpret Section 123 of the Indian Evidence Act.

68. We might begin by reproducing Section 123 which reads as follows:

> 123. *Evidence as to affairs of State.*—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

It is also necessary for arriving at a proper interpretation of Section 123 to refer to Section 162 which says:

> 162. *Production of documents.*—A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.
>
> The court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.
>
> *Translation of documents.*—If for such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such directions, he shall be held to have committed an offence under Section 166 of the Indian Penal Code, 1860 (45 of 1860).

These two sections came up for consideration for the first time before this Court in *State of Punjab* v. *Sodhi Sukhdev Singh*[37]. Gajendragadkar, J. (as he then was), speaking on behalf of himself, Sinha, C.J. and Wanchoo, J. pointed out that the principle behind the exclusionary rule enacted in Section 123 is that a document should not be allowed to be produced in court if such production would cause injury to public interest and where a conflict arises between public interest in non-disclosure and private interest in disclosure, the latter must yield to the former. The learned Judge emphasized that though Section 123 does not expressly refer to injury to public interest, that principle is obviously implicit in it and indeed it is the sole foundation and proceeded to add that even though administration of justice is a matter of very high public importance, if there is a real "conflict between public interest and the interest of an individual in a pending case, it may reluctantly have to be conceded that the interest of the individual cannot prevail over the public interest." Now we agree with the learned Judge that public interest lies at the foundation of the claim for protection against disclosure enacted in Section 123 and it seeks to prevent production of a document where such production would cause public injury but we do not think the learned Judge was right in observing that the interest which comes into conflict with the claim for non-disclosure is the private interest of the litigant in disclosure. It is rather the public interest in fair administration of justice that comes into clash with the public interest sought to be protected by non-disclosure and the court is called upon to balance these two aspects of public interest and decide which aspect predominates. We shall

have to discuss this problem of balancing different aspects of public interest a little later, but in the meanwhile let us continue with the examination of the decision in *Sukhdev Singh* case[27]. Gajendragadkar, J. (as he then was) after pointing out that public interest was the sole foundation for the claim for protection under Section 123 proceeded to consider when a document can be said to be relating to "affairs of State" within the meaning of that section. The learned Judge observed that three different views are possible on this question. The first view is that documents relating to affairs of State are broadly divisible into two classes, one the disclosure of which will cause no injury to public interest and which may therefore be described as innocuous documents and the other the disclosure of which may cause injury to public interest and may therefore be described as noxious documents; it is the head of the department who decides to which class the document in respect of which the claim for protection against disclosure is made, belongs; if he comes to the conclusion that the document is innocuous, he will give permission for its production; if, however, he comes to the conclusion that the document is noxious, he will withhold such permission; in any case the court does not materially come into the picture. The second view is that documents relating to affairs of State should be confined only to the class of noxious documents and when a question arises, it is for the court to determine the character of the document and if necessary, to enquire whether its disclosure would lead to injury to public interest. The third view which does not accept either of the two extreme positions would be that the court can determine the character of the document and if it comes to the conclusion that the document belongs to the noxious class, it may leave it to the head of the department to decide whether its production should be permitted or not, for it is not the policy of Section 123 that in the case of every noxious document, the head of the department must always withhold permission. The learned Judge then proceeded to consider which of the three views represents the correct legal position and for that purpose, turned to examine Section 162 and after discussing the true import of that section and holding that where an objection to the disclosure of a document is raised under Section 123 on the ground that it relates to affairs of State, the court cannot inspect the document for the purpose of deciding the objection, the learned Judge accepted the third view as correct and summarised his conclusion in the following words:

> Thus our conclusion is that reading Sections 123 and 162 together the court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not.
>
> In this enquiry the court has to determine the character or class of the document. If it comes to the conclusion that the document does

> not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State, it should leave it to the head of the department to decide whether he should permit its production or not.

The learned Judge thus took the view in no uncertain terms that documents relating to affairs of State are documents belonging to the noxious class, that is, documents which by reason of their contents or the class to which they belong, are such that disclosure may cause injury to public interest. The learned Judge agreed that it is for the court to determine whether a particular document in respect of which the claim for non-disclosure is made is a document relating to affairs of the State or in other words, it is a document falling within the noxious class, but introduced a serious impediment in the way of the court making such determination by holding that the court cannot for this purpose inspect the document or hold "an enquiry into the possible injury to public interest which may result from the disclosure of the document." Now, if the court has no power to inspect the document, it is difficult to understand how the court can find, without conducting an enquiry as regards the possible effect of the disclosure of the document upon public interest, that the document is one relating to affairs of State, as ex hypothesi a document can be said to relate to affairs of State only if its disclosure will cause injury to public interest. It might be that there are certain classes of documents which are of such a character that even without inspecting them or conducting an enquiry, it might be possible to say that by virtue of their character, their disclosure would be injurious to public interest and therefore they are documents relating to affairs of State. But, there might be other documents which do not fall within this description and yet whose disclosure might be injurious to public interest and in case of such documents, it would not be possible for the court without inspecting them or at any rate without holding an enquiry, to determine whether their disclosure would be injurious to public interest and they should therefore be classified as documents relating to affairs of State. Even so, according to Gajendragadkar, J. and the other learned Judges, the court can and must determine whether such documents relate to affairs of State without inspecting them and without even holding an enquiry into the possible injury to public interest which might result from their disclosure. The view taken by Gajendragadkar, J. and the other learned Judges in *Sodhi Sukhdev Singh* case[27] thus runs into an inconsistency and creates an illogical situation.

69. There is also another infirmity from which the view taken in *Sodhi Sukhdev Singh* case[27] suffers. Gajendragadkar, J. speaking on behalf of himself and the other learned Judges observed that when an objection against the disclosure of a document is raised under Section 123, the court must first determine the character of the document and if it comes to the conclusion that the document relates to affairs of State, it should leave it to the head of the department to decide whether he should permit its production

or not. Now even according to Gajendragadkar, J. and the other learned Judges, a document can be said to relate to affairs of State only if it is a document of such a character that its disclosure will injure public interest and therefore the court would have to reach the conclusion that the disclosure of the document will be injurious to public interest before it can find that the document relates to affairs of State. If that be so, it is difficult to understand, after the court has enquired into the objection and come to the conclusion that disclosure of the document would be injurious to public interest. what purpose would be served by reserving to the head of the department the power to permit its disclosure, because the question to be decided by him would practically be the same, namely, whether disclosure of the document would be injurious to public interest — a question already decided by the court. In other words, if injury to public interest is the foundation of this immunity from disclosure, when once the court has inquired into the question and found that the disclosure of the document will injure public interest and therefore it is a document relating to affairs of State, it would in most cases be a futile exercise for the head of the department to consider and decide whether its disclosure should be permitted as he would be making an enquiry into the identical question. There may be a few rare cases where in regard to a document which by reason of the class to which it belongs may be regarded as relating to affairs of State, the head of the department may be able to take the view that though it belongs to the noxious class, its disclosure would not be injurious to public interest and therefore allow it to be disclosed. But, by and large, once the court has found that the document is of such a character that its disclosure will cause injury to public interest, it would be futile to leave it to the head of the department to decide whether he should permit its production or not. We are therefore unable to accept the decision in *Sodhi Singh* case[27] as laying down the correct law on this point. The court would allow the objection if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document. The basic question to which the court would therefore have to address itself for the purpose of deciding the validity of the objection would be whether the document relates to affairs of State or in other words, it is of such a character that its disclosure would be against the interest of the State or the public service and if so, whether the public interest in its non-disclosure is so strong that it must prevail over the public interest in the administration of justice and on that account, it should not be allowed to be disclosed. The final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with the court by reason of Section 162.

70. Now an objection against the disclosure of a document on the ground that it relates to affairs of State may be made before the court either because it would be against the interest of the State or the public service to disclose its contents or because it belongs to a class of document which in the public interest ought not to be disclosed, whether or not it would be harmful to disclose the contents of the particular document. Where immunity from disclosure is claimed on the ground that disclosure of the contents of the document would be injurious to the interest of the State or the public service it would not be difficult to decide the claim because it would almost invariably be supported by an affidavit made either by the Minister or by the head of the department and if the Minister or the head of the department asserts that to disclose the contents of the document "would or might do to the nation or the public service a grave injury, the court will be slow to question his opinion or to allow any interest, even that of justice, to prevail over it" unless there can be shown to exist some factor suggesting either lack of good faith or an error of judgment or an error of law on the part of the minister or the head of the department. But, even in such cases it is now well settled that the court is not bound by the statement made by the minister or the head of the department in the affidavit and it retains the power to balance the injury to the State or the public service against the risk of injustice, before reaching its decision. *Vide* observations of Lord Scarman in *Burmah Oil Co. Ltd.* v. *Bank of England*[30]. But the claim in the present case to withold disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to continuance of S.N. Kumar is not based on the ground that the contents of these particular documents are such that their disclosure would harm the national interest or the interest of public service. The claim put forward by the learned Solicitor-General on behalf of the Union of India is that these documents are entitled to immunity from disclosure because they belong to a class of documents which it would be against national interest or the interest of the judiciary to disclose. It is settled law, and it was so clearly recognised in *Raj Narain* case[29] that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors

30. (1979) 3 All ER 700, 732

abroad (vide: *Conway* v. *Rimmer*[31]; and *Reg* v. *Lewes Justices, ex parte Home Secretary*[32], papers brought into existence for the purpose of preparing a submission to cabinet (vide: *Lanyon Property Limited* v. *Commonwealth*[33] and indeed any documents which relate to the framing of government policy at a high level (vide: *Re, Grosvenor Hotel, London*[34]). It would seem that according to the decision in *Sodhi Sukhdev Singh* case[35], this class may also extend to "notes and minutes made by the respective officers on the relevant files, information expressed or reports made and gist of official decisions reached" in the course of determination of questions of policy. Lord Reid in *Conway* v. *Rimmer*[31] at page 952 proceeded also to include in this class "all documents concerned with policy making within departments including, it may be minutes and the like by quite junior officials and correspondence with outside bodies". It is not necessary for us for the purpose of this case to consider what documents legitimately belong to this class so as to be entitled to immunity from disclosure, irrespective of what they contain. But, it does appear that cabinet papers, minutes of discussions of heads of departments and high level documents relating to the inner working of the government machine or concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure.

71. Now, one reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. This reason based on the need for frankness and candour, though suggested by some judges, has not found universal acceptance. In *Conway* v. *Rimmer*[31] Lord Reid dismissed the "candour argument" summarily at page 952 and Lord Upjohn pointed out at page 993 that immunity of this class of documents against disclosure "has nothing whatever to do with candour or uninhibited freedom of expression", for it is not possible to believe "that any minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies, of some colleague, by the thought that his observation might one day see the light of day." Lord Morris of Borth-Y-Gest also said in the same case at page 957:

> In many decided cases, however, there have been references to a suggestion that, if there were knowledge that certain documents (e.g.

31. 1968 AC 910, 952, 973, 979, 987, 993: (1968) 1 All ER 874 (HL)
32. 1973 AC 388, 412: (1972) 2 All ER 1057 (HL) (cited therein as *Rogers* v. *Secretary of State for the Home Department, Gaming Board for Great Britain* v. *Rogers*)
33. 129 CLR 650
34. (1964) 3 All ER 354 (CA)
35. *State of Punjab* v. *Sodhi Sukhdev Singh*, (1961) 2 SCR 371: AIR 1961 SC 493: (1961) 2 SCJ 691

> reports) might in some circumstances be seen by eyes for which they were never intended, the result would be that in the making of similar documents in the future candour would be lacking. Here is a suggestion of doubtful validity. Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated.

Lord Radcliffe also remarked in *Glasgow Corporation* v. *Central Land Board*[36] that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harmen, LJ in the *Grosvenor Hotel* case[34] at page 1255. Lord Salmon too rejected the "candour theory" in *Reg* v. *Lewes Justices, ex parte Secretary of State for Home Deptt.*[38] at page 413 by referring to it as "the old fallacy" that "any official in the government service would be inhibited from writing frankly and possibly at all unless he could be sure that nothing which he wrote could ever be exposed to the light of day". The candour argument has also not prevailed with judges and jurists in the United States and it is interesting to note what Raoul Berger while speaking about the immunity claimed by President Nixon against the demand for disclosure of the Watergate Tapes, says in his book *Executive Privilege: A Constitutional Myth* at page 264:

> "Candid interchange" is yet another pretext for doubtful secrecy. It will not explain Mr. Nixon's claim of blanket immunity for members of his White House staff on the basis of mere membership without more; it will not justify Kleindienst's assertion of immunity from congressional inquiry for two and one-half million federal employees. It is merely another testimonial to the greedy expansiveness of power, the costs of which patently outweigh its benefits. As the latest branch in a line of illegitimate succession, it illustrates the excess bred by the claim of executive privilege.

We agree with these learned Judges that the need for candour and frankness cannot justify granting of complete immunity against disclosure of documents of this class, but as pointed out by Gibbs, ACJ in *Sankey* v. *Whitlam*[37], it would not be altogether unreal to suppose "that in some matters at least communications between ministers and servants of the Crown may be more frank and candid if these concerned believe that they are protected from disclosure" because not all Crown servants can be expected to be made of "sterner stuff". The need for candour and frankness must therefore certainly be regarded as a factor to be taken into account in determining whether, on balance, the public interest lies in favour of disclosure or against it (*vide*: the observations of Lord Denning in *Neilson* v. *Lougharne*[38].

72. There was also one other reason suggested by Lord Reid in

36. 1956 SC 1 (HL), 20: 1956 SLT 41
37. (1978) 21 Australian LR 505 : 53 ALJR 11
38. (1981) 1 All ER 829, 835

Conway v. *Rimmer*[31] for according protection against disclosure to documents belonging to this case: "To my mind", said the learned Law Lord: "the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind." But this reason does not commend itself to us. The object of granting immunity to documents of this kind is to ensure the proper working of the government and not to protect the ministers and other government servants from criticism however intemperate and unfairly based. Moreover, this reason can have little validity in a democratic society which believes in an open government. It is only through exposure of its functioning that a democratic government can hope to win the trust of the people. If full information is made available to the people and every action of the government is bona fide and actuated only by public interest, there need be no fear of "ill-informed or captious public or political criticism". But at the same time it must be conceded that even in a democracy, government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to be made public. It is therefore in the interest of the State and necessary for the proper functioning of the public service that some protection be afforded by law to documents belonging to this class. What is the measure of this protection is a matter which we shall immediately proceed to discuss.

73. We have already pointed out that whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the non-disclosure would thwart the administration of justice by keeping back from the court a material document. There are two aspects of public interest clashing with each other out of which the court has to decide which predominates. The approach to this problem is admirably set out in a passage from the judgment of Lord Reid in *Conway* v. *Rimmer*[31]:

> It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be

> produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the State in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved.

The court has to balance the detriment to the public interest on the administrative or executive side which would result from the disclosure of the document against the detriment to the public interest on the judicial side which would result from non-disclosure of the document though relevant to the proceeding [*Vide* the observations of Lord Pearson in *Reg* v. *Lewes Justices, ex parte Home Secretary*[32] at page 406 of the Report]. The court has to decide which aspect of the public interest predominates or in other words, whether the public interest which requires that the document should not be produced, outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence. The court has thus to perform a balancing exercise and after weighing the one competing aspect of public interest against the other, decide where the balance lies. If the court comes to the conclusion that, on the balance, the disclosure of the document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class. Even in *Conway* v. *Rimmer*[31] at page 952, Lord Reid recognised an exception that cabinet minutes and the like can be disclosed when they have become only of historical interest, and in *Lanyon Property Limited* v. *Commonwealth*[33], Menzies, J. agreed that there might be "very special circumstances" in which such documents might be examined. Lord Scarman also pointed out in the course of his speech in *Burmah Oil Co. Ltd.* v. *Bank of England*[30] that he did not accept "that there are any classes of documents which, however harmless their contents and however strong the requirement of justice, may never be disclosed until they are only of historical interest". The learned law Lord said and we are quoting here his exact words since they admirably express our own approach to the subject :

> But is the secrecy of the 'inner workings of the government machine' so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some State secret

> of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?
>
> The reasons given for protecting the secrecy of government at the level of policy-making are two. The first is the need for candour in the advice offered to Ministers; the second is that disclosure 'would create or fan ill-informed or captious public or political criticism'. Lord Reid in *Conway* v. *Rimmer*[31] thought the second 'the most important reason'. Indeed, he was inclined to discount the candour argument.
>
> I think both reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service (i.e. the executive arm of the government) and the public interest in the administration of justice. Sometimes the public service reasons will be decisive of the issue; but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed.

The same view was expressed by Gibbs, ACJ in *Sankey* v. *Whitlam*[37] where the learned Acting Chief Justice said:

> I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with special care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection — the extent of protection required will depend to some extent on the general subject-matter with which the documents are concerned.

There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to anyone by withholding relevant evidence. This is a balancing task which has to be performed by the court in all cases.

74. What should be the technology and methodology of this balancing task is a matter which we shall presently examine. But, before we do so, it is necessary to point out that class immunity is not confined merely to that class of documents in respect of which non-disclosure is really necessary

for the proper functioning of the public service, though mostly it is in respect of documents falling within this class that the claim for class immunity is usually made. There is also another class of documents which has always been recognised by the Court as entitled to the same immunity and that class consists of documents evidencing the sources from which the police obtain information. Now we agree with the learned counsel on behalf of the petitioners that this immunity should not be lightly extended to any other class of documents, but, at the same time, boundaries cannot be regarded as immutably fixed. The principle is that whenever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure. If a new class comes into existence to which this principle applies, then that class would enjoy the same immunity. This is the basis on which in *Reg* v. *Lewes Justices, ex parte Home Secretary*[32] the House of Lords extended this immunity to a new class of documents, namely, all such documents as were supplied to the Gaming Board and related to the "character, reputation and financial standing . . . of the applicant". Lord Reid pointed out in that case that the claim for protection made on behalf of the Gaming Board was not based on the contents of the particular letter of which disclosure was sought by the appellant, but it was "based on the fact that the Board cannot adequately perform their statutory duty unless they can preserve the confidentiality of all communications to them regarding the character, reputation or antecedents of applicants for their consent". The learned Law Lord posited the question for consideration in the following words: "Here the question is whether the withholding of this class of documents is really necessary to enable the Board adequately to perform its statutory duties" and proceeded to hold that "if there is not to be very serious danger of the Board being deprived of information essential for the proper performance of their task, there must be a general rule that they are not bound to produce any document which gives information to them about any applicant". Lord Morris of Borth-Y-Gest also observed to the same effect at page 405 of the Report:

> However honourable and public spirited a person might be, he would undoubtedly feel somewhat inhibited in the future if he found that as a result of his last response to a request for information he had himself become a defendant or an accused. The test, however, is not in personal terms. It rests upon a consideration of the necessities of the public service arising out of the rather special duties and functions imposed and recognised by Parliament.

The House of Lords accordingly held that "on balance the public interest clearly requires that documents of this kind should not be disclosed" and thus upheld the claim of immunity in respect of the letter which gave information to the Gaming Board about the character, reputation and antecedents of the appellant. The question is whether immunity of this kind — what we have described as class immunity — should be extended to the class of documents consisting of correspondence exchanged between the

Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court and the Chief Justice of India in regard to appointment or non-appointment of a High Court or Supreme Court Judge.

75. Now we may conveniently at this stage consider the question as to how a claim for immunity against disclosure should be raised under Section 123. It is necessary to repeat and re-emphasize that this claim of immunity can be justifiably made only, if it is felt that the disclosure of the document would be injurious to public interest. Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the Press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document. So also the effect of the document on the ultimate course of the litigation — whether its disclosure would hurt the State in its defence — should have no relevance in making a claim for immunity against disclosure. The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court. It has therefore been held since long before *Conway* v. *Rimmer*[31] was decided in England and since the decision in *Sodhi Sukhdev Singh* case[35] in India that a claim for immunity against disclosure should be made by the minister who is the political head of the department concerned or failing him, by the secretary of the department and the claim should always be made in the form of an affidavit. Where the affidavit is made by the secretary, the Court may in an appropriate case require an affidavit of the minister concerned. The affidavit should show that the document in question has been carefully read and considered and the person making the affidavit has formed the view that the document should not be disclosed either because of its actual contents or because of the class of documents to which it belongs. If in a given case no affidavit is filed or the affidavit filed is defective, the Court may give an opportunity to the State to file a proper affidavit. The reason is that the immunity against disclosure claimed under Section 123 is not a privilege which can be waived by the State. It is an immunity which is granted in order to protect public interest and therefore even if the State has not filed an affidavit or the affidavit filed is not satisfactory, the court cannot abdicate its duty of deciding whether the disclosure of the document in question would be injurious to public interest and the document should not therefore be allowed to be disclosed. That is why in England this immunity is no longer described as "Crown Privilege" but is called "public interest immunity". This aspect of the immunity was emphasized by Lord Reid in *Reg* v. *Lewes Justices, ex parte Home Secretary*[32] where the learned Law Lord observed that the expression 'Crown Privilege'

is wrong and may be misleading and there is no question of any privilege in the ordinary sense of the word, as the real question is whether the public interest requires that the document shall not be produced. Lord Simon of Glaisdale also pointed out in the same case: "Crown privilege is a misnomer and apt to be misleading. It refers to the rule that certain evidence is inadmissible on the ground that its adduction would be contrary to the public interest . . . it is not a privilege which may be waived by the Crown or by anyone else". It is therefore clear that if a document is entitled to immunity against disclosure, it cannot be adduced in evidence by either party and even if neither of the parties claims such immunity, the Judge himself must take the objection, for the rule that the public interest must not be put in jeopardy by the disclosure of a document which would injure it, is one upon which the court should, if necessary, insist, even though no objection has been taken by any party or by any Government department. In *Conway* v. *Rimmer*[31] Lord Reid said that it is the duty of the Court to prevent the disclosure of a document without the intervention of any minister, "if possible serious injury to the national interest is readily apparent". In *Reg* v. *Lewes Justices, ex parte Home Secretary*[32] Lord Simon of Glaisdale pointed out that even a litigant or a witness may draw the attention of the Court to the nature of the document with a view to its being excluded. Since the immunity is founded on public interest, it is necessary that the court should have the power and the duty to prevent the disclosure of a document when it would be injurious to public interest to disclose it, even if the proper procedure for objection by or on behalf of the minister or the secretary has not been followed. The Court must intervene proprio motu if it appears that the public interest requires the document to be protected from disclosure.

76. This being the correct legal position, it is immaterial whether in the present case appropriate affidavit claiming immunity was filed on behalf of the Union of India. The learned Attorney-General sought to tender on an affidavit sworn by Burney, the then Secretary to the Home and Judiciary Department claiming immunity against disclosure in respect of the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to the non-appointment of S. N. Kumar but since the affidavit was sworn on September 7, 1981 and yet not tendered until September 16, 1981 even though the arguments had begun long back, we expressed our displeasure at the delay in filing the affidavit whereupon the learned Attorney-General stated that he would not rely upon the affidavit. Thereafter when the learned counsel for S. N. Kumar sought answers to certain queries in regard to this correspondence, the learned Attorney-General filed an affidavit sworn by T. N. Chaturvedi, Secretary to the Home and Judiciary Department claiming protection against disclosure of this correspondence, strong objection was taken to the filing of this affidavit by the learned counsel on behalf of the petitioners and S. N. Kumar on the ground that the learned Attorney-General having made a statement that he would not rely upon previous affidavit, it was not

competent and in any event not proper for the Union of India to file the affidavit of T. N. Chaturvedi which was almost in the same terms as the previous affidavit. But we overruled this objection, because, as would be clear from what we have discussed above, even if no affidavit were filed earlier on behalf of the Union of India claiming immunity against disclosure, the Union of India could always file an affidavit claiming such immunity at any stage before the claim for immunity was considered and decided by the court and once the claim for immunity was raised, the court could also on its own direct the Union of India to file a proper affidavit, if no such affidavit were already filed. We therefore took the affidavit of T. N. Chaturvedi on file and allowed the Union of India to rely upon it. We may point out that even if this affidavit had not been filed, the Court would still have had to consider on the basis of the other material before it including the nature of the correspondence whether its disclosure would be injurious to public interest and hence it should not be allowed to be disclosed.

77. We may also point out that we were invited to inspect for ourselves the correspondence exchanged between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India for the purpose of deciding whether that correspondence was entitled to immunity against disclosure. Now the view taken in *Sodhi Sukhdev Singh* case[39] was that where an objection is raised against the disclosure of a document under Section 123, the Court has no power to inspect the document under Section 162 for the purpose of deciding the objection. But with the greatest respect to the learned Judges who decided that case, we do not think this view is correct and in fact subsequent decisions of this Court seem to be against it. So far as English Law is concerned it is now well settled as a result of the decision of the House of Lords in *Conway* v. *Rimmer*[40] that there is a residual power in the Court to inspect the document if the Court finds it necessary to do so for the purpose of deciding whether on balance the disclosure of the document would cause greater injury to public interest than its non-disclosure. Vide *Conway* v. *Rimmer*[40] at pages 953, 979, 981 and 993. This residual power of the court to inspect the document has also been recognised in Australian Law by the decision of the High Court of Australia in *Sankey* v. *Whitlam*[37]. We do not see any reason why under Indian Law the Court should be denied this residual power to inspect the document. It is true that under Section 162 the Court cannot inspect the document if it relates to affairs of State, but this bar comes into operation only if the document is established to be one relating to affairs of State. If, however, there is any doubt whether the document does relate to affairs of State, the residual power which vests in the Court to inspect the document for the purpose of determining whether the disclosure of the document would be injurious to public interest and the

39. *State of Punjab* v. *Sodhi Sukhdev Singh*, (1961) 2 SCR 371 : AIR 1961 SC 493 : (1961) 2 SCJ 691

40. 1968 AC 910, 952, 973, 979, 987, 993 : (1968) 1 All ER 874 (HL)

document is therefore one relating to affairs of State, is not excluded by Section 162. This Court in fact held in no uncertain terms in *Raj Narain* case[41] where an objection against the disclosure of the Blue Book was taken on behalf of the State under Section 123, that if the Court was not satisfied with the affidavit objecting to the disclosure of the document, the Court may inspect the document. Ray, C. J. observed at two places while dealing with the objection against the disclosure of the Blue Book under Section 123 that "If the Court would yet like to satisfy itself the Court may see the document. This will be the inspection of the document by the Court" and "if the Court in spite of the affidavit wishes to inspect the document, the Court may do so" (SCC p. 443). Mathew, J. also pointed out that in *Amar Chand Butail* v. *Union of India*[42], this Court inspected the document in order to see whether it related to affairs of State. There can therefore, be no doubt that even where a claim for immunity against disclosure of a document is made under Section 123, the Court may in an appropriate case inspect the document in order to satisfy itself whether its disclosure would, in the particular case before it, be injurious to public interest and the claim for immunity must therefore be upheld. Of course this power of inspection is a power to be sparingly exercised, only if the Court is in doubt, after considering the affidavit, if any, filed by the minister or the secretary, the issues in the case and the relevance of the document whose disclosure is sought. Since, in the present case, the affidavit of T.N. Chaturvedi claiming immunity against disclosure was made at a late stage of the proceedings and the claim for immunity was in respect of a new class of documents which has so far not come up for judicial consideration and we were in doubt, even after considering the affidavit, whether the correspondence whose disclosure was sought on behalf of the petitioners and S. N. Kumar was of such a character that its disclosure would, on an overall view after weighing the two aspects of public interest referred to above, be injurious to public interest, we inspected the correspondence for ourselves for the purpose of deciding whether or not it should be ordered to be disclosed.

78. Now as we have already pointed out above, it is for the court to decide the claim for immunity against disclosure made under Section 123 by weighing the competing aspects of public interest and deciding which, in the particular case before the court, predominates. The court is not bound by the affidavit made by the minister or the secretary because the minister or the secretary would be concerned primarily and almost exclusively with the assertion of the public interest which would be injured by the disclosure of the document and he would have very little concern, if at all, with the public interest in the fair administration of justice and in fact he would not be in a position to appreciate and assess the relative importance of the two

41. *State of U. P.* v. *Raj Narain*, (1975) 4 SCC 428: (1975) 3 SCR 333: AIR 1975 SC 865

42. AIR 1964 SC 1658: (1965) 1 SCJ 243

competing public interests so as to be able to judge as to which in the particular case before the Court should be allowed to prevent. What should be the relative weight to be attached to each aspect of public interest is a question which the court would be best qualified to decide and not the minister or the secretary. That is why in *Conway* v. *Rimmer*[40] Lord Reid, while rejecting the notion that a minister's claim of immunity was conclusive, pointed out at page 943 that the minister who withholds production of a document has no duty to consider the degree of public interest involved in a particular case in frustrating the due administration of justice, it not mattering to the minister at all whether the result of withholding the document would merely be to deprive a litigant of some evidence on a minor issue in a case of little importance or on the other hand, to make it impossible to do justice in a case of the greatest importance. The court would of course consider the affidavit made by the minister or the secretary and give it due weight and importance, but ultimately it is the court which will have to determine which aspect of public interest must prevail and whether the claim for immunity against disclosure should be upheld or not. This was most felicitously expressed by Lord Radcliffe in the Scottish appeal of *Glasgow Corporation* v. *Central Land Board*[36] where the learned Law Lord said :

> The power reserved to the court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. The interests of government, for which the minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the court would be better qualified than minister to measure the importance of such principles in application to the particular case that is before it.

Mathew, J. also observed to the same effect in his concurring opinion in *Raj Narain* case[41] : (SCC pp. 452-53, para 71)

> The claim of the Executive to exclude evidence is more likely to operate to subserve a partial interest, viewed exclusively from a narrow departmental angle. It is impossible for it to see or give equal weight to another matter, namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the Court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates.

The court will therefore have to put in the scales against the injury to public interest which may be caused by the disclosure of the document, the likely injury to the cause of injustice by non-disclosure and both will have to

be assessed and weighed and it will have to be determined on which side the balance tilts.

79. Now obviously the weight of the likely injury to the cause of justice will vary according to the nature of the proceeding in which the disclosure is sought, the relevance of the document and the degree of likelihood that the document will be of importance in the litigation. The particular nature of the proceeding and the importance of the document in the determination of the issues arising in it are vital considerations to be taken into account in determining what are the relevant aspects of public interest which are to be weighed and what is the outcome of that weighing process. Perhaps the most striking example of the way in which the nature of the case will bear upon the judicial process of weighing aspects of public interest is afforded by the well-recognised rule that where a document is necessary to support the defence of an accused person whose liberty is at stake in a criminal trial, it must be disclosed whatever be the nature of the document, because, as observed by Lord Simon of Glaisdale in *D* v. *National Society for the Prevention of Cruelty to Children*[43-44], "the public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest" which might be injured by the disclosure of the document. Lord Keith also emphasized the necessity of taking the particular nature of the proceeding into account in the balancing process, when he said in *Glasgow Corporation* v. *Central Land Board*[36] that "everything must depend on the particular circumstances of the case. It is impossible to lay down broad and general rules." So also in *Sankey* v. *Whitlam*[45] the High Court of Australia pointed out that the character of the proceeding in which the claim for immunity against disclosure is raised and the importance of the document in the determination of the issues arising in the proceeding are of extreme relevance in deciding which way the balance of public interest lies. There, the question was whether in a proceeding alleging offences against Mr. Whitlam, a former Prime Minister and others, certain papers and documents which were relevant to the issues arising in the proceeding were entitled to public interest immunity so as to be protected against disclosure. The High Court of Australia negatived the claim for immunity and in the course of his judgment, Stephen, J. laid the greatest stress on the character of the proceeding and pointed out its triple significance in the determination of the claim :

> First, it makes it very likely that, for the prosecution to be successful, its evidence must include documents of a class hitherto regarded as undoubtedly the subject of Crown privilege. But then to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be

43-44. (1977) 2 WLR 207 : (1977) 1 All ER 589 (HL)

45. (1978) 21 Australian LR 505 : 53 ALJR 11

> exercising a far more potent power: by a decision to claim privilege dismissal of the charge will be wellnigh ensured. Secondly, and assuming for the moment that there should prove to be any substance in the present charges, their character must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it. Thirdly, the high offices which were occupied by those charged and the nature of the conspiracies sought to be attributed to them in those offices must make it a matter of more than usual public interest that in the disposition of the charges the course of justice be in no way unnecessarily impeded. For such charges to have remained pending and unresolved for as long as they have is bad enough; if they are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest for non-disclosure should be shown before the privilege should be accorded.

The nature of the proceeding in which the claim for immunity arose was regarded as an important factor influencing the decision of the court in rejecting the claim and ordering production of the documents. It would thus seem clear that in the weighing process which the court has to perform in order to decide which of the two aspects of public interest should be given predominance, the character of the proceeding, the issues arising in it and the likely effect of the documents on the determination of the issues must form vital considerations, for they would affect the relative weight to be given to each of the respective aspects of public interest when placed in the scales.

80. Bearing these observations in mind, we must now proceed to examine the claim for immunity against disclosure in respect of the correspondence between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India in regard to non-appointment of S.N. Kumar. It was a class immunity which was claimed in respect of this correspondence and the protected class was said to consist of correspondence between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the Chief Minister or the Law Minister of the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or a Supreme Court Judge or transfer of a High Court Judge and the notings made by these constitutional functionaries in that behalf. The argument was that the documents belonging to this class are immune from disclosure, irrespective of their contents, because it is in national interest and also necessary for maintaining the dignity of the judiciary and preserving the confidence of the people in the integrity of the judicial process that documents belonging

to this class should be withheld from disclosure. Now there are a few prefatory remarks we would like to make before embarking upon an examination of this argument. In the first place, it is necessary to bear in mind that the burden of establishing a claim for class immunity is very heavy on the person making the claim. Lord Reid pointed out in *Reg* v. *Lewes Justices, ex parte Home Secretary*[46] that the speeches in *Conway* v. *Rimmer*[40] made it clear that there is a heavy burden of proof on any authority which makes a claim for class immunity. The claim for class immunity is an extraordinary claim because it is based not upon the contents of the document in question but upon its membership of a class whatever be its contents and therefore the court should be very slow in upholding such a broad claim which is contradictory, if not destructive, of the concept of open government. Secondly, it is true, as pointed out earlier, that classes of documents to which the immunity may be accorded are not closed and in the life of a fast-changing society rapidly growing and developing under the impact of vast scientific and technological advances new class or classes of documents may come into existence to which the immunity may have to be granted in public interest, but that should only be as a highly exceptional measure. It is only under the severest compulsion of the requirement of public interest that the court may extend the immunity to any other class or classes of documents and in the context of our commitment to an open government with the concomitant right of the citizen to know what is happening in the government, the court should be reluctant to expand the classes of documents to which immunity may be granted. The court must on the contrary move in the direction of attenuating the protected class or classes of documents, because by and large secrecy is the badge of an authoritarian government. We may point out once again, though it be at the cost of repetition, that even in regard to documents belonging to the class which has been judicially recognised as entitled to immunity, the law must now be taken to be well settled that the immunity is not absolute. The public interest in non-disclosure of a document belonging to this class may in an appropriate case yield to the public interest that in the administration of justice, the court should have the fullest possible access to every relevant document and in that event, the document would be liable to be disclosed even though it belongs to the protected class. The executive cannot by merely invoking the scriptural formula of class immunity defeat the cause of justice by withholding a document which is essential to do justice between the parties, for otherwise the doctrine of class immunity would become a frightful weapon in the hands of the executive for burying its mistakes, covering up its inefficiencies and sometimes even hiding its corruption. Every claim for immunity in respect of a document, whatever be the ground on which the immunity is claimed and whatever be the nature of the document, must stand scrutiny of the court with reference to one and only one test, namely, what does public interest require — disclosure or non-disclosure. The doctrine of class

46. 1973 AC 388 : (1972) 2 All ER 1057 (HL), *see also* footnote 32

immunity is therefore no longer impregnable; it does not any more deny judicial scrutiny; it is no more a *mantra* to which the court pays obeisance. Whenever class immunity is claimed in respect of a document, the court has to weigh in the scales the one aspect of public interest which requires that the document should not be disclosed against the other that the court in performing its functions should not be denied access to relevant document and decide which way the balance lies. And this exercise has to be performed in the context of the democratic ideal of an open government.

81. If we approach the problem before us in the light of these observations, it will be clear that the class of documents consisting of the correspondence exchanged between the Law Minister or other high level functionary of the Central Government, the Chief Justice of the High Court, the State Government and the Chief Justice of India in regard to appointment or non-appointment of a High Court Judge or Supreme Court Judge or the transfer of a High Court Judge and the notes made by these constitutional functionaries in that behalf cannot be regarded as a protected class entitled to immunity against disclosure. It is undoubtedly true that appointment or non-appointment of a High Court Judge or a Supreme Court Judge and transfer of a High Court Judge are extremely important matters affecting the quality and efficiency of the judicial institution and it is therefore absolutely essential that the various constitutional functionaries concerned with these matters should be able to freely and frankly express their views in regard to these matters. But we do not think that the candour and frankness of these constitutional functionaries in expressing their views would be affected if they felt that the correspondence exchanged between them would be liable to be disclosed in a subsequent judicial proceeding. The constitutional functionaries concerned in this exercise are holders of high constitutional offices such as the Chief Justice of a High Court and the Chief Justice of India and it would not be fair to them to say that they are made of such weak stuff that they would hesitate to express their views with complete candour and frankness if they apprehend subsequent disclosure. We have no doubt that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would not be deterred from performing their constitutional duty of expressing their views boldly and fearlessly even if they were told that the correspondence containing their views might subsequently be disclosed. If, to quote the words of Lord Pearce in *Conway* v. *Rimmer*[40] "there are countless teachers at schools and universities, countless employers of labour, who write candid reports, unworried by the outside chance of disclosure," there is no reason to suspect that high level constitutional functionaries like the Chief Justice of a High Court and the Chief Justice of India would flinch and falter in expressing their frank and sincere views when performing their constitutional duty. We have already dealt with the argument based on the need for candour and frankness and we must reject it in its application to the case of holders of high constitutional

offices like the Chief Justice of a High Court and the Chief Justice of India. Be it noted — and of this we have no doubt — that our Chief Justices and Judges are made of sterner stuff; they have inherited a long and ancient tradition of independence and impartiality; they are by training and experience as also by their oath of office dedicated to the cause of justice administered without fear or favour, affection or ill will and in fact there is no power on earth which can deflect them from the path of rectitude. They are, to quote the words from the famous verse from Manasollasa रागद्वेषविवर्जिताः and विलोभा भयवर्जिताः and we find it difficult to believe that they would not act as judges but as weak kneed and effete individuals afraid to express their views lest they might come to be known to others and provoke criticism. The Chief Justice of a High Court and the Chief Justice of India would undoubtedly expect confidentiality while expressing their views but that is no ground for upholding a claim for class immunity in respect of the correspondence exchanged between them and the Central Government or the State Government. Confidentiality is not a head of privilege and the need for confidentiality of high level communications without more cannot sustain a claim for immunity against disclosure. Vide: *Science Research Council* v. *Nasse*[47] and particularly the observations of Lord Scarman at pages 697 and 698. Even if a document be confidential, it must be produced, notwithstanding its confidentiality, if it is necessary for fairly disposing of the case, unless it can be shown that its disclosure would otherwise be injurious to public interest.

82. Now we fail to see how in cases of this kind where non-appointment of an Additional Judge for a further term or transfer of a High Court Judge is challenged, the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them, could at all said to be injurious to public interest. We have already pointed out above that so far as non-appointment of an Additional Judge for a further term is concerned, the only two grounds on which the decision not to appoint can be assailed are: firstly, that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India before reaching the decision and secondly, that the decision is mala fide or based on irrelevant considerations. Now obviously these two grounds cannot be made good by a petitioner unless the correspondence between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notings made by them are disclosed, for they alone would furnish the relevant evidence showing whether these two grounds are satisfied or not. These documents would show or at least shed light on the question whether there was full and effective consultation between the Central Government on the one hand and the Chief Justice of the

47. (1979) 3 All ER 673 (HL)

High Court, the State Government and the Chief Justice of India on the other, because, as already pointed out by us, such consultation would ordinarily be in writing — as it ought to be — and they would also, in cases where such consultation has taken place, indicate the reasons which have weighed with the Central Government in reaching its decision. Apart from these documents, there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation or that the decision of the Central Government was based on irrelevant considerations and if an affidavit is made by an appropriate authority of the Central Government or by the Chief Justice of the High Court or by the Chief Justice of India stating that every relevant aspect of the question was discussed and there was full and effective consultation, it would be wellnigh impossible for the petitioner to successfully challenge the decision of the Central Government. It is only through these documents that the petitioner can, if at all, hope to show that there was no full and effective consultation by the Central Government with the Chief Justice of the High Court, the State Government and the Chief Justice of India or that the decision of the Central Government was mala fide or based on irrelevant grounds and therefore, to accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against the discontinuance of the Additional Judge. It would have the effect of placing the Union of India, whose decision is challenged, in an unassailable — almost invincible — position where it can, by claiming class immunity in respect of these documents, ensure the rejection of the writ petition. The harm that would be caused to the public interest in justice by the non-disclosure of these documents would in the circumstances far outweigh the injury which may possibly be caused by their disclosure, because the non-disclosure would almost inevitably result in the dismissal of the writ petition and consequent denial of justice even though the claim of the petitioner may be true and just. Moreover, it may be noted that the discontinuance of an Additional Judge by the Central Government is a serious matter and if such discontinuance is mala fide or based on irrelevant grounds, it would tend to affect the independence of the judiciary and it is therefore necessary in order to maintain public confidence in the independent functioning of the judiciary that the people should know whether the constitutional requirements were complied with before the decision was taken not to continue the Additional Judge and whether any oblique motivations or irrelevant considerations influenced the Central Government in reaching that decision. The charge against the Central Government in the first group of present writ petitions was that there was no full and effective consultation with the Chief Justice of India before the decision was reached by the Central Government in regard to S. N. Kumar and in any event, the decision of the Central Government was actuated by oblique or improper motives. This was a serious charge against the Central Government and there can be no doubt that it would be very much in pub-

lic interest that the necessary documents throwing light on the truth or otherwise of this charge should be disclosed, so that the full facts may be known to the public and the doubts raised and entertained about the influence of extraneous factors in the case of S. N. Kumar should be resolved and removed. It is significant to note that had there not been disclosure of these documents, a certain doubt or misgiving would have continued to prevail in the public mind that the decision to discontinue S. N. Kumar as an Additional Judge was taken by the Central Government without full and effective consultation of the Chief Justice of India and that this decision was motivated by oblique or irrelevant considerations. But, as we shall presently point out these documents when disclosed helped to clear this doubt and remove this misgiving by explaining to the people what were the true facts behind the decision to discontinue S. N. Kumar as an Additional Judge. Furthermore, it may be noted that when the charge against the Central Government is that it has discontinued S. N. Kumar as an Additional Judge for oblique or improper reasons and thereby sought to interfere with the independence of the judiciary, it would be singularly inappropriate to exclude these documents which constitute the only evidence, if at all, for establishing this charge, by saying that the disclosure of these documents would impair the efficient functioning of the judicial institution. The interest of the wider community in getting to the bottom of this charge is so great that it cannot be allowed to be impeded by a mere rule of evidence. Nor can the decision to admit or exclude be safely left to the Central Government which is itself charged with wrongful or improper conduct.

83. These selfsame reasons must apply equally in negativing the claim for immunity in respect of the correspondence between the Law Minister and the Chief Justice of India and the relevant notings made by them in regard to the transfer of a High Court Judge including the Chief Justice of a High Court. These documents are extremely material for deciding whether there was full and effective consultation with the Chief Justice of India before effecting the transfer and the transfer was made in public interest, both of which are, according to the view taken by us, justiciable issues and the non-disclosure of these documents would seriously handicap the petitioner in showing that there was no full and effective consultation with the Chief Justice of India or that the transfer was by way of punishment and not in public interest. It would become almost impossible for the petitioner, without the aid of these documents, to establish his case, even if it be true. Moreover, the transfer of a High Court Judge or Chief Justice of a High Court is a very serious matter and if made arbitrarily or capriciously or by way of punishment or without public interest motivation, it would erode the independence of the judiciary which is a basic feature of the Constitution and therefore when such a charge is made, it is in public interest that it should be fully investigated and all relevant documents should be produced before the court so that the full facts may come before the people, who in a democracy are the ultimate arbiters. It would be plainly contrary to

public interest to allow the inquiry into such a charge to be baulked or frustrated by a claim for immunity in respect of documents essential to the inquiry. It is also important to note that when the transfer of a High Court Judge or Chief Justice of a High Court is challenged, the burden of showing that there was full and effective consultation with the Chief Justice of India and the transfer was effected in public interest is on the Union of India and it cannot withhold the relevant documents in its possession on a plea of immunity and expect to discharge this burden by a mere statement in an affidavit. Besides, if the reason for excluding these documents is to safeguard the proper functioning of the higher organs of the State including the judiciary, then that reason is wholly inappropriate where what is charged is the grossly improper functioning of those very organs. It is therefore obvious that, in a proceeding where the transfer of a High Court Judge or Chief Justice of a High Court is challenged, no immunity can be claimed in respect of the correspondence exchanged between the Law Minister and the Chief Justice of India and the notings made by them, since, on the balance, the non-disclosure of these documents would cause greater injury to public interest than what may be caused by their disclosure.

84. But, quite apart from these considerations, we do not understand how the disclosure of the correspondence exchanged between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India and the relevant notes made by them in regard to non-appointment of an Additional Judge for a further term or transfer of a High Court Judge can be detrimental to public interest. It was argued by the learned Solicitor-General on behalf of the Union of India that if the Chief Justice of the High Court and the Chief Justice of India differ in their views in regard to the suitability of an Additional Judge for further appointment, the disclosure of their views would cause considerable embarrassment because the rival views might be publicly debated and there might be captious and uninformed criticism which might have the effect of undermining the prestige and dignity of one or the other Chief Justice and shaking the confidence of the people in the administration of justice. If the difference in the views expressed by the Chief Justice of the High Court and the Chief Justice of India becomes publicly known, contended the learned Solicitor-General, it might create a difficult situation for the Chief Justice of the High Court vis-a-vis the Chief Justice of India and if despite the adverse opinion of the Chief Justice of the High Court, the Additional Judge is continued for a further term, and the Additional Judge knows that he has been so continued overruling the view of the Chief Justice of the High Court, it might lead to a certain amount of friction which would be detrimental to the proper functioning of the High Court. So also if an Additional Judge is continued for a further term accepting the view expressed by the Chief Justice of the High Court and rejecting the opinion of the Chief Justice of India, it would again create a piquant situation

because it would affect the image of the Chief Justice of India in the public eyes. Moreover, a feeling might be created in the mind of the public that a person who was regarded as unsuitable for judicial appointment by one or the other of the two Chief Justices, has been appointed as a Judge and the litigants would be likely to have reservations about him and the confidence of the people in the administration of justice would be affected. The learned Solicitor-General contended that for these reasons it would be injurious to public interest to disclose the correspondence exchanged between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India.

85. We have given our most anxious thought to this argument urged by the learned Solicitor-General, but we do not think we can accept it. We do not see any reason why, if the correspondence between the Law Minister, the Chief Justice of the High Court and the Chief Justice of India and the relevant notes made by them, in regard to discontinuance of an Additional Judge are relevant to the issues arising in a judicial proceeding, they should not be disclosed. There might be difference of views between the Chief Justice of the High Court and the Chief Justice of India but so long as the views are held bona fide by the two Chief Justices, we do not see why they should be worried about the disclosure of their views? Why should they feel embarrassed by public discussion or debate of the views expressed by them when they have acted bona fide with the greatest care and circumspection and after mature deliberation. Do Judges sitting on a Division Bench not differ from each other in assessment of evidence and reach directly contrary conclusions on questions of fact? Do they not express their judicial opinions boldly and fearlessly leaving it to the jurists to decide which of the two differing opinions is correct? If two Judges do not feel any embarrassment in coming to different findings of fact which may be contrary to each other, why should two Chief Justices feel embarrassed if the opinions given by them in regard to the suitability of an Additional Judge for further appointment differ and such differing opinions are made known to the public. Not only tolerance but acceptance of bona fide difference of opinion is a part of judicial discipline and we find it difficult to believe that the disclosure of their differing opinions might create a strain in the relationship between the Chief Justice of the High Court and the Chief Justice of India. We have no doubt that the Chief Justice of the High Court would come to his own independent opinion on the material before him and he would not surrender his judgment to the Chief Justice of India, merely because the Chief Justice of India happens to be head of the judiciary having a large voice in the appointment of Judges on the Supreme Court Bench. Equally we are confident that merely because the Chief Justice of the High Court has come to a different opinion and is not prepared to change that opinion despite the persuasion of the Chief Justice of India, no offence would be taken by the Chief Justice of India and he would not harbour any feeling of resentment against the Chief

Justice of the High Court. Both the Chief Justices have trained judicial minds and both of them would have the humility to recognise that they can be mistaken in their opinions. We do not therefore see any real possibility of estrangements or even embarrassment for the two Chief Justices, if their differing views in regard to the suitability of an Additional Judge for further appointment are disclosed. We also find it difficult to agree that if the differing views of the two Chief Justices become known to the outside world, the public discussion and debate that might ensue might have the effect of lowering the dignity and prestige of one or the other of the two Chief Justices. When the differing views of the two Chief Justices are made public as a result of disclosure, there would certainly be public discussion and debate in regard to those views with some criticising one view and some criticising the other, but that cannot be helped in a democracy where the right of free speech and expression is a guaranteed right and if the views have been expressed by the two Chief Justices with proper care and deliberation and a full sense of responsibility in discharge of a constitutional duty, there is no reason why the two Chief Justices should worry about public criticism. We fail to see how such public criticism could have the effect of undermining the prestige and dignity of one or the other Chief Justice. So long as the two Chief Justices have acted honestly and bona fide with full consciousness of the heavy responsibility that rests upon them in matters of this kind, we do not think that any amount of public criticism can affect their prestige and dignity. But if either of the two Chief Justices has acted carelessly or improperly or irresponsibly or out of oblique motive, his view would certainly be subjected to public criticism and censure and that might show him in poor light and bring him down in the esteem of the people, but that will be the price which he will have to pay for his remissness in discharge of his constitutional duty. No Chief Justice or Judge should be allowed to hide his improper or irresponsible action under the clock of secrecy. If any Chief Justice or Judge has behaved improperly or irresponsibly or in a manner not befitting the high office he holds, there is no reason why his action should not be exposed to public gaze. We believe in an open government and openness in government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers. Today the process of judicial appointments and transfers is shrouded in mystery. The public does not know how Judges are selected and appointed or transferred and whether any and if so what, principles and norms govern this process. The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely, the Chief Justice of the High Court, the Chief Minister of the State, the Law Minister of the Central Government and the Chief Justice of India in case of appointment or non-appointment of a High Court Judge and the Law Minister of the Central Government and the Chief Justice of India

in case of appointment of a Supreme Court Judge or transfer of a High Court Judge. The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off. We do not see any reason why this process of appointment and transfer of Judges should be regarded as so sacrosanct that no one should be able to pry into it and it should not be protected against disclosure at all events and in all circumstances. Where it becomes relevant in a judicial proceeding, why should the Court and the opposite party and through them, the people not know what are the reasons for which a particular appointment is made or a particular Additional Judge is discontinued or a particular transfer is effected. We fail to see what harm can be caused by the disclosure of true facts when they become relevant in a judicial proceeding. In fact, the possibility of subsequent disclosure would act as an effective check against carelessness, impetuosity, arbitrariness or mala fides on the part of the Central Government, the Chief Justice of the High Court and the Chief Justice of India and ensure bona fide and correct approach, objective and dispassionate consideration, mature thought and deliberation and proper application of mind on their part in discharging their constitutional duty in regard to appointments and transfers of Judges. It is true that if the views expressed by the Chief Justice of the High Court and the Chief Justice of India in regard to the suitability of an Additional Judge for further appointment become known to the public, they might reflect adversely on the competence, character or integrity of the Additional Judge, but the Additional Judge cannot legitimately complain about it, because it would be at his instance that the disclosure would be ordered and the views of the two Chief Justices made public. If the Additional Judge is appointed for a further term either accepting the opinion expressed by the Chief Justice of the High Court in preference to that of the Chief Justice of India or vice versa, the question of disclosure of differing opinions of the two Chief Justices would not arise, because no one would know that the two Chief Justices were not agreed on continuing the Additional Judge for a further term and therefore, ordinarily, there would be no challenge to the appointment of the Additional Judge. It is only if the Additional Judge is not continued for a further term that he or someone on his behalf may challenge the decision of the Central Government not to continue him and in that event, if he asks for disclosure of the relevant correspondence embodying the views of the two Chief Justices, and if such disclosure is ordered, he has only himself to thank for it and in any event, in such a case, there would be no harm done to public interest if the views expressed by the two Chief Justices become known to the public.

86. We are therefore of the view that, in the two groups of writ

petitions which are before us, the injury which would be caused to the public interest in administration of justice by non-disclosure of the correspondence between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India and the relevant notings made by them in regard to non-appointment of S.N. Kumar and the correspondence between the Law Minister and the Government of India and the relevant notings made by them in regard to transfer of the Chief Justice of Patna, far outweighs the injury which may, if at all, be caused to the public interest by their disclosure and hence these documents were liable to be disclosed in response to the demand of the learned counsel appearing on behalf of the petitioners and S.N. Kumar. There were the reasons for which we directed by our Order dated October 16, 1981 that these documents be disclosed to the petitioners and S.N. Kumar.

Facts of S. N. Kumar's case: *Whether full & effective consultation*

87. That takes us to the next question as to whether there was full and effective consultation between the President which means the Central Government on the one hand and the Chief Justice of India on the other. Article 217 provides that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. We have already rejected the contention urged on behalf of the respondents that the requirement of consultation is necessary only where a person is being appointed a Judge of the High Court and not where a decision is taken not to appoint him. We have, of course, made it clear that where the name of a person is proposed for appointment as a Judge of the High Court for the first time, he, having no right to be considered for such appointment, is not entitled to insist that the proposal for his appointment, whether initiated by the Chief Justice of the High Court or the State Government or the Chief Justice of India, should be subjected to the process of consultation set out in Article 217 and his name can be dropped without any such consultation. But, as pointed out by us in an earlier portion of the judgment, the position is different in case of an Additional Judge, for though an Additional Judge has no right, on the expiration of his term, to be appointed an Additional Judge for a further term or to be appointed a permanent Judge, he has still a right to be considered for such appointment and the Central Government has to decide whether or not to appoint him after consultation with the three constitutional functionaries mentioned in Article 217. Here, in the present case, Shri S. N. Kumar was an Additional Judge whose term expired on June 6, 1981 and he was entitled to be considered for appointment as an Additional Judge for a further term and the Central Government certainly could, after considering his name, decide in the bona fide exercise of its power, not to appoint him, but that could be done only after consultation with the three constitutional functionaries specified in Article 217 which included the Chief Justice of India. It therefore becomes necessary to consider whether the