STATE OF GUJARAT & ANR. A

v.

HON'BLE MR. JUSTICE R. A. MEHTA (RETD) & ORS.

(Civil Appeal Nos. 8814-8815 of 2012)

JANUARY 2, 2013 B

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Gujarat Lokayukta Act, 1986: C

s.3 – Appointment of Lokayukta – 'Consultation' – Connotation of – Primacy of opinion of Chief Justice of State – Held: Section 3 must be construed in the light of meaning given by courts to the word 'consultation' so as to give effect to the provisions of the statute to make it operative and workable – Statutory construction of provisions of the Act itself mandates primacy of opinion of the Chief Justice – In a situation where one of the consultees has ***primacy*** *of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean* ***concurrence*** *– Interpretation of statutes – Purposive construction.* D E

s.3 – Appointment of Lokayukta – Process of consultation – Chief Justice of State recommending the name of a retired Judge of High Court to Governor and Chief Minister – Leader of opposition in the House intimating that he had been consulted by Governor and he had agreed to the appointment – Held: Process of consultation stood complete as 3 out of 4 statutory authorities had approved the name of the respondent and Chief Justice replied to Chief Minister regarding his objections with respect to appointment of respondent as Lokayukta. F G

s.3 – Appointment of Lokayukta – Held: Chief Justice

 H

A *recommending only one name, instead of a panel of names, is in consonance with the law laid down by Supreme Court, and there is no cogent reason not to give effect to the said recommendation.*

B *s.3 – Delay in appointment of Lokayukta – Held: Statutory provisions make it mandatory on the part of the State to ensure that the office of Lokayukta is filled up without any delay.*

Constitution of India, 1950:

C

Arts. 163 and 166 – Manner in which Governor acts – Explained – Held: Where Governor acts as the Head of the State, except in relation to areas which are earmarked under the Constitution as giving discretion to the Governor, the D *exercise of power by him, must only be upon the aid and advice of the Council of Ministers – Therefore, appointment of Lokayukta can be made by the Governor, as Head of the State, only with aid and advice of Council of Ministers, and not independently as a Statutory Authority*

E *Administrative Law:*

Bias – Appointment of Lokayukta – Chief Minister raising objections to recommendation of name of respondent by Chief Justice – Held: An apprehension of bias against a person, F *does not render such person, ineligible/ disqualified, or unsuitable for the purpose of being appointed to a particular post, or at least for the purpose of which, the writ of quo warranto is maintainable – Objections raised by State Government, are not cogent enough to ignore the primacy of* G *opinion of Chief Justice in this regard – Views of Chief Minister may not resonate with those of the public at large and, thus, such apprehension is misplaced – The reasons discussed by Chief Justice appear to be rational and based on facts – The issue appears to have been dealt with* H *objectively – There is no scope of judicial review so far as the*

process of decision making is concerned – Judicial review – Constitution of India, 1950 – Art. 226.

Judgments:

Judgment of High Court – Use of harsh language against authorities – Held: Judges must not use strong and carping language, rather they must act with sobriety, moderation and restraint – In the instant case, the Judge ought to have maintained a calm disposition and should not have used harsh language against a Constitutional authority, i.e. the Chief Minister – Judicial restraint.

SUPREME COURT RULES, 1966:

O.7, r. 2 – Reference to larger bench – Factors to be taken into account – Explained.

WORDS AND PHRASES:

Words 'by and under' – Connotation of.

The appointment of respondent no. 1 as Lokayukta was challenged by the State Government in a writ petition before the High Court. There being difference of opinion between the two Judges of the High Court comprising the Bench, the matter was referred to the third Judge. The writ petition was ultimately dismissed as per majority opinion.

In the instant appeal filed by the State Government, it was contended for the appellants that the Governor was bound to act only in accordance with the aid and advice of the Council of Ministers, headed by the Chief Minister; that the consultation by the Governor with the Attorney General of India being alien to the Gujarat Lokayukta Act, 1986, runs contrary to the statutory provisions of the said Act; that the Chief Justice ought to have recommended a panel of names for consideration by the other

A consultees, i.e., the Chief Minister and Leader of Opposition, and that he could not recommend only one name, as the same would cause the entire process to fall within the ambit of concurrence, rather than that of consultation; that the Chief Justice ought to have taken B into consideration, the objections raised by the appellants, qua the recommendation made by the Chief Justice with respect to the appointment of respondent no. 1; and that the third Judge made unwarranted and uncalled for remarks in carping language in connection C with the Chief Minister which tantamounted to resounding strictures, and the same required to be expunged.

Dismissing the appeals, the Court

D HELD: 1.1. These appeals raise legal issues of great public importance, such as, what is the meaning of the term 'consultation' contained in S.3 of the Gujarat Lokayukta Act, 1986 (the Act), and also whether the opinion of the Chief Justice has primacy with respect to E the appointment of the Lokayukta. However, a two-Judges bench in the case of *Suraz Trust India* has entertained the questions raised while doubting the correctness of the larger bench decisions and the same is pending consideration before a three-Judges bench. F [para 5] [26-G; 27-B-C]

Suraz Trust India v. Union of India & Anr. (2011) 4 SCALE 252 – referred to.

1.2. It is, evident that before making a reference to a G larger Bench, the Court must reach a conclusion regarding the correctness of the judgment delivered by it previously, and adjudge the effect of any error therein, upon the public, what inconvenience, hardship or mischief it would cause, and what the exact nature of the H infirmity or error that warrants a review of such earlier

judgments. In the instant case, there is no such compelling circumstance that may warrant a review, and thus, taking into consideration the facts of the case, it cannot be said that the matter requires a reference to a larger Bench. [para 7] [28-F-H]

The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income-tax, Bombay North, Ahmedabad **1965 SCR 908 = AIR 1965 SC 1636 – relied on.**

2.1. In *Gujarat Revenue Tribunal Bar Association's case, this Court has held that, the object of consultation is to render its process meaningful, so that it may serve its intended purpose. The meaning of consultation varies from case to case, depending upon its fact-situation and the context of the statute, as well as the object it seeks to achieve. In a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean concurrence. The court must examine the fact-situation in a given case to determine whether the process of consultation, as required under the particular situation did in fact, stand complete. [para 9 and 16] [31-C; 36-A-C]**

State of Gujarat & Anr. v. Gujarat Revenue Tribunal Bar Association & Anr.*, **JT 2012 (10) SC 422; *UOI v. Sankalchand Himatlal Sheth & Anr.* **1978 (1) SCR 423 = AIR 1977 SC 2328**; *State of Kerala v. Smt. A. Lakshmikutty & Ors.* **1987 (1) SCR 136 = AIR 1987 SC 331**; *High Court of Judicature for Rajasthan v. P.P Singh & Anr.*, **2003 (1) SCR 593 = AIR 2003 SC 1029**; *UOI & Ors. v. Kali Dass Batish & Anr.*, **2006 (1) SCR 261 = AIR 2006 SC 789**; *Andhra Bank v. Andhra Bank Officers & Anr.*, **AIR 2008 SC 2936**; **and** *Union of India v. R. Gandhi, President, Madras Bar Association* **2010 (6) SCR 857 = (2010) 11 SCC 1**; *Chandramouleshwar Prasad v. The Patna High Court & Ors.*, **1970 (2) SCR 666 =AIR 1970 SC 370**; *Centre for PIL & Anr. v. Union of India & Anr.*, **2011**

A **(4) SCR 445 = AIR 2011 SC 1267;** *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak & Ors.*, **AIR 2002 SC 3578;** *Ram Chandra Nayak v. State of Orissa* **AIR 2002 Ori 25;** *Indian Administrative Service (S.C.S.) Association, U.P. & Ors. v. Union of India & Ors.*, **1992 (2) Suppl. SCR 389 = (1993)**
B **Supp.1 SCC 730 - referred to**

2.2. The statutory construction of the provisions of the Gujarat Lokayukta Act, 1986 itself mandates the primacy of the opinion of the Chief Justice for the simple reason that S.3 provides for the consultation with the
C **Chief Justice. The purpose of giving primacy of opinion to the Chief Justice is for the reason that he enjoys an independent Constitutional status, and also because the person eligible to be appointed as Lokayukta is from among the retired Judges of the High Court and the**
D **Chief Justice is, therefore, the best person to judge their suitability for the post. Besides, s. 6 provides for the removal of Lokayukta, and lays down the procedure for such removal. The same can be done only on proven misconduct in an inquiry conducted by the Chief Justice/**
E **his nominee with respect to specific charges. Section 8(3) further provides for recusal of the Lokayukta in a matter where a public functionary has raised the objection of bias, and whether such apprehension of bias actually exists or not, shall be determined in accordance with the**
F **opinion of the Chief Justice. [para 56] [61-A-E]**

N. Kannadasan v. Ajoy Khose & Ors. **2009 (7) SCR 668 = (2009) 7 SCC 1;** *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana*
G *& Ors.*, **1996 (3) SCR 474 = AIR 1996 SC 1308; and** *Ashok Tanwar & Anr. v. State of H.P. & Ors.*, **2004 (6) Suppl. SCR 1065 = AIR 2005 SC 614;** *Supreme Court Advocates-on-Record Association & Anr. v. Union of India*, **1993 (2) Suppl. SCR 659 = AIR 1994 SC 268 – referred to.**

H **2.3. The doctrine of purposive construction may be**

taken recourse to for the purpose of giving full effect to statutory provisions, and the courts must state what meaning the statute should bear, rather than rendering the statute a nullity, as statutes are meant to be operative and not inept. The courts must refrain from declaring a statute unworkable. In the process of statutory construction, the court must construe the Act before it, bearing in mind the legal maxim *ut res magis valeat quam pereat* **– which means – it is better for a thing to have effect than for it to be made void, i.e., a statute must be construed in such a manner, so as to make it workable. The court must give effect to the purpose and object of the Act for the reason that legislature is presumed to have enacted a reasonable statute. [para 66 and 67] [65-B-C-F-G; 66-E]**

M. Pentiah & Ors. v. Muddala Veeramallappa & Ors. **1961 SCR 295 = AIR 1961 SC 1107;** *S.P. Jain v. Krishna Mohan Gupta & Ors.,* **1987 (1) SCR 411 = AIR 1987 SC 222;** *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors.*, **1987 (2) SCR 1 = AIR 1987 SC 1023;** *Tinsukhia Electric Supply Co. Ltd. v. State of Assam & Ors.*, **1989 (2) SCR 544 = AIR 1990 SC 123;** *UCO Bank & Anr. v. Rajinder Lal Capoor* **2008 (5) SCR 775 = (2008) 5 SCC 257; and** *Grid Corporation of Orissa Limited & Ors. v. Eastern Metals and Ferro Alloys & Ors.,* **2010 (10) SCR 779 = (2011) 11 SCC 334– referred to.**

Nokes v. Doncaster Amalgamated Collieries Ltd., **(1940) 3 All E.R. 549;** *Whitney v. Inland Revenue Commissioner,* **1926 AC 37 – referred to**

2.4. It is evident from the Preamble of the Act, 1986 that the Lokayukta has two duties, firstly, to protect honest public functionaries from false complaints and allegations, and secondly, to investigate charges of corruption filed against public functionaries. The office of the Lokayukta is very significant for the people of the

A **State, as it provides for a mechanism through which, the people of the State can get their grievances heard and redressed against maladministration. Thus, the Lokayukta Act may be termed as a pro-people Act. If a political party in power succeeds in its attempt to appoint**
B **a pliant Lokayukta, the same would be disastrous and would render the Act otiose. A pliant Lokayukta, therefore, would render the Act completely meaningless/ ineffective, as he would no doubt reject complaints u/s 7 of the Act, at the instance of the government, taking the**
C **prima facie view that there is no substance in the complaint, and further, he may also make a suggestion u/s 20 of the said Act, to exclude a public functionary, from the purview of the Act, which may include the Chief Minister himself. Thus, s.3 of the Act must be construed in light of the meaning given by the courts to the word**
D **'consultation', so as to give effect to the provisions of the statute to make it operative and workable. [para 8, 61 and 69] [29-B; 61-C-D-E; 67-A-C]**

Vineet Narain & Ors. v. Union of India & Anr., **1997 (6) Suppl. SCR 595 = AIR 1998 SC 889**; *State of Madhya Pradesh & Ors. v. Shri Ram Singh* **2000 (1) SCR 579 = AIR 2000 SC 870**; *State of Maharashtra thr. CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar* **JT 2012 (10) SC 446**; **and** *Dr. Subramanian Swamy v. Dr. Manmohan*
F *Singh & Anr.* **2012 (3) SCR 52 = AIR 2012 SC 1185**; *re: Special Courts Bill*, **1978, AIR 1979 SC 478 – referred to.**

2.5. The Gujarat Lokayukta Act, 1986 stipulates that the institution of Lokayukta must be demonstrably
G **independent and impartial. Proviso to sub-s. (1) of s.3 envisages the appointment of the Lokayukta when the Legislative Assembly has been dissolved, or when a Proclamation of Emergency under Art. 356 of the Constitution is in operation, upon consultation with the Chief Justice of the State and the Leader of Opposition.**
H **However, such consultation with the Leader of**

Opposition also stands dispensed with, if the Assembly is dissolved or suspended. Thus, it is evident that the Governor can appoint a Lokayukta, even when there is no Council of Ministers in existence. [para 38] [52-C-D-F]

2.6. The facts of the instant case make it crystal clear that the process of consultation stood complete as on 2.8.2011, as 3 out of 4 statutory authorities had approved the name of the respondent. The Chief Minister had certain objections regarding the appointment of respondent No.1, as Lokayukta, and his objections were duly considered by the Chief Justice, after which, it was also explained to the Chief Minister that the said objections raised by him, were in fact, completely irrelevant, or rather, not factually correct. This Court has reached the inescapable conclusion that none of the objections raised by the Chief Minister could render respondent no.1 ineligible/ disqualified or unsuitable for appointment to the post of Lokayukta. [para 45, 46] [56-D-G; 57-C-D]

2.7. As the Chief Justice has primacy of opinion in the matter, the non-acceptance of such recommendations, by the Chief Minister, remains insignificant. Thus, it clearly emerges that in the instant case, the Governor, u/s 3 of the Act, 1986 has acted upon the aid and advice of the Council of Ministers. Section 3 of the Act, 1986, does not envisage unanimity in the consultative process. In such a situation, the appointment of respondent no.1 cannot be held to be illegal. Thus, there is no scope of judicial review so far as the process of decision making in this case is concerned. [para 46, 57 and 74] [57-E; 61-G; 71-E]

2.8. The recommendation of the Chief Justice suggesting only one name, instead of a panel of names, is in consonance with the law laid down by this Court, and there is no cogent reason not to give effect to the

A said recommendation. If the Chief Justice sends a panel of names, and the Governor selects one from them, then it would obviously become the primacy of the Governor and would not remain the primacy of the Chief Justice, which is the requirement under the law. [para 11 and 74] B [33-B; 70-H; 71-A]

N. Kannadasan v. Ajoy Khose & Ors. 2009 (7) SCR 668 = (2009) 7 SCC 1; *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana & Ors.*, 1996 (3) SCR 474 = AIR 1996 SC 1308; and *Ashok* C *Tanwar & Anr. v. State of H.P. & Ors.* 2004 (6) Suppl. SCR 1065 = AIR 2005 SC 614 – referred to.

2.9. The statutory provisions make it mandatory on the part of the State to ensure that the office of the D Lokayukta is filled up without any delay, as the Act provides for such filling up, even when the Council of Ministers is not in existence. In the instant case, admittedly, the office of the Lokayukta has been lying vacant for a period of more than 9 years i.e. from E 24.11.2003 till date. [para 38] [52-F-G]

3.1. Absence of bias can be defined as the total absence of any pre-conceived notions in the mind of the Authority/Judge, and in the absence of such a situation, it is impossible to expect a fair deal/trial and no one would F therefore, see any point in holding/participating in one, as it would serve no purpose. The Judge/Authority must be able to think dispassionately, and sub-merge any private feelings with respect to each aspect of the case. The apprehension of bias must be reasonable, i.e., which G a reasonable person would be likely to entertain. [para 34] [49-D-F]

3.2. Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim - *nemo* H *debet esse judex in causa propria sua.* It applies only when

the interest attributed to an individual is such, so as to tempt him to make a decision in favour of, or to further, his own cause. While considering the issue of bias, the Court must bear in mind the impression which the public at large may have, and not that of an individual. [para 34] [49-F; 50-C]

S. Parthasarathi v. State of Andhra Pradesh, **1974 (1) SCR 697 = AIR 1973 SC 2701;** *State of Punjab v. V.K. Khanna & Ors.,* **2000 (5) Suppl. SCR 200 = AIR 2001 SC 343;** *N.K. Bajpai v. Union of India & Anr.,* **2012 (2) SCR 433 = (2012) 4 SCC 653; and** State of *Punjab v. Davinder Pal Singh Bhullar & Ors. etc.* **2011 SCR 540 = AIR 2012 SC 364 – referred to**

3.3. There are sufficient safeguards in the Statute itself, to take care of the pre-conceived notions in the mind, or the bias of the Lokayukta, and so far as the suitability of the person to be appointed as Lokayukta is concerned, the same is to be examined, taking into consideration the interests of the people at large, and not those of any individual. [para 74] [71-C-D]

3.4. It is a settled legal proposition that a judgment of this Court is binding, particularly, when the same is that of a co-ordinate bench, or of a larger bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. [para 35] [50-F-G]

Smt. Somavanti & Ors. v. The State of Punjab & Ors., **1963 SCR 774 = AIR 1963 SC 151;** *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur,* **AIR 1970 SC 1002;** *Ambika Prasad Mishra v. State of U.P. & Ors.* **1980 (3) SCR 1159 = AIR 1980 SC 1762; and** *Director of*

A *Settlements, A.P. & Ors. v. M.R. Apparao & Anr.*, **2002 (2) SCR 661 = AIR 2002 SC 1598**; *Bidi Supply Co. v. Union of India & Ors.* **1956 SCR 267 = AIR 1956 SC 479 – referred to**

B **4.1. Under the scheme of our Constitution, the Governor is synonymous with the State Government, and can take an independent decision upon his/her own discretion only when he/she acts as a statutory authority under a particular Act, or under the exception(s), provided in the Constitution itself. Where the Governor acts as the** C **Head of the State, except in relation to areas which are earmarked under the Constitution as giving discretion to the Governor, the exercise of power by him, must only be upon the aid and advice of the Council of Ministers, for the reason that the Governor, being the custodian of** D **all executive and other powers under various provisions of the Constitution, is required to exercise his formal Constitutional powers, only upon, and in accordance with, the aid and advice of his Council of Ministers. He is, therefore, bound to act under the Rules of Business** E **framed under Art. 166 (3) of the Constitution. The expression, 'Business of the Government of India' in clause (3) of Art. 77, and the expression, 'Business of the Government of the State' in clause (3) of Art. 166, include all executive business. In the of Rules of Executive** F **Business, the topic involving the appointment of a Lokayukta, must be brought before the Council of Ministers. [para 21, 22, 25 and 74] [40-F-H; 41-A-E; 44-H; 45-A; 70-D-E]**

G *Samsher Singh v. State of Punjab & Anr.*, **1975 (1) SCR 814 = AIR 1974 SC 2192**; *Brundaban Nayak v. Election Commission of India & Anr.*, **1965 SCR 53 = AIR 1965 SC 1892**; *Election Commission of India & Anr. v. Dr. Subramanian Swamy & Anr.*, **1996 (1) Suppl. SCR 637 =** H **AIR 1996 SC 1810**; *Pu Myllai Hlychho & Ors. v. State of Mizoram & Ors.*, **2005 (1) SCR 279 = AIR 2005 SC 1537**;

Ram Nagina Singh & Ors. v. S.V. Sohni & Ors., **AIR 1976 Pat 36**; *Ram Nagina Singh & Ors. v. S.V. Sohni & Ors.*, **AIR 1976 Pat 36**; *Bhuri Nath & Ors. v. State of J & K & Ors.*, **1997 (1) SCR 138 = AIR 1997 SC 1711 – referred to** A

4.2. While Art. 163 provides that there shall be a Council of Ministers with the Chief Minister as the head, to aid and advise the Governor, in the exercise of his functions, an exception has been carved out with respect to situations wherein, he is, by or under the Constitution, required to perform certain functions by exercising his own discretion. The exceptions carved out in the main clause of Art. 163(1), permit the legislature to entrust certain functions to the Governor to be performed by him, either in his discretion, or in consultation with other authorities, independent of the Council of Ministers. The meaning of the words 'by or under' is well settled. Whenever the Constitution intends to confer discretionary powers upon the Governor, or to permit him to exercise his individual judgment, it has done so expressly. [Arts. 200; 239(2); 371-A(1)(b); 371-A(1)(a); 371-A(2)(b); and 371-A(2)(f), VI Schedule, Para 9(2) (and VI Schedule, Para 18(3), until omitted with effect from January 21, 1972]. [para 17, 26 and 28] [37-C-D; 45-D-E; 46-E] B C D E

Dr. Indramani Pyarelal Gupta & Ors. v. W.R. Natu & Ors., **1963 SCR 721 = AIR 1963 SC 274 – relied on** F

Chandra Mohan v. State of U.P. & Ors., **AIR 1966 SC 1987**; **and** *Rajendra Singh Verma (dead) thr. Lrs. & Ors. v. Lt. Governor (NCT of Delhi) & Ors.* **2011 (12) SCR 496 = (2011) 10 SCC 1**; *Hardwari Lal v. G.D. Tapase & Ors.*, **AIR 1982 P & H 439**; *Vice-Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors.*, **1996 (10) Suppl. SCR 175 = (1997) 10 SCC 264**; *M.P. Special Police Establishment v. State of M.P. & Ors.*, **2004 (5) Suppl. SCR 1020 = AIR 2005 SC 325**; *State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.*, **1983 (1) SCR 8 = AIR** G H

A **1982 SC 1249; *Rameshwar Prasad (VI) v. Union of India* 2006 (1) SCR 562 = (2006) 2 SCC 1 – referred to.**

4.3. The judgments of this Court do not leave any room for doubt with respect to the fact that, when the B **Governor does not act as a statutory authority, but as the Head of the State, being Head of the executive and appoints someone under his seal and signature, he is bound to act upon the aid and advice of the Council of Ministers. Thus, the law as evolved and applicable can be summarised to the effect that the Governor is bound** C **to act on the aid and advice of the Council of Ministers, unless he acts as, "persona designata" i.e. *"eo nomine"*, under a particular statute, or acts in his own discretion under the exceptions carved out by the Constitution itself. Therefore, the appointment of the Lokayukta can** D **be made by the Governor, as the Head of the State, only with the aid and advice of the Council of Ministers, and not independently as a Statutory Authority. [para 33,42 and 74] [49-C; 54-C-D; 70-E-F]**

E *State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.*, **1983 (1) SCR 8 = AIR 1982 SC 1249;** *Narmada Bachao Andolan v. State of Madhya Pradesh* **2011 (12) SCR 84 = AIR 2011 SC 3199;** *Maru Ram, Bhiwana Ram etc. etc. v. Union of India & Ors. etc.*, **AIR 1980 SC 2147;** *State of U.P.* F *& Ors. etc. v. Pradhan Sangh Kshettra Samiti & Ors. etc.*, **1995 (2) SCR 1015 = AIR 1995 SC 1512;** *S.R. Chaudhuri v. State of Punjab & Ors.*, **2001 (1) Suppl. SCR 621 = AIR 2001 SC 2707 – referred to.**

4.4. In the instant case, the Governor has misjudged G **her role and has insisted that under the Act of 1986, the Council of Ministers has no role to play in the appointment of the Lokayukta, and that she could therefore, fill it up in consultation with the Chief Justice of the High Court and the Leader of Opposition. Such** H **attitude is not in conformity, or in consonance with the**

democratic set up of government envisaged in our Constitution. The Governor consulted the Attorney General of India for legal advice, and communicated with the Chief Justice of the High Court directly, without taking into confidence, the Council of Ministers. In this respect, she was wrongly advised to the effect that she had to act as a statutory authority and not as the Head of the State. However, it is evident that the Chief Minister had full information and was in receipt of all communications from the Chief Justice, whose opinion is to be given primacy as regards such matters, and can only be overlooked, for cogent reasons. [para 74] [70-D-H]

5.1. Courts should not make any undeserving or derogatory remarks against any person, unless the same are necessary for the purpose of deciding the issue involved in a given case. Even where criticism is justified, the court must not use intemperate language and must maintain judicial decorum at all times. Maintaining judicial restraint and discipline are necessary for the orderly administration of justice. Therefore, while formation and expression of honest opinion and acting thereon, is a necessity to decide a case, courts must always act within the four-corners of the law. [para 71 and 73]

State of M.P. & Ors. etc.etc. v. Nandlal Jaiswal & Ors. etc.etc., **1987 (1) SCR 1 = AIR 1987 SC 251**; *A.M. Mathur v. Pramod Kumar Gupta*, **1990 (2) SCR 110 = AIR 1990 SC 1737**; *State of Bihar & Anr. v. Nilmani Sahu & Anr.*, (1999) 9 SCC 211; In *the matter of: "K" a Judicial Officer*, **2001 (1) SCR 959 = AIR 2001 SC 972**; In ***the matter of:*** *"RV", a Judicial Officer*, **2004 (5) Suppl. SCR 129 = AIR 2005 SC 1441**; and *Amar Pal Singh v. State of U.P. & Anr.*, **AIR 2012 SC 1995 – referred to.**

5.2. In the instant case, it appears that the third Judge of the High Court has used harsh language against the Chief Minister, after examining the various letters written

A by him. At an earlier stage, the Chief Minister had taken a stand to the effect that a retired Judge, who has been given some other assignment, should not be considered for appointment to the post of Lokayukta. However, with respect to the case of another retired Judge, he seems B to have taken an altogether different view. This Court is of the view that the Judge, even if he did not approve of the attitude adopted by the Chief Minister, ought to have maintained a calm disposition and should not have used such harsh language against a Constitutional authority, C i.e. Chief Minister. [para 73] [67-G; 68-B-C; 69-G-H; 70-A]

Case Law Reference:

(2011) 4 SCALE 252	referred to	para 5
1965 SCR 908	relied on	para 6
D JT 2012 (10) SC 422	referred to	para 9
1978 (1) SCR 423	referred to	para 9
1987 (1) SCR 136	referred to	para 9
E 2003 (1) SCR 593	referred to	para 9
2006 (1) SCR 261	referred to	para 9
AIR 2008 SC 2936	referred to	para 9
2010 (6) SCR 857	referred to	para 9
F 1970 (2) SCR 666	referred to	para 9
2009 (7) SCR 668	referred to	para 9
2010 (6) SCR 857	referred to	para 9
G 1970 (2) SCR 666	referred to	para 10
2009 (7) SCR 668	referred to	para 11
1996 (3) SCR 474	referred to	para 11
H 2004 (6) Suppl. SCR 1065	referred to	para 11

2011 (4) SCR 445	**referred to**	**para 13**	A
AIR 2002 SC 3578	**referred to**	**para 14**	
AIR 2002 Ori 25	**referred to**	**para 14**	
1992 (2) Suppl. SCR 389	**referred to**	**para 15**	B
1975 (1) SCR 814	**referred to**	**para 17**	
2004 (5) Suppl. SCR 1020 8	**referred to**	**para 18**	
1983 (1) SCR 8	**referred to**	**para 18**	C
1965 SCR 53	**referred to**	**para 19**	
1996 (1) Suppl. SCR 637	**referred to**	**para 19**	
1993 (2) Suppl. SCR 659	**referred to**	**para 20**	
2005 (1) SCR 279	**referred to**	**para 21**	D
AIR 1976 Pat 36	**referred to**	**para 22**	
AIR 1982 P & H 439	**referred to**	**para 23**	
1996 (10) Suppl. SCR 175	**referred to**	**para 24**	E
1997 (1) SCR 138	**referred to**	**para 25**	
2011 (12) SCR 84	**referred to**	**para 25**	
AIR 1980 SC 2147	**referred to**	**para 25**	F
1963 SCR 721	**relied on**	**para 26**	
2006 (1) SCR 562	**referred to**	**para 27**	
1966 AIR 1987	**referred to**	**para 28**	G
2011 (12) SCR 496	**referred to**	**para 28**	
1995 (2) SCR 1015	**referred to**	**para 30**	
2001 (1) Suppl. SCR 621	**referred to**	**para 31**	
1974 (1) SCR 697	**referred to**	**para 34**	H

A	2000 (5) Suppl. SCR 200	referred to	para 34
	2012 (2) SCR 433	referred to	para 34
	2011 SCR 540	referred to	para 34
B	1963 SCR 774	referred to	para 35
	AIR 1970 SC 1002	referred to	para 35
	1980 (3) SCR 1159	referred to	para 35
C	2002 (2) SCR 661	referred to	para 35
	1956 SCR 267	referred to	para 55
	1997 (6) Suppl. SCR 595	referred to	para 62
	2000 (1) SCR 579	referred to	para 62
D	2012 (10) JT 446	referred to	para 62
	2012 (3) SCR 52	referred to	para 62
	AIR 1979 SC 478	referred to	para 64
E	(1940) 3 All E.R. 549	referred to	para 66
	1926 AC 37	referred to	para 66
	1961 SCR 295	referred to	para 67
F	1987 (1) SCR 411	referred to	para 67
	1987 (2) SCR 1	referred to	para 67
	1989 (2) SCR 544	referred to	para 67
G	2008 (5) SCR 775	referred to	para 67
	2010 (10) SCR 779	referred to	para 67
	1987 (1) SCR 1	referred to	para 73
	1990 (2) SCR 110	referred to	para 73
H			

(1999) 9 SCC 211	**referred to**	**para 73**
2001 (1) SCR 959	**referred to**	**para 73**
2004 (5) Suppl. SCR 129	**referred to**	**para 73**
2012 (6) SCC 491	**referred to**	**para 73**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8814-8815 of 2012 etc.

From the Judgment & Order dated 10.10.2011 and 18.01.2012 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 12632 of 2011.

WITH

SLP (C) Nos. 2625-2626 & 2687-88 of 2012

Rohintion F. Nariman, S.G., K.K. Venugopal, Mukul Rohtagi, Prakash Jani, Soli J. Sorabjee, Yatin Oza, Dr. Rajeev Dhawan, Mihir J. Thakore, Dr. A. M. Singhvi, Huzefa Ahmadi, Satya Pal Jain, P.P. Rao, Kamal Trivedi, A.G., Sangeeta Vishen, E.C. Agrawala, Mahesh Agarwal, Ankur Saigal, S. Udaya Kumar Sagar, Bina Madhavan, Praseena E. Joseph, Shaunak Kahsypa, Mehernaz Mehta, Unmesh Shukla, Srushti Tula (for M/s. Lawyer's Knit & Co.) Sanjay R. Hegde, Amit M. Panchal, S. Nitin, Anil Kumar Mishra-I, D.N. Ray, Lokesh K. Choudhary, Sumita Ray, Sanjay Kapur, Anmol Chandan, Priyanka Das, Ritin Rai, Ashmi Mohan, Kamini Jaiswal, Ezaz Maqbool, Mrigank Prabhakar, Sakashi Banga, Aniruddha P. Mayee, Charudatta Mahindrakar, Pawan Upadhyay, Sarvjit Partap Singh, Anisha Upadhyay, Sharmila Upadhyay, Naresh K. Sharma, Abhijit P. Medh, Rajiv Nanda, Padma Lakshmi Nigam for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the judgments and orders of the High Court

of Gujarat at Ahmedabad in Special Civil Application No. 12632 of 2011, dated 10.10.2011 and 18.1.2012.

2. The facts and circumstances giving rise to these appeals are as under:

A. The legislature of Gujarat enacted the Gujarat Lokayukta Act 1986 (hereinafter referred to as the, 'Act, 1986'), which provided for the appointment of a Lokayukta, who must be a retired Judge of the High Court. The said statute, was given effect to, and various Lokayuktas were appointed over time, by following the procedure prescribed under the Act, 1986, for the said purpose, i.e., the Chief Minister of Gujarat, upon consultation with the Chief Justice of the Gujarat High Court, and the Leader of Opposition in the House, would make a recommendation to the Governor, on the basis of which, the Governor would then issue requisite letters of appointment.

B. The post of the Lokayukta became vacant on 24.11.2003, upon the resignation of Justice S.M. Soni. The Chief Minister, after the expiry of about three years, wrote a letter dated 1.8.2006 to the Chief Justice, suggesting the name of Justice K.R. Vyas for appointment to the post of Lokayukta. The name of Justice K.R. Vyas was approved by the Chief Justice, vide letter dated 7.8.2006, and the Chief Minister, after completing other required formalities, forwarded the said name, to the Governor on 10.8.2006, seeking his approval, as regards appointment. The file remained pending for a period of 3 years, and was returned on 10.9.2009, as Justice K.R. Vyas had been appointed as Chairman of the Maharashtra State Human Rights Commission, on 21.8.2007.

C. On 29.12.2009, Private Secretary, to the Governor of Gujarat, addressed a letter to the Registrar General of the High Court of Gujarat, requesting that a panel of names be suggested by the Chief Justice, so that the same could be considered by the Governor, with respect to their possible appointment, to the post of Lokayukta.

D. The Chief Minister, also wrote a letter dated 8.2.2010, to the Chief Justice, requesting him to send a panel of names of three retired Judges for the purpose of consideration of one of them to be finally appointed as Lokayukta. The Chief Justice, vide letter dated 24.2.2010, suggested the names of four retired Judges, taking care to stipulate that the said names were not arranged in any order of preference, and that any one of them, could thus, be chosen by the Governor.

E. The Chief Minister after receiving the aforementioned letter, made an attempt to consult the Leader of Opposition, regarding the said names by writing a letter dated 2.3.2010, who vide letter dated 3.3.2010, was of the opinion that under the Act, 1986 the Chief Minister, had no right to embark upon any consultation, with respect to the appointment of the Lokayukta. There was some further correspondence of a similar nature between them on this issue.

F. The Leader of Opposition, vide letter dated 4.3.2010, pointed out to the Chief Minister, that the process of consultation regarding the appointment of the Lokayukta, had already been initiated by the Governor directly, and thus, the Chief Minister should not attempt to interfere with the same. The Leader of Opposition did not attend any meeting held in this regard, and the Governor also did not think it proper to indulge in any further consultation with the Chief Minister with respect to the said issue.

G. In the meantime, as has been mentioned above, not only were the meetings called by the Chief Minister, not attended by the Leader of Opposition, but it also appears that simultaneously, the Council of Ministers had already considered the names as recommended by the Chief Justice, and vide letter dated 24.2.2010, had proceeded to approve the name of Justice J.R. Vora (Retd.), for appointment to the post of Lokayukta, and the file was sent to the Governor for approval and consequential appointment. However, no orders were passed by the Governor.

H. The Governor instead sought the opinion of the Attorney General of India, as regards the nature of the process of consultation, required to be adopted in the matter of appointment of the Lokayukta. The Governor also addressed a letter to the Chief Justice dated 23.4.2010, soliciting his opinion as to who would be a better choice for appointment to the post of Lokayukta, between Justice R.P. Dholakia (Retd.), who was the President of the Gujarat Consumer Disputes Redressal Commission and Justice J.R. Vora (Retd.), from among the panel of names that had been sent by the Chief Justice, vide letter dated 24.2.2010.

I. The Attorney General in his opinion dated 23.4.2010, stated that the Chief Justice ought to have suggested only one name, and that he could not have required to recommend a panel of names. The Chief Justice on 27.4.2010, wrote to the Governor stating that, in his opinion, Justice R.P. Dholakia (Retd.) would be the more appropriate choice. However, despite this, the Governor did not issue a letter of appointment to anyone, and requested the Chief Justice vide letter dated 3.5.2010, to recommend only one name, as opined by the Attorney General, vide his letter dated 23.4.2010.

J. In response to the suggestion made by the Governor, the Chief Justice wrote to the Governor on 29.12.2010, recommending the name of Justice S.D. Dave (Retd.), for appointment to the post of Lokayukta. The Chief Justice also wrote a letter to the Chief Minister on 31.12.2010, recommending the name of Justice S.D. Dave, in place of that of Justice J.R. Vora, as Justice J.R. Vora had already been appointed elsewhere.

K. The Chief Minister wrote a letter dated 21.2.2011, to the Chief Justice by way of which, he re-iterated the request of the State Government, to appoint Justice J.R. Vora as Lokayukta, owing to the fact that the process of consultation was already complete and further that, Justice J.R. Vora had expressed his willingness to accept his appointment to the post

of Lokayukta, if the same was offered to him, and in this regard, the Chief Minister even wrote a second letter, dated 4.5.2011, to the Chief Justice, requesting him to reconsider the said issue.

L. The Chief Justice, vide letter dated 7.6.2011, made a suggestion to the Governor to the effect that, Justice R.A. Mehta (Retd.) be appointed as Lokayukta, and the said recommendation was also sent by the Chief Justice, to the Chief Minister. The Governor, on the same day, i.e. 7.6.2011, requested the Chief Minister to expedite the process for the appointment of Justice R.A. Mehta, as Lokayukta.

M. The Chief Minister, vide letter dated 16.6.2011, requested the Chief Justice to consider certain objections raised by him against the appointment of Justice R.A. Mehta as Lokayukta, which included among other things, the fact that Justice R.A. Mehta was above 75 years of age, as also **his association with NGOs and social activist groups, known for their antagonism against the State Government;** and further, that he possessed a specific biased disposition, against the Government. To support the apprehensions raised by him, the Chief Minister annexed along with his letter, 11 clippings of newspaper.

N. The Chief Justice, vide letter dated 2.8.2011, replied to the aforementioned letter of the Chief Minister, pointing out that Justice R.A. Mehta was not ineligible for appointment to the post of Lokayukta on the basis of any of the points raised by the Chief Minister, and that he was a man of great repute and high integrity. Justice R.A. Mehta had never made any public statement detrimental to the society as a whole, nor had he ever shown any bias either with respect to, or against any government, and finally, that he was not a member of any NGO. Even otherwise, membership of a person of an NGO, or his social activities, cannot be treated as a basis for his disqualification, for being appointed to the post of Lokayukta.

A O. The Governor, vide letter dated 16.8.2011, requested the Chief Minister to process the appointment of Justice R.A. Mehta as Lokayukta. The Leader of Opposition also wrote a letter dated 16.8.2011, to the Chief Minister, informing him of the fact that he had already been consulted by the Governor, B as regards the said issue, and that in connection with the same, he had agreed to the appointment of Justice R.A. Mehta as Lokayukta. At this juncture, the Governor issued the requisite warrant from her office on 25.8.2011, appointing Justice R.A. Mehta as Lokayukta.

C P. The Gujarat Lokayukta (Amendment) Bill, 2011 was passed by the Legislative Assembly of the State of Gujarat on 30.3.2011, which primarily sought to widen the definition of the term, "public functionaries", contained in Section 2(7) of the Act, 1986, by including a large number of other functionaries, within D its purview, such as Mayors, Deputy Mayors of the Municipal Corporation, the President or the Vice-President of Municipalities, the Sarpanch and Up-Sarpanch of Village Panchayats etc. The Governor returned the said Bill for reconsideration, as she realised that the Lokayukta, however E competent and efficient he may be, would be unable to look into complaints of irregularities made against such a large number of persons.

Q. The Governor also refused to issue an Ordinance to F amend the Act, 1986, wherein Section 3 was to be amended, which would have changed the composition of the consultees as contemplated under the Act, 1986, for the purpose of deciding upon the appointment of the Lokayukta, on the ground that there was no grave urgency for bringing in such an G Ordinance, all of a sudden.

R. The State of Gujarat filed writ petition No. 12632 of 2011 dated 5.9.2011, in the High Court of Gujarat, challenging the appointment of Justice R.A. Mehta to the post of Lokayukta. The matter was decided vide judgment and order dated H 10.10.2011, wherein the two Judges while hearing the case

differed in their views to a certain extent. Accordingly, the matter was then referred to a third Judge, who delivered his judgment dated 18.1.2012, dismissing the said writ petition.

Hence, these appeals.

RIVAL CONTENTIONS:

3. Mr. K.K. Venugopal, Mr. Soli Sorabjee, Dr. Rajeev Dhavan, Mr. Mihir J. Thakore, and Mr. Yatin Oza, learned senior counsel appearing for the appellants, have submitted that the Governor, being a titular head of State, is bound to act only in accordance with the aid and advice of the Council of Ministers, headed by the Chief Minister, and that the actions of the Governor, indulging in correspondence with, and issuing directions to other statutory authorities, are contrary to the principles of Parliamentary democracy, and thus, the Governor ought not to have corresponded with, and consulted the Chief Justice of the High Court of Gujarat directly. It was also contended that, the Chief Justice ought to have recommended, a **panel of names** for consideration by the other consultees, i.e., the Chief Minister and Leader of Opposition, and that he could not recommend **only one name**, as the same would cause the entire process to fall within the ambit of **concurrence**, rather than that of **consultation**. Furthermore, consultation by the Governor with the Attorney General of India, who is alien to the Act, 1986, runs contrary to the statutory provisions of the said Act. The Governor is not acting merely as a statutory authority, but as the Head of the State, and hence, the entire procedure adopted by her is in clear contravention of the actual procedure, contemplated by the statute, for the purpose of selection of the Lokayukta. The Chief Justice ought to have taken into consideration, the objections raised by the appellants, qua the recommendation made by the Chief Justice with respect to the appointment of respondent no. 1. The third Hon'ble Judge made unwarranted and uncalled for remarks in carping language in connection with the Chief Minister which tantamount to resounding strictures, and the

A same require to be expunged. Thus, the appeals deserve to be allowed and the majority judgments (impugned), set aside.

4. Per contra, Mr. R.F. Nariman, learned Solicitor General of India, Mr. P.P.Rao, Dr. A.M. Singhvi, and Mr. Huzefa Ahmadi,
B learned senior counsel appearing on behalf of the respondents, have opposed the appeals, contending that the Governor had acted as a statutory authority under the Act, 1986, and not as the head of the State, and thus, she was not required to act in accordance with the aid and advice of the Council of Ministers.
C Furthermore, no fault can be found with the procedure adopted by the Governor, as the objections raised by the Chief Minister were thoroughly considered by the Chief Justice, and no substance was found therein. The Chief Justice has **primacy** of opinion in the matter of consultation, and therefore, the sending of a panel of names instead of just one name, does
D not amount to a violation of the scheme of the Act. A perusal of the statute and the sequence of events herein, makes it crystal clear, that the Governor acted in correct perspective, and that no fault can be found with the selection of respondent no. 1 to the post of Lokayukta. The appellants have in fact, been
E avoiding the appointment of a Lokayukta for a period of more than nine years, for which there can be no justification. The harsh language used by the 3rd Judge was warranted because of the defiant attitude adopted by the Chief Minister which was appalling, and thus, the remarks do not need to be expunged.
F The appeals hence, lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

These appeals raise legal issues of great public
G importance, such as, what is the meaning of the term '**consultation**' contained in Section 3 of the Act, 1986, and also whether the opinion of the Chief Justice has **primacy** with respect to the appointment of the Lokayukta.

H The twin issues of consultation vis-à-vis concurrence and

primacy, have been debated extensively before this Court and answered by larger benches while interpreting Article 124(2) of the Constitution in matters relating to appointment of Judges of Supreme Court and High Court. The present case also involves the determination of the meaning of the word "consultation" in Section 3 of the Act, 1986 in the said context. A B

However, a two-Judges bench in the case of *Suraz Trust India v. Union of India & Anr.*, (2011) 4 SCALE 252, has entertained the questions raised while doubting the correctness of the larger bench decisions that is pending consideration before a three-Judges bench presided over by Hon'ble the Chief Justice. C

6. In *The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income-tax, Bombay North, Ahmedabad,* AIR 1965 SC 1636, this Court held: D

> *".....When this Court decides questions of law, its decisions are, under Art. 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and* E *maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally* F *tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must* G *be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the* H

A *question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent* B *aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed ? Is the Court hearing such plea fairly unanimous that there is* C *such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good ? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier* D *decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still* E *more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."*

7. It is, therefore, evident that before making a reference to a larger Bench, the Court must reach a conclusion regarding F the correctness of the judgment delivered by it previously, particularly that, which has been delivered by a Bench of nine Judges or more, and adjudge the effect of any error therein, upon the public, what inconvenience, hardship or mischief it would cause, and what the exact nature of the infirmity or error G that warrants a review of such earlier judgments.

In the instant case, we do not find any such compelling circumstance that may warrant a review, and thus, taking into consideration the facts of the present case, we are not convinced that this matter requires a reference to a larger H Bench.

8. Before proceeding with the case, it is necessary to refer to certain relevant **statutory provisions:**

It is evident from the Preamble of the Act, 1986 that the Lokayukta has two duties, firstly, to protect honest public functionaries from false complaints and allegations, and secondly, to investigate charges of corruption filed against public functionaries. Hence, investigation of such charges of corruption against public functionaries is not the only responsibility that the Lokayukta is entrusted with.

Section 2(8) of the Act, 1986, defines the term, "Public servant", as having the same meaning, that has been given to it, under Section 21 of the Indian Penal Code, 1860.

Section 3 (1) of the Act, 1986, reads as under:

> "For the purpose of conducting investigations in accordance with provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukta.
>
> Provided that the Lokayukta shall be appointed **after consultation with the Chief Justice of the High Court** and except where such appointment is to be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under Article 356 of the Constitution is in operation in the State of Gujarat, after **consultation also with the Leader of the Opposition** in the Legislative Assembly, or if there be no such Leader, a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct." (Emphasis added)

Section 4 prescribes certain disabilities/disqualifications with respect to the appointment of the Lokayukta, and stipulates that he must not be a Member of Parliament or of any State Legislature, and also that he must not hold any office of trust,

A or profit and even if he does hold any such post, that he must tender his resignation as regards the same, before he is appointed as Lokayukta, and also further, that he must not be affiliated with any political party.

B Section 6 of the said Act, provides that the Lokayukta shall not be removed from office, except under an order made by the Governor, on the grounds of proven misbehaviour, or incapacity, after an inquiry into the same which has been conducted by the Chief Justice of the High Court of the State, or by a Judge nominated by him, in which, the Lokayukta is C informed of the charges against him, and has been given, a reasonable opportunity of being heard, with respect to the same.

Section 7 of the Act, 1986 provides for matters which may D be investigated by the Lokayukta, against **public functionaries,** which may include the Chief Minister and the Council of Ministers also.

Section 12 of the Act, 1986 provides that the Lokayukta, E after investigation of a complaint against the Chief Minister, if any substance is found therein, shall submit a written report, communicating the findings arrived at by him, along with such relevant materials/documents and other evidence, that are in his possession, to the Chief Minister himself. Clause 2 thereof F provides that, the Chief Minister shall then place the said report, without any delay, before the Council of Ministers.

Section 19 of the Act, empowers the Governor to confer additional functions upon the Lokayukta, after having consultation with the Lokayukta, in relation to the eradication G of corruption, which may be specified, by publishing a notification with respect to the same, in the Official Gazette.

Section 20 of the Act, deals with the power to exclude complaints against certain classes of public functionaries. H Under this Section, the State Government, upon a

recommendation made by the Lokayukta, may exclude, by Notification in the Official Gazette, complaints involving allegations against persons belonging to a particular class of public functionaries, as has been specified in the said notification, from under the jurisdiction of the Lokayukta.

CONSULTATION- means:

9. In *State of Gujarat & Anr. v. Gujarat Revenue Tribunal Bar Association & Anr.,* JT 2012 (10) SC 422, this Court held that, the object of consultation is to render its process meaningful, so that it may serve its intended purpose. Consultation requires the meeting of minds between the parties that are involved in the consultative process, on the basis of material facts and points, in order to arrive at a correct, or at least a satisfactory solution. If a certain power can be exercised only after consultation, such consultation must be conscious, effective, meaningful and purposeful. To ensure this, each party must disclose to the other, all relevant facts, for due deliberation. The consultee must express his opinion only after complete consideration of the matter, on the basis of all the relevant facts and quintessence. Consultation may have different meanings in different situations, depending upon the nature and purpose of the statute.

(See also: *UOI v. Sankalchand Himatlal Sheth & Anr.,* AIR 1977 SC 2328; *State of Kerala v. Smt. A. Lakshmikutty & Ors.,* AIR 1987 SC 331; *High Court of Judicature for Rajasthan v. P.P Singh & Anr.,* AIR 2003 SC 1029; *UOI & Ors. v. Kali Dass Batish & Anr.,* AIR 2006 SC 789; *Andhra Bank v. Andhra Bank Officers & Anr.,* AIR 2008 SC 2936; and *Union of India v. R. Gandhi, President, Madras Bar Association,* (2010) 11 SCC 1).

10. In *Chandramouleshwar Prasad v. The Patna High Court & Ors.,* AIR 1970 SC 370, this Court held that, consultation or deliberation can neither be complete nor effective, before the parties thereto, make their respective

points of view, known to the other, or others, and discuss and examine the relative merits of their views. If one party makes a proposal to the other, who has a counter proposal in mind, which is not communicated to the proposer, a direction issued to give effect to the counter proposal, without any further discussion with respect to such counter proposal, with the proposer cannot be said to have been issued after consultation.

11. In *N. Kannadasan v. Ajoy Khose & Ors.*, (2009) 7 SCC 1, this Court considered a case regarding the appointment of the Chairman of a State Consumer Disputes Redressal Commission, under the provisions of the Consumer Protection Act 1986, and examined the communication between the consultant and consultee, i.e. the State Government and the Chief Justice of the High Court, and observed that, where the High Court had placed for consideration, certain material against a person, whose name was proposed by the State Government, for consideration with respect to his appointment to the post of Chairman of the State Commission, and no specific explanation was provided for the non-consideration of such material, then an appointment made in light of such circumstances, cannot be held to be an appointment made after due consultation. The Court held as under:"But, where a decision itself is thickly clouded by non-consideration of the most relevant and vital aspect, the ultimate appointment is vitiated not because the appointee is not desirable or otherwise, but because mandatory statutory requirement of consultation has not been rendered effectively and meaningfully". Thus, in such a situation, even if a person so appointed was in theory, eligible for the purpose of being considered for appointment to the said post, the fact that the process of consultation was vitiated, would render the ultimate order of appointment vulnerable, and liable to questioning. In this case, this Court also considered its earlier decisions, in the cases of *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana & Ors.*, AIR 1996 SC 1308; and *Ashok Tanwar & Anr. v. State of H.P. & Ors.*,

AIR 2005 SC 614, and came to the conclusion that, the Chief Justice must send **only one name, and not a panel of names for consideration,** or else, the word '**primacy**' would lose its significance. If the Chief Justice sends a panel of names, and the Governor selects one from them, then it would obviously become the **primacy** of the Governor, and would not remain the primacy of the Chief Justice, which is the requirement under the law.

The concept of primacy in such a situation, has been included, owing to the fact that, the Chief Justice of the High Court of the concerned State, is the most appropriate person to judge the suitability of a retired Judge, who will act as the Lokayukta and the object of the Act would not be served, if the final decision is left to the executive. The opinion of the Chief Justice would be entirely independent, and he would most certainly be in a position to determine who the most suitable candidate for appointment to the said office is. This Court has, therefore, explained that, the primacy of the opinion of the Chief Justice must be accepted, except for **cogent reasons,** and that the term **consultation,** for such purpose shall mean **concurrence**.

12. In *N. Kannadasan* (supra), while interpreting the provisions of Section 16 of the Consumer Protection Act, 1986, this Court held that, consultation under the said Act, cannot be equated with consultation, as contemplated by the Constitution under Article 217, in relation to the appointment of a Judge of the High Court. However, the Court further held, that *primacy will be given to the opinion of the Chief Justice, where such consultation is statutorily required.*

13. In *Centre For PIL & Anr. v. Union of India & Anr.,* AIR 2011 SC 1267, this Court considered the argument of unanimity, or consensus, in the matter of the appointment of the Central Vigilance Commissioner and observed:

"It was further submitted that if unanimity is ruled out then

A *the very purpose of inducting the Leader of the Opposition in the process of selection will stand defeated because if the recommendation of the Committee were to be arrived at by majority it would always exclude the Leader of the Opposition since the Prime Minister and*
B *the Home Minister will always be ad idem.*

xx xx xx

We find no merit in these submissions. To accept the contentions advanced on behalf of the petitioners would
C *mean conferment of a "veto right" on one of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation."*

14. This Court, in *Justice K.P. Mohapatra v. Sri Ram*
D *Chandra Nayak & Ors.*, AIR 2002 SC 3578, considered the provisions of Section 3(1)(a) of the Orissa Lokpal and Lokayuktas Act, 1995, which are *pari materia* with those of Section 3 of the Act, 1986. In the aforementioned case, the question that arose was with respect to the meaning of
E **consultation**, as contemplated under the Orissa Act, which is a verbatim replication of Section 3 of the Gujarat Act, and upon consideration of the statutory provisions of the Act, this Court came to the conclusion that:

F *"**12.** ..... The investigation which **Lokpal is required to carry out is that of quasi-judicial nature** which would envisage not only knowledge of law, but also of the nature and work which is required to be discharged by an administrator. In this context, the word "consultation" used in Section 3(1) proviso (a) would require that*
G *consultation with the Chief Justice of the High Court of Orissa is a must or a sine qua non. For such appointment, the Chief Justice of the High Court would be the best person for proposing and suggesting such person for being appointed as Lokpal. His opinion would*
H *be totally independent and he would be in a position to*

find out who is most or more suitable for the said office. In this context, ***primacy*** *is required to be given to the opinion of the Chief Justice of the High Court.*

xx xx xx xx xx

16. *Applying the principle enunciated in the aforesaid judgment, scheme of Section 3(1) of the Act read with the functions to be discharged by the Lokpal and the nature of his qualification, it is apparent that the consultation with the Chief Justice is mandatory and* ***his opinion would have primacy.***" (Emphasis added)

The aforesaid appeal was filed against the judgment of the Orissa High Court in *Ram Chandra Nayak v. State of Orissa,* AIR 2002 Ori 25, wherein the High Court had held that the Governor, while appointing a person as Lokpal, must act upon the aid and advice of the Council of Ministers, and that there was no question of him exercising any power or discretion in his personal capacity. The said judgment was reversed by this Court on other grounds, but not on this issue.

15. In *Indian Administrative Service (S.C.S.) Association, U.P. & Ors. v. Union of India & Ors.,* (1993) Supp.1 SCC 730, this Court explained the term 'Consultation', though the same was done in the context of the promotion of certain officials under the provisions of the All India Services Act, 1951. The Court laid down various propositions with respect to consultation, *inter-alia:*

"(6) No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions, nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is 'after consultation'; 'was, in fact, consulted' or was it a 'sufficient consultation'."

A 16. Thus, in view of the above, the meaning of **consultation** varies from case to case, depending upon its fact-situation and the context of the statute, as well as the object it seeks to achieve. Thus, no straight-jacket formula can be laid down in this regard. Ordinarily, consultation means a free and
B fair discussion on a particular subject, revealing all material that the parties possess, in relation to each other, and then arriving at a decision. However, in a situation where one of the consultees has **primacy** of opinion under the statute, either specifically contained in a statutory provision, or by way of
C implication, consultation may mean **concurrence**. The court must examine the fact-situation in a given case to determine whether the process of consultation, as required under the particular situation did in fact, stand complete.

THE MANNER IN WHICH THE GOVERNOR ACTS:

D

17. In *Samsher Singh v. State of Punjab & Anr.,* AIR 1974 SC 2192, this Court expounded the universal rule that, the Governor is bound to act **only** in accordance with the aid and advice of the Council of Ministers, headed by the Chief Minister.
E The Rules of Business and allocation of business among the Ministers, related to the provisions of Article 53 in the case of the President, and Article 154 in the case of the Governor, state that executive power in connection with the same, shall be exercised by the President or the Governor either directly, or
F through subordinate officers. The President is the formal or Constitutional head of the Executive. The real executive powers, however, are vested in the Ministers of the Cabinet. Wherever the Constitution requires the satisfaction of the President or the Governor, for the purpose of exercise by the
G President or the Governor, any power or function, such satisfaction is not the personal satisfaction of the President, or of the Governor, in their personal capacity, but the satisfaction of the President or Governor, in the Constitutional sense as contemplated in a Cabinet system of Government, that is, the satisfaction of the Council of Ministers, on whose aid and
H

advice the President, or the Governor, generally exercise all their powers and functions. The President of India is not a glorified cipher. He represents the majesty of the State, and is at its apex, though only symbolically, and has a different rapport with the people and parties alike, being above politics. His vigilant presence makes for good governance if only he uses, what Bagshot described as, "the right to be consulted, to warn and to encourage".

Whenever the Constitution intends to confer discretionary powers upon the Governor, or to permit him to exercise his individual judgment, it has done so **expressly**. For this purpose, the provisions of "Articles 200; 239(2); 371-A(1)(b); 371-A(1)(a); 371-A(2)(b); and 371-A(2)(f), VI Schedule, Para 9(2) (and VI Schedule, Para 18(3), until omitted with effect from January 21, 1972), may be referred to. Thus, discretionary powers exist only where they are expressly spelt out.

However, the power to grant pardon or to remit sentence (Article 161), the power to make appointments including that of the Chief Minister (Article 164), the Advocate-General (Article 165), the District Judges (Article 233), the Members of the Public Service Commission (Article 316) are in the category where the Governor is bound to act on the aid and advice of the Council of Ministers. Likewise, the power to prorogue either House of Legislature or to dissolve the Legislative Assembly (Article 174), the right to address or send messages to the Houses of the Legislature (Article 175 and Article 176), the power to assent to Bills or withhold such assent (Article 200), the power to make recommendations for demands of grants [Article 203(3)], and the duty to cause to be laid every year the annual budget (Article 202), the power to promulgate ordinances during recess of the Legislature (Article 213) also belongs to this species of power. Again, the obligation to make available to the Election Commission, requisite staff for discharging functions conferred upon it by Article 324(1) and Article 324(6), the power to nominate a member of the Anglo-

A Indian Community to the Assembly in certain situations (Article 333), the power to authorise the use of Hindi in proceedings in the High Court [Article 348(2)], are illustrative of the functions of the Governor, qua the Governor.

B The Governor shall act with aid and advice of the Council of Ministers, save in a few well known exceptional situations. **Without being dogmatic or exhaustive**, this situation relates to the choice of the Chief Minister, dismissal of the government, and dissolution of the House.

C 18. In *M.P. Special Police Establishment v. State of M.P. & Ors.*, AIR 2005 SC 325, the question that arose was whether, for the purpose of grant of sanction for the prosecution of Ministers, for offences under the Prevention of Corruption Act and/or, the Indian Penal Code, the Governor, while granting D such sanction, could exercise his own discretion, or act contrary to the advice rendered to him by the Council of Ministers. The Court, in this regard, first considered the object and purpose of the statutory provisions, which are aimed at achieving the prevention and eradication of acts of corruption by public E functionaries. The Court then also considered, the provisions of Article 163 of the Constitution, and took into consideration with respect to the same, a large number of earlier judgments of this Court, including the cases of *Samsher Singh* (supra); and *State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.*, F AIR 1982 SC 1249, and thereafter, came to the conclusion that, in a matter related to the grant of sanction required to prosecute a public functionary, the Governor is usually required to act in accordance with the aid and advice rendered to him by the Council of Ministers, and not upon his own discretion. G However, an exception may arise while considering the grant of sanction required to prosecute the Chief Minister, or a Minister, where, as a matter of propriety, the Governor may have to act upon his own discretion. Similar would be the situation in a case where, the Council of Ministers disables or disentitles itself from providing such aid and advice. Such a H conclusion by the court, was found to be necessary, for the

reason that the facts and circumstances of a case involving any of the aforementioned fact situations, may indicate the possibility of bias on the part of the Chief Minister, or the Council of Ministers.

This Court carved out certain exceptions to the said provision. For instance, where bias is inherent or apparent; or, where the decision of the Council of Ministers is wholly irrational, or, where the Council of Ministers, because of some incapacity or other situation, is disentitled from giving such advice; or, where it refrains from doing so as matter of propriety; or in the case of a complete break down of democracy.

Article 163(2) of the Constitution provides that it would be permissible for the Governor to act without ministerial advice in certain other situations, depending upon the circumstances therein, even though they may not specifically be mentioned in the Constitution as discretionary functions; e.g., the exercise of power under Article 356(1), as no such advice will be available from the Council of Ministers, who are responsible for the break down of Constitutional machinery, or where one Ministry has resigned, and the other alternative Ministry cannot be formed. Moreover, Clause 2 of Article 163 provides that the Governor himself is the final authority to decide upon the issue of whether he is required by or under the Constitution, to act in his discretion. The Council of Ministers therefore, would be rendered incompetent in the event of there being a difference of opinion with respect to such a question, and such a decision taken by the Governor, would not be **justiceable** in any court. There may also be circumstances where, there are matters, with respect to which the Constitution does not specifically require the Governor to act in his discretion, but the Governor, despite this, may be fully justified to act so e.g., the Council of Ministers may advise the Governor to dissolve a House, which may be detrimental to the interests of the nation. In such circumstances, the Governor would be justified in refusing to accept the advice rendered to him, and act in his discretion.

A There may even be circumstances where ministerial advice is not available at all, i.e., the decision regarding the choice of Chief Minister under Article 164(1), which involves choosing a Chief Minister after a fresh election, or in the event of the death or resignation of the Chief Minister, or dismissal of the Chief B Minister, who loses majority in the House and yet refuses to resign, or agree to dissolution. The Governor is further not required to act on the advice of the Council of Ministers, where some other body has been referred for the purpose of consultation i.e., Article 192(2) as regards decisions on C questions related to the disqualification of members of the State Legislature.

19. In *Brundaban Nayak v. Election Commission of India & Anr.,* AIR 1965 SC 1892, this Court held that while dealing with a case under Article 192 of the Constitution, the Governor D must act in accordance with advice of the Election Commission, and that he does not require any aid or advice from the Council of Ministers.

(See also: *Election Commission of India & Anr. v. Dr.* E *Subramanian Swamy & Anr.,* AIR 1996 SC 1810).

20. The issue of primacy of the Chief Justice in such cases, has also been considered and approved by this Court in *Ashish Handa* (supra); and *Supreme Court Advocates-on-Record Association & Anr. v. Union of India,* AIR 1994 SC 268. F

21. Thus, where the Governor acts as the Head of the State, except in relation to areas which are earmarked under the Constitution as giving discretion to the Governor, the exercise of power by him, must only be upon the aid and advice G of the Council of Ministers, for the reason that the Governor, being the custodian of all executive and other powers under various provisions of the Constitution, is required to exercise his formal Constitutional powers, only upon, and in accordance with, the aid and advice of his Council of Ministers. He is, H therefore, bound to act under the Rules of Business framed

under Article 166 (3) of the Constitution. (Vide: *Pu Myllai Hlychho & Ors. v. State of Mizoram & Ors.,* AIR 2005 SC 1537). A

22. In *Ram Nagina Singh & Ors. v. S.V. Sohni & Ors.,* AIR 1976 Pat 36, the Patna High Court considered the issue involved herein, i.e., the appointment of the Lokayukta, under the Bihar Lokayukta Act, 1974, and held that, ordinarily, when a power is vested, even by virtue of a statute, in the Governor, he must act in accordance with the aid and advice tendered to him by the Council of Ministers, for the simple reason that, he does not cease to be an Executive Head, as mentioned under the Constitution, merely because such authority is conferred upon him by a statute. It would, in fact, be violative of the scheme of the Constitution, if it was held that the mere use of the word, "Governor" in any statute, is sufficient to impute to the legislature, an intention by it, to confer a power, *"eo nomine".* Any interpretation other than the one mentioned above, would therefore, be against the concept of parliamentary democracy, which is one of the basic postulates of the Constitution. B C D

In view of the Rules of Executive Business, the topic involving appointment of the Lokayukta, must be brought before the Council of Ministers. Even if the appointment in question, is not governed by any specific rule in the Rules of Executive Business, such appointment must still be made following the said procedure, for the reason that the Rules of Executive Business cannot be such, so as to override any bar imposed by Article 163(3) of the Constitution. E F

However, a different situation altogether may arise, where the Governor *ex-officio,* becomes a statutory authority under some statute. G

23. In *Hardwari Lal v. G.D. Tapase & Ors.,* AIR 1982 P & H 439, the powers of the Governor, with respect to the appointment/removal of the Vice-Chancellor of Maharshi H

A Dayanand University, Rohtak under the Maharshi Dayanand University (Amendment) Act, 1980, were considered, wherein a direction was sought with regard to the renewal of the term of the Vice-Chancellor of the said University. Certain promises had been made in connection with the same, while making such B appointment. The Court held that, as the Governor was the *ex-officio* Chancellor of the University, therefore, by virtue of his office, he was not bound to act under the aid and advice of the Council of Ministers. Under Article 154 of the Constitution, the executive powers of the State are vested in the Governor, which C may be exercised by him either directly, or through officers subordinate to him, in accordance with the provisions of the Constitution. Article 161 confers upon the Governor, a large number of powers including the grant of pardon, reprieves, respites or remissions of punishment etc. Such executive D power can be exercised by him, only in accordance with the aid and advice of the Council of Ministers. Article 162 states that the executive power of the State, shall extend to all such matters, with respect to which, the legislature of the State has the power to make laws. Therefore, the said provision, widens the powers of the Governor. Article 166(3) of the Constitution, E further bestows upon the Governor the power to make rules for more convenient transactions of business, of the Government of the State, and also for the purpose of allocating among the Ministers of State, such business.

F There are several ways by which, a power may be conferred upon the Governor, or qua the Governor, which will enable him to exercise the said power, by virtue of his office as Governor. Therefore, there can be no gainsaying that all the powers that are exercisable by the Governor, by virtue of his G office, can be exercised only in accordance with the aid and advice of the Council of Ministers, except insofar as the Constitution expressly, or perhaps by necessary implication, provides otherwise.

H Thus, in such a situation, the Statute makes a clear cut

distinction between two distinct authorities, namely, the Chancellor and the State Government. When the legislature intentionally makes such a distinction, the same must also be interpreted distinctly, and while dealing with the case of the Vice-Chancellor, the Governor, being the Chancellor of the University, acts only in his personal capacity, and therefore, the powers and duties exercised and performed by him under a statute related to the University, as its Chancellor, have absolutely no relation to the exercise and performance of the powers and duties by him, while he holds office as the Governor of the State.

24. In *Vice-Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors.,* (1997) 10 SCC 264, this Court dealt with the power of the Governor of the State of U.P. *ex-officio,* with respect to all the Universities established under the provisions of the U.P. State Universities Act, 1973 (hereinafter referred to as 'the Act 1973). Section 68 of the Act, 1973 empowers the Chancellor to entertain any question, related to the appointment, selection, promotion or termination of any employee in the University. In the meanwhile, the Legislature of the State of U.P., enacted the U.P. Public Services (Reservation of Schedule Castes, Tribes and Backward Classes) Act, 1994 (hereinafter referred to as 'the Act 1994), providing for a particular reservation. This Court held that, Section 6 of the Act, 1994 enables the State Government to call for records and direct enforcement of the provisions of the said Act. This Court also held that, when the Governor *ex-officio,* acts as the Chancellor of a University, he acts under Section 68 of the Act, 1973, and discharges statutory duties as mentioned under the Act, 1973, but when the Government calls for the record of appointment of any employee, to examine whether the reservation policy envisaged under the Act, 1994, has been given effect to or not, and takes action in such respect, then he acts in his capacity as Governor, under Article 163 of the Constitution of India and is therefore, bound to act upon the aid and advice of the Council of Ministers.

A 25. The Constitutional provisions hence, clearly provide that the Governor does not exercise any power by virtue of his office, in his individual discretion. The Governor is aided and advised by the Council of Ministers in the exercise of such powers, that have been assigned to him, under Article 163 of
B the Constitution. The executive power of the State, is coextensive with the legislative power of the State, and the Governor in the Constitutional sense, discharges the functions assigned to him under the Constitution, with the aid and advice of the Council of Ministers, except insofar as he is, by or under
C the Constitution, required to exercise such functions in his own discretion. The satisfaction of the Governor for the purpose of exercise of his other powers or functions, as required by the Constitution, does not mean the personal satisfaction of the Governor, but refers to satisfaction in the Constitutional sense,
D under a Cabinet system of Government. The executive must act, subject to the control of the legislature. The executive power of the State, is vested in the Governor, as he is the head of the executive. Such executive power is generally described as residual power, which does not fall within the ambit of either
E legislative or judicial power. However, executive power may also partake legislative or judicial actions. All powers and functions of the President, except his legislative powers as have been mentioned, for example, in Article 123, viz., the ordinance making power, and all powers and functions of the Governor, except his legislative power, as also for example,
F under Article 213, which state that Ordinance making powers are executive powers of the Union, vested in the President under Article 53(1) in one case, and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or clause (3) of Article 77 are not limited in their
G operation, only with respect to the executive actions of the Government of India, under clause (1) of Article 77. Similarly, clause (2) or clause (3) of Article 166 are also not limited in their operation, only with respect to the executive actions of the Government of the State under clause (1) of Article 166. The
H expression, 'Business of the Government of India' in clause (3)

of Article 77, and the expression, 'Business of the Government of the State' in clause (3) of Article 166, include all executive business. (Vide: *Samsher Singh* (supra); *Ramdas Shrinivas Nayak* (supra); *Bhuri Nath & Ors. v. State of J & K & Ors.,* AIR 1997 SC 1711; and *Narmada Bachao Andolan v. State of Madhya Pradesh,* AIR 2011 SC 3199).

In *Maru Ram, Bhiwana Ram etc. etc. v. Union of India & Ors. etc.,* AIR 1980 SC 2147, a Constitution Bench of this Court held that, "the Governor is but a shorthand expression for the State Government, and the President is an abbreviation for the Central Government".

26. The exceptions carved out in the main clause of Article 163(1), permit the legislature to entrust certain functions to the Governor to be performed by him, either in his discretion, or in consultation with other authorities, independent of the Council of Ministers.

The meaning of the words 'by or under' is well-settled. The expression, `by an Act', would mean by virtue of a provision directly enacted in the statute in question and that, which is conceivable from its express language or by necessary implication therefrom. The words 'under the Act', would in such context, signify that which may not directly be found in the statute itself, but which is conferred by virtue of powers enabling such action(s), e.g., by way of laws framed by a subordinate law making authority competent to do so under the Parent Act. (Vide: *Dr. Indramani Pyarelal Gupta & Ors. v. W.R. Natu & Ors.,* AIR 1963 SC 274).

27. This Court in *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1 held:

> ***57.*** *The expression "required" found in Article 163(1) is stated to signify that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been reasoned that the*

A *expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. The Sarkaria Commission Report further adds that such necessity may arise even from rules and*
B *orders made "under" the Constitution.*

28. However, there is a marked distinction between the provisions of Articles 74 and 163 of the Constitution.

The provisions of Article 74 of the Constitution, are not *pari*
C *materia* with the provisions of Article 163, as Article 74 provides that there shall be a Council of Ministers, with the Prime Minister at their head, to aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice as is rendered to him, provided that the
D President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice that is tendered, after such reconsideration. While Article 163 provides that there shall be a Council of Ministers with the Chief Minister at their head,
E to aid and advise the Governor, in the exercise of his functions, **an exception has been carved out with respect to situations wherein, he is by, or under this Constitution, required to perform certain functions by exercising his own discretion.**

F The exception carved out by the main clause under Article 163(1) of the Constitution, permits the legislature to bestow upon the Governor, the power to execute **certain** functions, that may be performed by him, in his own discretion, or in consultation with other authorities, independent of the Council
G of Ministers. While dealing with the powers of the Governor with respect to appointment and removal, or imposing punishment for misconduct etc., the Governor is required to act upon the recommendations made by the High Court, and not upon the aid and advice rendered by the Council of Ministers, for the
H reason that, the State is not competent to render aid and

advice to the Governor with respect to such subjects. While the High Court retains powers of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them during inquiries, and also to impose punishments upon them, formal orders, in relation to questions regarding the dismissal, removal, reduction in rank or the termination of services of judicial officers on any count, must be passed by the Governor upon recommendations made by the High Court. (Vide: *Chandra Mohan v. State of U.P. & Ors.,* AIR 1966 SC 1987; and *Rajendra Singh Verma (dead) thr. Lrs. & Ors. v. Lt. Governor (NCT of Delhi) & Ors.,* (2011) 10 SCC 1).

29. In *Bhuri Nath* (supra), the question that arose was in relation to whether the Governor was bound to act in accordance with the aid and advice of the Council of Ministers, or whether he could exercise his own discretion, independent of his status and position as the Governor, by virtue of him being the *ex-officio* Chairman of the Shri Mata Vaishno Devi Shrine Board, under the Shri Mata Vaishno Devi Shrine Act, 1988. The Shrine Board discharges functions and duties, as have been described under the Act, in the manner prescribed therein, and thus, after examining the scheme of the Act, this Court held that, "the decision is his own decision, on the basis of his own personal satisfaction, and not upon the aid and advice of the Council of Ministers. The nature of exercise of his powers and functions under the Act is distinct, and different from the nature of those that are exercised by him formally, in the name of the Governor, under his seal, for which responsibility rests only with his Council of Ministers, headed by the Chief Minister".

30. In *State of U.P. & Ors. etc. v. Pradhan Sangh Kshettra Samiti & Ors. etc.,* AIR 1995 SC 1512, this Court dealt with the position of the Governor in relation to functions of the State and held as under:

> *"Admittedly, the function under Article 243(g) is to be exercised by the Governor on the aid and advice of his*

Council of Ministers. Under the Rules of Business, made by the Governor under Article 166(3) of the Constitution, it is in fact an act of the Minister concerned, or of the Council of Ministers, as the case may be. When ***the Constitution itself thus equates the Governor with the State Government*** *for the purposes of relevant functions,.....Further, Section 3(60)(c) of the General Clauses Act, 1897, defines '****State Government****" to mean* ***"Governor"****, which definition is in conformity with the provisions of the Constitution...The Governor means the Government of the State and all executive functions which are exercised by the Governor, except where he is required under the Constitution to exercise the functions in his discretion, are exercised by him on the aid and advice of Council of Ministers."* (Emphasis added)

31. In *S.R. Chaudhuri v. State of Punjab & Ors.*, AIR 2001 SC 2707, this Court held as under:

"21. Parliamentary democracy generally envisages (*i*) *representation of the people*, (*ii*) *responsible government*, and (*iii*) *accountability* of the Council of Ministers to the Legislature. The essence of this is to draw a direct line of authority from the people through the Legislature to the executive.

xx xx xx xx

40. Chief Ministers or the Governors, as the case may be, must forever remain conscious of their constitutional obligations and not sacrifice either political responsibility or parliamentary conventions at the altar of "political expediency. .... Constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency". We should not allow erosion of principles of constitutionalism."

32. The principle of check and balance is a well

established philosophy in the governance of our country, under our Constitution. If we were all to have our way, each person would be allowed to wage a war against every other person, i.e., *Bellum Omnium Contra Omnes*. This reminds us to abide by Constitutional law followed by statutory law, otherwise everybody would sit in appeal against the judgment of everybody.

33. In view of the aforesaid discussion, the law as evolved and applicable herein can be summarised to the effect that the Governor is bound to act on the aid and advice of the Council of Ministers, unless he acts as, "persona designata" i.e. "*eo nomine*", under a particular statute, or acts in his own discretion under the exceptions carved out by the Constitution itself.

BIAS :

34. Absence of bias can be defined as the total absence of any pre-conceived notions in the mind of the Authority/Judge, and in the absence of such a situation, it is impossible to expect a fair deal/trial and no one would therefore, see any point in holding/participating in one, as it would serve no purpose. The Judge/Authority must be able to think dispassionately, and submerge any private feelings with respect to each aspect of the case. The apprehension of bias must be reasonable, i.e., which a reasonable person would be likely to entertain. Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim - *nemo debet esse judex in causa propria sua*. It applies only when the interest attributed to an individual is such, so as to tempt him to make a decision in favour of, or to further, his own cause. There may not be a case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided, or dealt with impartially, but where the circumstances are such, so as to create a reasonable apprehension in the minds of others, that there is a likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias.

A In the event that actual proof of prejudice is available, the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary pre-condition, for what is relevant, is actually the reasonableness of the apprehension in this regard, in the mind of such party. In case B such apprehension exists, the trial/judgment/order etc. would stand vitiated, for want of impartiality, and such judgment/order becomes a nullity. The trial becomes "*coram non judice*".

While deciding upon such an issue, the court must examine the facts and circumstances of the case, and examine C the matter from the view point of the people at large. The question as regards, "whether or not a real likelihood of bias exists, must be determined on the basis of probabilities that are inferred from the circumstances of the case, by the court objectively, or, upon the basis of the impression that may D reasonably be left upon the minds of those aggrieved, or the public at large". (Vide: *S. Parthasarathi v. State of Andhra Pradesh,* AIR 1973 SC 2701; *State of Punjab v. V.K. Khanna & Ors.,* AIR 2001 SC 343; *N.K. Bajpai v. Union of India & Anr.,* (2012) 4 SCC 653; and *State of Punjab v. Davinder Pal Singh* E *Bhullar & Ors. etc.,* AIR 2012 SC 364).

BINDING EFFECT OF THE JUDGMENT:

35. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding, F particularly, when the same is that of a co-ordinate bench, or of a larger bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point G with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". The case must be considered, taking note of the *ratio decidendi* of the H same i.e., the general reasons, or the general grounds upon

which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision. (Vide: *Smt. Somavanti & Ors. v. The State of Punjab & Ors.*, AIR 1963 SC 151; *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur*, AIR 1970 SC 1002; *Ambika Prasad Mishra v. State of U.P. & Ors.*, AIR 1980 SC 1762; and *Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr.*, AIR 2002 SC 1598).

36. So far as the judgment in *Ram Nagina Singh* (supra), is concerned, para 9 of the said judgment, makes it clear that the High Court had summoned the original record of proceedings, containing communication between the prescribed statutory authorities therein, wherein the Chief Minister had made a note, while writing to the Governor, which reads as under:

> "In this connection, I have already deliberated with you. In my opinion, **it is not necessary to obtain the opinion of the Council of Ministers in this connection**". (Emphasis added)

In view of this, the counsel for the State took the same stand before the High Court. It was the counsel appearing for the Central Government, who argued otherwise. In fact, the Governor had appointed the Lokayukta acting upon his own discretion, without seeking any aid or advice from the Council of Ministers. The said judgment was approved by this Court in *Bhuri Nath* (supra). Undoubtedly, the provisions of Section 18 of the Act, 1974, which are analogous to the provisions of Section 20 of the Act, 1986, by virtue of which, the Act enables the State Government, to exclude complaints made against certain classes of public servants, were not considered by the court, as the same were not brought to its notice. However, on this basis, it cannot be held that had the said provision been brought to the notice of the court, the result would have been different.

A **INSTANT CASE** :

37. This case must be examined in light of the aforesaid settled legal propositions, and also taking into consideration, the scheme of the Act, as provided in its provisions, that have been referred to hereinabove.

B

38. The Act, 1986 stipulates that the institution of Lokayukta must be demonstrably independent and impartial. A conjoint reading of Sections 4 and 6 of the Act, 1986, makes it clear that the Lokayukta must be entirely independent and free from all political and commercial associations. Investigation proceedings by the Lokayukta, must be conducted in a formal manner. The appointment must, as far as possible, be non-political and the status of the Lokayukta, must be equivalent to that of the highest judicial functionaries in the State. The Act, 1986 provides for a proviso to sub-section (1) of Section 3 of Act, 1986, which envisages the appointment of the Lokayukta when the Legislative Assembly has been dissolved, or when a Proclamation of Emergency under Article 356 of the Constitution is in operation, upon consultation with the Chief Justice of the State and the Leader of Opposition. However, such consultation with the Leader of Opposition also stands dispensed with, if the Assembly is dissolved or suspended. Thus, it is evident that the Governor can appoint a Lokayukta, even when there is no Council of Ministers in existence.

C

D

E

F The aforesaid statutory provisions make it mandatory on the part of the State to ensure that the office of the Lokayukta is filled up without any delay, as the Act provides for such filling up, even when the Council of Ministers is not in existence. In the instant case, admittedly, the office of the Lokayukta has been lying vacant for a period of more than 9 years i.e. from 24.11.2003, when Justice S.M. Soni relinquished the office of Lokayukta, till date.

G

39. The facts of the case also reveal that the Government, for reasons best known to it, came forward with a request to

H

the Governor, to issue an Ordinance on 17.8.2011. The said Ordinance would have changed the manner of appointment of the Lokayukta, for, if the manner of selection of the Lokayukta suggested by it would have been accepted, then the institution of the Lokayukta would have vested in not one, but several persons, and selection of such persons would have been done by a committee consisting of the Chief Minister, the Speaker of the Legislative Assembly, Minister (Incharge of Legal Department), a sitting Judge of the High Court, as nominated by the Chief Justice and the Leader of Opposition in the Legislative Assembly.

40. In a democratic set up of government, the successful functioning of the Constitution depends upon democratic spirit, i.e. a spirit of fair play, of self restraint, and of mutual accommodation of different views, different interests and different opinions of different sets of persons. "There can be no Constitutional government unless the wielders of power are prepared to observe limits upon governmental powers".

It is evident that the Governor enjoys complete immunity under Article 361(1) of the Constitution, and that under this, his actions cannot be challenged, for the reason that the Governor acts only upon the aid and advice of the Council of Ministers. If this was not the case, democracy itself would be in peril. The Governor is not answerable to either House of State, or to the Parliament, or even to the Council of Ministers, and his acts cannot be subject to judicial review. In such a situation, unless he acts upon the aid and advice of the Council of Ministers, he will become all powerful and this is an anti-thesis to the concept of democracy. Moreover, his actions, including such actions which may be challenged on ground of allegations of malafides, are required to be defended by the Union/State. In spite of the fact that the Governor is immune from any liability, it is open to him to file an affidavit if anyone seeks review of his opinion, despite the fact that there is a bar against any action of the court as regards issuing notice to, or for the purpose of

A impleading, at the instance of a party, the President or the Governor in a case, making him answerable.

41. The Gujarat Government Rules of Business, 1990, have been framed under Article 166 of the Constitution, and under the same, the Governor of Gujarat has made several rules B for the convenient transaction of business of the Government of Gujarat, and the subjects allocated in this context, to the General Administration Department include the appointment of High Court Judges (Serial No. 36) and the Lokayukta (Serial No. 316A).
C

42. Be that as it may, the judgments referred to hereinabove, do not leave any room for doubt with respect to the fact that, when the Governor does not act as a statutory authority, but as the Head of the State, being Head of the D executive and appoints someone under his seal and signature, he is bound to act upon the aid and advice of the Council of Ministers. The Governor's version of events, stated in her letter dated 3.3.2010, to the effect that she was not bound by the aid and advice of the Council of Ministers, and that she had the E exclusive right to appoint the Lokayukta, is most certainly not in accordance with the spirit of the Constitution. It seems that this was an outcome of an improper legal advice and the opinion expressed is not in conformity with the Rule of Law. The view of the Governor was unwarranted and logically F insupportable.

43. All the three learned Judges in the judgment under appeal have recorded the following findings upon the issue with respect to whether the Governor must act on the aid and advice of the Council of Ministers, or not:
G

(1) Mr. Justice Akil Kureshi came to the conclusion :

"The Governor under Section 3 of the Act acts under the aid and advice of the Council of Ministers."
H

(2) Ms. Justice Sonia Gokani held as under: A

"As provided under Section 3 of the Lokayukta Act, appointment is expressly to be done by the Governor on aid and advice of the Council of Ministers headed by the Chief Minister who are B required to so do it after consultation with the Chief Justice and the Leader of the Opposition party."

(3) Mr. Justice V.M. Sahai has recorded his finding as under:

C

"However, the Chief Minister is the Head of the Council of Ministers. Article 163 of the Constitution of India provides that the Council of Ministers is to aid and advice the Governor in the exercise of all his functions. The exceptions are where the D Governor under the Constitution is required to exercise functions in his discretion. Therefore, the Chief Minister as the Head of the Council of Ministers will automatically figure in the matter of appointment of Lokayukta under Section 3 of the E Act. The Governor is the constitutional or formal Head of the State, and has to make appointment of Lokayukta with the aid and advice of the Council of Ministers as provided by Article 163 of the Constitution.....The Governor was justified and F authorised to act under Section 3 of the Act and exercise her discretionary powers under Article 163 of the Constitution, in the fact-situation of this case in the manner she did while issuing warrant/ notification appointing Justice (Retired) R.A. Mehta as Lokayukta of the Gujarat State without or G contrary to the aid and advice of the Council of Ministers headed by the Chief Minister to save democracy and uphold rule of law. I am of the considered opinion that the answer to the second point is that the Governor of the State was H

A authorised to act in a manner she did while issuing warrant/notification appointing Justice R.A. Mehta as Lokayukta of the State without the aid and advice of the Council of Ministers."

B 44. Such findings have not been challenged by any respondent before this Court. Therefore, the controversy herein, lies within a very narrow compass, as two of the learned Judges have held that the consultation process herein, was in fact complete, and therefore, upon considering the primacy of opinion of the Chief Justice in this regard, they held that the C appointment of respondent no.1 to the post of Lokayukta was valid. However, one learned Judge has differed only as regards the factual aspect of the matter, stating that on the basis of such facts, it cannot be said that the consultation process was complete.

D

45. The facts mentioned hereinabove, make it crystal clear that the process of consultation stood complete as on 2.8.2011, as 3 out of 4 statutory authorities had approved the name of Justice R.A. Mehta and the Chief Justice provided an E explanation to the Chief Minister regarding the objections raised by the latter, with respect to the appointment of Justice R.A. Mehta to the post of Lokayukta, vide letter dated 16.6.2011. This is because, the Chief Minister had certain objections regarding the appointment of respondent No.1, as Lokayukta, F and his objections were considered by the Chief Justice, after which, it was also explained to the Chief Minister, how the said objections raised by him, were in fact, completely irrelevant, or rather, not factually correct. The position was clarified by the Chief Justice after verifying all relevant facts, which is why, the Chief Justice took six whole weeks to reply to the letter dated G 16.6.2011. In the aforesaid letter, it was mentioned that Justice R.A. Mehta was affiliated with certain NGOs, social activist groups etc., and may therefore, have pre-conceived notions, or having prior opinions with respect to certain issues of governance in the State. It was also mentioned that Justice R.A.

H

Mehta had shared a platform with such persons who are known for their antagonism against the State Government. Moreover, he had been a panelist for such NGOs, social activist groups etc., and had expressed his dissatisfaction as regards the manner in which, the present government in the State was functioning. In support of the allegations regarding the aforesaid associations etc., newspaper cuttings were also annexed to the said letter.

46. We have examined the objections raised by the Chief Minister and the reasons given by the Chief Justice for not accepting the same, and reach the inescapable conclusion that none of the objections raised by the Chief Minister could render respondent no.1 ineligible/disqualified or unsuitable for appointment to the said post. On a close scrutiny, the reasons discussed by the Chief Justice appear to be rational and based on facts involved. This establishes an application of mind and a reasonable approach with hardly any element of perversity to invoke a judicial review of the decision making process. The issue appears to have been dealt with objectively. If a vigilant citizen draws the attention of the State/Statutory authority to the apprehensions of the minority community in that State, then the same would not amount to a biased attitude of such citizen towards the State. Thus, there is no scope of judicial review so far as the process of decision making in this case is concerned.

47. While considering the issue of bias, the Court must bear in mind the impression which the public at large may have, and not that of an individual.

LETTERS OF THE CHIEF MINISTER:

48. A perusal of the Minutes of the Meeting dated 23.2.2010 regarding the discussion upon the subject of consultation for the purpose of appointment of the Lokayukta, between the Leader of Opposition and the Hon'ble Chief Minister reveals that, the Chief Minister expressed his view

A stating that **in the event a retired Judge has been given some other assignment, it is not permissible to consider him for the appointment to the post of Lokayukta in the State of Gujarat**. Furthermore, the Chief Minister also expressed his view to the effect that in the process of B consultation, the view of the Hon'ble Chief Justice of the Gujarat High Court must be given primacy, as also, the requirement of receiving a name suggested by the Hon'ble Chief Justice, and finally that the Government, owing to the aforementioned reasons, should not restart the process of consultation.

C

49. However, the letter dated 4.5.2011 reveals that the Hon'ble Chief Minister had changed his view as regards the said issue, and suggested that in spite of the fact that Justice J.R. Vora was presently engaged with another assignment, his name could be considered for the purpose of appointment as D Lokayukta, as the same was required in public interest. It is further revealed from this letter that Justice J.R. Vora had even offered to resign if such an offer was made to him.

50. Letter dated 16.6.2011, revealed that while opposing E the appointment of Justice R.A. Mehta, the Hon'ble Chief Minister insisted that Justice J.R. Vora may be appointed so that this **long standing issue would finally be resolved.**

51. The Hon'ble Chief Minister in his letter dated 18.8.2011 to the Governor even raised a question as to why the judgment F of this Court in *Kannadasan* (Supra) be followed in the State of Gujarat, when the same was not being followed elsewhere, and in light of this, questioned the insistence of the Chief Justice, in following the procedure prescribed in the aforementioned judgment.

G

52. In the letter dated 18.8.2011, written by Hon'ble Chief Minister to the Chief Justice, a strange situation was created. The relevant part of the letter reads as under:

H *".....Although, I have no personal reservation against*

the name of Hon'ble Mr. Justice (Retired) R.A. Mehta, but as the Head of the State Government, I am afraid, ***I may not be able to accept the name of Hon'ble Mr. Justice (Retired) R.A. Mehta****, who, in my view, cannot be considered the most suitable choice for the august post of Lokayukta, Gujarat State....."*(Emphasis added)

53. From the above, it, thus, becomes evident, that the Hon'ble Chief Minister who had spoken, not only about the **primacy** of the opinion of the Chief Justice, but had also expressed his opinion as regards the **supremacy** of the same, and had expressed his solemn intention to accept the recommendation of a name provided by the Chief Justice, was now **expressing his inability to accept such name.**

54. On 16.8.2011, the process of consultation stood complete as the record reveals, there was nothing left for the consultees to do/discuss.

It is pertinent to note that, in order to delay the appointment of the Lokayukta, an enquiry commission was set up under the Commission of Inquiry Act by the State Government appointing Hon'ble Mr. Justice M.B. Shah, a former Judge of this Court, as Chairman. In the event of the appointment of such an enquiry commission, the Lokayukta is restrained under the provision of the Act, 1986, from proceeding with such cases that the Commission is appointed to look into.

55. The arguments advanced on the basis of the doctrine of bias in the present case, are irrelevant, so far as the facts of the instant case are concerned, for the reason that all the judgments cited at the Bar, relate to the deciding of a case by the court, and are not therefore, applicable, with respect to the issue of appointment of a person to a particular post. Such an apprehension of bias against a person, does not render such person, ineligible/disqualified, or unsuitable for the purpose of being appointed to a particular post, or at least for the purpose of which, the writ of *quo warranto* is maintainable. The Act, 1986

A itself provides for statutory safeguards against bias. Section 8(3) of the said Act for instance, provides that in the event of reasonable apprehension of bias in the mind of the person aggrieved, such person is free to raise his grievance, and seek recusal of the person concerned. Thus, prospective
B investigatees will not be apprehended as potential victims unnecessarily.

Section 4 of the Act, 1986 makes a retired Judge, who is elected as a Member of the Parliament, or of a State Legislature, eligible for the purpose of being appointed as
C Lokayukta, provided that he resigns from the said House, and severs his relationship with the political party to which he belongs. It is therefore, difficult to imagine a situation where the allegations of bias/prejudice with respect to a person would be accepted, merely on the basis of the fact that such a person
D has some association with a particular NGO. We do not feel that that objections raised by the State Government, are cogent enough to ignore the primacy of the opinion of the Chief Justice in this regard. Thus, we are of the opinion that the views of the Hon'ble Chief Minister in this regard may not resonate with
E those of the public at large and thus, such apprehension is misplaced.

The Court has to bear in mind the dicta of this Court in *Bidi Supply Co. v. Union of India & Ors.* AIR 1956 SC 479 which
F is as under:

> ".....that the Constitution is not for the exclusive benefit of Governments and States ...It also exists for the common man for the poor and the humble...for the 'butcher, the baker and the candlestick maker'....It lays down for this
G land 'a rule of law' as understood in the free democracies of the world."

CHIEF JUSTICE'S OPINION - PRIMACY :

H 56. Without reference to any Constitutional provision or any

judgment of this Court referred to earlier, even if we examine the statutory provisions of the Act, the statutory construction itself mandates the primacy of the opinion of the Chief Justice for the simple reason that Section 3 provides for the consultation with the Chief Justice. Section 6 provides for the removal of Lokayukta, and lays down the procedure for such removal. The same can be done only on proven misconduct in an inquiry conducted by the Chief Justice/his nominee with respect to specific charges. Section 8(3) further provides for recusal of the Lokayukta in a matter where a public functionary has raised the objection of bias, and whether such apprehension of bias actually exists or not, shall be determined in accordance with the opinion of the Chief Justice.

The purpose of giving primacy of opinion to the Chief Justice is for the reason that he enjoys an independent Constitutional status, and also because the person eligible to be appointed as Lokayukta is from among the retired Judges of the High Court and the Chief Justice is, therefore, the best person to judge their suitability for the post. While considering the statutory provisions, the court has to keep in mind the Statement of Objects and Reasons published in the Gujarat Gazette (Extraordinary) dated 1.8.1986, as here, it is revealed that the purpose of the Act is also to provide for the manner of removal of a person from the office of the Lokayukta, and the Bill ensured that the grounds for such removal are similar to those specified for the removal of the Judges of the High Court.

57. As the Chief Justice has **primacy** of opinion in the said matter, the non-acceptance of such recommendations, by the Chief Minister, remains insignificant. Thus, it clearly emerges that the Governor, under Section 3 of the Act, 1986 has acted upon the aid and advice of the Council of Ministers. Such a view is taken, considering the fact that Section 3 of the Act, 1986, does not envisage unanimity in the consultative process.

58. Leaving the finality of choice of appointment to the Council of Ministers, would be akin to allowing a person who

A is likely to be investigated, to choose his own Judge. Additionally, a person possessing limited power, cannot be permitted to exercise unlimited powers.

However, in light of the facts and circumstances of the B case, it cannot be held that the process of consultation was incomplete and was not concluded as per the requirements of the Act, 1986.

59. In *M.P. Special Police Establishment* (Supra), this Court held as under:

C

"11...Thus, as rightly pointed out by Mr Sorabjee, a seven-Judge Bench of this Court has already held that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently D *or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out hereinabove. It is,* ***however, clarified that the exceptions mentioned in the judgment are not exhaustive.*** *It is also recognised that* E *the concept of the Governor acting in his* ***discretion or exercising independent judgment is not alien to the Constitution****. It is recognised that there may be situations where by reason of peril to democracy or democratic principles, an action may be compelled* F *which from its nature is not amenable to Ministerial advice. Such a situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers.* (Emphasis added)

60. In fact, a five Judge Bench of this Court, in this case G has explained the judgment of a seven Judge Bench in *Samsher Singh* (Supra), observing that in exceptional circumstances, the Governor may be justified in acting in his discretion, and that the exceptions enumerated in *Samsher Singh* (Supra) are not exhaustive.

H

Thus, the view taken by the 3rd learned Judge, in which it has been stated that it had become absolutely essential for the Governor to exercise his discretionary powers under Article 163 of the Constitution, must be read in light of the above-mentioned explanation.

PURPOSIVE CONSTRUCTION:

61. The office of the Lokayukta is very significant for the people of the State, as it provides for a mechanism through which, the people of the State can get their grievances heard and redressed against maladministration. The right to administer, cannot obviously include the right to maladminister. (Vide: *In Re. Kerela Education Bill, 1957*, AIR 1958 SC 956). In a State where society suffers from moral denigration, and simultaneously, from rampant corruption, there must be an effective forum to check the same. Thus, the Lokayukta Act may be termed as a pro-people Act, as the object of the Act, 1986 is to clean up augean stables, and in view thereof, if a political party in power, succeeds in its attempt to appoint a pliant Lokayukta, the same would be disastrous and would render the Act otiose. A pliant Lokayukta may not be able to take effective and required measures to curb the menace of corruption.

62. **Corruption** in a civilised society is a disease like cancer, which if not detected in time, is sure to spread its malignance among the polity of the country, leading to disastrous consequences. Therefore, it is often described as royal thievery. Corruption is opposed to democracy and social order, as being not only anti people, but also due to the fact that it affects the economy of a country and destroys its cultural heritage. It poses a threat to the concept of Constitutional governance and shakes the very foundation of democracy and the rule of law. It threatens the security of the societies undermining the ethical values and justice jeopardizing sustainable development. Corruption de-values human rights, chokes development, and corrodes the moral fabric of society. It causes considerable damage to the national economy,

national interest and the image of the country. (Vide: *Vineet Narain & Ors. v. Union of India & Anr.,* AIR 1998 SC 889; *State of Madhya Pradesh & Ors. v. Shri Ram Singh,* AIR 2000 SC 870; *State of Maharashtra thr. CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar,* JT 2012 (10) SC 446; and *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr.,* AIR 2012 SC 1185).

63. The adverse impact of lack of probity in public life leads to a high degree of corruption. Corruption often results from patronage of statutory/higher authorities and it erodes quality of life, and it has links with organized crimes, economic crimes like money laundering etc., terrorism and serious threats to human security to flourish. Its impact is disastrous in the developing world as it hurts the poor disproportionately by diverting funds intended for development. Corruption generates injustice as it breeds inequality and become major obstacle to poverty alleviation and development. United Nation Convention Against Corruption, 2003, envisages the seriousness and magnitude of the problem. December 9 has been designated as International Anti-Corruption Day. India is a party to the said convention with certain reservation.

64. In *re: Special Courts Bill, 1978*, AIR 1979 SC 478, Justice Krishna Iyer observed :

> "Corruption and repression – cousins in such situation - hijack development process and in the long run lagging national progress means ebbing people's confidence in constitutional means to social justice."

65. Corruption in a society is required to be detected and eradicated at the earliest as it shakes "the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society." Liberty cannot last long unless the State is able to eradicate corruption from public life. The corruption is a bigger threat than external threat to the civil society as it corrodes the vitals of our polity and society. Corruption is instrumental in not proper implementation and enforcement of

policies adopted by the Government. Thus, it is not merely a fringe issue but a subject matter of grave concern and requires to be decisively dealt with.

66. In the process of statutory construction, the court must construe the Act before it, bearing in mind the legal maxim *ut res magis valeat quam pereat* – which mean – it is better for a thing to have effect than for it to be made void, i.e., a statute must be construed in such a manner, so as to make it workable. Viscount Simon, L.C. in the case of *Nokes v. Doncaster Amalgamated Collieries Ltd.*, (1940) 3 All E.R. 549, stated as follows:

> *".....if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility, the should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."*

Similarly in *Whitney v. Inland Revenue Commissioner,* 1926 AC 37, it was observed as under:

> *"A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable."*

67. The doctrine of purposive construction may be taken recourse to for the purpose of giving full effect to statutory provisions, and the courts must state what meaning the statute should bear, rather than rendering the statute a nullity, as statutes are meant to be operative and not inept. The courts must refrain from declaring a statute to be unworkable. The rules of interpretation require that construction, which carries forward the objectives of the statute, protects interest of the parties and keeps the remedy alive, should be preferred, looking into the text and context of the statute. Construction

A given by the court must promote the object of the statute and serve the purpose for which it has been enacted and not efface its very purpose. "The courts strongly lean against any construction which stands to reduce a statute to futility. The provision of the statute must be so construed so as to make it B effective and operative." The court must take a pragmatic view and must keep in mind the purpose for which the statute was enacted, as the purpose of law itself provides good guidance to courts as they interpret the true meaning of the Act and thus, legislative futility must be ruled out. A statute must be construed C in such a manner so as to ensure that the Act itself does not become a dead letter, and the obvious intention of the legislature does not stand defeated, unless it leads to a case of absolute intractability in use. The court must adopt a construction which suppresses the mischief and advances the D remedy and "to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*". The court must give effect to the purpose and object of the Act for the reason that legislature is presumed to have enacted a E reasonable statute. (Vide: *M. Pentiah & Ors. v. Muddala Veeramallappa & Ors.*, AIR 1961 SC 1107; *S.P. Jain v. Krishna Mohan Gupta & Ors.*, AIR 1987 SC 222; *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors.*, AIR 1987 SC 1023; *Tinsukhia Electric Supply* F *Co. Ltd. v. State of Assam & Ors.*, AIR 1990 SC 123; *UCO Bank & Anr. v. Rajinder Lal Capoor,* (2008) 5 SCC 257; and *Grid Corporation of Orissa Limited & Ors. v. Eastern Metals and Ferro Alloys & Ors.*, (2011) 11 SCC 334).

G 68. Governance in terms of Constitutional perceptions and limitations is a basic feature of the Constitution, wherein social, economic and political justice is a Constitutional goal. We must always keep in mind that the Constitution is a living organism and is meant for the people, not just for the government, as it H provides for promotion of public welfare.

69. A pliant Lokayukta therefore, would render the Act completely meaningless/ineffective, as he would no doubt reject complaints under Section 7 of the Act, at the instance of the government, taking the prima facie view that there is no substance in the complaint, and further, he may also make a suggestion under Section 20 of the said Act, to exclude a public functionary, from the purview of the Act, which may include the Chief Minister himself. Thus, Section 3 of the Act, 1986 must be construed in the light of meaning given by the courts to the word 'consultation' so as to give effect to the provisions of the statute to make it operative and workable.

ROLE OF THE GOVERNOR :

70. In the facts of this case, it may not be necessary for the court to examine the submissions made on behalf of the appellants that the Governor should neither have directly sought the opinion of the Attorney General of India, nor should have directly solicited the opinion of the Chief Justice on the issue, and further, that after doing so, she should not have asked the Chief Justice to send only one name in the light of the opinion of the Attorney General, as such conduct of the Governor could not be in consonance and conformity with the Constitutional scheme. It appears that the Governor had been inappropriately advised and thus mistook her role, as a result of which, she remained under the impression that she was required to act as a statutory authority under the Act, 1986, and not as the Head of the State. Moreover, the advice of the Attorney General was based on the judgments of this Court, referred to hereinabove, and the Chief Minister was also aware of each and every development in these regards.

LANGUAGE OF THE JUDGMENT :

71. It appears that the third learned Judge has used a harsh language against the Chief Minister, after examining the various letters written by him wherein he contradicted himself as at one place, he admits not just to the **primacy** of the Chief Justice, but to his **supremacy** in this regard, and in another

A letter, he states that the recommendation made by the Chief Justice **would not be acceptable** to him, and also revealed his perpetual insistence as regards consideration of the name of Justice J.R. Vora for appointment to the said post of Lokayukta.

B At an earlier stage, the Chief Minister had taken a stand to the effect that a retired Judge, who has been given some other assignment, should not be considered for appointment to the post of Lokayukta. However, with respect to the case of Justice J.R. Vora, he seems to have taken an altogether C different view.

72. The third learned Judge made numerous observations *inter-alia* that a Constitutional mini crisis had been sparked by the actions of the Chief Minister, compelling the Governor to D exercise his discretionary powers under Article 163 of the Constitution, to protect democracy and the rule of law, while appointing respondent no.1 as the Lokayukta; that, there was an open challenge by the Council of Ministers in their non-acceptance of the **primacy** of the opinion of the Chief Justice of the Gujarat High Court, which revealed the discordant E approach of the Chief Minister; that, the conduct of the Chief Minister demonstrated deconstruction of democracy and tantamounts to a refusal by the Chief Minister to perform his statutory or Constitutional obligation and, therefore, in light of this, a responsible Constitutional decision was required to be F taken by the Governor so as to ensure that democracy thrived, or to preserve democracy and prevent tyranny. The same seem to have been made after examining the attitude of the Chief Minister, as referred to hereinabove.

G 73. This Court has consistently observed that Judges must act independently and boldly while deciding a case, but should not make atrocious remarks against the party, or a witness, or even against the subordinate court. Judges must not use strong and carping language, rather they must act with sobriety, moderation and restraint, as any harsh and disparaging H

strictures passed by them, against any person may be mistaken or unjustified, and in such an eventuality, they do more harm and mischief, than good, therefore resulting in injustice. Thus, the courts should not make any undeserving or derogatory remarks against any person, unless the same are necessary for the purpose of deciding the issue involved in a given case. Even where criticism is justified, the court must not use intemperate language and must maintain judicial decorum at all times, keeping in view always, the fact that the person making such comments, is also fallible. Maintaining judicial restraint and discipline are necessary for the orderly administration of justice, and courts must not use their authority to "make intemperate comments, indulge in undignified banter or scathing criticism". Therefore, while formation and expression of honest opinion and acting thereon, is a necessity to decide a case, the courts must always act within the four-corners of the law. Maintenance of judicial independence is characterized by maintaining a cool, calm and poised mannerism, as regards every action and expression of the members of the Judiciary, and not by using inappropriate, unwarranted and contumacious language. The court is required "to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of *loco parentis* has to take foremost place in the mind of a Judge and he must keep at bay any uncalled for, or any unwarranted remarks." (Vide: *State of M.P. & Ors. etc.etc. v. Nandlal Jaiswal & Ors. etc.etc.*, AIR 1987 SC 251; *A.M. Mathur v. Pramod Kumar Gupta,* AIR 1990 SC 1737; *State of Bihar & Anr. v. Nilmani Sahu & Anr.*, (1999) 9 SCC 211; *In the matter of: "K" a Judicial Officer,* AIR 2001 SC 972; *In the matter of: "RV", a Judicial Officer,* AIR 2005 SC 1441; and *Amar Pal Singh v. State of U.P. & Anr.,* AIR 2012 SC 1995).

Thus, in view of the above, we are of the view that the learned Judge, even if he did not approve of the "my-way or the high way" attitude adopted by the Hon'ble Chief Minister, ought to have maintained a calm disposition and should not have used such harsh language against a Constitutional

A authority, i.e. the Chief Minister.

74. **CONCLUSIONS:**

(i) The facts of the case reveal a very sorry state of affairs, revealing that in the State of Gujarat, the post of the Lokayukta B has been lying vacant for a period of more than 9 years, as it became vacant on 24.11.2003, upon the resignation of Justice S.M. Soni from the said post. Since then a few half-hearted attempts were made to fill up the post of the Lokayukta, but for one reason or another, the same could not be filled. The present C Governor has misjudged her role and has insisted, that under the Act, 1986, the Council of Ministers has no role to play in the appointment of the Lokayukta, and that she could therefore, fill it up in consultation with the Chief Justice of the Gujarat High Court and the Leader of Opposition. Such attitude is not in D conformity, or in consonance with the democratic set up of government envisaged in our Constitution. Under the scheme of our Constitution, the Governor is synonymous with the State Government, and can take an independent decision upon his/her own discretion only when he/she acts as a statutory authority E under a particular Act, or under the exception(s), provided in the Constitution itself. Therefore, the appointment of the Lokayukta can be made by the Governor, as the Head of the State, only with the aid and advice of the Council of Ministers, and not independently as a Statutory Authority.

F (ii) The Governor consulted the Attorney General of India for legal advice, and communicated with the Chief Justice of the Gujarat High Court directly, without taking into confidence, the Council of Ministers. In this respect, she was wrongly advised to the effect that she had to act as a statutory authority G and not as the Head of the State. Be that as it may, in light of the facts and circumstances of the present case, it is evident that the Chief Minister had full information and was in receipt of all communications from the Chief Justice, whose opinion is to be given **primacy** as regards such matters, and can only be overlooked, for cogent reasons. The recommendation of the H

Chief Justice suggesting only one name, instead of a panel of names, is in consonance with the law laid down by this Court, and we do not find any cogent reason to not give effect to the said recommendation.

(iii) The objections raised by the Chief Minister, have been duly considered by the Chief Justice, as well as by this Court, and we are of the considered view that none of them are tenable, to the extent that any of them may be labeled as cogent reason(s), for the purpose of discarding the recommendation of the name of respondent no.1, for appointment to the post of Lokayukta.

(iv) There are sufficient safeguards in the Statute itself, to take care of the pre-conceived notions in the mind, or the bias, of the Lokayukta, and so far as the suitability of the person to be appointed as Lokayukta is concerned, the same is to be examined, taking into consideration the interests of the people at large, and not those of any individual. The facts referred to hereinabove, make it clear that the process of consultation stood complete, and in such a situation, the appointment of respondent no.1 cannot be held to be illegal.

The appeals lack merit and are accordingly dismissed.

75. Before parting with the case, we would like to mention that as the respondent no.1 did not join the post, because of the pendency of the case, he may join now. Needless to say that the appellants shall provide all facilities/office, staff etc., required to carry out the work of the Lokayukta. More so, we have no doubt that appellants will render all co-operation to respondent no.1 in performance of the work of the Lokayukta.

In view of the above, no separate order is required to be passed in SLP (C) Nos. 2625-2626/2012; and 2687-2688/2012. The said petitions and all IAs, pending, (if any), stand disposed of in terms of the aforesaid judgment.

R.P. Appeals dismissed.