2019 INSC 1184

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NOS.9036-9038 OF 2016

INDORE DEVELOPMENT AUTHORITY ..PETITIONER(S)

VERSUS

MANOHAR LAL & ORS. ETC. ..RESPONDENTS

WITH

CIVIL APPEAL NOS.19532-19533 OF 2017

SPECIAL LEAVE PETITION (C) NOS.9798-9799 OF 2016

SPECIAL LEAVE PETITION (C) NO. 17088-17089 OF 2016

SPECIAL LEAVE PETITION (C) NO.37375 OF 2016

SPECIAL LEAVE PETITION (C) NO.37372 OF 2016

SPECIAL LEAVE PETITION (C) NOS.16573-16605 OF 2016

SPECIAL LEAVE PETITION (C) NO....CC NO. 15967 OF 2016

CIVIL APPEAL NO.19356 OF 2017

CIVIL APPEAL NO.19362 OF 2017

CIVIL APPEAL NO.19361 OF 2017

CIVIL APPEAL NO.19358 OF 2017

CIVIL APPEAL NO.19357 OF 2017

CIVIL APPEAL NO.19360 OF 2017

CIVIL APPEAL NO.19359 OF 2017

SPECIAL LEAVE PETITION (C) NOS. 34752-34753 OF 2016

SPECIAL LEAVE PETITION (C) NO.15890 OF 2017

CIVIL APPEAL NO.19363 OF 2017

CIVIL APPEAL NO.19364 OF 2017

CIVIL APPEAL NO.19412 OF 2017

M.A. 1423 OF 2017 IN CIVIL APPEAL NO.12247 OF 2016

SPECIAL LEAVE PETITION (C) NO.33022 OF 2017

SPECIAL LEAVE PETITION (C) NO.33114 OF 2017

SPECIAL LEAVE PETITION (C) NO.33127 OF 2017

M.A. 1787 OF 2017 IN CIVIL APPEAL NO.10210 OF 2016

M.A. 1786 OF 2017 IN CIVIL APPEAL NO.10207 OF 2016

M.A. 45 OF 2018 IN CIVIL APPEAL NO.6239 OF 2017

SPECIAL LEAVE PETITION (C) NO.16051 OF 2019

DIARY NO. 23842 OF 2018

SPECIAL LEAVE PETITION (C) NO.30452 OF 2018

CIVIL APPEAL NO.4835 OF 2015

SPECIAL LEAVE PETITION (C) NOS.30577-30580 OF 2015

O R D E R

ARUN MISHRA, J.

1. The question of interpretation of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, 'the Act of 2013'), has been referred to a five-Judge Constitution Bench of this Court.

2. A three-Judge Bench of this Court in *Pune Municipal Corporation & Anr. v. Harakchand Misirimal Solanki & Ors.* (2014) 3 SCC 183, had delivered a judgment interpreting section 24 of the Act of 2013. In *Yogesh Neema & Ors. v. State of Madhya Pradesh* (2016) 6 SCC 387, a two-Judge Bench, doubted the decision of *Sree Balaji Nagar*

Residential Assn. v. State of Tamil Nadu (2015) 3 SCC 353 and referred the matter to a larger Bench.

3. Yet in another Civil Appeal No.20982 of 2017 arising out of S.L.P. (C) No.2131 of 2016 (*Indore Development Authority vs. Shailendra (Dead) through Lrs. & Ors.,* 2018 SCC Online SC 100) the matter was referred to a larger Bench on 7.12.2017. The following observations were made in *Indore Development Authority* (supra):

> "19. It was also urged that this Court is also bound to prevent the abuse of process of law. The cases which have been concluded are being revived. In spite of not accepting the compensation deliberately and statement are made in the Court that they do not want to receive the compensation at any cost, and they are agitating the matter time and again after having lost the matters and when proceedings are kept pending by interim orders by filing successive petitions, the provisions of section 24 cannot be invoked by such landowners.
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> 20. There is already a reference made as to the applicability of section 24 in SLP (C) No.10472/2008 – *Yogesh Neema & Ors v. State of M.P. & Ors.* vide order dated 12.01.2016. There are several other issues arising which have been mentioned above but have not been considered in Pune Municipal Corpn. (supra). Thus, here is a case where the matter should be considered by a larger Bench. Let the matter be placed before Hon'ble the Chief Justice of India for appropriate orders."

4. In *Indore Development Authority v. Shailendra (Dead) thr. Lrs. & Ors.* (supra), the bench consisting of one of us, namely, Arun Mishra, J., Adarsh Kumar Goel, J. and Mohan M. Shantanagoudar, J. has decided the matter, and the view taken is that in *Pune Municipal Corporation* (supra), the Court did not consider several aspects as to

the interpretation of section 24 of the Act of 2013. The decision mentioned above was accepted unanimously by the three Judges. However, as *Pune Municipal Corporation* (supra) was a judgment by a bench of coordinate strength, two of us, namely, myself and Adarsh Kumar Goel, J. opined that decision is *per incuriam.* However, Mohan M. Shantanagoudar, J. opined that it would be appropriate to refer the matter to a larger Bench. In the majority opinion in *Indore Development Authority* (supra), the questions formulated have been answered thus:

> "228. Our answers to the questions are as follows:
>
> Q. No. I:- The word 'paid' in section 24 of the Act of 2013 has the same meaning as 'tender of payment' in section 31(1) of the Act of 1894. They carry the same meaning, and the expression 'deposited' in section 31(2) is not included in the expressions 'paid' in section 24 of the Act of 2013 or in 'tender of payment' used in section 31(1) of the Act of 1894. The words 'paid'/tender' and 'deposited' are different expressions and carry different meanings within their fold.
>
> In section 24(2) of the Act of 2013 in the expression 'paid,' it is not necessary that the amount should be deposited in Court as provided in section 31(2) of the Act of 1894. Non-deposit of compensation in Court under section 31(2) of the Act of 1894 does not result in a lapse of acquisition under section 24(2) of the Act of 2013. Due to the failure of deposit in Court, the only consequence at the most in appropriate cases may be of a higher rate of interest on compensation as envisaged under section 34 of the Act of 1894 and not lapse of acquisition.
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> Once the amount of compensation has been unconditionally tendered, and it is refused, that would amount to payment, and the obligation under section 31(1) stands discharged, and that amounts to the discharge of obligation of payment under section 24(2) of the Act of 2013 also. It is not open to the person who has refused to accept compensation, to urge that since it has not been deposited in Court, the acquisition has lapsed. Claimants/landowners, after refusal,

cannot take advantage of their own wrong and seek protection under the provisions of section 24(2).

Q. No. II:- The normal mode of taking physical possession under the land acquisition cases is drawing of Panchnama as held in Banda *Development Authority* (supra).

Q. No. III:- The provisions of section 24 of the Act of 2013, do not revive barred or stale claims such claims cannot be entertained.

Q. No. IV:- Provisions of section 24(2) do not intend to cover the period spent during litigation and when the authorities have been disabled to act under section 24(2) due to the final or interim order of a court or otherwise, such period has to be excluded from the period of five years as provided in section 24(2) of the Act of 2013. There is no conscious omission in section 24(2) for the exclusion of a period of the interim order. There was no necessity to insert such a provision. The omission does not make any substantial difference as to legal position.

Q. No. V:- The principle of *actus curiae neminem gravabit* is applicable, including the other common law principles for determining the questions under section 24 of the Act of 2013. The period covered by the final/ interim order by which the authorities 196 have been deprived of taking possession has to be excluded. Section 24(2) has no application where Court has quashed acquisition."

Question Nos.2, 3, 4, and 5, which have been decided, did not arise in *Pune Municipal Corporation* (supra). Question No.2 was a general question with respect to the mode of taking possession under the land acquisition cases. Remaining question arose out of *Yogesh Neema* (supra).

5. A three-Judge Bench of this Court on 21.2.2018 requested the other benches to defer the hearing until a decision, one way or the other, on the issue whether the matter should be referred to the larger Bench or not.

6. A Division Bench presided by Adarsh Kumar Goel, J. on 22.2.2018 in *Indore Development Authority v. Shyam Verma and Ors.*, (S.L.P. (C) No.9798 of 2016) considered it appropriate to refer the matter to Hon’ble the Chief Justice of India to refer the issues to be resolved by a larger Bench at the earliest.

7. On 22.2.2018, a Bench consisting of myself and Amitava Roy, J. have in *State of Haryana v. Maharana Pratap Charitable Trust (Regd.) & Anr.* (Civil Appeal No. 4835 of 2015) referred the matter to the Hon’ble the Chief Justice of India to constitute an appropriate bench for consideration of the larger issue. Thus, it is apparent that two-division Benches, *i.e.*, one consisting of myself and another consisting of Adarsh Kumar Goel, J. referred the matter to Hon’ble the Chief Justice of India. Hon'ble, the Chief Justice of India, considered it appropriate to constitute a Constitution Bench to deal with all the issues in an apposite manner.

8. The case was listed before a five-Judge Constitution Bench on 6.3.2018. The Constitution Bench observed that it would consider all the aspects including the correctness of the decision of *Pune Municipal Corporation* (supra) and the other judgments following the said decision as well as the judgments rendered in *Indore Development*

Authority (supra). Thus, all the questions are kept open to be decided. No particular question has been referred to the larger bench. After that, Hon'ble, the Chief Justice of India has constituted this Bench to decide the reference.

9. Mr. Shyam Divan, Mr. Dinesh Dwivedi and Mr. Gopal Sankarnarayanan, learned Senior Advocates on behalf of the respondents, have raised a preliminary objection for recusal of one of us, namely; Arun Mishra, J. on the ground that Constitution Bench consists of one of the Judges who were on a smaller panel and the correctness of the opinion cannot be, thus, judged by the Constitution Bench independently, as a final view has been expressed in *Indore Development Authority* (supra) wherein the decision in *Pune Municipal Corporation* (supra) has been held to be *per incuriam*. Thus, the Judge who has decided the matter in *Indore Development Authority* (supra) is pre-disposed to decide the matter only in a particular way. It was also submitted that there is reasonable apprehension that the Judge may have some bias in dealing with the matter by a larger Bench. As such, one of us, namely; Arun Mishra, J. should recuse. It was further submitted that a Judge could not sit in appeal to adjudge his judgment. The jurisdictions are primarily corrective jurisdictions under the hierarchal system, and professional as well as institutional integrity demands that the same person should not be a Judge at both

levels. The Judge who has decided the matter may be pre-disposed to support the previous reasoning and, in that case, it would seem that he is or she is a Judge in his or her own cause. The learned Counsel for the respondents are of the view that the *Indore Development Authority* (supra) is wrongly decided. The Court or Tribunal should be above unfairness or bias. The Judge has to step down, in case he cannot impart justice impartially. The judge or judges concerned should excuse themselves and abstain from sitting in the case. A Judge cannot hear an appeal against his/ her own decisions.

10. *Per contra*, Shri Tushar Mehta, Learned Solicitor General, Shri Mohan Parasaran, Shri Anoop Chaudhary and Shri Vivek Tankha, learned Senior Advocates submitted that there is no question of recusal and as a matter of substance it is the practice of this Court that the Judges who have decided the matter earlier or have referred it are made part of the Bench. They have cited several decisions to the effect that Judges who have delivered a Judgment in a three-Judges Bench formed part of a five-Judges Bench or the larger Benches which decided the matter. The plea of bias or pre-disposition is not attracted in the matter of judicial decisions. The plea of bias or pre-disposition is based on extra-judicial factors. What the Court is required to answer is only a pure question of law, and there are occasions when Hon'ble, the Chief Justice of India, has considered it appropriate to

constitute an appropriate bench having decided a case. Recusal of any Judge cannot be sought on the ground that the decision rendered by him in a smaller bench has to be considered by the larger bench.

11. Learned Solicitor General submitted that a tendency is growing in that as soon as important matters are listed, particular articles are written in the newspapers concerning the Constitution of the bench or to influence the decision on merits of a case. Newspaper articles are written to influence Court. The very independence of the judicial system is at stake, if in this kind of scenario, recusal is sought by powerful lobbies, and any recusal would be defeating the very oath of the office which a Judge takes.

12. Shri Mohan Parasaran, learned Senior Counsel has also pointed out that the practice of this Court makes the law, and the Judges who have decided the matters in a smaller Bench have ordinarily formed quorum of the larger Benches. The question is of deciding the legal principle. In the Review jurisdiction and Curative Petitions; the same Judge hears the matter. There is nothing wrong in case the Judges who have heard the matter in smaller Benches form part of the larger bench. There is no question of any pre-disposition in such matters or bias, and as such, the decision rendered in smaller formation cannot be a ground for seeking recusal.

13. The first question before us is whether a Judge who has expressed an opinion in a smaller Bench and the case has been referred to a larger Bench, because of the conflict of the opinion or otherwise, can hear the matter in a larger bench. For finding an answer to the same, we have to look into the practice of this Court.

14. Shri M.C. Setalvad, in his autobiography "My Life, Law and other things" has referred in Chapter 12 the events between 1955 to 1969. He has referred to one of the important decisions of this Court delivered by S.R. Das, J., who was the then Acting Chief Justice. It was the *Bengal Immunity case.* In 1953, a bench presided over by Chief Justice Sastri of which Justice Bhagwati was a member held that State could impose sales tax on goods delivered for consumption in that State, even though the sale was an inter-State sale as held in *State of Bombay v. United Motors India Ltd.,* 1953 SCR 1069 with Justice Bose and Justice S.R. Das, Justice Bose delivered a dissenting judgment and S.R. Das, J. as a Junior Judge had also expressed a contrary opinion in another decision.

15. The same question arose in *Bengal Immunity Co. Ltd. v. State of Bihar,* 1955 (2) S.C.R. 603, which came up when S.R. Das, J. was acting as the Chief Justice. S.R. Das, J. who held strong views on the

matter, had the matter placed before larger Bench of seven Judges, including the two, Justice Bose and Justice Bhagwati, who had participated in the earlier decision. Justice Bhagwati, who had formed part of the majority in the *United Motors* case (supra), agreeing with the view of Chief Justice Sastri, had reversed his former view, giving his reasons in detail and held that earlier decision was erroneous. Following are the extracts from "My Life, Law and other things" by M.C. Setalvad :

> "One of the important decisions of the Supreme Court delivered while S.R. Das was the Chief Justice, was the *Bengal Immunity Case.* That case had an interesting history. Article 286 of the Constitution (as it then stood) prohibited a State Legislature from imposing sales tax on transactions of inter-State sales and sales in the course of export. The Article was not, however, happily worded. In 1953, a Bench of the Supreme Court presided over by Chief Justice Sastri, of which Justice Bhagwati was a member, held that a State could impose sales tax on goods delivered for consumption in that State, even though the sale was an inter-State sale[1]. This decision was contrary to the express provision of the Constitution that Parliament alone could authorise the imposition of a tax on sales in the course of inter-State sales and was based on an explanation to Article 286(1)(a), which was not applicable. Justice Bose had delivered a dissenting judgment, and S.R. Das as a puisne judge had also expressed a contrary opinion in another decision.
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> The same question arose in *Bengal Immunity Co. Ltd.* v. *State of Bihar*[2] which came up when S.R. Das was acting as the Chief Justice. The Bengal Immunity Co. manufactured medicinal products in Bengal and sold them all over India including Bihar. The Company had no office or agent in Bihar but the Bihar sales tax authorities sought to compel the Company to register as a dealer in Bihar and pay sales tax on the ground that goods delivered in Bihar for consumption in Bihar as a direct result of the sale were liable to sales tax in Bihar even though the sale had taken place in Bengal. The view of the State of Bihar was in accordance with the decision of the Supreme Court in the *United Motors Case* but Das, who held strong views in the matter, had the matter placed before a

1 *State of Bombay v. United Motors (India) Ltd.,* (1953) S.C.R. 1069.
2 (1955) 2 S.C.R. 603.

larger Bench of seven judges including two, Justice Bose and Justice Bhagwati, who had participated in the earlier decision.

The matter was of vital importance to the States, because under the view expressed by Chief Justice Sastri in the *United Motors Case*, one State – the State in which goods had been delivered for consumption as a direct result of the sale – would be entitled to levy sales tax on such transactions, while, under the other view, no State at all would be able to tax the goods, as the transaction of sale would be an inter-State sale. The Centre alone could make a law for levying a sales tax on inter-State sales. There is little doubt that the somewhat strained construction put upon the Explanation to Article 286(1)(a) by Chief Justice Sastri and the majority was due to the consideration that the sources of revenue of the States under the Constitution which were already slender should not be diminished by denying to the States the opportunity of levying sales tax altogether in such cases.

Notices were issued to all the States and many of them intervened by their Advocates-General. N.C. Chatterjee appeared for the Bengal Immunity Company, and Lal Narayanan Sinha, then the Government Advocate of Bihar, appeared for the State of Bihar. I intervened on behalf of the State of West Bengal. Sikri, as the Advocate-General, represented the State of East Punjab.

At the outset arose the question whether the Supreme Court could overrule its previous decision if it was satisfied that it was erroneous. That was the first occasion on which the Court was called upon to deal with this important question.

The Court naturally considered the practice followed in other final Courts of appeal. The Privy Council had held that though it was not absolutely bound to follow its earlier decisions it would seldom differ from them in constitutional matters as they would have been acted upon both by Governments and subjects. The United States Supreme Court had on a number of occasions expressly overruled its previous decisions. The majority of the Supreme Court including Das preferred to follow the American practice. Das pointed out the difference between the position in England where the House of Lords had held that it was bound by its earlier decisions[3] and India and observed:

> But, in a country governed by a federal constitution, such as the United States of America and the Union of India are, it is by no means easy to amend the Constitution, if an erroneous interpretation is put upon it by this Court. An erroneous interpretation to the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for considerable time to the great detriment to public well-being. The considerations adverted to in the decisions of the Supreme Court of America quoted above are, therefore, apposite and apply in full force in determining whether a previous decision of this Court should or should not

3. In England the position has since changed; the House of Lords is no longer bound by its own decisions.

be disregarded or overruled There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public.

He then proceeded to point out a number of circumstances which made it necessary to set right what he considered to be the harmful effects of the earlier decision which he believed to be erroneous. He ultimately formulated the governing principle in these words:

Reference is made to the doctrine of finality of judicial decisions and it is pressed upon us that we should not reverse our previous decision except in cases where a material provision of law has been overlooked or where the decision has proceeded upon the mistaken assumption of the continuance of a repealed or expired statute and that we should not differ from a previous decision merely because a contrary view appears to us to be preferable. It is needless for us to say that we should not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well-being in the light of the surrounding circumstances of each case brought to our notice; but we do not consider it right to confine our power within rigidly fixed limits, as suggested before us.

The minority, consisting of three Judges, did not, however, accept this position.

On the merits, the majority of the Court consisting of four judges, including the acting Chief Justice, came to the conclusion that the provisions of several parts of Article 286 made it clear that it had to deal with different topics and one part could not be projected or read into another. The conclusion reached was that the Explanation to clause (1) (a) could not be ultimately extended to clause (2) either as an exception or as a proviso and read as limiting the ambit of clause (2). Until Parliament provided otherwise by law in exercise of its powers under clause (2) of the Article, no State could impose any tax on sales or purchases taking place in the course of inter-State trade or commerce. The decision of Chief Justice Sastri to the extent that it decided to the contrary could not be accepted as well-founded on principle or authority.

The dissenting view was expressed in powerful opinions by each of the three dissenting Judges. They took the view that the scheme of the Article was that it fixed the *situs* of the sales with a view to avoid multiple taxation. For that purpose, it divided sales into two categories, "inside sales" and "outside sales", and enacted that a State cannot tax an outside sale. When, in the same context, the Explanation declared that a sale must be deemed to have taken place in the State in which the goods are delivered for consumption, its purpose clearly was to take such sales out of inter-State trade and stamp them with the character of inter-State sales.

> The most powerful dissent was that delivered by Justice Aiyar, whose judgment was the most exhaustive and the longest of the judgments delivered by the various Judges. One of the notable judgments in the case was that of Justice Bhagwati who had formed part of the majority in the *United Motors case*, agreeing with the view of Chief Justice Sastri. He reversed his former view with skill, giving his reasons in detail. He had the courage to state that his opinion in the earlier decision "was clearly erroneous and public interest demand the same should be reversed."
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> (emphasis supplied)

16. In *M/s. Ujagar Prints and Ors. (II) v. Union of India & Ors.* (1989) 3 SCC 488, a Constitution Bench of this Court was constituted consisting of R.S. Pathak, C.J., Sabyasachi Mukherji, S. Natarajan, M.N. Venkatachaliah and S. Ranganathan, JJ. The question which arose for consideration was the correctness of the decision in *Empire Industries Ltd. v. Union of India* (1985) 3 SCC 314, which was decided by a Bench consisting of three-Judges, namely S. Murtaza Fazal Ali, S. Varadarajan, and Sabyasachi Mukherji, JJ. Sabyasachi Mukherji, J. delivered the judgment on his behalf and S. Murtaza Fazal Ali, J. Varadarajan partly concurred. The matter was referred to examine the correctness of the view of Justice Sabyasachi Mukherji expressed for the Court in *Empire Industries Ltd. v. Union of India* (supra). The view taken in the previous decision by Sabyasachi Mukherji, J., was held to be good law. It was a case where the correctness of the view taken in *Empire Industries* case (supra) on certain aspects was doubted by another Bench of this Court in *M/s. Ujagar Prints v. Union of India* (1986) Supp. SCC 652. Accordingly, the matter was referred

to a five-judge Bench. Sabyasachi Mukherji, J. was one of the members of the Bench which affirmed his decision in the *Empire Industries* case (supra).

17. There is yet another instance of a Constitution Bench which comprised of Y.V. Chandrachud, C.J., P.N. Bhagwati, S. Murtaza Fazal Ali, Amarendra Nath Sen, P. Balakrishna Eradi, JJ. in the matter of *Gyan Devi Anand v. Jeevan Kumar & Ors.* (1985) 2 SCC 683, where the question which arose was whether statutory tenancy is heritable. In *Gyan Devi Anand* (supra), the correctness of the decision in *Ganpat Ladha v. Sashikant Vishnu Shinde,* (1978) 2 SCC 573 came up for consideration. The decision in *Ganpat Ladha's* case had been overruled, and *Damadilal v. Parashram,* (1976) 4 SCC 855 was affirmed. The Court has observed thus:

> "35. In our opinion, the view expressed by this Court in *Ganapat Ladha v. Sashikant Vishnu Shinde,* (1978) 2 SCC 573 and the observations made therein which we have earlier quoted, do not lay down the correct law. The said decision does not properly construe the definition of the 'tenant' as given in Section 5(11)(b) of the Act and does not consider the status of the tenant, as defined in the Act, even after termination of the commercial tenancy. In our judgment in *Damadilal v. Parashram,* (1976) 4 SCC 855, this Court has correctly appreciated the status and the legal position of a tenant who continues to remain in possession after termination of the contractual tenancy. We have quoted at length the view of this Court and the reasons in support thereof. The view expressed by a seven Judge Bench of this Court in *Dhanapal Chettiar v. Yesodai Ammal,* (1979) 4 SCC 214 and the observations made therein which we have earlier quoted, lend support to the decision of this Court in *Damadilal case*. These decisions correctly lay down that the termination of the contractual tenancy by the landlord does not bring about a change in the status of the tenant who continues to

> remain in possession after the termination of the tenancy by virtue of the provisions of the Rent Act. A proper interpretation of the definition of tenant in the light of the provisions made in the Rent Acts makes it clear that the tenant continues to enjoy an estate or interest in the tenanted premises despite the termination of the contractual tenancy."

18. Justice P.N. Bhagwati concurred with the view and overruled his own decision in *Ganpat Ladha's case* (supra). Justice Bhagwati has observed thus:

> "3. On November 6, 1960 the appellant-landlord filed a suit for eviction which is now before us. On August 30, 1962, the first date of hearing, the issues were framed. On June 18, 1963, the trial court decreed the suit on the following findings: the notice to quit was valid and duly served; the arrears of rent were properly demanded under Section 12(2) of the Act; the demand was not complied with in accordance with law by the tenant within a month of the demand; the case was governed by the provisions of Section 12(3)(b) and not by the provisions of Section 12(3)(a) because a dispute about the fixation of standard rent was still pending when the notice demanding standard rent was given; nevertheless, the tenant was not entitled to the protection of Section 12(3)(b), since he had not paid the rent regularly in accordance with the conditions under which the protection of Section 12(3)(b) could be given to him."

19. Also, in the landmark decision of *Kesavananda Bharati v. the State of Kerala* (1973) 4 SCC 225, the earlier view held by this Court in *Sajjan Singh v. State of Rajasthan* 1965 AIR SC 845 was overruled though some of the Hon'ble Judges in the two cases were common.

20. In *Hyderabad Industries Limited and Anr. v. Union of India & Ors.* (1995) 5 SCC 338, a three-Judge Bench of this Court consisting of A.M. Ahmadi, C.J., S.P. Bharucha, and K.S. Paripoornan, JJ. doubted the correctness of the view taken in *Khandelwal Metal &*

Engineering Works v. Union of India (1985) 3 SCC 620 and referred the matter to a larger Bench. The larger bench consisted of S.P. Bharucha, B.N. Kirpal, S. Rajendra Babu, Syed Mohammed Quadri, and M.B. Shah, JJ. They answered the reference reported in *Hyderabad Industries Ltd. & Anr. v. Union of India & Ors.* (1999) 5 SCC 15. It is significant to note that S.P. Bharucha, J., who had doubted the correctness of the decision and referred the matter to a Constitution Bench, has overruled the earlier view on certain grounds.

21. In *M/s. Cloth Traders (P) Ltd. v. Additional C.I.T., Gujarat-I,* (1979) 3 SCC 538, a three-Judge Bench consisting of P.N. Bhagwati, D.A. Desai, and A.D. Koshal, JJ. decided the question of inter-corporate dividends. The correctness of this decision was taken up for consideration before a Constitution Bench of Y.V. Chandrachud, C.J., P.N. Bhagwati, Amarendra Nath Sen, D.P. Madon, M.P. Thakkar, JJ. in *Distributors (Baroda) Pvt. Ltd. v. Union of India & Ors.,* (1986) 1 SCC 43, in which the decision in *M/s. Cloth Traders (P) Ltd. v. Addl. CIT, Gujarat* (supra), was overruled. P.N. Bhagwati, J. delivered the judgment for the Constitution Bench. He was also the author of the earlier judgment in *M/s. Cloth Traders (P) Ltd. v. Addl. CIT, Gujarat* (supra), which had been overruled. This Court has observed thus:

> "19. But, even if in our view the decision in *M/s. Cloth Traders (P) Ltd. v. Additional C.I.T., Gujarat-I,* (1979) 3 SCC 538 is erroneous, the question still remains whether we should

overturn it. Ordinarily we would be reluctant to overturn a decision given by a Bench of this Court, because it is essential that there should be continuity and consistency in judicial decisions and law should be certain and definite. It is almost as important that the law should be settled permanently as that it should be settled correctly. But there may be circumstances where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of stare decisis should not deter the Court from overruling an earlier decision, if it is satisfied that such decision is manifestly wrong or proceeds upon a mistaken assumption in regard to the existence or continuance of a statutory provision or is contrary to another decision of the Court. It was Jackson, J. who said in his dissenting opinion in Massachusetts v. United States 333 US 611: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." Lord Denning also said to the same effect when he observed in *Ostime v. Australian Mutual Provident Society* (1960) AC 549: "The doctrine of precedent does not compel Your Lordships to follow the wrong path until you fall over the edge of the cliff." Here we find that there are overriding considerations which compel us to reconsider and review the decision in *Cloth Traders case* (supra). In the first place, the decision in *Cloth Traders case* (supra) was rendered by this Court on May 4, 1979 and immediately thereafter, within a few months, Parliament introduced Section 80-AA with retrospective effect from April 1, 1968 with a view to overriding the interpretation placed on Section 80-M in *Cloth Traders case* (supra). The decision in *Cloth Traders case* (supra) did not therefore hold the field for a period of more than a few months, and it could not be said that any assessee was misled into acting to its detriment on the basis of that decision. There was no decision of this Court in regard to the interpretation of sub-section (1) of Section 80-M prior to the decision in *Cloth Traders case* (supra), and there was therefore no authoritative pronouncement of this Court on this question of interpretation on which an assessee could claim to rely for making its fiscal arrangements. The only decision in regard to the interpretation of sub-section (1) of Section 80-M given by any High Court prior to the decision in *Cloth Traders* case (supra), was that of the Gujarat High Court in *Addl. CIT v. Cloth Traders Pvt. Ltd.* (1974) 97 ITR 140 (Guj.) and that decision took precisely the same view which we are inclined to accept in the present case. It is therefore difficult to see how any assessee can legitimately complain that any hardship or inconvenience would be caused to it if the decision in *Cloth Traders case* was overturned by us. If despite the decision of the Gujarat High Court in *Addl. CIT v. Cloth Traders Pvt. Ltd.* the assessee proceeded on the assumption, now found to be erroneous, that the Gujarat High Court decision was wrong and the deduction permissible under sub-section (1) of Section 80-M was liable to be calculated with reference to the full amount of dividend

> received by the assessee, the assessee can have only itself to blame. Knowing fully well that the Gujarat High Court had decided the question of interpretation of sub-section (1) of Section 80-M in favour of the Revenue and there was no decision of this Court taking a different view, no prudent assessee could have proceeded to make its financial arrangements on the basis that the decision of the Gujarat High Court was erroneous. Moreover, we find, for reasons we have already discussed, that the decision in *Cloth Traders case* is manifestly wrong because it has failed to take into account a very vital factor, namely, that the deduction required to be made under sub-section (1) of Section 80-M is not from the gross total income but from "such income by way of dividends". There is also another circumstance which makes it necessary for us to reconsider and review the decision in *Cloth Traders case*, and that is the decision in *Cambay Electric Supply Co.* case (1978) 2 SCC 644. The decision in *Cloth Traders case* is inconsistent with that in *Cambay Electric Supply Co. case*. Both cannot stand together. If one is correct, the other must logically be wrong and vice versa. It is therefore necessary to resolve the conflict between these two decisions and harmonise the law and that necessitates an inquiry into the correctness of the decision in *Cloth Traders case*. It is for this reason that we have reconsidered and reviewed the decision in *Cloth Traders case*, and on such reconsideration and review, we have come to the conclusion that the decision in *Cloth Traders case* is erroneous and must be overturned."

This Court has observed that law should be settled permanently and that it should be settled correctly. There may be circumstances where public interest demands that the previous decision be reviewed and reconsidered. Thus, it is apparent that this is the consistent practice of this Court that Judges who had rendered the earlier decision have presided over or been part of the larger Bench.

22. *Petlad Turkey Red Dye Works Co. Ltd. v. Commissioner of Income Tax, Bombay North, Ahmedabad* (1963) Supp. 1 SCR 871 came up for consideration in *Keshav Mills Co. Ltd. v. Commissioner of Income Tax,*

Bombay North, Ahmedabad (1965) 2 SCR 908. The Constitution Bench comprised of seven-Judges in *Keshav Mills Co. Ltd.*, M. Hidayatullah, J. was part of the Bench in both the matters. There are other instances which have been cited indicating the practice of this Court.

23. Shri Mohan Parasaran learned Senior Counsel has submitted that practice of the Court is the law of the Court and binding and should normally be adhered to in the absence of rules to the contrary. He referred to the decision of *Jamal Uddin Ahmad v. Abu Saleh Najmuddin,* (2003) 4 SCC 257, which held thus:

> "18. Sub-section (1) of the abovesaid provision required the election petition being presented to the Election Commission. Sub-section (2) provided for the election petition being delivered to the Secretary to the Commission or to such other officer as may be appointed by the Election Commission or even being sent by registered post and delivered to the Secretary to the Commission or the officer appointed so as to be deemed to have been presented to the Election Commissioner. While "High Court" has been substituted in place of Election Commission in sub-section (1), sub-section (2) of the erstwhile Section 81 has been deleted without re-enacting a corresponding provision. The reason is more than obvious. Parliament knew that so far as the Election Commission is concerned, it was considered necessary to trust only the Secretary to the Commission or such other officer as may be appointed by the Election Commission entrusted with the responsibility of receiving the election petition presented to the Election Commission. So far as the High Court is concerned, such a provision was not required to be enacted into the Act. Jurisdiction to try an election petition has been conferred on the High Court in place of the Election Tribunal. The High Court is a constitutional court which was pre-existing. It is a court of record and exercises plenary powers. <u>The High Court being a pre-existing judicial institution also had rules, directions and practice already existing and prevalent and governing the reception of documents presented to it; the same would apply to election petitions. *Cursus curiae est lex curiae* — The practice of the Court is the law of the</u>

> Court. Every Court is the guardian of its own records and the master of its own practice; and where a practice has existed, it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience. (See Broom's Legal Maxims, 10th Edn., p. 82.) Even in the absence of Chapter VIII-A in the Gauhati High Court Rules there would have been nothing wrong in the High Court or the Chief Justice authorizing any of its officers to receive the election petition presented to it so as to enable exercise of the jurisdiction conferred on the High Court by Chapter II of the Act. The Gauhati High Court thought it proper to incorporate Chapter VIII-A in its Rules in view of the amendment made in Chapter II of the Act."
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> (emphasis supplied)

24. Shri Mohan Parasaran, learned Senior Counsel has also relied upon the decision of the Supreme Court of United States in *John Patrick LITEKY v. United States*, 510 U.S. 540 (1994), where the question of recusal based on "extrajudicial source" doctrine came up for consideration. The Supreme Court of United States held:

> "[5] [6] [7] The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the Judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions." In *re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.
>
> [8] [9] It is wrong in theory, though it may not be too far off the mark as a practical matter, to suggest, as many opinions have, that "extrajudicial source" is the *only* basis for establishing disqualifying

bias or prejudice. It is the only *common* basis, but not the exclusive one, since it is not the exclusive reason a predisposition can be wrongful or inappropriate. A favourable or unfavourable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the "pervasive bias" exception to the "extrajudicial source" doctrine. See, *e.g., Davis v. Board of School Comm'rs of Mobile County,* 517 F.2d 1044, 1051 (CA5 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

[13] [14] For all these reasons, we think that the "extrajudicial source" doctrine, as we have described it, applies to § 455(a). As we have described it, however, there is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predisposition developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice. Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) "extrajudicial source" *factor,* than of an "extrajudicial source" *doctrine,* in recusal jurisprudence.

[15] [16] [17] [18] The facts of the present case do not require us to describe the consequences of that factor in complete detail. It is enough for present purposes to say the following: First, judicial rulings along almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.,* 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (*i.e.,* apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favouritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings or of prior proceedings, do not constitute a basis for a bias or partiality motion unless the display a deep-seated favouritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favouritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the

> former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States,* 255 U.S. 22, 41 S.Ct.230, 65 L.Ed.481 (1921), a World War I espionage case against German-American defendants; "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyality." *Id.,* at 28 (internal quotation marks omitted). *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.
>
> The term "extrajudicial source," though not the interpretive doctrine bearing its name, has appeared in only one of our previous cases. *United States v. Grinnell Corp.,* 384 U.S. 563, 86 S.Ct.1698, 16 L.Ed.2d 778 (1966). Respondents in *Grinnell* alleged that the trial judge had a personal bias against them, and sought his disqualification and a new trial under 28 U.S.C. § 144. That statute, like § 455(b)(1), requires disqualification for "bias or prejudice". In denying respondents' claim, the Court stated that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." 384 U.S., at 583, 86 S.Ct., at 1710."

In *LITEKY* (supra), it has been held that it is desirable to have the same Judge in the successive causes. They have to be faithful to oath. Following observation has been made:

> "<u>To take a common example, litigants (like petitioners here) often seek disqualification based upon a judge's prior participation, in a judicial capacity, in some related litigation. Those allegations are meritless in most instances, and their prompt rejection is important so the case can proceed. Judges, if faithful to their oath, approach every aspect of each case with a neutral and objective disposition. They understand their duty to render decisions upon a proper record and to disregard earlier judicial contacts with a case or party</u>.
>
> Some may argue that a judge will feel the "motivation to vindicate a prior conclusion" when confronted with a question for the second or third time, for instance, upon trial after a remand. Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How.L.J. 228, 229-230 (1957). Still, we accept the notion that the "conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify

> their effect." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (CA2 1943). The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office. As a matter of sound administration, moreover, it may be necessary and prudent to permit judges to preside over successive causes involving the same parties or issues. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 4(a) ("The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant"). The public character of the prior and present proceedings tends to reinforce the resolve of the judge to weigh with care the propriety of his or her decision to hear the case.
>
> Out of this reconciliation of principle and practice comes the recognition that a judge's prior judicial experience and contacts need not, and often do not, give rise to reasonable questions concerning impartiality."
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> (emphasis supplied)

25. In *State of W.B. v. Shivananda Pathak,* (1998) 5 SCC 513, this Court has laid down that prejudging question of law, policy or discretion, Judge is not disqualified to hear a case. It was held as under:

> "**25.** Bias may be defined as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is, in fact, a condition of mind, which sways judgments and renders the judge unable to exercise impartiality in a particular case.
>
> **26.** Bias has many forms. It may be pecuniary bias, personal bias, bias as to subject-matter in dispute, or policy bias etc. In the instant case, we are not concerned with any of these forms of bias. We have to deal, as we shall presently see, a new form of bias, namely, bias on account of judicial obstinacy.
>
> **27.** Judges, unfortunately, are not infallible. As human beings, they can commit mistakes even in the best of their judgments reflective of their hard labour, impartial things and objective assessment of the problem put before them. In the matter of interpretation of statutory provisions or while assessing the evidence in a particular case or deciding questions of law or facts, mistakes may be committed bona fide which are corrected at the appellate stage. This explains the philosophy behind the hierarchy of courts. Such a

mistake can be committed even by a judge of the High Court which are corrected in the letters patent appeal, if available.

28. If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to that judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment. Even if it was a decision on a pure question of law which came to be overruled, it cannot be reiterated in the same proceedings at the subsequent stage by reason of the fact that the judgment of the higher court which has overruled that judgment, not only binds the parties to the proceedings but also the judge who had earlier rendered that decision. That judge may have his occasion to reiterate his dogmatic views on a particular question of common law or constitutional law in some other case but not in the same case. If it is done, it would be exhibitive of his bias in his own favour to satisfy his egoistic judicial obstinacy.

29. As pointed out earlier, an essential requirement of judicial adjudication is that the judge is impartial and neutral and is in a position to apply his mind objectively to the facts of the case put up before him. If he is predisposed or suffers from prejudices or has a biased mind, he disqualifies himself from acting as a judge. But Frank, J. of the United States in *Linahan, In re,* 138 F 2d 650 says:

"If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions.... Much harm is done by the myth that, merely by ... taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."

[See also Griffith and Street, *Principles of Administrative Law* (1973 Edn.), p. 155; *Judicial Review of Administrative Action* by de Smith (1980 Edn.), p. 272; *II Administrative Law Treatise* by Davis (1958 Edn.), p. 130.]

30. These remarks imply a distinction between prejudging of facts specifically relating to a party, as against preconceptions or predispositions about general questions of law, policy or discretion. The implication is that though in the former case, a judge would disqualify himself, in the latter case, he may not. But this question does not arise here and is left as it is."

(emphasis supplied)

26. In *Asok Pande v. Supreme Court of India,* (2018) 5 SCC 341, question of allocation of work and roster of Benches came up for consideration. The Court has laid down that Chief Justice has to

consider specialization of each Judge and other factors. The Court observed:

> "**10.** Recently, a Constitution Bench of this Court in *Campaign for Judicial Accountability and Reforms* v. *Union of India*, (2018) 1 SCC 196, held that the principle which was noticed and recognised in the decision of this Court in *State of Rajasthan v. Prakash Chand*, (1998) 1 SCC 1, in relation to the jurisdiction and authority of the Chief Justice of the High Court "must apply proprio vigore as regards the power of the Chief Justice of India". The position of the Chief Justice was reiterated with the following observations: (SCC pp. 199-200, paras 7 & 8)
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> > "*7.* The aforesaid position though stated as regards the High Court, we are absolutely certain that the said principle is applicable to the Supreme Court. We are disposed to think so. Unless such a position is clearly stated, there will be utter confusion. Be it noted, this has been also the convention of this Court, and the convention has been so because of the law. We have to make it clear without any kind of hesitation that the convention is followed because of the principles of law and because of judicial discipline and decorum. Once the Chief Justice is stated to be the Master of the Roster, he alone has the prerogative to constitute Benches. Needless to say, neither a two-Judge Bench nor a three-Judge Bench can allocate the matter to themselves or direct the composition for constitution of a Bench. To elaborate, there cannot be any direction to the Chief Justice of India as to who shall be sitting on the Bench or who shall take up the matter as that touches the composition of the Bench. We reiterate such an order cannot be passed. It is not countenanced in law and is not permissible.
> >
> > *8.* An institution has to function within certain parameters and that is why there are precedents, rules and conventions. As far as the composition of Benches is concerned, we accept the principles stated in *Prakash Chand*, which were stated in the context of the High Court, and clearly state that the same shall squarely apply to the Supreme Court and there cannot be any kind of command or order directing the Chief Justice of India to constitute a particular Bench."
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> **12.** Quite apart from the fact that the relief sought is contrary to legal and constitutional principle, there is a fundamental fallacy in the approach of the petitioner, which must be set at rest. The petitioner seeks the establishment of a binding precept under which a three-Judge Bench in the Court of the Chief Justice must consist of the Chief Justice and his two seniormost colleagues alone while the Constitution Bench should consist of five seniormost Judges (or, as he suggests, three "seniormost" and two "juniormost" Judges). There is no constitutional foundation on the basis of which such a suggestion can be accepted. For one thing, as we have noticed earlier, this would intrude into the exclusive duty and authority of

the Chief Justice to constitute Benches and to allocate cases to them. Moreover, the petitioner seems to harbour a misconception that certain categories of cases or certain courts must consist only of the seniormost Judges in terms of appointment. Every Judge appointed to this Court under Article 124 of the Constitution is invested with the equal duty of adjudicating cases which come to the Court and are assigned by the Chief Justice. Seniority in terms of appointment has no bearing on which cases a Judge should hear. It is a settled position that a judgment delivered by a Judge speaks for the Court (except in the case of a concurring or dissenting opinion). The Constitution makes a stipulation in Article 124(3) for the appointment of Judges of the Supreme Court from the High Courts, from the Bar and from amongst distinguished jurists. Appointment to the Supreme Court is conditioned upon the fulfilment of the qualifications prescribed for the holding of that office under Article 124(3). Once appointed, every Judge of the Court is entitled to and in fact, duty-bound, to hear such cases as are assigned by the Chief Justice. Judges drawn from the High Courts are appointed to this Court after long years of service. Members of the Bar who are elevated to this Court similarly are possessed of wide and diverse experience gathered during the course of the years of practice at the Bar. To suggest that any Judge would be more capable of deciding particular cases or that certain categories of cases should be assigned only to the seniormost among the Judges of the Supreme Court has no foundation in principle or precedent. To hold otherwise would be to cast a reflection on the competence and ability of other Judges to deal with all cases assigned by the Chief Justice notwithstanding the fact that they have fulfilled the qualifications mandated by the Constitution for appointment to the office.

14. The Chartered High Courts of Allahabad, Bombay, Calcutta and Madras have a long history of over a hundred and fifty years. Each of them has marked its sesquicentennial. Many High Courts are not far behind in vintage. Some are of a recent origin. Over the course of their judicial history, High Courts have evolved conventions in matters governing practice and procedure. These conventions provide guidance to the Chief Justice in the allocation of work, including in the constitution of Benches. The High Courts periodically publish a roster of work under the authority of the Chief Justice. The roster indicates the constitution of Benches, Division and Single. The roster will indicate the subject-matter of the cases assigned to each Bench. Different High Courts have their own traditions in regard to the period for which the published roster will continue, until a fresh roster is notified. Individual Judges have their own strengths in terms of specialisation. The Chief Justice of the High Court has to bear in mind the area of specialisation of each Judge, while deciding upon the allocation of work. However, specialisation is one of several aspects which weigh with the Chief Justice. A newly appointed Judge may be rotated in a variety of assignments to enable the Judge to acquire expertise in diverse branches of law. Together with the need for specialisation, there is a

need for Judges to have a broadbased understanding of diverse areas of law. In deciding upon the allocation of work and the constitution of Benches, Chief Justices have to determine the number of Benches which need to be assigned to a particular subject-matter keeping in view the inflow of work and arrears. The Chief Justice of the High Court will have regard to factors such as the pendency of cases in a given area, the need to dispose of the oldest cases, prioritising criminal cases where the liberty of the subject is involved and the overall strength, in terms of numbers, of the Court. Different High Courts have assigned priorities to certain categories of cases such as those involving senior citizens, convicts who are in jail and women litigants. These priorities are considered while preparing the roster. Impending retirements have to be borne in mind since the assignment given to a Judge who is due to demit office would have to be entrusted to another Bench when the vacancy arises. These are some of the considerations which are borne in mind. The Chief Justice is guided by the need to ensure the orderly functioning of the Court and the expeditious disposal of cases. The publication of the roster on the websites of the High Courts provides notice to litigants and lawyers about the distribution of judicial work under the authority of the Chief Justice. This Court was constituted in 1950. In the preparation of the roster and in the distribution of judicial work, some of the conventions which are adopted in the High Courts are also relevant, subject to modifications having regard to institutional requirements.

15. Underlying the submission that the constitution of Benches and the allocation of cases by the Chief Justice must be regulated by a procedure cast in iron is the apprehension that absent such a procedure the power will be exercised arbitrarily. In his capacity as a Judge, the Chief Justice is *primus inter pares*: the first among equals. In the discharge of his other functions, the Chief Justice of India occupies a position which is sui generis. Article 124(1) postulates that the Supreme Court of India shall consist of a Chief Justice of India and other Judges. Article 146 reaffirms the position of the Chief Justice of India as the head of the institution. From an institutional perspective the Chief Justice is placed at the helm of the Supreme Court. In the allocation of cases and the constitution of Benches the Chief Justice has an exclusive prerogative. As a repository of constitutional trust, the Chief Justice is an institution in himself. The authority which is conferred upon the Chief Justice, it must be remembered, is vested in a high constitutional functionary. The authority is entrusted to the Chief Justice because such an entrustment of functions is necessary for the efficient transaction of the administrative and judicial work of the Court. The ultimate purpose behind the entrustment of authority to the Chief Justice is to ensure that the Supreme Court is able to fulfil and discharge the constitutional obligations which govern and provide the rationale for its existence. The entrustment of functions to the Chief Justice as the head of the institution, is with the purpose of securing the position of the Supreme Court as an independent safeguard for the preservation of personal liberty. There cannot be a

> presumption of mistrust. The oath of office demands nothing less."
>
> (emphasis supplied)

Thus, rendering a decision on any issue of law and the corrective procedure of it cannot be said to be ground for recusal of a Judge; otherwise, no Judge can hear a review, curative petition, or a reference made to the larger bench.

27. There may not be even one Judge in this Court who has not taken a view one way or the other concerning Section 24 of the Act of 2013, either in this Court or in the High Court. If the submission is accepted, no Judge will have the power to decide such a matter on the judicial side. We have to deal with the cases every day in which similar or somewhat different questions are involved concerning the same provision. For having taken a view once, if recusal is to be made, it would be very difficult to get a Judge to hear and decide a question of law. We have to correct the decision, apply the law, independently interpret the provisions as per the fact situation of the case which may not be germane in the earlier matter. A judgment is not a halting-place, it is stepping stone. It is not like a holy book which cannot be amended or corrected. It may also work to the advantage of all concerned if a Judge having decided the matter either way is also a member of the larger bench. A Judge who had rendered any decision in a smaller combination is not disqualified from being

part of a larger Bench when a reference is made to the larger bench. Rather, it is a consistent practice prevailing in various High Courts as well as of this Court to include the same Judge/Judges in larger Benches. Shri Mohan Parasaran, learned senior counsel has referred to Rule 8 of Delhi High Court Rules contained in Chapter 3; Part C which reads as under:

> "8. **Judge or Judges who refer a case shall ordinarily sit on the bench which considers the reference –** The Judges or a Bench by whom any question or case is referred shall ordinarily be members of the Division Bench or Full Bench, as the case may be appointed to consider such question or case."

The rule provides that a Judge who referred a case has to sit on the larger Bench to consider the reference. In the present case also, the reference has been made by me and my recusal has been sought. Thus, based on the consistent practice, we find that no ground for recusal is made out.

28. Recusal has been prayed for on the ground of legal pre-disposition. Where recusal is sought on the ground, various questions arise for consideration. Firstly, legal pre-disposition is the outcome of a judicial process of interpretation, and the entire judicial system exists for refining the same. There is absolutely nothing wrong in holding a particular view in a previous judgment for or against a view canvassed by a litigant. No litigant can choose, who should be on the Bench. He cannot say that a Judge who might have decided a case on

a particular issue, which may go against his interest subsequently or is part of a larger Bench should not hear his case. Furthermore, if a party or his Counsel can at length argue on the question of recusal of the Judge before him, he can also successfully question the correctness of a judgment rendered by him. A litigant has got the right to make arguments which suit his cause before a Judge/Judges having taken a contrary view earlier. Moreover, if it is open to one litigant to seek recusal and recusal is permitted, then the right has to be given to the opposite party to seek recusal of a Judge who may have decided a case against his interest. In case it is permitted to either side, that would end judicial independence. Then parties will be choosing Benches to their liking. In that case, the Judges holding a view can be termed to be disqualified. In case the submission of recusal is accepted, the Judges having either side view, cannot hear the matter and have to recuse from hearing. In that case to find neutral Judges would be difficult to find and that would be subvert to the very concept of independent judicial system. If litigants are given the right to seek recusal of a judge on the ground that in a smaller Bench, a view has been taken by the Judge, the correctness of which has to be decided by the larger Bench, which includes the same Judge, then on a parity of reasoning recusal might be sought on the ground of the judge having taken a view one way or the other even in a different case in which similar issues are involved if the judge has

decided similar issues earlier, in the same Court or in a different Court. This would open the flood gates of forum shopping. Recusal upon an imagined apprehension of legal pre-disposition would, in reality amount to acceding to the request that a Judge having a particular view and leanings in favour of the view which suits a particular litigant, should man the Bench. It would not only be allowing Bench hunting but would also be against the judicial discipline and will erode the confidence of the common man for which the judicial system survives.

29. The question that comes to the mind is whether one of us should recuse in order to prevent the embarrassment caused to a Judge by a member of the Bar, by seeking his recusal. Recusal would be the easiest way to solve it. On the other hand, a larger question arises. If request for recusal on the ground of legal pre-disposition in the form of a judgment is acceded to, that would destroy the very edifice of an independent judicial system.

30. The entire judicial system is based on sound constitutional principles. The roster making power is bestowed on the Chief Justice of India so that litigants are not able to choose the Judges before whom they have to argue a matter, and he is a constitutional functionary who has been enjoined with this task at the highest

pedestal to exercise the power of roster making. He is the repository of faith. Once he has exercised his power, it is not for the Judges to choose. As per their oath, they have to discharge their duties without fear and favour and in a dispassionate manner without any ill will, bias towards litigants, or a cause. The question which arises is whether merely delivering a judgment of which correctness is to be examined, would disqualifying a Judge from being part of the larger Bench. The answer to the question has to be in the negative as there is a consistent practice of this Court which has evolved that the Judges who have rendered a decision earlier in smaller combination, have also formed part of the larger Bench, and there are umpteen occasions as mentioned above when Judges have overruled their own view. In *LITEKY* (supra), the United States Supreme Court has held that rather it may be advantageous to have them on a Bench hearing the matter as judgments are rendered after hearing the arguments of learned counsel for the parties. There is always a scope to further develop the law and to correct the errors, and this can better be done by having Judges on the Bench, who have earlier rendered judgments with respect to the subject-matter to which of the parties the view taken suits is not relevant.

31. If requests for recusal are acceded to for the asking, litigants will be unscrupulously taking over the roster making powers of the Chief

Justice and that would tantamount to interference with the judicial system, by the mighty to have a particular Bench by employing several means and putting all kinds of pressures from all angles all around. It is the test of the ability of the judicial system to withstand such onslaught made from every nook and corner. Any recusal in the circumstances is ruled out, such prayer strengthens the stern determination not to succumb to any such pressure and not to recuse on the ground on which recusal sought because for any reason, such a prayer is permitted, even once, it would tantamount to cowardice and give room to big and mighty to destroy the very judicial system. Moreover, recusal in such unjustified circumstances, would become the norm.

32. It was vehemently urged by learned senior counsel on behalf of the respondents that they may feel embarrassed in arguing a proposition of law which has been dealt with in the Indore Development Authority elaborately. We find that given that arguments on recusal, spilling for over a day, could be made vociferously, in a belligerent fashion and with utmost ability, the submission that the learned counsel would feel diffident in arguing a proposition of law on merits, is difficult to accept. We feel that there is no dearth of talent in this Court to argue a matter most effectively even against the tide. The lawyers have compelled this Court time and again to change its

views and to refine the law. This Court is known for not a particular view but for refining the law and that has been done with the help, ability and legal ingenuity of the lawyers to convince this Court with aplomb to correct its view. That is how the process goes on as the entire system exists for the people of this country. Under the guise of that, a reasonable man should not have even an iota of doubt as to the impartiality of the Tribunal. If recusal is made, it would tantamount to giving room to unscrupulous litigant to have a Judge of their choice who can share the views which are to be canvassed by them. No such right can be given to any person under the aforesaid guise; there is no cause for any apprehension. There is no room to entertain the same. The plea cannot be termed anything other than Bench hunting, if it is said that until and unless the one which suits a litigant is found the matters are not to be argued.

33. It also passes comprehension whether in a Constitution Bench, consisting of five Judges, prayer for recusal of a Judge who has taken a particular view earlier, is justified? The Bench consists of five Judges. Each Judge may have his own view. They would not succumb to a view held by one of the judges. They may also have their own view in the matter. Are they also to be disqualified? In case the petitioner's prayer is to be allowed, then they may want a Bench of 5:0 in their favour or 4 in favour and 1 against or 3 in favour and 2 against. That

is not how the system can survive. The very idea of seeking recusal is inconceivable and wholly unjustified, and the prayer cannot be acceded to.

34. The decision in *Supreme Court Advocates-on-Record Association & Anr. v. Union of India (recusal matter),* (2016) 5 SCC 808, has been referred to. Recusal of Justice Khehar (as His Lordship then was) was sought from the Constitution Bench. The principles have been summarised by this Court. The first principle which this Court has discussed is the impartiality of a Judge. It has been observed by Justice Chelameswar that the first principle is that the Judge should be impartial. Merely having a legal opinion has no connection with impartiality. It may be within the purview of the legal correctness of the opinion. The second test is Latin maxim *nemo judex in re sua* i.e., no man shall be a Judge in his own cause. A judgment rendered by a Judge is not in his own cause. Grant Hammond, a former Judge of the Court of Appeal of New Zealand has in his book 'Judicial Recusal', which has been referred to, observed that English Common Law on recusal was both simple and highly constrained; a Judge could only be disqualified for a direct pecuniary interest or consanguinity, affinity, friendship or enmity with a party or because he was or had been a party's advocate. The Court has discussed the matter thus:

“**12.** Grant Hammond, a former Judge of the Court of Appeal of New Zealand and an academician, in his book titled *Judicial Recusal* traced out principles on the law of recusal as developed in England in the following words:

> “The central feature of the early English common law on recusal was both simple and highly constrained: a Judge could only be disqualified for a direct pecuniary interest. What would today be termed ‘bias’, which is easily the most controversial ground for disqualification, was entirely rejected as a ground for recusal of Judges, although it was not completely dismissed in relation to jurors.
>
> This was in marked contrast to the relatively sophisticated canon law, which provided for recusal if a Judge was suspected of partiality because of consanguinity, affinity, friendship or enmity with a party, or because of his subordinate status towards a party or because he was or had been a party’s advocate.”

He also pointed out that in contrast in the United States of America, the subject is covered by legislation.

13. *Dimes* v. *Grand Junction Canal*, (1852) 3 HLC 759, is one of the earliest cases where the question of disqualification of a Judge was considered. The ground was that he had some pecuniary interest in the matter. We are not concerned with the details of the dispute between the parties to the case. Lord Chancellor Cottenham heard the appeal against an order of the Vice-Chancellor and confirmed the order. The order went in favour of the defendant Company. A year later, Dimes discovered that Lord Chancellor Cottenham had shares in the defendant Company. He petitioned the Queen for her intervention. The litigation had a long and chequered history, the details of which are not material for us. Eventually, the matter reached the House of Lords. The House dismissed the appeal of Dimes on the ground that setting aside of the order of the Lord Chancellor would still leave the order of the Vice-Chancellor intact as Lord Chancellor had merely affirmed the order of the Vice-Chancellor. However, the House of Lords held that participation of Lord Cottenham in the adjudicatory process was not justified. Though Lord Campbell observed: (*Dimes case*, ER p. 315)

> “… No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a Judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. … This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.”

14. Summing up the principle laid down by the abovementioned case, *Hammond* observed as follows:

> "The 'no-pecuniary interest' principle as expressed in *Dimes* requires a judge to be automatically disqualified when there is neither actual bias nor even an apprehension of bias on the part of that judge. The fundamental philosophical underpinning of *Dimes* is therefore predicated on a conflict of interest approach."

15. The next landmark case on the question of "bias" is *R.* v. *Gough,* 1993 AC 646. Gough was convicted for an offence of conspiracy to rob and was sentenced to imprisonment for fifteen years by the trial court. It was a trial by Jury. After the conviction was announced, it was brought to the notice of the trial court that one of the jurors was a neighbour of the convict. The convict appealed to the Court of Appeal unsuccessfully. One of the grounds on which the conviction was challenged was that, in view of the fact that one of the jurors being a neighbour of the convict presented a possibility of bias on her part and therefore the conviction is unsustainable. The Court of Appeal noticed that there are two lines of authority propounding two different tests for determining disqualification of a Judge on the ground of bias:

(*1*) "real danger" test; and

(*2*) "reasonable suspicion" test.

The Court of Appeal confirmed the conviction by applying the "real danger" test.

16. The matter was carried further to the House of Lords. Lord Goff noticed that there are a series of authorities which are "not only large in number but bewildering in their effect". After analysing the judgment in *Dimes*, Lord Goff held: (*Gough case*, AC p. 661 F-G)

> "In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

In other words, where a Judge has a pecuniary interest, no further inquiry as to whether there was a "real danger" or "reasonable suspicion" of bias is required to be undertaken. But in other cases, such an inquiry is required and the relevant test is the "real danger" test: (*Gough case*, AC pp. 661 G-H-662 A-B)

> "… But [in other cases], the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include … cases in which the member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests

> may vary widely in their nature, in their effect, and in their relevance to the subject-matter of the proceedings; and there is no rule … that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts."

17. The learned Judge examined various important cases on the subject and finally concluded: (*Gough case*, AC p. 670 E-G)

> "… Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…."

18. Lord Woolf agreed with Lord Goff in his separate judgment. He held: (*Gough case*, AC p. 673 F-G)

> "… There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject-matter of the proceedings as in *Dimes* v. *Grand Junction Canal*. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist."

19. In substance, the Court held that in cases where the Judge has a pecuniary interest in the outcome of the proceedings, his disqualification is automatic. No further enquiry whether such an interest lead to a "real danger" or gave rise to a "reasonable suspicion" is necessary. In cases of other interest, the test to determine whether the Judge is disqualified to hear the case is the "real danger" test.

20. The *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.2),* (2000) 1 AC 119, added one more category to the cases of automatic disqualification for a Judge. Pinochet, a former Chilean dictator, was sought to be arrested and extradited from England for his conduct during his incumbency in office. The issue was whether Pinochet was entitled to immunity from such arrest or extradition. Amnesty International, a charitable organisation, participated in the said proceedings with the leave of the Court. The House of Lords held that Pinochet did not enjoy any such immunity. Subsequently, it came to light that Lord Hoffman,

one of the members of the Board which heard *Pinochet case*, was a Director and Chairman of a company (known as AICL) which was closely linked with Amnesty International. An application was made to the House of Lords to set aside the earlier judgment on the ground of bias on the part of Lord Hoffman.

21. The House of Lords examined the following questions:

(*i*) Whether the connection of Lord Hoffman with Amnesty International required him to be automatically disqualified?

(*ii*) Whether an enquiry into the question whether cause of Lord Hoffman's connection with Amnesty International posed a real danger or caused a reasonable apprehension that his judgment is biased — is necessary?

(*iii*) Did it make any difference that Lord Hoffman was only a member of a company associated with Amnesty International which was in fact interested in securing the extradition of Senator Pinochet?

22. Lord Wilkinson summarised the principles on which a Judge is disqualified to hear a case. As per Lord Wilkinson: (*Pinochet case*, AC pp. 132 G-H-133 A-C)

> "The fundamental principle is that a man may not be a Judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a Judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a Judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a Judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be Judge in his own cause, since the Judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.
>
> In my judgment, this case falls within the first category of case, viz. where the Judge is disqualified because he is a Judge in his own cause. In such a case, once it is shown that the Judge is himself a party to the cause, or has a relevant interest in its subject-matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure...."

And framed the question: (AC p. 134B-C)

> "... the question then arises whether, in non-financial litigation, anything other than a financial or proprietary

> interest in the outcome is sufficient *automatically to disqualify* a man from sitting as Judge in the cause."
>
> (emphasis supplied)

He opined that although the earlier cases have

> "all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification". (AC p. 135B)

23. Lord Wilkinson concluded that Amnesty International and its associate company known as AICL, had a non-pecuniary interest established that Senator Pinochet was not immune from the process of extradition. He concluded that: (*Pinochet case*, AC p. 135C-D)

> "... the matter at issue does not relate to money or economic advantage but is concerned with the *promotion of the cause*, the rationale disqualifying a Judge applies just as much if the Judge's decision will lead to the promotion of a cause in which the Judge is involved together with one of the parties."
>
> (emphasis supplied)

24. After so concluding, dealing with the last question, whether the fact that Lord Hoffman was only a member of AICL but not a member of Amnesty International made any difference to the principle, Lord Wilkinson opined that: (*Pinochet case*, AC p. 132H-133A)

> even though a Judge may not have financial interest in the outcome of a case, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial....

and held that: (AC p. 135 E-F)

> "... If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a Judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions...."

This aspect of the matter was considered in *P.D. Dinakaran (1) v. Judges Inquiry Committee,* (2011) 8 SCC 380

25. From the above decisions, in our opinion, the following principles emerge:

25.1. If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.

25.2. In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.

25.3. The *Pinochet case* added a new category i.e. that the Judge is automatically disqualified from hearing a case where the Judge is

interested in a cause which is being promoted by one of the parties to the case.

26. It is nobody's case that, in the case at hand, Justice Khehar had any pecuniary interest or any other interest falling under the second of the abovementioned categories. By the very nature of the case, no such interest can arise at all.

27. The question is whether the principle of law laid down in *Pinochet case* is attracted. In other words, whether Justice Khehar can be said to be sharing any interest which one of the parties is promoting. All the parties to these proceedings claim to be promoting the cause of ensuring the existence of an impartial and independent judiciary. The only difference of opinion between the parties is regarding the process by which such a result is to be achieved. Therefore, it cannot be said that Justice Khehar shares any interest which any one of the parties to the proceeding is seeking to promote.

28. The implication of Shri Nariman's submission is that Justice Khehar would be predetermined to hold the impugned legislation to be invalid. We fail to understand the stand of the petitioners. If such apprehension of the petitioners comes true, the beneficiaries would be the petitioners only. The grievance, if any, on this ground should be on the part of the respondents.

29. The learned Attorney General appearing for the Union of India made an emphatic statement that the Union of India has no objection for Justice Khehar hearing the matter as a Presiding Judge of the Bench.

30. No precedent has been brought to our notice, where courts ruled at the instance of the beneficiary of bias on the part of the adjudicator, that a judgment or an administrative decision is either voidable or void on the ground of bias. On the other hand, it is a well-established principle of law that an objection based on bias of the adjudicator can be waived. Courts generally did not entertain such objection raised belatedly by the aggrieved party:

> "The right to object to a disqualified adjudicator may be waived, and this may be so even where the disqualification is statutory. The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged."

In our opinion, the implication of the above principle is that only a party who has suffered or is likely to suffer an adverse adjudication because of the possibility of bias on the part of the adjudicator can raise the objection.

31. The significant power as described by Shri Nariman does not inhere only to the members of the Collegium, but inheres in every Judge of this Court who might be called upon to express his opinion regarding the proposals of various appointments of the High Court Judges, Chief Justices or Judges of this Court, while the members of the Collegium are required to exercise such "significant power" with respect to each and every appointment of the abovementioned categories, the other Judges of this Court are required to exercise such "significant power", at least with respect to the appointments to or from the High Court with which they were earlier associated with either as Judges or Chief Justices. The argument of Shri Nariman, if accepted would render all the Judges of this Court disqualified from hearing the present controversy. A result not legally permitted by the "doctrine of necessity".

Justice J.S. Khehar, in his opinion, has observed thus:

"**57.** The reason that was pointed out against me, for seeking my recusal was, that I was a part of the 1 + 4 Collegium. But that should have been a disqualification for Anil R. Dave, J. as well. When he commenced hearing of the matters, and till 7-4-2015, he suffered the same alleged disqualification. Yet, the objection raised against me, was not raised against him. When confronted, Mr Fali S. Nariman vociferously contested, that he had not sought the recusal of Anil R. Dave, J. He supported his assertion with proof. One wonders, why did he not seek the recusal of Anil R. Dave, J.? There is no doubt about the fact, that I have been a member of the 1 + 4 Collegium, and it is likely that I would also shortly become a Member of NJAC, if the present challenge raised by the petitioners was not to succeed. I would therefore remain a part of the selection procedure, irrespective of the process which prevails. That however is the position with reference to four of us (on the instant five-Judge Bench). Besides me, my colleagues on the Bench — J. Chelameswar, Madan B. Lokur and Kurian Joseph, JJ. would in due course be a part of the Collegium (if the writ petitioners before this Court were to succeed), or alternatively, would be a part of NJAC (if the writ petitioners were to fail). In such eventuality, the averment of conflict of interest, ought to have been raised not only against me, but also against my three colleagues. But, that was not the manner in which the issue has been canvassed. In my considered view, the prayer for my recusal is not well founded. If I were to accede to the prayer for my recusal, I would be initiating a wrong practice, and laying down a wrong precedent. A Judge may recuse at his own, from a case entrusted to him by the Chief Justice. That would be a matter of his own choosing. <u>But recusal at the asking of a litigating party, unless justified, must never to be acceded to. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. A Judge before he assumes his office, takes an oath to discharge his duties without fear or favour. He would breach his oath of office, if he accepts a prayer for recusal, unless justified. It is my duty to</u>

discharge my responsibility with absolute earnestness and sincerity. It is my duty to abide by my oath of office to uphold the Constitution and the laws. My decision to continue to be a part of the Bench, flows from the oath which I took, at the time of my elevation to this Court.

(emphasis supplied)

Justice Lokur, in his opinion, has observed:

> "**60.** In my respectful opinion, when an application is made for the recusal of a Judge from hearing a case, the application is made to the Judge concerned and not to the Bench as a whole. Therefore, my learned brother Justice Khehar is absolutely correct in stating that the decision is entirely his, and I respect his decision.
>
> **65.** The issue of recusal from hearing a case is not as simple as it appears. The questions thrown up are quite significant and since it appears that such applications are gaining frequency, it is time that some procedural and substantive rules are framed in this regard. If appropriate rules are framed, then, in a given case, it would avoid embarrassment to other Judges on the Bench."

It has been held that decision to recuse is that of the Judge concerned, and unjustified pressure should never be allowed.

35. Shri Tushar Mehta, learned Solicitor General, has relied upon the decision *in Subrata Roy Sahara v. Union of India & Ors.,* (2014) 8 SCC 470. Recusal of the Bench was sought by way of filing a petition. The embarrassment which is caused by such a prayer, concept of correction of a mistake, if any, recognition of mistake and its rectification have also been considered. This Court has observed:

> "**7.** Now the embarrassment part. Having gone through the pleadings of the writ petition we were satisfied that nothing expressed therein could be assumed as would humiliate or discomfort us by putting us to shame. To modify an earlier order passed by us for a mistake we may have committed, which is apparent on the face of the record, is a jurisdiction we regularly exercise under Article 137 of the Constitution of India. Added to that, it is open to a party to file a curative petition as held by this Court in *Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388.

> These jurisdictions are regularly exercised by us, when made out, without any embarrassment. Correction of a wrong order would never put anyone to shame. Recognition of a mistake, and its rectification, would certainly not put us to shame. In our considered view, embarrassment would arise when the order assailed is actuated by personal and/or extraneous considerations, and the pleadings record such an accusation. No such allegation was made in the present writ petition. And therefore, we were fully satisfied that the feeling entertained by the petitioner, that we would not pass an appropriate order, if the order impugned dated 4-3-2014 was found to be partly or fully unjustified, was totally misplaced."

36. In *Subrata Roy Sahara* (supra) this Court has also referred to the decision of *Mr. R.K. Anand's case* (supra) in which it has been observed that the path of recusal is very often a convenient and a soft option as a Judge has no vested interest in doing a particular matter. It is the Constitution of India which enjoins a Judge to duly and faithfully and to the best of his ability, knowledge, and judgment, perform the duties of his office without fear or favour. Affronts, jibes, and consciously planned snubs should not deter us from discharging our onerous responsibility. This Court has observed:

> "**10.** We have recorded the above narration, lest we are accused of not correctly depicting the submissions as they were canvassed before us. In our understanding, the oath of our office required us to go ahead with the hearing. And not to be overawed by such submissions. In our view, not hearing the matter, would constitute an act in breach of our oath of office, which mandates us to perform the duties of our office, to the best of our ability, without fear or favour, affection or ill will.
>
> **11.** This is certainly not the first time when solicitation for recusal has been sought by the learned counsel. Such a recorded peremptory prayer was made by Mr R.K. Anand, an eminent Senior Advocate, before the High Court of Delhi seeking the recusal of Mr Justice Manmohan Sarin from hearing his personal case. Mr Justice Manmohan Sarin while declining the request made by Mr R.K. Anand, observed as under:

> "The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Article 219 of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour, affection or ill will while upholding the Constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting/Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfilling the oath of office."

The above determination of the High Court of Delhi was assailed before this Court in *R.K. Anand* v. *Delhi High Court,* (2009) 8 SCC 106. The determination of the High Court whereby Mr Justice Manmohan Sarin declined to withdraw from the hearing of the case came to be upheld, with the following observations: (SCC p. 192, para 263)

> "*263. The above passage, in our view, correctly sums up what should be the court's response in the face of a request for recusal made with the intent to intimidate the court or to get better of an 'inconvenient' Judge or to obfuscate the issues or to cause obstruction and delay the proceedings or in any other way frustrate or obstruct the course of justice.*"
>
> (emphasis supplied)

In fact, the observations of the High Court of Delhi and those of this Court reflected exactly how it felt, when the learned counsel addressed the Court at the commencement of the hearing. If it was the learned counsel's posturing antics, aimed at bench-hunting or bench-hopping (or should we say, bench-avoiding), we would not allow that. Affronts, jibes and carefully and consciously planned snubs could not deter us from discharging our onerous responsibility. We could at any time during the course of hearing walk out and make way for another Bench to decide the matter, if ever we felt that that would be the righteous course to follow. Whether or not it would be better for another Bench to hear this case will emerge from the conclusions, we will draw, in the course of the present determination.

131. We shall now deal with the substance, and the import, of the judgments relied upon. It is not the case of the petitioner that we have any connection with either the two Companies under reference, or any other company/firm which constitutes the Sahara Group. We may state, that neither of us has even a single share with the two Companies concerned or with any other company/firm comprising of the Sahara Group. In order to remove all ambiguity in the matter we would further state, that neither of us, nor any of our dependent family members, own even a single share in any

company whatsoever. Neither of us has been assisted in this case, for its determination on merits by any law clerk, intern or staff member, while hearing, dealing with or deciding the controversy. Nor has any assertion in this behalf been made against us by the petitioner or his learned counsel. Accordingly, the factual position, which was the basis of the decisions relied upon by the learned counsel, is not available in the facts and circumstances of this case. In the above view of the matter, it is but natural to conclude, that none of the judgments relied upon by the learned Senior Counsel for the petitioner, on the subject of bias, are applicable to the facts and circumstances of this case. We are satisfied that none of the disguised aspersions cast by the learned Senior Counsel, would be sufficient to justify the invocation of the maxim, that justice must not actually be done, but must also appear to be done. As already noticed above, even though our combination as a Bench, did not exist at the time, when the present petition was filed, a Special Bench, with the present composition, was constituted by the Hon'ble the Chief Justice, as a matter of his conscious determination. No litigant can be permitted to dissuade us in discharging the onerous responsibility assigned to us by the Hon'ble the Chief Justice.

135. Dr. Rajeev Dhavan, learned Senior Counsel also accused us of having a predisposition in respect of the controversy. This predisposition, according to him, appeared to be on the basis of a strong commitment towards the "other side". This assertion was repeated several times during the hearing. But, which is the other side? In terms of our order dated 31-8-2012 the only gainer on the other side is the Government of India. The eighth direction of our order dated 31-8-2012, reads as under: (SCC p. 172, para 326)

> "*326.8. SEBI (WTM) if, after the verification of the details furnished, is unable to find out the whereabouts of all or any of the subscribers, then the amount collected from such subscribers will be appropriated to the Government of India.*"
>
> (emphasis supplied)

If the "other side", is the Government of India, there is certainly no substance in the aspersion cast by the learned counsel. Just the above aspect of the matter is sufficient to burst the bubble of all the carefully crafted insinuations, systematically offloaded, by the learned counsel for effect and impact.

137. The observations recorded in the above judgment in *Jaswant Singh v. Virender Singh*, 1995 Supp (1) SCC 384, are fully applicable to the mannerism and demeanour of the petitioner Mr Subrata Roy Sahara and some of the learned Senior Counsel. We would have declined to recuse from the matter, even if the "other side", had been a private party. For, our oath of office requires us to discharge our obligations, without fear or favour. We therefore also commend to all courts, to similarly repulse all baseless and unfounded insinuations, unless of course, they should not be hearing a

particular matter, for reasons of their direct or indirect involvement. The benchmark, that justice must not only be done but should also appear to be done, has to be preserved at all costs."

37. In *R.K. Anand v. Registrar, Delhi High Court,* (2009) 8 SCC 106, it was observed:

> **264.** We are constrained to pause here for a moment and to express grave concern over the fact that lately such tendencies and practices are on the increase. We have come across instances where one would simply throw a stone on a Judge (who is quite defenceless in such matters!) and later on cite the gratuitous attack as a ground to ask the Judge to recuse himself from hearing a case in which he would be appearing. Such conduct is bound to cause deep hurt to the Judge concerned but what is of far greater importance is that it defies the very fundamentals of administration of justice. A motivated application for recusal, therefore, needs to be dealt with sternly and should be viewed ordinarily as interference in the due course of justice leading to penal consequences."

38. In *Kamini Jaiswal v. Union of India & Anr.*, (2018) 1 SCC 156, this Court has dealt with the matter of recusal thus:

> "**24.** There is no conflict of interest in such a matter. In case a Judge is hearing a matter and if he comes to know that any party is unscrupulously trying to influence the decision-making or indulging in malpractices, it is incumbent upon the Judge to take cognizance of such a matter under the Contempt of Courts Act and to deal with and punish such person in accordance with law as that is not the conflict of interest but the purpose for which the entire system exists. Such things cannot be ignored and recusal of a Judge cannot be asked on the ground of conflict of interest, it would be the saddest day for the judicial system of this country to ignore such aspects on the unfounded allegations and materials. It was highly improper for the petitioner to allege conflict of interest in the petition filed that the Hon'ble Chief Justice of India should not hear on judicial side or allocate the matter on the administrative side. It appears that in order to achieve this end the particular request has been made by filing successive petitions day after the other and prayer was made to avoid the Hon'ble Chief Justice of India to exercise the power for allocation of cases which was clearly an attempt at forum hunting and has to be deprecated in the strongest possible words. Making such scandalous remarks also tantamount to interfering with administration of justice, an advocate cannot escape the responsibility on the ground that he drafted the same in his/her personal capacity as laid down in *Shamsher Singh Bedi* v. *High Court of Punjab & Haryana*, (1996) 7 SCC 99. In *Charan Lal Sahu* v. *Union of India*, (1988) 3 SCC 255, this Court has observed

that in a petition filed under Article 32 in the form of PIL attempt of mudslinging against the advocates, Supreme Court and also against the other constitutional institutions indulged in by an advocate in a careless manner, meaningless and as contradictory pleadings, clumsy allegations, contempt was ordered to be drawn. The Registry was directed not to entertain any PIL petition of the petitioner in future.

27. This Court considered various categories of forum shopping in *Union of India* v. *Cipla Ltd.*, (2009) 8 SCC 106. Even making allegations of a per se conflict of interest require the matter could be transferred to another Bench, has also been held to be another form of forum hunting. This Court has considered various decisions thus: (SCC pp. 318-20, paras 146-155)

> "*146.* The learned Solicitor General submitted that Cipla was guilty of forum shopping inasmuch as it had filed petitions in the Bombay High Court, the Karnataka High Court and also an affidavit in the Delhi High Court as a member of the Bulk Drug Manufacturers Association and had eventually approached the Allahabad High Court for relief resulting in the impugned judgment and order dated 3-3-2004. It was submitted that since Cipla had approached several constitutional courts for relief, the proceedings initiated in the Allahabad High Court clearly amount to forum shopping.
>
> *147.* We are not at all in agreement with the learned Solicitor General. Forum shopping takes several hues and shades and Cipla's petitions do not fall under any category of forum shopping.
>
> *148.* A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in *Rajiv Bhatia* v. *State (NCT of Delhi)*, (1999) 8 SCC 525. The respondent mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the respondent mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping.
>
> *149.* In *Arathi Bandi* v. *Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790, this Court noted that jurisdiction in a court is not attracted by the operation or creation of fortuitous circumstances. In that case, circumstances were created by one of the parties to the dispute to confer jurisdiction on a particular High Court. This was frowned upon by this Court by observing

that to allow the assumption of jurisdiction in created circumstances would only result in encouraging forum shopping.

150. Another case of creating circumstances for the purposes of forum shopping was *World Tanker Carrier Corpn.* v. *SNP Shipping Services (P) Ltd.*, (1998) 5 SCC 310, wherein it was observed that the respondent-plaintiff had made a deliberate attempt to bring the cause of action, namely, a collision between two vessels on the high seas within the jurisdiction of the Bombay High Court. Bringing one of the vessels to Bombay in order to confer jurisdiction on the Bombay High Court had the character of forum shopping rather than anything else.

151. Another form of forum shopping is taking advantage of a view held by a particular High Court in contrast to a different view held by another High Court. In *Ambica Industries* v. *CCE*, (2007) 6 SCC 769, the assessee was from Lucknow. It challenged an order passed by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") located in Delhi before the Delhi High Court. CESTAT had jurisdiction over the State of Uttar Pradesh, NCT of Delhi and the State of Maharashtra. The Delhi High Court did not entertain the proceedings initiated by the assessee for want of territorial jurisdiction. Dismissing the assessee's appeal this Court gave the example of an assessee affected by an assessment order in Bombay invoking the jurisdiction of the Delhi High Court to take advantage of the law laid down by the Delhi High Court or an assessee affected by an order of assessment made at Bombay invoking the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and consequently evade the law laid down by the Bombay High Court. It was said that this could not be allowed and circumstances such as this would lead to some sort of judicial anarchy.

152. Yet another form of forum shopping was noticed in *Jagmohan Bahl* v. *State (NCT of Delhi)*, (2014) 16 SCC 501, wherein it was held that successive bail applications filed by a litigant ought to be heard by the same learned Judge, otherwise an unscrupulous litigant would go on filing bail applications before different Judges until a favourable order is obtained. Unless this practice was nipped in the bud, it would encourage unscrupulous litigants and encourage them to entertain the idea that they can indulge in forum shopping, which has no sanction in law and certainly no sanctity.

153. Another category of forum shopping is approaching different courts for the same relief by making a minor change in the prayer clause of the petition. In *Udyami Evam Khadi Gramodyog Welfare Sanstha* v. *State of U.P.*, (2008) 1 SCC 560, it was noticed by this Court that four writ applications were filed by a litigant and although the prayers were apparently different, the core issue in each petition centred round the recovery of the amount advanced by the bank. Similarly, substituting some petitioners for others with a view to confer jurisdiction on a

particular court would also amount to forum shopping by that group of petitioners.

154. Finally and more recently, in *Supreme Court Advocates-on-Record Assn.* v. *Union of India* (*Recusal Matter*), (2016) 5 SCC 808, Khehar, J. noticed yet another form of forum shopping where a litigant makes allegations of a perceived conflict of interest against a Judge requiring the Judge to recuse from the proceedings so that the matter could be transferred to another Judge.

155. The decisions referred to clearly lay down the principle that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not."

39. In *Bal Kishan Giri v. State of Uttar Pradesh*, (2014) 7 SCC 280, this Court has considered derogatory remarks and efforts to destroy the system. The relevant portions are extracted hereunder:

"**12.** This Court in *M.B. Sanghi* v. *High Court of Punjab and Haryana*, (1991) 3 SCC 600, while examining a similar case observed: (SCC p. 602, para 2)

> "*2*. … The foundation of [judicial] system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society."

13. In *Asharam M. Jain* v. *A.T. Gupta*, (1983) 4 SCC 125, while dealing with the issue, this Court observed as under: (SCC p. 127, para 3)

> "*3*. … The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorise and destroy the system of administration of justice by vilification of Judges. It is not that Judges need be protected; Judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected."

14. In *Jennison* v. *Baker*, (1972) 2 QB 52, All ER p. 1006*d*, it was observed: (QB p. 66 H)

> "… 'The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.'"

40. The decision in *All India Institute of Medical Sciences v. Prof. Kaushal K. Verma*, (2015) 220 DLT 446 (W.P. [C] No.4103/2014), rendered by one of us, Ravindra Bhat, J., has also been referred, thus:

> "25. Before ending this unusually prolix order, which can run into the danger of self-vindication, the Court observes that requests for recusal are to be based on reasonable apprehensions; they cannot be speculative or fanciful suppositions. An observation that needs to be emphasized is that recusals generally, and especially those fuelled by unjustified demands can be burdensome on the judges who are eventually called upon to decide the cause. Whenever made, the concerned court or judge so charged is bound to take it seriously, as it undermines what is the bedrock of justice delivery- impartiality. To borrow the words of Beverely Mclachlin (Chief Justice of Canada) ("Judging in a Democratic State") :
>
> > "…judges are not living Oracles. They are human beings, trained in the law, who struggle to understand the situations before them and to resolve them in accordance with the law and their consciences. And judges must learn to live with being wrong. As human beings, judges learn early in their career to deal with criticism. Every new judge dons the judicial robes resolved never to make a mistake. And every new judge fails. Decisions must sometimes be made without the opportunity for full reflection. The law may not be entirely clear. The truth may be elusive. In the result, even the best judges inevitably are found to have erred. The errors are publicly identified by appellate judges and laid plain for all to see. The fact that appellate judges themselves have been known to err may provide only limited consolation."
>
> If one may add, the greater the experience of the judge, the more acutely she or he is aware of her or his fallibility and the pitfalls of acting on impulse or prejudice. The journey, which begins with certainty, later leads to a path of many grey areas. Given that language itself is an imperfect medium, words are but vessels giving shape to ideas and that no human being is perfect, no judge can claim to be perfect in communicating ideas. The emphasis on a phrase here or an expression there, bereft of anything more, would not ipso facto disclose a predilection, or pre-disposition to decide in a particular manner."

There is a concurring opinion thus:

> "1. I have seen the draft of the order, prepared by my brother S. Ravindra Bhat, J., on the request of recusal by the Division Bench headed by him. I fully concur with the conclusions reached by him and the reasoning leading thereto. I would only add that the request for recusal by the Bench ignores the fact that it comprises of two Judges each of whom have an independent mind to apply. The presence of another Judge with equal say strengthens the rigor of the judicial scrutiny and cannot be undermined."

41. Mr. Shyam Diwan, learned senior counsel has referred to the foreign Rules stating "what is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw". In support of his submission, he has referred to Section 47 of Title 28, Judiciary and Judicial Procedure, 1948 of United States of America; and Rule 24(5)(b) of Rules of Court of the European Union, stating that there is a statutory bar on any judge presiding over cases where judgments delivered by him are to be adjudicated upon in appeal.

42. The decisions and rules relating to the appeal against Chamber Judge are not at all relevant. There is no appeal within the Supreme Court. It has a totally different structure, and has its own corrective mechanism, need not be gainsaid. There is no room for reasonable apprehension to be entertained by the clientele of the respondent's counsel. There is no question of recusal on pre-disposition as to the legal issue or as to the relief to be granted, such an apprehension also

is baseless. The ultimate test is that it is for the Judge to decide and to find out whether he will be able to deliver impartial justice to a cause with integrity with whatever intellectual capacity at his command and he is not prejudiced by any fact or law and is able to take an independent view. The answer would lie in examining whether without having any bias or without any pressure or not even irked by such a prayer for recusal, can he decide the case impartially. In case the answer is that he will be able to deliver justice to the cause, he cannot and must not recuse from any case as the duty assigned by the Constitution has to be performed as per the oath and there lies the larger public interest. He cannot shake the faith that the common man reposes in the judiciary as it is the last hope for them.

43. Having surveyed the precedents cited at the Bar, and having considered the arguments, it is my considered view that a judge rendering a judgment on a question of law would not be a bar to her or his participation if in a larger Bench if that view is referred for re-consideration. The previous judgment cannot constitute bias, or a pre-disposition - nor can it seem to be such, so as to raise a reasonable apprehension of bias. Nor can expressions through a judgment (based on the outcome of arguments in an adversarial process) be a “subject matter” bias on the merits of a norm or legal

principle, or provisions. The previous decisions and practice of this court have clearly shown that there can be and is no bar as the respondents' senior counsel argue. Accepting the plea of recusal would sound a death knell to the independent system of justice delivery where litigants would dictate participation of judges of their liking in particular cases or causes.

44. Recusal is not to be forced by any litigant to choose a Bench. It is for the Judge to decide to recuse. The embarrassment of hearing the lengthy arguments for recusal should not be a compelling reason to recuse. The law laid down in various decisions has compelled me not to recuse from the case and to perform the duty irrespective of the consequences, as nothing should come in the way of dispensation of justice or discharge of duty as a Judge and judicial decision-making. There is no room for prejudice or bias. Justice has to be pure, untainted, uninfluenced by any factor, and even decision for recusal cannot be influenced by outside forces. However, if I recuse, it will be a dereliction of duty, injustice to the system, and to other Judges who are or to adorn the Bench/es in the future. I have taken an informed decision after considering the nitty-gritty of the points at issue, and very importantly, my conscience. In my opinion, I would be committing a grave blunder by recusal in the circumstances, on the grounds prayed for, and posterity will not forgive me down the line for

setting a bad precedent. It is only for the interest of the judiciary (which is supreme) and the system (which is *nulli secundus*) that has compelled me not to recuse.

……………………..J.
(Arun Mishra)

NEW DELHI;
OCTOBER 23, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO.9036-9038 OF 2016

INDORE DEVELOPMENT AUTHORITY ...PETITIONER

VS.

MANOHARLAL AND ORS. ETC. ...RESPONDENTS

WITH

[C.A.NO.19532-19533/2017, SLP (C) NO.9798-9799/2016, SLP (C) NO.17088-17089/2016, SLP (C) NO. 37375/2016, SLP (C) NO.37372/2016, SLP (C) NO.16573-16605/2016, SLP (C)...CC NO.15967/2016, C.A.NO.19356/2017, C.A.NO.19362/2017, C.A.NO.19361/2017, C.A.NO. 19358/2017, C.A.NO.19357/2017, C.A.NO. 19360/2017, C.A. NO.19359/2017, SLP(C) NO. 34752-34753/2016, SLP (C) NO.15890/2017, C.A.NO.19363/2017, C.A.NO.19364/2017, C.A.NO.19412/2017, MA NO.1423/2017 IN C.A. NO. 12247/2016, SLP (C) NO.33022/2017, SLP (C) NO.33127/2017, SLP (C) NO. 33114/2017, MA NO.1787/2017 IN C.A.NO. 10210/2016, MA NO.1786/2017 IN C.A.NO.10207/2016, MA NO.45/2018 IN C.A.NO.6239/2017, SLP (C) NO.16051/2019, DIARY NO.23842/2018 & SLP (C) NO. 30452/2018, CA NO.4835/2015 & SLP (C) NO.30577-30580/2015]

O R D E R

1. We have gone through the draft opinion circulated by Arun Mishra J. An application for recusal is dealt with- and has been dealt with, in this case, by the concerned member of the Bench whose participation is sought to be objected to.

2. The approach to be adopted by other members of the Bench to this sensitive issue- in such cases, is best summarized in the view of Justice Madan B. Lokur *Supreme Court Advocates-on-Record-Association and Ors. vs. Union of India* 2016 (5) 808 where it was stated as follows:

> *"In my respectful opinion, when an application is made for the recusal of a judge from hearing a case, the application is made to the concerned judge and not to the Bench as a whole. Therefore, my learned brother Justice Khehar is absolutely correct in stating that the decision is entirely his, and I respect his decision.*
>
> *539. In a detailed order pronounced in Court on its own motion v. State and Ors. reference was made to a decision of the Supreme Court of the United States in Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America 325 US 897 (1945), wherein it was held that a complaint as to the qualification of a justice of the Supreme Court to take part in the decision of a cause cannot properly be addressed to the*

Court as a whole and it is the responsibility of each justice to determine for himself the propriety of withdrawing from a case.

540. This view was adverted to by Justice Rehnquist in Hanrahan v. Hampton 446 US 1301 (1980) in the following words:

> *'Plaintiffs-Respondents and their counsel in these cases have moved that I be recused from the proceedings in this case for the reasons stated in their 14-page motion and their five appendices filed with the Clerk of this Court on April 3, 1980. The motion is opposed by the state-Defendant Petitioners in the action. Since generally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer, see Jewell Ridge Coal Corporation v. Mine Workers 325 U.S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring), I shall treat the motion as addressed to me individually. I have considered the motion, the Appendices, the response of the state Defendants, 28 U.S.C. 455 (1976 ed. And Supp. II), and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly denied.'*

541. The issue of recusal may be looked at slightly differently apart from the legal nuance. What would happen if, in a Bench of five judges, an application is moved for the recusal of Judge A and after hearing the application Judge A decides to recuse from the case but the other four judges disagree and express the opinion

that there is no justifiable reason for Judge A to recuse from the hearing? Can Judge A be compelled to hear the case even though he/she is desirous of recusing from the hearing? It is to get over such a difficult situation that the application for recusal is actually to an individual judge and not the Bench as a whole.

542. As far as the view expressed by Justice Kurian Joseph that reasons should be given while deciding an application for recusal, I would prefer not to join that decision. In the first place, giving or not giving reasons was not an issue before us. That reasons are presently being given is a different matter altogether. Secondly, the giving of reasons is fraught with some difficulties. For example, it is possible that in a given case, a learned judge of the High Court accepts an application for his/her recusal from a case and one of the parties challenges that order in this Court. Upon hearing the parties, this Court comes to the conclusion that the reasons given by the learned judge were frivolous and therefore the order is incorrect and is then set aside. In such an event, can this Court pass a consequential order requiring the learned judge to hear the case even though he/she genuinely believes that he/she should not hear the case.”

3. In view of the above, we are of the opinion that the view of Mishra, J, to reject the application for recusal, is not a matter that can be commented upon by us.

4. With respect to the observations by Mishra, J in his opinion, regarding the legal principles applicable, we are of

the considered view that there is no legal impediment or bar to his participation to hearing the reference on the merits in the present Bench.

5. We notice that his order has cited several previous instances where judges who rendered decisions in smaller bench compositions, also participated in larger bench formations when the reasoning (in such previous decisions) was doubted, and the issue referred to larger benches, for authoritative pronouncement.

6. For those and other reasons mentioned in the order of Mishra, J, we concur with his reasoning and conclusions that no legal principle or norm bars his participation in the present Bench which is to hear the reference; the precedents cited and the practice of the court, point to the contrary, i.e. that the judge who decided a previous cause, finally, can – and very often has- participated in the later, larger bench to which such previous decision is referred for reconsideration.

7. For the above reasons, and having regard to the reasons contained in Mishra, J's order, outlining the rejection of the request for his recusal, we are of the considered opinion that this Bench should proceed to hear and decide the reference made to it, on its merits.

...J.
[INDIRA BANERJEE]

...J.
[VINEET SARAN]

...J.
[M.R. SHAH]

...J.
[S. RAVINDRA BHAT]

New Delhi,
October 23, 2019.