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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 1373 OF 2018

CENTRE FOR PUBLIC INTEREST LITIGATION …PETITIONER (S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

J U D G M E N T

K.V. Viswanathan, J.

1. Independent India's first Home Minister Shri Sardar Vallabhbhai Patel referred to civil servants as the '*Steel Frame of India*'. In a similar vein, noted economist Joseph Schumpeter said – '*Bureaucracy is not an obstacle to democracy but an inevitable complement to it'*. This case brings into sharp focus the enduring profundity and the everlasting significance of these words of wisdom.

2. By this writ petition, the petitioner is challenging the constitutional validity of Section 17A of the Prevention of Corruption Act, 1988 [for short ''the Act'']. The said section was introduced by virtue of Section 12 of the Prevention of Corruption (Amendment) Act, 2018 (for short 'the Amendment Act'). It should be recorded that yet another prayer challenging the validity of Section 7 of the Amendment Act on the assumed premise that the ingredients of the erstwhile Section 13(1)(d)(ii) of the Act were not engrafted, had been given up during the course of the arguments by Mr. Prashant Bhushan, learned counsel for the petitioner.

TEXT OF SECTION 17A:

3. Section 17A, as introduced w.e.f. 26.07.2018, reads as under:-

> **"17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.-**
>
> No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—
>
> (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;
>
> (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:
>
> Provided that **no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person**:
>
> Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month."

4. It will be noticed that under the said section, no police officer shall conduct any enquiry or inquiry or investigation

into any offence alleged to have been committed by a public servant under the Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval of the authority prescribed therein. The proviso prescribes that no such approval is necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. It is also prescribed that the concerned authority is to convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

CONTENTIONS OF THE PETITIONER:

5. Mr. Prashant Bhushan, learned counsel for the petitioner, ably assisted by Mr. Anurag Tiwary and Ms. Cheryl D'Souza, learned Counsels contends that Section 17A of the Act is violative of Articles 14 and 21 of the Constitution of India.

According to the learned counsel, this is an attempt to reintroduce a provision which had already been struck down twice by this Court in ***Vineet Narain and Others*** vs. ***Union of India and Another***[1] and ***Subramanian Swamy*** vs. ***Director, Central Bureau of Investigation and Another***[2]. According to the learned counsel, in ***Subramanian Swamy (supra)***, this Court found that the provision prevented the investigating agency from collecting material evidence. He contends that all that Section 17A does is to extend the scope of protection to all levels of public servants and not just to a particular category. Pointing to the data filed by the Union of India pertaining to the Central Bureau of Investigation [CBI], it is contended by the learned counsel for the petitioner that out of 2395 cases, prior approval was refused in 41.3% of the cases, namely, in 989 cases. According to the learned counsel, there is no indication as to any transparent criteria for grant or refusal of sanction. It is contended that there is a reasonable

[1] (1998) 1 SCC 226
[2] (2014) 8 SCC 682

apprehension of arbitrariness on the part of the authority. According to the learned counsel, this will give room for selectively targeting officials and also result in protecting and shielding the politically connected officials. Learned counsel for the petitioner contends that Section 17A, by vesting the power in the government to grant approval, is repugnant to the provisions of the Lokpal Act and Lokayuktas Act, 2013 (for short 'the Lokpal Act') defeating the purpose of an independent mechanism. Learned counsel further contends that the impugned provision (Section 17A) runs contrary to the dictum of this Court in ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others,***[3] which according to the learned counsel for the petitioner, mandated registration of FIR on the disclosure of a cognizable offence. Learned counsel also contends that the provision is contrary to the United Nations Convention against Corruption, particularly Articles 6(2), 19 and 36. Learned counsel submits that there is an obligation to

[3] (2014) 2 SCC 1

interpret domestic law in the light of the obligation under the International Conventions. Alternatively, without prejudice to his arguments on the invalidity of Section 17A of the Act, Mr. Prashant Bhushan, learned counsel, in the rejoinder submissions, argued that if the regime of prior approval is to be preserved then screening by an independent agency, like for example the Lokpal, be engrafted.

CONTENTIONS OF THE RESPONDENT:

6. Mr. Tushar Mehta, learned Solicitor General, very ably assisted by Mr. Kanu Agrawal and Mr.Rajat Nair, learned counsels, vehemently opposed the submissions of the petitioner while defending the validity of Section 17A. It is contended that there is a presumption of constitutionality in favour of a statutory provision. It is further contended that a challenge to the validity can only be made in the background of an actual fact scenario. According to the learned Solicitor General, an extensive consultation, was undertaken before the enactment of the said provision. Apart from the

Parliamentary Standing Committee, the matter was also examined by the Law Commission of India and further by the Rajya Sabha Select Committee. The learned Solicitor General contended that Section 17A, as it stands, being a statutory provision, the principles laid down in ***Vineet Narain (supra)*** can have no application as the single directive in ***Vineet Narain (supra)*** was struck down on the ground that an executive instruction cannot be *ultra vires* the statute. Similarly, according to the learned Solicitor General, Section 6A of the Delhi Special Police Establishment Act, 1946 [for short "the DSPE Act"] which applied only to a class of individuals was found to be discriminatory and that vice is not attracted herein as Section 17A is applied across the board to all public servants. Learned Solicitor General also referred to the Standard Operating Procedure [SOP] for the grant or refusal of approval under Section 17A. The contents of the SOP have been dealt with in detail hereinbelow.

7. The learned Solicitor General contended that Section 17A was a salutary provision with substantial checks and balances enacted for a specific purpose, i.e. to protect honest public servants from harassment by way of enquiry or inquiry or investigation in respect of the recommendations made or decisions taken in bona fide performance of their official functions or duties. It was contended that the said provision was part of the larger parliamentary policy to protect genuine bona fide executive decisions taken by public servants while discharging their official functions or duties. The learned Solicitor General contends that the screening mechanism was introduced to prevent misuse of the legal process and to ensure that only genuine cases are proceeded with. The provision, according to the learned Solicitor General, was intended to maintain a balance between accountability and administrative efficiency. Learned Solicitor General, however, in para 5 of his written submissions expressly stated as under:-

> "Before a public servant is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct and a FIR is lodged against him, there must be some suitable preliminary inquiry into the allegations by a responsible officer."

8. Learned Solicitor General traced the legislative history leading to the enactment of Section 17A. The same has been discussed later in this judgment in detail. Learned Solicitor General brought out the qualitative distinction between Section 6A and Section 17A and the scope, sweep and ambit of the said two provisions. According to the learned Solicitor General, while ***Vineet Narain (supra)*** struck down the single directive on the ground of it being an executive instruction contrary to the statutory provision, in ***Subramanian Swamy (supra),*** Section 6A was struck down on the ground of classification only.

9. Learned Solicitor General submitted that pre-investigative sanctions are not an anathema to the rule of law and illustrated the point with reference to the judgment of this Court in ***K. Veeraswami*** vs. ***Union of India and Others***[4] and

[4] (1991) 3 SCC 655

contended that the protection is not confined to judges in constitutional courts but have been extended to all members of the judiciary. Learned Solicitor General emphasized on the use of the phrase *"discharge of official duties"* in Section 17A to bring home the point about narrow tailoring of Section 17A. Reliance was placed on ***Matajog Dobey*** vs. ***H.C. Bhari***[5] to contend that like in Section 197 of the Code of Criminal Procedure, 1973 (for short 'the CrPC'), protection is extendable under Section 17A only when there is a reasonable connection between the act and the discharge of official duty. It was further emphasized that the Section is further confined to recommendation made and decision taken as is clear from the use of the phrase "*relatable to any recommendation made or decision taken*" which qualifies the phrase "*in discharge of official duties*". This was argued to make good the point that all acts are not protected.

[5] (1955) 2 SCR 925

10. It was argued that the prescription of time-limits for the decision to be taken itself is a guarantee against misuse. It was also argued that post the grant or refusal, remedies by way of judicial review are available. Learned Solicitor General laid emphasis on the proviso to Section 17A to contend that on the spot arrests are outside the purview of the screening mechanism. Learned Solicitor General contended that in view of Section 56 of the Lokpal Act, the Lokpal Act has an overriding effect and whenever there is an investigation ordered or FIR is ordered to be registered by the Lokpal, the provision of Section 17A has no application. A large number of judgments of the High Court interpreting Section 17A were placed for consideration.

11. It was argued by the learned Solicitor General that there was no breach of ***Lalita Kumari (supra)*** as even ***Lalita Kumari (supra)*** contemplated exceptions to the rule of mandatory registration of FIR and amongst the exceptions, corruption cases were covered. It was argued that where the

statute creates a new procedure and sets out a machinery dealing with it, the general provisions of the CrPC will not apply to those matters covered by the special statute.

12. Much emphasis was laid on the pre-investigative sanction prescribed for members of judiciary to contend that Section 17A which extends similar protection to the executive cannot be faulted with. Citing ***U.P. Judicial Officers' Association*** vs. ***Union of India and Others***[6], it was argued that the protection has been extended to the higher judiciary which are not constitutional courts. It was submitted that ***Subramanian Swamy (supra)*** wrongly understood the protection given to the judicial officers as being confined to the judges of the constitutional courts. It was argued that mere possibility of abuse of provision cannot be the basis to judge its validity.

[6] (1994) 4 SCC 687

QUESTION FOR CONSIDERATION:

13. In the above background, the question that arises for consideration is, whether Section 17A of the Act as introduced w.e.f. 26.07.2018 by Section 12 of the Amendment Act, is constitutionally valid?

PRECURSOR TO SECTION 17A:

14. Prior to the judgment dated 18.12.1997 in ***Vineet Narain (supra),*** a directive popularly known as the Single Directive was in vogue. It was in the form of an executive order which contained certain instructions to the CBI regarding modalities of initiating an inquiry or registering a case against certain categories of civil servants. Directive No. 4.7(3) read as under:-

> "4.7(3)(*i*) In regard to any person who is or has been a decision-making level officer (Joint Secretary or equivalent or above in the Central Government or such officers as are or have been on deputation to a Public Sector Undertaking; officers of the Reserve Bank of India of the level equivalent to Joint Secretary or above in the Central Government, Executive Directors and above of the SEBI and Chairman & Managing Director and Executive Directors and such of the bank officers who are one level below the Board of Nationalised Banks), there

should be prior sanction of the Secretary of the Ministry/Department concerned before SPE takes up any enquiry (PE or RC), including ordering search in respect of them. Without such sanction, no enquiry shall be initiated by the SPE.

(*ii*) All cases referred to the Administrative Ministries/Departments by CBI for obtaining necessary prior sanction as aforesaid, except those pertaining to any officer of the rank of Secretary or Principal Secretary, should be disposed of by them preferably within a period of two months of the receipt of such a reference. In respect of the officers of the rank of Secretary or Principal Secretary to Government, such references should be made by the Director, CBI to the Cabinet Secretary for consideration of a Committee consisting of the Cabinet Secretary as its Chairman and the Law Secretary and the Secretary (Personnel) as its members. The Committee should dispose of all such references preferably within two months from the date of receipt of such a reference by the Cabinet Secretary.

(*iii*) When there is any difference of opinion between the Director, CBI and the Secretary of the Administrative Ministry/Department in respect of an officer up to the rank of Additional Secretary or equivalent, the matter shall be referred by CBI to Secretary (Personnel) for placement before the Committee referred to in clause (*ii*) above. Such a matter should be considered and disposed of by the Committee preferably within two months from the date of receipt of such a reference by Secretary (Personnel).

(*iv*) In regard to any person who is or has been Cabinet Secretary, before SPE takes any step of the kind mentioned in (*i*) above the case should be submitted to the Prime Minister for orders.''

Vineet Narain (supra) dealt with the validity of the said directive. Two questions arose in relation to the said Directive No. 4.7(3) of the Single Directive, namely, its propriety/legality and the extent of its coverage.

15. In defending the validity of the Single Directive, the then Attorney General had contended that the CBI being a special agency created by the Central Government, was required to function according to the mandate of the Central Government which had constituted the special agency. It was also contended that the Officers at the decision-making level needed protection against malicious or vexatious investigations in respect of honest decisions taken by them. While dealing with these contentions, this Court held that the general power to review the working of the agency would not extend to permitting the Minister to interfere with the course of investigation and prosecution in any individual case and in that respect the officers concerned are to be governed entirely by the mandate of law and the statutory duty cast upon them [para 28 of ***Vineet Narain (supra)***].

16. This Court quoted the judgment in ***Union of India and Others*** vs. ***Sushil Kumar Modi and Others***[7], which, in turn, relied on the observations of Lord Denning in ***R*** v. ***Metropolitan Police Commr.***[8] to the following effect:-

> "I have no hesitation, however, in holding that, like every constable in the land, ***he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, ... I hold it to be the duty*** **of the Commissioner of Police, as it is of every chief constable,** ***to enforce the law of the land*****.** He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; ***but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone*****."**
>
> [Emphasis supplied]

17. Thereafter, ***Vineet Narain (supra)*** distinguished the judgments in ***State of Bihar and Another*** vs. ***J.A.C. Saldanha and Others***[9] and ***K. Veeraswami (supra)*** and held that statutory powers cannot be fettered by single directives

[7] (1997) 4 SCC 770
[8] (1968) 1 All ER 763
[9] (1980) 1 SCC 554

which are in the nature of executive instructions. This Court further held that unlike the power to sanction prosecution under the then Section 6 of the DSPE Act which was statutorily prescribed, the Single Directive was in the nature of an executive order. This Court held that in the absence of any statutory requirement of prior permission or sanction for investigation, the same cannot be imposed as a condition precedent for initiation of the investigation once jurisdiction is conferred on the CBI to investigate the offence statutorily.

18. Going further, this Court held that the law does not classify offenders differently for treatment thereunder, including investigation of offences and prosecution for offences, according to their status in life. This Court found that the Single Directive was applicable only to certain persons above the specified level who are described as "decision-making officers". Further, this Court first excluded from the applicability of the Single Directive accusation of bribery which is supported by direct evidence including trap cases and offence of possession of assets disproportionate to known

sources of income. Thereafter, dealing with cases where accusation could not be supported by direct evidence and is a matter of inference of corrupt motive, this Court held as under:-

> **"46.** There may be other cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision, with nothing to prove directly any illegal gain to the decision-maker. Those are cases in which the inference drawn is that the decision must have been made for a corrupt motive because the decision could not have been reached otherwise by an officer at that level in the hierarchy. This is, therefore, an area where the opinion of persons with requisite expertise in decision-making of that kind is relevant and, may be even decisive in reaching the conclusion whether the allegation requires any investigation to be made. In view of the fact that the CBI or the police force does not have the expertise within its fold for the formation of the requisite opinion in such cases, the need for the inclusion of such a mechanism comprising of experts in the field as a part of the infrastructure of the CBI is obvious, to decide whether the accusation made discloses grounds for a reasonable suspicion of the commission of an offence and it requires investigation. In the absence of any such mechanism within the infrastructure of the CBI, comprising of experts in the field who can evaluate the material for the decision to be made, introduction therein of a body of experts having expertise of the kind of business which requires the decision to be made, can be appreciated. But then, the final opinion is to be of the CBI with the aid of that advice and not that of anyone else. It would be more appropriate to have such a body within the infrastructure of the CBI itself."

19. What is important to note is, this Court held that the final opinion whether to investigate or not has to be made by the CBI and not by anybody else and exhorted the CBI to have within its midst body of experts to make the required decision. What was emphasized was that the final decision whether to investigate or not was to rest with the agency. Holding so, the Single Directive was held to be invalid.

20. A minute reading of ***Vineet Narain (supra)*** indicates that this Court first addressed the question of propriety/legality of the Single Directive. In answering the question, this Court held that the executive cannot dictate to the investigating machinery as to whom to prosecute or not to prosecute. This Court also reiterated that the formation of the opinion as to whether or not a case has to be placed for trial is that of a police officer and by no other authority. (See para 29)

RATIO, SPIRIT AND ESSENCE OF VINEET NARAIN (SUPRA)

21. Though said in the context of examining the validity of the executive instruction, the ratio, true spirit and essence of the

judgment in ***Vineet Narain (supra)*** is that the executive on its own cannot foreclose enquiry into any allegation of corruption as that will be entering the domain of the investigative agency. This is the principle that permeates the warp and woof of the entire judgment in ***Vineet Narain (supra)***. The fact that what was struck down as an executive instruction and the observations on the aspect of classification have all to be read in the context of this one fundamental underpinning in the judgment, namely, that any decision to foreclose an enquiry against a public servant has to be taken by a body which is independent of the executive.

22. In ***Vineet Narain (supra),*** this Court proceeded to give certain directions to implement the rule of law, to reiterate as far as possible the recommendations of the Independent Review Committee popularly known as N.N. Vohra Committee. The following words of this Court from ***Vineet Narain (supra)*** repays study: -

> **"26.** … There can also be no doubt that the conclusions reached by the IRC and its recommendations are the minimum which require immediate acceptance and

implementation in a bid to arrest any further decay of the polity. It follows that the exercise to be performed now by this Court is really to consider whether any modifications/additions are required to be made to the recommendations of the IRC for achieving the object for which the Central Government itself constituted the IRC. We are informed by the learned Attorney General that further action on the report of the IRC could not be taken so far because of certain practical difficulties faced by the Central Government but there is no negative reaction to the report given by the Central Government."

23. This Court reiterated some of the recommendations made by Lord Nolan of U.K. dealing with "Standards in Public Life" wherein one of the recommendations was as follows:-

"Independent scrutiny

7. Internal systems for maintaining standards should be supported by independent scrutiny."

In conclusion, this Court in ***Vineet Narain (supra)*** held as under:-

"61. In the result, we strike down Directive No. 4.7(3) of the Single Directive quoted above and issue the above directions, which have to be construed in the light of the earlier discussion. The Report of the Independent Review Committee (IRC) and its recommendations which are similar to this extent can be read, if necessary, for a proper appreciation of these directions. To the extent we agree with the conclusions and recommendations of the IRC, and that is a large area, we have adopted the same in the formulation of the above directions. These directions

require the strict compliance/adherence of the Union of India and all concerned."

INTRODUCTION OF SECTION 6A IN THE DELHI SPECIAL POLICE ESTABLISHMENT ACT, 1946

24. By the insertion of Section 26(c) to the Central Vigilance Commission Act, 2003 [CVC], Section 6A was introduced to the DSPE Act in 2003. Section 6A read as under:

> "**6-A.** ***Approval of Central Government to conduct inquiry or investigation***.—(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to—
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> (*a*) the employees of the Central Government of the level of Joint Secretary and above; and
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> (*b*) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (*c*) of the Explanation to Section 7 of the Prevention of Corruption Act, 1988 (49 of 1988)."

25. A Constitution Bench of this Court in ***Subramanian Swamy (supra)*** examined the challenge to the validity of Section 6A of the DSPE Act. It is crucial to notice the argument of learned Amicus Curiae Shri Anil B. Divan, learned senior counsel, in supporting the challenge to the validity:-

a) That the provision has to be struck down as it strikes at the core of rule of law as explained in ***Vineet Narain (supra)*** and the principle of independent, unhampered, unbiased and efficient investigation;

b) That the provision was subversive of independent investigation;

c) The very group of persons, namely, high-ranking bureaucrats whose misdeeds and illegalities may have to be inquired into, would decide whether the CBI should even start an inquiry or investigation;

d) There will be no confidentiality and insulation of the investigating agency from political as well as bureaucratic control and influence because the approval

has to be taken from the Central Government which would involve leaks and disclosures at every stage.

e) The very nexus of the criminal-bureaucrat-politician which is subverting the whole polity would be involved in granting or refusing prior approval before an inquiry or investigation can take place.

f) The essence of a police investigation is skilful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The submission made being that the prior sanction of the same department would result in indirectly putting to notice the officers to be investigated before the commencement of investigation.

g) Lastly, the classification contained in Section 6A created a privileged class of government officers of the level of Joint Secretary and above level and certain officials in Public Sector Undertakings, which is directly destructive and ran counter to the object of the Act and undermined

the object of detecting and punishing high-level corruption.

26. The validity of the statute was defended by contending that those in decision-making positions could become target of frivolous complaints and they need to be protected. Hence, a screening mechanism is legitimate as otherwise governance would be affected and decision makers instead of tendering honest advice would only give safe and non-committal advice. It was argued that the screening mechanism was to filter out frivolous or motivated investigation that could be initiated against senior officers to protect them from harassment to enable them to take decision without fear. The decision in ***Matajog (supra)*** was cited to contend that Section 197 of the CrPC was held to be valid and not violative of Article 14 and on similar logic Section 6A should also be upheld. It was argued that there was intelligible differentia since high-ranking public servants took policy decisions.

HOLDING IN SUBRAMANIAN SWAMY (SUPRA)

27. This Court, after analyzing the various arguments and after considering several precedents including the judgments in ***Vineet Narain (supra)***, ***JAC Saldanha (supra)*** and ***K. Veeraswami (supra),*** held as under:-

i) The classification made in Section 6A on the basis of status in government service is not permissible under Article 14 as it defeats the purpose of finding *prima facie* truth into the allegations of graft, which amount to an offence under the Act. (para 59)

ii) Irrespective of their status or position, corrupt public servants are corrupters of public power and whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally (para 59). Section 6A neither eliminates public mischief nor achieves some positive public good. It advances public mischief and protects the crimedoer. The provision thwarts an independent, unhampered, unbiased, efficient and fearless

inquiry/investigation to track down the corrupt public servants. (para 60)

iii) The essence of police investigation is skillful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The previous approval from the Government necessarily required under Section 6A would result in indirectly putting to notice the officers to be investigated before the commencement of investigation, if CBI is not even allowed to enquire. (para 61)

iv) A preliminary enquiry is intended to ascertain whether a *prima facie* case for investigation is made out or not. If CBI is not even allowed to verify complaints by a preliminary enquiry, how can the case move forward? A fetter is put to enable the CBI to gather relevant material. (para 61)

v) As a matter of fact, CBI is not able to collect the material even to move the Government for the purpose of obtaining previous approval from the Central Government. (para 61)

vi) In the criminal justice system, the inquiry and investigation into an offence is the domain of the police. Even

this exercise of scrutiny of records and gathering relevant information to find out whether the case is worth pursuing further or not is not possible. (para 62)

vii) As per the CBI Manual, a preliminary enquiry relating to allegations of bribery and corruption should be limited to the scrutiny of records and interrogation of bare minimum persons which being necessary to judge whether there is any substance in the allegations which are being enquired into and whether the case is worth pursuing further or not. (para 62)

viii) The very power of CBI to enquire and investigate into the allegations of bribery and corruption against a certain class of public servants and officials in public undertakings is subverted and impinged by Section 6A. (para 62)

ix) Section 6A continues to suffer from the other two infirmities a) Where inference is to be drawn that the decision must have been for corrupt motive and direct evidence is not there, the expertise to take decision whether to proceed or not

in such cases should be with CBI itself and not with the Central Government, and;

b) In any event, the final decision to commence investigation into the offences must be of CBI with the internal aid and advice and not of anybody else. (para 65)

x) Section 6A also suffers from the vice of classifying offenders differently for treatment thereunder for inquiry and investigation of offences, according to their status in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone. (para 65)

xi) The impugned provision blocks inquiry and investigation by CBI by conferring the power of previous approval on the Central Government. (para 66)

xii) CBI is not able to proceed even to collect the material to unearth *prima facie* substance into the merits of allegations and thus the object of Section 6A itself is discriminatory. (para 68)

xiii) That being the position, the discrimination cannot be justified on the ground that there is a reasonable classification because it has a rational relation to the object sought to be achieved. (para 68)

xiv) The criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted (Para 86).

xv) It is equally important that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair investigation resulting in the offenders escaping the punitive course of law. These are important facets of the rule of law. Breach of rule of law amounts to negation of equality under Article 14. Section 6A fails in the context of these facets of Article 14 (Para 86).

xvi) **Whether decision-maker or not, an independent investigation into such allegations is of utmost importance and unearthing the truth is the goal. The aim and object of investigation is ultimately to search for truth**

and any law that impedes that object may not stand the test of Article 14. (para 91)

28. The ratio, spirit and essence of the judgment in ***Subramanian Swamy (supra)*** indicates that the Constitution Bench was primarily concerned with the untenability of foreclosing any enquiry or inquiry by an independent agency before the grant or refusal of approval under Section6A. It also emphasized on how vesting the power in the government would forewarn the officials who are subject matter of the inquiry. The Constitution Bench held that irrespective of the status of the public servants, they must be confronted with the same process of inquiry/investigation. It frowned upon the erstwhile Section 6A for subverting an inquiry by an independent agency and for that reason found the object of Section 6A to be discriminatory. Additionally, it found the classification of high-level public servants as illegal.

29. It is in this background that the validity of Section 17A, as introduced in 2018, needs to be tested.

METAMORPHOSIS OF SECTION 17A:

RECOMMENDATIONS OF THE LAW COMMISSION

30. The Law Commission of India in its 254th report considered the Prevention of Corruption (Amendment) Bill, 2013. The proposed Section 17A, after certain minor amendments suggested by the Law Commission, read as follows: -

> **"17A. Investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.**
>
> (2) No police officer shall conduct any investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties, without the previous approval-
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> (c) of the Lokpal, in the case of a public servant who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union, and is a person referred to in clauses (a) to (h) of sub-section (1) of section 14 of the Lokpal and Lokayuktas Act, 2013;
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> (d) of the Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant falls, in the case of a person who is employed, as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of a State,

> conveyed by an order issued by the Lokpal in accordance with the provisions contained in Chapter VII of the Lokpal and Lokayuktas Act, 2013 or Lokayukta of the State or such authority referred to in clause (b) for processing of investigation against the public servant
>
> Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person."

31. It will be noticed that the section, as recommended by the Law Commission, provided for previous approval of the Lokpal in case of a public servant employed with the affairs of the Union and Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant fell, in case of a person who is employed with the affairs of the State. This draft Bill is significant.

32. A close and minute reading of the judgments in ***Vineet Narain (supra)*** and ***Subramanian Swamy (supra)*** clearly brings to the fore the aspect that the Constitution Bench had found fault with foreclosing any independent investigation before the papers are put for approval to the Government. Moreover, the Court had expressly observed that under the impugned provisions therein, the very group of persons,

namely, high-ranking bureaucrats whose misdeeds and illegalities may have to be inquired into were to decide whether CBI should even start an inquiry or investigation against them or not. The finding on discrimination was only an additional finding as is clear from the use of the word "also" employed in the judgment in ***Subramanian Swamy (supra)*** in para 65 set out hereinabove.

33. The draft, as proposed by the Law Commission, addressed this issue squarely and vested the power in the Lokpal in accordance with Chapter VII of the Lokpal Act. The draft Bill carrying amendments to the Prevention of Corruption Act was thereafter placed before the Rajya Sabha Select Committee in August 2016.

RECOMMENDATIONS OF THE RAJYA SABHA SELECT COMMITTEE:

34. The Select Committee, in its Report, observed that several stakeholders stated that the grant of sanction of prosecution by Lokpal/Lokayukta for prosecuting public

servants under Section 23 of the Lokpal Act would be *ultra vires* Article 311 of the Constitution. It was felt that disciplinary/appointing authority should retain the power to grant sanction of prosecution of government servant as that authority is well placed with the functioning and conduct of his/her employee. (See para 15.2 of the Report). The Select Committee further observed that almost all State Governments/UT Administration were of the view that the power of granting sanction for prosecution should remain with the competent/appointing authority of appropriate government for practical reasons and administrative convenience.

35. What is significant is that there was no discussion on the serious concerns pointed out by the Constitution Bench in ***Subramanian Swamy (supra)*** about the unconstitutionality in vesting the power of grant of approval in the Government without any independent screening mechanism.

36. The ultimate Section 17A which emerged has been set out in para 3 hereinabove.

QUALITATIVE DIFFERENCE BETWEEN THE ERSTWHILE SECTION 6A AND THE PRESENT SECTION 17A:

37. It will be seen that unlike Section 6A which was applicable to *"any offence alleged to have been committed under the Act"* [except those mentioned in sub-section (2)], Section 17A applies only to *"any offence alleged to have been committed by a public servant under this Act (the PC Act) where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties."* Section 17A also excepted cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. Section 6A applied only to employees of the Central Government of the Level of Joint Secretary and above and to such officers as are appointed by the Central Government in corporations established by or

under any Central Act, Government companies, societies and local authorities owned or controlled by that Government. The Section, as such, did not mention about its applicability to State employees. Section 17A applies to all public servants and in that sense does not make any classification and also applies to employees at the State Government level.

MANNER OF FUNCTIONING OF GOVERNMENT MACHINERY:

38. The phrase *"is relatable to any recommendation made or decision taken"* is crucial because it considerably limits the applicability of the filter mechanism to offences relatable to recommendations made or decisions taken in discharge of official duties or functions of the public servant.

39. In ***A. Sanjeevi Naidu, Etc.*** vs. ***State of Madras and Another***,[10] K.S. Hegde, J. felicitously speaking for the Constitution Bench of six Judges of this Court, while explaining the method of administration under the Council of

[10] (1970) 1 SCC 443

Ministers with civil servants manning each department observed as under: -

> **"9.** We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. **In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transation of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister.** Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.
>
> **10.** The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Governmental functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. **Even the**

most hard working Minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day-to-day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the "Rules" or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates."

40. Further, explaining how when civil servants discharge the functions allotted to them, they do so as limbs of the government and not as persons to whom the power of the government has been delegated, this Court observed as under:-

> **12.** In *Ishwarlal Girdharlal Joshi, etc.* v. *State of Gujarat and Another,* [(1968) 2 SCR p. 266], this Court rejected the contention that the opinion formed by the Deputy Secretary under Section 17(1) of the Land Acquisition Act cannot be considered as the opinion of the State Government. After referring to the rules of business

regulating the Government business, this Court observed at p. 282:

"In our case the Secretaries concerned were given the jurisdiction to take action on behalf of Government and satisfy themselves about the need for acquisition under Section 6, the urgency of the matter and the existence of waste and arable lands for the application of sub-sections (1) and (4) of Section 17. In view of the Rules of business and the instructions their determination became the determination of Government and no exception could be taken."

13. In *Capital Multi-purpose Cooperative Society* v. *State of M.P. and others,* [Civil Appeal No. 2201 of 1966, decided on 30-3-1957] this Court dealing with the scope of Section 68 (*d*) of the Act observed that the State Government obviously is not a natural person and therefore some natural person has to give hearing on behalf of the State Government and hence the hearing given by the special secretary pursuant to the power conferred on him by the business rules framed under Article 166 (3) is a valid hearing.

14. As mentioned earlier in the very nature of things, neither the Council of Ministers nor an individual Minister can attend to the numerous matters that come up before the Government. Those matters have to be attended to and decisions taken by various officials at various levels. When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated. In *Halsbury Laws of England*, Vol. I, 3rd Edn. at p. 170, it is observed:

"Where functions entrusted to a Minister are performed by an official employed in the Minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister."

This crucial aspect of transacting business in government has to be borne-in-mind while considering the validity of Section

17A. If as laid down in ***Sanjeevi Naidu (supra),*** the law is that the officers take decisions on behalf of the government and that they are limbs of the government and not its delegates, one question that arises is should there not be an independent agency which will screen the information before grant or refusal of approval under Section 17A and ought that decision not bind the government?

IMPORTANCE OF HONEST AND FEARLESS ADVICE BY PUBLIC SERVANTS:

41. Civil servants should have the necessary freedom to take administrative decisions and express their views fearlessly without any threat of frivolous or vexatious complaints, for if they were to be exposed to such complaints in future, there will be a chilling effect on them and their hands will be shackled. The net result will be a "policy paralysis". It will be the tendency of every civil servant then to play it safe by taking no decision at all. Though said in the context of a

debate on the erstwhile Section 6A, the observations of Shri Shivraj V. Patil in the Lok Sabha merits mention herein: -

> **"I have seen files which have been moving not, only from one table to the other, but they have been moving from one Ministry to the other. If the Ministry of Defence has to take a decision, the matter is referred to the Finance Ministry. The Finance Ministry's opinion is obtained and then the Finance Ministry also does not give the final opinion. It says that it could go to the Industries Ministry and let the Industries Ministry decide whether a particular thing is to be imported or whether it can be manufactured in the country. If the Industries Ministry says that can be manufactured in the country or it can be imported from outside also, then they would say that they should examine the legal position. So, the matter goes to the Law Ministry and it opines something and then it comes back to the Ministry of Defence. Then, the Ministry of Defence again says that they have taken decisions separately sitting in their own offices, but they should take the decision jointly sitting in a meeting. Again, the file goes back and then the officers have to come together and take a decision.**
>
> **The result of this kind of procedure adopted is that not only months, but years pass before the final decision is taken. When years pass, the cost of acquiring the equipments or the cost of implementing a project goes up by 25 per cent or 30 per cent or even 50 per cent. The delays are there; time has its own cost. If you do not respect time now, it will certainly increase the cost. This aspect has to be considered. So, while governing and administering, a balanced attitude is required; and that balanced attitude is that there should not be corruption and at the same time, there**

should not be undue delays which can increase the cost of doing things.

So, it is easy to allege anything against anybody but it is very difficult to substantiate an allegation. As a Government it has a responsibility to see that there is no corruption and everything that is necessary for this purpose should be done. At the same time it has a responsibility to see that delays are avoided. That is a very important thing. **That is why we shall have to be careful in seeing that corruption is not there, delay is not there and the innocent people are not put to any inconvenience."**

[Emphasis supplied]

42. This Court in ***State of Bihar and Others*** vs. ***Kripalu Shankar and Others***[11], while holding how file notings cannot be the basis for an action for contempt made the following telling observations. Speaking through V. Khalid, J., this Court observed thus: -

"13. In our considered view the internal notes file of the Government, maintained according to the rules of business, is a privileged document. If the government claims privilege or quasi-privilege regarding the notes file we will not be justified in rejecting the claim outright. In this case, the notes file was brought to the court not voluntarily by the Government. It was summoned by the court. The court can always look into it. The right of the court to look into any file can never be denied. The contents of the notes file brought to court got communicated to the court because the court looks into it. **It would be dangerous to found an action for contempt,**

[11] (1987) 3 SCC 34

for the views expressed in the notes file, on the discovery of unpleasant or unsavoury notes, on a perusal of the notes file by the court after getting them summoned. This would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Government. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in some cases, technically speaking is in disobedience of an order of the court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon the notings in a file for the purpose of initiating contempt, in our view, therefore, would be to put the functioning of the Government out of gear. We must guard against being over-sensitive, when we come across objectionable notings made by officers, sometimes out of inexperience, sometimes out of over-zealousness and sometimes out of ignorance of the nuances of the question of law involved.

30. Before parting with this case we would like to observe the need for restraint and care in dealing with the internal files of the Government. We have already indicated its privileged position and limited areas where exposure is permissible of the notings in the file. This is not to say that absolute privilege can be claimed of its exposure and protection from the view of the courts. **But what is to be borne in mind is that the notings in the departmental files by the hierarchy of officials are meant for the independent discharge of official duties and not for exposure outside. In a democracy, it is absolutely necessary that its steel frame in the form of civil service is permitted to express itself freely uninfluenced by extraneous considerations.** It might well be that even orders of court come in for adverse remarks by officers dealing with them, confronted with difficult situations to straightway obey such orders. Notings made on such occasions are only for the benefit of the officers concerned. When a subordinate official

commits a mistake higher official will always correct it. It is necessary for courts also to view such notings in the proper perspective. In this case, the court, after looking into the notes file could have passed appropriate orders giving relief to the affected party and expressing its displeasure at the manner in which its order was implemented instead of initiating action on the notings made in the file. That way the court would have enhanced its prestige."

43. In ***P. Sirajuddin, Etc*** vs. ***State of Madras, Etc***[12], speaking about the incalculable harm the lodging of FIR can do to an honest public servant, this Court observed as under:-

> **"17.** … Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. **The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general.** If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner……"
>
> **[Emphasis supplied]**

[12] (1970) 1 SCC 595

44. Very recently, I had occasion to make the following observations in ***MMTC Limited*** vs. ***Anglo American Metallurgical Coal Pvt. Limited***[13] about the need to protect the honest public servants who are faced with the duty to take decisions during the day-to-day administration: -

> "99. Before we part, a small postscript. Whether in Government, Public Sector Corporations or even in the private sector, the driving force of the entity are the persons who administer them. A certain play in the joints is inevitable for their day-to-day functioning. If they are shackled with the fear that, their decisions taken for the day-to-day administration, could years later with the benefit of hindsight, be viewed with a jaundiced eye, it will create a chilling effect on them. A tendency to play it safe will set in. Decision making will be avoided. Policy paralysis will descend. All this will in the long run prove detrimental not just to that entity but to the nation itself. We are not to be understood to be condoning decisions taken for improper purposes or extraneous considerations. All that we are at pains to drive home is that great caution and circumspection have to be exercised before such allegations are brought forward and adequate proof must exist to back them. Otherwise for fear that carefully built reputations could be casually tarnished, best of talent will not be forthcoming, especially for government and public sector corporations."

[13] 2025 INSC 1279

CONSTITUTIONAL VALIDITY OF SECTION 17A:

45. Viewed in this background, the object behind Section 17A to provide that without the previous approval, no police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, cannot be found fault with. However, the question that arises is, whether Section 17A addresses the issue of an independent agency being involved in the filtering mechanism before the decision is taken by the Government.

46. As adverted to earlier, a minute reading of the judgment in ***Subramanian Swamy (supra)*** would clearly indicate that the reasoning was not only on the ground of untenable classification contrary to Article 14 but on larger grounds of upholding the majesty of the rule of law because Section 6A was perceived as foreclosing any enquiry before grant or

rejection of approval. If the ingredients of Section 6A were to be reincarnated and made applicable to all public servants irrespective of the level at which they are working, the said section would still be unconstitutional, applying the ratio, spirit and essence of ***Subramanian Swamy (supra)***. As noticed earlier, there is a qualitative difference between Section 6A and the present Section 17A.

EXISTING STANDARD OPERATING PROCEDURE (SOP) GOVERNING THE GRANT/REJECTION OF APPROVAL:

47. When a query was put to the learned Solicitor General as to whether there was any Standard Operating Procedure [SOP] for processing of cases under Section 17A of the Act, the learned Solicitor General produced before the Court a Standard Operating Procedure circulated with the letter of 03.09.2021 of the Additional Secretary, Government of India, Ministry of Personnel, Public Grievances and Pensions to all the Chief Secretaries of all State Governments/Union Territory administrations. The SOP provides for –

"a) Stage-wise processing of information received by a Police Officer;

b) Specifying the rank of the police officer entitled to seek prior approval under Section 17A in respect of different categories of public servants;

c) Consideration of the proposals under Section 17A of the Act by the Appropriate Government or Authority;

d) Laying down of single window procedure to specify receipt stage of the proposal; and

e) Check List for submitting proposals under Section 17A."

48. The SOP provides that on receipt of an information, the police officer shall place the matter before the police officer of the appropriate rank for seeking prior approval under Section 17A of the Act, by such police officer of appropriate rank. Thereafter, it states that the police officer of the appropriate rank shall make a proposal to the appropriate government/authority under Section 17A of the Act, in respect of a person who is or has been a public servant in accordance with the prescription in Annexure-I thereon. Thereafter, it states that the police officer of the appropriate rank shall decide whether the information received, merits to be a) enquired; or b) inquired into; or c) investigated. The police

officer of the appropriate rank shall thereafter make a proposal containing the following information:

> "i. the office held by the public servant(s) when the offence was alleged to have been committed;
>
> ii. the present rank and status of the public servant; or
>
> iii. the post/office last held by the person who ceases to be a public servant; and
>
> iv. the appropriate Government or Authority, before whom the proposal of previous approval is to be made in accordance with the provisions of clauses (a) to (c) of section 17A of the Act.

Thereafter, it states that the said proposal shall be made to the appropriate government or authority through the single window procedure as laid down by the SOPs and shall ensure that the proposal is in accordance with the requirements laid down in the Check List and shall enclose legible and authenticated documents as may be required. Separate proposals were to be submitted for enquiry/inquiry or investigation, as the case may be. Separate proposals were to be made in respect of each public servant, where a composite offence is alleged against more than one public servant and the proposal shall be submitted in a sealed cover in

accordance with the Check List as prescribed in Annexure-2 thereon. The Check List is as follows: -

Annexure-II

CHECK LIST OF ITEMS FOR MATTERS RELATING TO SECTION 17A OF THE PREVENTION OF CORRUPTION ACT, 1988

S. No.	Head	Yes/No	Folder No./ Page No.
1.	Name, designation or office held by the public servant against whom the allegation of an offence under the Prevention of Corruption Act, 1988 has been made. If the person has ceased to be a public servant, the post or office last held by such person may also be indicated.		
2.	The post or office held by such public servant at the time of alleged commission of offence under the Prevention of Corruption Act. Please furnish the details of the Appropriate Government or Authority the public servant was serving at the relevant point of time.		
3.	(i) Whether the request is based on a complaint received? Please enclose a copy thereof. (ii) If yes, please enclose an authenticated translation thereof where the original complaint has been made in a vernacular language.		
4.	Whether the complaint prima facie reveals deriving of an undue advantage		

	by a public servant for self or any other person? Please furnish details.		
5.	Whether any information is available in respect of the bribe giver? If so, please furnish details.		
6.	Mention clearly, the offences under specific provisions of the Prevention of Corruption Act, 1988 as alleged against the person who is or has been a public servant.		
7.	Please provide specific details of the recommendation made or decision taken by a public servant, which is relatable to the offence alleged against the public servant.		
8.	In case any preliminary enquiry/ inquiry was undertaken at any earlier stage, please enclose the findings thereof and it may also be confirmed as to whether prior approval was sought for such PE/ inquiry?		
9.	Whether any criminal offences under the Indian Penal Code or offences under any other law have also been alleged against the public servant? If so, please furnish details thereof.		
10.	Any other information which is considered to be relevant for consideration of the proposal.		

11.	Name, designation and contact details of person authorized by the Police Officer of Appropriate Rank to rectify inadequacies and deficiencies in the proposal seeking Previous Approval, as pointed out by the Officer designated to receive the proposal by Appropriate Government or Authority.		

Signature_____
Date:_____

Name of Police officer authorised
to seek prior approval
(in Block letters)_____

Designation_____

Telephone No._____

email ID_____

49. The Check List makes for an interesting reading. Apart from some biographical particulars, Serial No.4 prescribes the following: "Whether the complaint prima facie reveals deriving of an undue advantage by a public servant for self or any other person? [please furnish details]

7.	Please provide specific details of the recommendation made or decision taken by a public servant, which is relatable to the offence alleged against the public servant.

8.	In case any preliminary enquiry/ inquiry was undertaken at any earlier stage, please enclose the findings thereof and it may also be confirmed as to whether prior approval was sought for such PE/ inquiry?

SOP – DOES NOT CONTEMPLATE SCREENING BY AN INDEPENDENT AGENCY:

50. To say the least, the SOP is only a compilation of documents and does not indicate any independent examination being carried out by any independent agency. The crucial holding in ***Subramanian Swamy (supra)*** that the investigating agencies are not able to proceed even to collect the material to unearth prima facie substance into the merits of the allegations has not been addressed at all in the SOP. The further finding in ***Subramanian Swamy (supra)*** that the criminal justice system mandates that any investigation into the crime should be fair, in accordance with law and should not be tainted and it is important to ensure that interested or influential persons are not able to misdirect, hijack and

throttle a fair investigation has not been recognized at all in the SOP.

51. There cannot be two opinions on the fact that honest and independent public servants have to be protected from frivolous prosecutions. In fact, that is the reason why when the validity of Section 197 CrPC was questioned, this Court in ***Matajog Dobey (supra)*** held as follows:-

> "13 … Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. …"

52. The only distinction is that Section 197 CrPC like Section 19 of the Act would operate at the stage of cognizance. By then the material is collected by the investigating agency and that the sanctioning authority does is to weigh the material and grant or refuse sanction. The sanctioning authority is not groping in the dark unlike in a scenario that is prescribed in the SOP of the government, as set out earlier.

THROWING BABY OUT WITH THE BATHWATER – NOT AN OPTION:

53. What is the solution then? Is the option then to strike down Section 17A and throw the baby out with the bathwater? Certainly not. If honest public servants are not given a basic assurance that decisions taken by them will not be subjected to frivolous complaints, it is the nation that will suffer. Public servants will resort to a play it safe syndrome and that will result in policy paralysis. The panacea of striking down will turn out to be worse than the disease. Instead, the correct course is to find whether within the framework of law the mischief pointed out in ***Subramanian Swamy (supra)*** and ***Vineet Narain (supra)*** could be addressed in the process of grant or refusal of approval under Section 17A.

54. ***Vineet Narain (supra)*** found the executive instructions to be ultra vires the statutory provisions and held the foreclosing of enquiry, to be a serious threat to the rule of law. ***Subramanian Swamy (supra)*** echoed the same sentiments

and additionally found classification to be invalid. There can be no manner of doubt that if an independent inquiry was to precede a grant of approval no fault can be found. Section 17A has no vice of invalid classification.

POSSIBILITY OF ABUSE – NO GROUND TO HOLD PROVISION UNCONSTITUTIONAL:

55. There is no merit in the submission of Mr. Prashant Bhushan that Section 17A could be struck down because there is a possibility of the power being abused. It is well settled that mere possibility of an abuse of an otherwise valid provision cannot be a ground for declaring a provision unconstitutional. The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as

reasonably construed. [See ***The Collector of Customs, Madras*** vs. ***Nathella Sampathu Chetty and Another***[14]].

56. This case cannot be viewed only in a binary manner, that is either to accept the SOP of the government and uphold the provision under the rubric of protecting honest public servants or to strike down the law on the ground that the SOP does not contemplate an independent inquiry.

57. The SOP is only an executive instruction. Section 17A has to be construed with the interpretative tools at our command. A constitutional court in this scenario cannot throw up its hands in despair and say that it is caught between Scylla and Charybdis – between a rock and a hard place. This Court in ***Manzoor Ali Khan*** vs. ***Union of India and Others***[15], while upholding a validity of Section 19 of the Act made the following observations:-

> **"13.** Thus, while it is not possible to hold that the requirement of sanction is unconstitutional, the competent authority has to take a decision on the issue of sanction expeditiously as already observed. **A fine balance has to**

[14] (1962) 3 SCR 786
[15] (2015) 2 SCC 33

be maintained between need to protect a public servant against mala fide prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other hand."

(Emphasis supplied)

58. As was rightly observed, a fine balance has to be maintained between the need to protect a public servant against mala fide prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other. It is necessary to notice that Article 30(2) of the United Nations Convention Against Corruption also advocates the striking of adequate balance by providing as follows:-

> "Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention."

59. Echoing the need for an independent screening mechanism by an impartial agency before prior approval is granted, the Fourth Report (January 2007), of the Second Administrative Reforms Commission had the following emphatic observations to make: -

> 7.1 The raison d'être of vigilance activity is not to reduce but to enhance the level of managerial efficiency and effectiveness in the organization. Risk-taking should form part of government functioning. Every loss caused to the organization, either in pecuniary or non pecuniary terms, need not necessarily become the subject matter of a vigilance inquiry. One possible test for determining the bona-fides could be whether a person of common prudence working within the ambit of the prescribed rules, regulations and instructions, would have taken the decision in the prevailing circumstances in the commercial/operational interests of the organization.
>
> 7.5 There is a general perception among officers and managers that anti-corruption agencies do not fully appreciate administrative and business risks and that they tend to misinterpret the motives where the decision has gone awry or where a loss is caused in a commercial transaction. Such a perception is not without foundation. It is essential therefore for the investigating agencies to establish that their actions are designed in such a way as to protect honest officers. This depends on the ethical standards and professional competence of the personnel manning anti-corruption agencies. Allegations can be made by dishonest subordinates against whom the officer has initiated disciplinary proceedings or he may have stood in the way of dishonest intentions of the corrupt subordinate. More sinister could be the role of "aggrieved" outsiders who failed to have their wrongful way.

7.6 It is generally assumed by the investigating agencies that (1) a decision should be wrong for there to be corruption, and (2) it is easier to involve everyone in the chain of decision making and allege 'conspiracy' than to take pains to find out the individuals who are actually involved. It is often overlooked that a corruption can take place even when the decisions are correct and that it also takes place at specific points inside and outside the system. This entrenched approach to investigation has led to conviction rates being dismally low, honest functionaries getting demoralized and dishonest ones often going scot free.

7.7 The crucial question is one of ensuring a balance between equality before law and protection of an honest civil servant who has his reputation to safeguard, unlike a corrupt one. Such a balance could be achieved by an impartial agency which would screen cases of prior permission for investigation and sanction prosecution of public servants involved in corruption. The Commission has already recommended that the Central Vigilance Commission should be empowered to give such permission.

[Emphasis supplied]

60. Here is where the need for an independent agency to consider the matter before the grant or refusal of the approval under Section 17A becomes primordial. The stage is set now to have a closer look at the provisions of the Lokpal Act.

THE LOKPAL AND THE LOKAYUKTAS ACT, 2013:

61. The Lokpal Act was enacted to provide for the establishment of a body of Lokpal for the Union and Lokayukta for States to inquire into the allegations of corruption against certain public functionaries and for matters connected therewith or incidental thereto. The Act was enacted to give effect to the United Nations Convention Against Corruption. It was enacted to give effect to the Government's commitment to clean and responsive governance and to punish acts of corruption. It was enacted for providing prompt and fair investigation and prosecution in cases of corruption.

62. Section 3 provides for establishment of Lokpal and reads as follows: -

> "**3. Establishment of Lokpal.-** (1) On and from the commencement of this Act, there shall be established, for the purpose of this Act, a body to be called the "Lokpal".
>
> (2) The Lokpal shall consist of-
>
> (a) a Chairperson, who is or has been a Chief Justice of India or is or has been a Judge of the Supreme Court or an eminent person who fulfils the eligibility specified in clause (b) of sub-section (3); and

(b) such number of Members, not exceeding eight out of whom fifty per cent shall be Judicial Members:

Provided that not less than fifty per cent of the Members of the Lokpal shall be from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes. Other Backward Classes, Minorities and women.

(3) A person shall be eligible to be appointed,-

(a) as a Judicial Member if he is or has been a Judge of the Supreme Court or is or has been a Chief Justice of a High Court;

(b) as a Member other than a Judicial Member, if he is a person of impeccable integrity and outstanding ability having special knowledge and expertise of not less than twenty-five years in the matters relating to anti-corruption policy public administration, vigilance, finance including insurance and banking, law and management.

(4) The Chairperson or a Member shall not be-

(i) a member of Parliament or a member of the Legislature of any State or Union territory;

(ii) a person convicted of any offence involving moral turpitude;

(iii) a person of less than forty-five years of age, on the date of assuming office as the Chairperson or Member, as the case may be;

(iv) a member of any Panchayat or Municipality;

(v) a person who has been removed or dismissed from the service of the Union or a State,

and shall not hold any office of trust or profit (other than his office as the Chairperson or a Member) or be affiliated with any political party or carry on any business or practise any profession and, accordingly, before he

enters upon his office, a person appointed as the Chairperson or a Member, as the case may be, shall, if-

(a) he holds any office of trust or profit, resign from such office; or

(b) he is carrying on any business, sever his connection with the conduct and management of such business; or

(c) he is practising any profession, cease to practise such profession."

63. Section 4 prescribes that the Chairperson and Members of the Lokpal shall be appointed by the President after obtaining the recommendations of a Selection Committee consisting of a) the Prime Minister as the Chairperson; b) the Speaker of the House of the People as Member; c) the Leader of Opposition in the House of the People as Member; d) the Chief Justice of India or a Judge of the Supreme Court nominated by the Chief Justice as Member and e) one eminent jurist, as recommended by the Chairperson and Members referred to in Clauses (a) to (d) to be nominated by the President as Member.

64. Section 11 provides for the establishment of an Inquiry Wing of the Lokpal. It prescribes that the Lokpal shall

constitute an Inquiry Wing headed by the Director of Inquiry for the purpose of conducting preliminary inquiry into any offence alleged to have been committed by a public servant punishable under the Act.

65. Section 11, which occurs in Chapter III, reads as under: -

> **"11. Inquiry Wing.- (1)** Notwithstanding anything contained in any law for the time being in force, the Lokpal shall constitute an Inquiry Wing headed by the Director of Inquiry for the purpose of conducting preliminary inquiry into any offence alleged to have been committed by a public servant punishable under the Prevention of Corruption Act, 1988 (49 of 1988):
>
> Provided that till such time the Inquiry Wing is constituted by the Lokpal, the Central Government shall make available such number of officers and other staff from its Ministries or Departments, as may be required by the Lokpal, for conducting preliminary inquiries under this Act.
>
> (2) For the purposes of assisting the Lokpal in conducting a preliminary inquiry under this Act, the officers of the Inquiry Wing not below the rank of the Under Secretary to the Government of India, shall have the same powers as are conferred upon the Inquiry Wing of the Lokpal under section 27."

66. Chapter IV speaks of the Prosecution Wing. Section 12, which occurs in Chapter XII, reads as under: -

"12. Prosecution Wing.- (1) The Lokpal shall, by notification, constitute a Prosecution Wing headed by the Director of Prosecution for the purpose of prosecution of public servants in relation to any complaint by the Lokpal under this Act:

Provided that till such time the Prosecution Wing is constituted by the Lokpal, the Central Government shall make available such number of officers and other staff from its Ministries or Departments, as may be required by the Lokpal, for conducting prosecution under this Act:

(2) The Director of Prosecution shall, after having been so directed by the Lokpal, file a case in accordance with the findings of investigation report, before the Special Court, and take all necessary steps in respect of the prosecution of public servants in relation to any offence punishable under the Prevention of Corruption Act, 1988 (49 of 1988).

(3) The case under sub-section (2), shall be deemed to be a report, filed on completion of investigation, referred to in section 173 of the Code of Criminal Procedure, 1973 (2 of 1974)."

67. Chapter VI deals with jurisdiction in respect of inquiry by the Lokpal. Section 14, which occurs in Chapter VI, reads as under: -

"**14. Jurisdiction of Lokpal to include Prime Minister, Ministers, Members of Parliament, Groups A, B, C and D officers and Officials of Central Government.-** (1) Subject to the other provisions of this Act, the Lokpal shall inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with, any

allegation of corruption made in a complaint in respect of the following, namely:-

(a) any person who is or has been a Prime Minister:

Provided that the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against the Prime Minister,-

(i) insofar as it relates to international relations, external and internal security, public order, atomic energy and space;

(ii) unless a full bench of the Lokpal consisting of its Chairperson and all Members considers the initiation of inquiry and at least two-thirds of its Members approves of such inquiry:

Provided further that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone;

(b) any person who is or has been a Minister of the Union;

(c) any person who is or has been a member of either House of Parliament;

(d) any Group 'A' or Group 'B' officer or equivalent or above, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) when serving or who has served, in connection with the affairs of the Union;

(e) any Group 'C' or Group 'D' official or equivalent, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) when serving or who has

served in connection with the affairs of the Union subject to the provision of sub-section (1) of section 20;

(f) any person who is or has been a chairperson or member or officer or employee in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of Parliament or wholly or partly financed by the Central Government or controlled by it:

Provided that in respect of such officers referred to in clause (d) who have served in connection with the affairs of the Union or in any body or Board or corporation or authority or company or society or trust or autonomous body referred to in clause (e) but are working in connection with the affairs of the State or in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of the State Legislature or wholly or partly financed by the State Government or controlled by it, the Lokpal and the officers of its Inquiry Wing or Prosecution Wing shall have jurisdiction under this Act in respect of such officers only after obtaining the consent of the concerned State Government;

(g) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not), by whatever name called, wholly or partly financed by the Government and the annual income of which exceeds such amount as the Central Government may, by notification, specify:

(h) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not) in receipt of any

donation from any foreign source under the Foreign Contribution (Regulation) Act, 2010 (42 of 2010) in excess of ten lakh rupees in a year or such higher amount as the Central Government may, by notification, specify.

Explanation. For the purpose of clauses (f) and (g), it is hereby clarified that any entity or institution, by whatever name called, corporate, society, trust, association of persons, partnership, sole proprietorship, limited liability partnership (whether registered under any law for the time being in force or not), shall be the entities covered in those clauses:

Provided that any person referred to in this clause shall be deemed to be a public servant under clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) and the provisions of that Act shall apply accordingly.

(2) Notwithstanding anything contained in sub-section (1), the Lokpal shall not inquire ínto any matter involved in, or arising from, or connected with, any such allegation of corruption against any member of either House of Parliament in respect of anything said or a vote given by him in Parliament or any committee thereof covered under the provisions contained in clause (2) of article 105 of the Constitution.

(3) The Lokpal may inquire into any act or conduct of any person other than those referred to in sub-section (1), if such person is involved in the act of abetting, bribe giving or bribe taking or conspiracy relating to any allegation of corruption under the Prevention of Corruption Act, 1988 (49 of 1988) against a person referred to in sub-section (1):

Provided that no action under this section shall be taken in case of a person serving in connection with the affairs of a State, without the consent of the State Government.

(4) No matter in respect of which a complaint has been made to the Lokpal under this Act, shall be referred for inquiry under the Commissions of Inquiry Act, 1952 (60 of 1952).

Explanation.- For the removal of doubts, it is hereby declared that a complaint under this Act shall only relate to a period during which the public servant was holding or serving in that capacity."

68. It will be noticed that Lokpal has jurisdiction to inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with, any allegation of corruption made in a complaint even in respect of the Prime Minister of the country. Apart from the Prime Minister, the Lokpal has jurisdiction over the Ministers of the Union and other civil servants mentioned therein.

69. Chapter VII prescribes the procedure in respect of preliminary inquiry and investigation. Section 20, which occurs in Chapter VII, reads as under:-

"**20. Provisions relating to complaints and preliminary inquiry and investigation.-** *(1)* The Lokpal on receipt of a complaint, if it decides to proceed further, may order-

(a) preliminary inquiry against any public servant by its Inquiry Wing or any agency (including the Delhi Special Police Establishment) to ascertain whether there exists a prima facie case for proceeding in the matter; or

(b) investigation by any agency (including the Delhi Special Police Establishment) when there exists a prima facie case:

Provided that the Lokpal shall if it has decided to proceed with the preliminary inquiry, by a general or special order, refer the complaints or a category of complaints or a complaint received by it in respect of public servants belonging to Group A or Group B or Group C or Group D to the Central Vigilance Commission constituted under sub-section (1) of section 3 of the Central Vigilance Commission Act, 2003 (45 of 2003) :

Provided further that the Central Vigilance Commission in respect of complaints referred to it under the first proviso, after making preliminary inquiry in respect of public servants belonging to Group A and Group B, shall submit its report to the Lokpal in accordance with the provisions contained in sub-sections (2) and (4) and in case of public servants belonging to Group C and Group D, the Commission shall proceed in accordance with the provisions of the Central Vigilance Commission Act, 2003:

Provided also that before ordering an investigation under clause (b), the Lokpal shall call for the explanation of the public servant so as to determine whether there exists a prima facie case for investigation:

Provided also that the seeking of explanation from the public servant before an investigation shall not interfere with the search and seizure, if any, required to be undertaken by any agency (including the Delhi Special Police Establishment) under this Act.

(2) During the preliminary inquiry referred to in sub-section (1), the Inquiry Wing or any agency (including the Delhi Special Police Establishment) shall conduct a preliminary inquiry and on the basis of material, information and documents collected seek the comments on the allegations made in the complaint from the public servant and the competent authority and after obtaining the comments of the concerned public servant and the competent authority, submit, within sixty days from the date of receipt of the reference, a report to the Lokpal.

(3) A Bench consisting of not less than three Members of the Lokpal shall consider every report received under sub-section (2) from the Inquiry Wing or any agency (including the Delhi Special Police Establishment), and after giving an opportunity of being heard to the public servant, decide whether there exists a prima facie case, and proceed with one or more of the following actions, namely:-

(a) investigation by any agency or the Delhi Special Police Establishment, as the case may be;

(b) initiation of the departmental proceedings or any other appropriate action against the concerned public servants by the competent authority;

(c) closure of the proceedings against the public servant and to proceed against the complainant under section 46.

(4) Every preliminary inquiry referred to in sub-section (1) shall ordinarily be completed within a period of ninety days and for reasons to be recorded in writing, within a further period of ninety days from the date of receipt of the complaint.

(5) In case the Lokpal decides to proceed to investigate into the complaint, it shall direct any agency (including the Delhi Special Police Establishment) to carry out the

investigation as expeditiously as possible and complete the investigation within a period of six months from the date of its order:

Provided that the Lokpal may extend the said period by a further period not exceeding of six months at a time for the reasons to be recorded in writing.

(6) Notwithstanding anything contained in section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), any agency (including the Delhi Special Police Establishment) shall, in respect of cases referred to it by the Lokpal, submit the investigation report under that section to the court having jurisdiction and forward a copy thereof to the Lokpal.

(7) A bench consisting of not less than three Members of the Lokpal shall consider every report received by it under sub-section (6) from any agency (including the Delhi Special Police Establishment) and after obtaining the comments of the competent authority and the public servant may-

(a) grant sanction to its Prosecution Wing or investigating agency to file charge-sheet or direct the closure of report before the Special Court against the public servant;

(b) direct the competent authority to initiate the departmental proceedings or any other appropriate action against the concerned public servant.

(8) The Lokpal may, after taking a decision under sub-section (7) on the filing of the charge-sheet, direct its Prosecution Wing or any investigating agency (including the Delhi Special Police Establishment) to initiate prosecution in the Special Court in respect of the cases investigated by the agency.

(9) The Lokpal may, during the preliminary inquiry or the investigation, as the case may be. pass appropriate

orders for the safe custody of the documents relevant to the preliminary inquiry or, as the case may be, investigation as it deems fit.

(10) The website of the Lokpal shall, from time to time and in such manner as may be specified by regulations, display to the public, the status of number of complaints pending before it or disposed of by it.

(11) The Lokpal may retain the original records and evidences which are likely to be required in the process of preliminary inquiry or investigation or conduct of a case by it or by the Special Court.

(12) Save as otherwise provided, the manner and procedure of conducting a preliminary inquiry or investigation (including such material and documents to be made available to the public servant) under this Act, shall be such as may be specified by regulations."

70. It will be noticed that, under Section 20, on receipt of a complaint, the Lokpal may decide to proceed further or may decide otherwise. If it decides to proceed further, the Lokpal may order

a) the preliminary inquiry against any public servant by its Inquiry Wing or any agency (including the DSPE) to ascertain whether there exists a prima face case for proceeding in the matter; or

b) investigation by any agency (including the DSPE) when there exists a prima facie case ordinarily.

71. In case of utterly frivolous complaints, the Lokpal may decide not to proceed further in its discretion for reasons to be recorded. If it decides to proceed further, it may order a preliminary inquiry to ascertain whether there exists a prima facie case and investigation by any agency where prima facie case exists. The proviso prescribes that the Lokpal shall if it has decided to proceed with the preliminary inquiry, by a general or special order, refer the complaints or a category of complaints or a complaint received by it in respect of public servants belonging to Group A or Group B or Group C or Group D to the Central Vigilance Commission [CVC] constituted under sub-section (1) of Section 3 of the Central Vigilance Act, 2003. The proviso further provides that the CVC in respect of complaints referred to it under the first proviso, after making preliminary inquiry in respect of public servants belonging to Group A and Group B, shall submit its

report to the Lokpal in accordance with the provisions contained in sub-Sections (2) and (4) and in case of public servants belonging to Group C and Group D, the Commission shall proceed in accordance with the provisions of the CVC Act, 2003.

72. In case the Lokpal decides to order an investigation, before ordering the investigation, the Lokpal shall call for the explanation of the public servant so as to determine whether there exists a prima facie case for investigation. Sub-section (2) of Section 20 prescribes that during the preliminary enquiry referred to in sub-section (1), the Inquiry Wing or any agency (including the DSPE) shall conduct a preliminary inquiry and on the basis of material, information and documents collected, seek the comments on the allegations made in the complaint from the public servant and the competent authority and after obtaining the comments of the concerned public servant and the competent authority,

submit, within 60 days from the date of receipt of the reference, a report to the Lokpal.

73. What is crucial to notice is that in proceedings under the Lokpal Act when a preliminary inquiry is conducted an opportunity is given not only to the public servant to explain but also opportunity is given to the competent authority before furnishing a report to the Lokpal.

74. Competent authority has been defined in Section 2(c) of the Act as under:-

> ‘‘(c) "competent authority", in relation to-
>
> (1) the Prime Minister, means the House of the People;
>
> (ii) a member of the Council of Ministers, means the Prime Minister;
>
> (iii) a member of Parliament other than a Minister, means-
>
> (A) in the case of a member of the Council of States, the Chairman of the Council; and
>
> (B) in the case of a member of the House of the People, the Speaker of the House;
>
> (iv) an officer in the Ministry or Department of the Central Government, means the Minister in charge of the Ministry or Department under which the officer is serving;

(v) a chairperson or members of any body or Board or corporation or authority or company or society or autonomous body (by whatever name called) established or constituted under any Act of Parliament or wholly or partly financed by the Central Government or controlled by it, means the Minister in charge of the administrative Ministry of such body or Board or corporation or authority or company or society or autonomous body;

(vi) an officer of any body or Board or corporation or authority or company or society or autonomous body (by whatever name called) established or constituted under any Act of Parliament or wholly or partly financed by the Central Government or controlled by it, means the head of such body or Board or corporation or authority or company or society or autonomous body;

(vii) in any other case not falling under sub-clauses (i) to (vi) above, means such Department or authority as the Central Government may, by notification, specify:

Provided that if any person referred to in sub-clause (v) or sub-clause (vi) is also a Member of Parliament, then, the competent authority shall be-

(A) in case such member is a member of the Council of States, the Chairman of the Council; and

(B) in case such member is a member of the House of the People, the Speaker of the House;"

75. Reverting back to Section 20 of the Lokpal Act, sub-section (7) of Section 20 prescribes that not less than three Members of the Lokpal shall consider every report received by it under sub-section (6) from any agency (including the

DSPE) and after obtaining the comments of the competent authority and the public servant may - grant sanction to its Prosecution Wing or investigation agency to file charge-sheet or direct the closure of report before the Special Court against the public servant. Sub-clause (b) of Section 20(7) provides not less than three members of the Lokpal may direct the competent authority to initiate the disciplinary proceedings or any other appropriate action against the concerned public servant. Under sub-section (8) of Section 20, the Lokpal may, on the filing of the chargesheet, direct its Prosecution Wing or any investigating agency (including the DSPE) to initiate prosecution in the Special Court in respect of the cases investigated by the agency. Under Section 23, the Lokpal has the power, notwithstanding anything contained in Section 197 of the CrPC or the erstwhile Section 6A of the DSPE Act or Section 19 of the Act, to grant sanction for prosecution under clause (a) of sub-section (7) of Section 20.

76. Sub-section (2) of Section 23 prescribes that no prosecution under sub-section (1) shall be initiated against any public servant accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, and no court shall take cognizance of such offence except with the previous sanction of the Lokpal.

77. The reason why the above provisions are set out is to demonstrate that while drafting the amendments to the provisions of the Act which ultimately culminated in the Amendments of 2018, the Lokpal Act was also being drafted and brought into force w.e.f 16.01.2014. Even the Prime Minister is subject to a certain procedure under the Lokpal Act. Any complaint could be made to the Lokpal and for the rigors of Section 14 to kick in, the Lokpal may apply the procedure under Section 20, on the same, subject to the restrictions prescribed therein. The provision is so couched that the Lokpal can decide not to proceed in absolutely

frivolous complaints and if it decides to proceed, it is vested with an Inquiry Wing to conduct a preliminary Inquiry where an opportunity is given to the public servant and the competent authority.

78. The statement of object and reasons which led to the enactment of the Lokpal Act provide as under:-

"STATEMENT OF OBJECTS AND REASONS

The need to have a legislation for Lokpal has been felt for the quite sometime. In its interim report on the "Problems of Redressal of Citizens' Grievances" submitted in 1966, the Administrative Reforms Commission, inter alia, recommended the setting up of an institution of Lokpal at the Centre. To give effect to this recommendation of the Administrative Reforms Commission, eight Bills on Lokpal were introduced in the Lok Sabha in the past. However, these Bills had lapsed consequent upon the dissolution of the respective Lok Sabha except in the case of 1985 bill which was subsequently withdrawn after its introduction.

2. In pursuance of the efforts to constitute a mechanism for dealing with complaints on corruption against public functionaries including in high places, the Government constituted a Joint Drafting Committee on 8th April, 2011 to draft a Lokpal Bill. Divergent views emerged during deliberations in the JDC. Government introduced a revised Bill namely 'Lokpal Bill, 2011' in the Lok Sabha on 4th August, 2011. This Bill was referred to the Department-related

Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the 8th August, 2011 for examination and report and this was followed by discussions in both the Houses of Parliament on 27th August, 2011. A sense of the House was communicated to the Standing Committee on the basis of discussions in the Houses. The Department-related Parliamentary Standing Committee after extensive discussion with all the concerned Stakeholders suggested major amendments as regards the scope and content of the Bill introduced in August 2011. It also recommended that Lokpal at the Centre and Lokayukta at the States be conferred constitutional status in its report of 9th December, 2011. Upon consideration of the recommendations of the Standing Committee it was decided to withdraw the Lokpal Bill, 2011 pending in Lok Sabha and to introduce a thoroughly revised bill for carrying out the necessary amendments to the Constitution for the setting up of Lokpal and Lokayuktas as constitutional bodies.

3. India is committed to pursue the policy of 'Zero Tolerance against Corruption'. India ratified the United Nations Convention Against Corruption by deposit of Instrument of Ratification on 9th May, 2011. This Convention imposes a number of obligations, some mandatory, some recommendatory and some optional on the member States. The Convention, inter alia, envisages that State Parties ensure measures in the domestic law for criminalization of offences relating to bribery and put in place an effective mechanism for its enforcement. The obligations of the Convention, with reference to India, have come into force with effect from 8th June, 2011. As a policy of Zero Tolerance against Corruption the Bill seeks to establish in the country, a more effective mechanism to receive complaints relating to allegations of corruption against public servants including

Ministers, MPs, Chief Ministers, Members of Legislative Assemblies and public servants and to inquire into them and take follow up actions. The bodies, namely, Lokpal and Lokayuktas which are being set up for the purpose will be constitutional bodies. This setting up of these bodies will further strengthen the existing legal and institutional mechanism thereby facilitating a more effective implementation of some of the obligations under the aforesaid Convention."

79. As the statement of objects and reasons indicates, it was enacted to give effect to the recommendations of the Administrative Reforms Commission to provide a mechanism for dealing with complaints of corruption against public functionaries including in high places. The statement of objects and reasons makes it clear that India as a nation has committed to pursue the policy of "Zero Tolerance against Corruption." The Lokpal and Lokayuktas have been set up to further strengthen the existing legal and institutional mechanism for effective implementation of the United Conventions against Corruption.

80. It will be useful to recall that even the Law Commission in its 254th Report wanted to vest the power of prior approval in

the Lokpal. This aspect has been discussed hereinabove. However, when the matter went to the Select Committee in order to give effect to the wishes of the State Government and on some assumed notion that it will be contrary to Article 311 the said clause was given up and Section 17A was enacted in the present form. The Rajya Sabha Select Committee had recorded that several stakeholders had opined that Article 311 of the Constitution would be violated if the Lokpal or Lokayukta is mandated with the task of screening the information prior to the grant of approval under Section 17A. One is at a loss to understand how Article 311 would be violated. The Lokpal Act as well as the State Acts permit the authorities concerned in those statutes to inquire into the conduct of public servant. Further, the interpretation that is placed in this judgment is only to vest the screening mechanism with the Lokpal/Lokayukta to bring the provision in line with the holding of the decision of the Constitution Bench in ***Subramanian Swamy (supra).*** Article 311 deals with

dismissal/removal or reduction in rank. Hence the reference to Article 311 in this scenario is totally incorrect.

81. The only way the validity of the provision can be sustained from a challenge under Article 14 and the consequent negation of rule of law, is to have the examination of the information which the appropriate government receives under Section 17A to be forwarded to the Lokpal. The Lokpal/Lokayukta may if it finds the information frivolous, recommend for reasons to be recorded in writing that the government reject the approval. If the Lokpal finds that the complaint calls for an inquiry it may order an inquiry by the Inquiry Wing. It may have the inquiry conducted under Chapter III and where it finds that there is no prima facie case, it can make the appropriate recommendations. On the contrary, if it finds a prima facie case it may forward the same to the Government which Government will be obliged to follow the recommendation and proceed to grant the approval. Thereafter, the investigating agency may follow the appropriate procedure laid down in the appropriate manual and regulate their investigation. This mechanism will

also take care of the serious concern to the threat to rule of law envisaged in ***Vineet Narain (supra)*** and ***Subramanian Swamy (supra),*** by vesting the decision to grant approval or not in the government without any inquiry by an independent agency.

82. Similar mechanism is available in the different Lokayukta Acts of the States and with regard to approval sought in the case of persons employed in connection with the affairs of the State. Reference will be made by the authority to whom approval is sought to the State Lokpal.

83. A question may arise as to how in this mechanism the officials covered by Section 17A(c) would be governed. Section 17A(c) reads as under: -

> "In the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed."

84. The jurisdiction of Lokpal under the Central Act as prescribed under Section 14 applies also to:-

a) Group 'A' or Group 'B' officer or equivalent or above, who has served or is serving, in connection with the affairs of the Union.

b) Group ‘C’ or Group ‘D’ official or equivalent, from amongst the public servants who have served or have been serving in connection with the affairs of the Union.

c) Any person who is or has been a chairperson or member or officer or employee in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of Parliament or wholly or partly financed by the Central Government or controlled by it.

d) Any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust, by whatever name called, wholly or partly financed by the Government and the annual income of which exceeds such amount as the Central Government may, by notification, specify;

e) Any person who is or has been a director, manager, secretary or other officer or every other society or association of persons or trust in receipt of any donation from any foreign source under the Foreign Contribution (Regulation) Act, 2010

in excess of ten lakh rupees in a year or such higher amount as the Central Government may, by notification, specify.

85. These officials will be subject to the jurisdiction of Lokpal and any Section 17A information can easily be referred to the Lokpal and the grant or refusal of approval under Section 17A would depend on the recommendation of the Lokpal.

86. It is reiterated that, as prescribed in Section 20, the Lokpal may in case where it decides to proceed further, may order a) preliminary inquiry by its Inquiry Wing or any agency (including the DSPE) to ascertain whether exists a *prima facie* case for proceeding in the matter; or b) investigation by any agency (including the DSPE) when there exists a *prima facie* case.

87. The proviso empowers the Lokpal by a general or special order, refer the complaints or a category of complaints or a complaint received by it in respect of a public servants belonging to Group A or Group B or Group C or Group D to the Central Vigilance Commission constituted under sub-

Section (1) of Section 3 of the Central Vigilance Act, 2003. The second proviso further provides that the Central Vigilance Commission in respect of complaints referred to it under the first proviso, after making preliminary inquiry in respect of public servants belonging to Group A and Group B, shall submit its report to the Lokpal and in case of public servants belonging to Group C and Group D, the Commission shall proceed in accordance with the provisions of the Central Vigilance Act, 2003.

88. Section 8A of the CVC Act, 2003 deals with action on preliminary inquiry in relation to public servants insofar as Group C and Group D officials are concerned. Section 8A is set out hereinbelow:-

> "8A. **Action on preliminary inquiry in relation to public servants.**-(1) Where, after the conclusion of the preliminary inquiry relating to corruption of public servants belonging to Group C and Group D officials of the Central Government, the findings of the Commission disclose, after giving an opportunity of being heard to the public servant, a prima facie violation of conduct rules relating to corruption under the Prevention of Corruption Act, 1988 (49 of 1988) by such public servant, the Commission shall proceed with one or more of the following actions, namely:-

(a) cause an investigation by any agency or the Delhi Special Police Establishment, as the case may be;

(b) initiation of the disciplinary proceedings or any other appropriate action against the concerned public servant by the competent authority;

(c) closure of the proceedings against the public servant and to proceed against the complainant under section 46 of the Lokpal and Lokayuktas Act, 2013 (1 of 2014).

(2) Every preliminary inquiry referred to in sub-section (1) shall ordinarily be completed within a period of ninety days and for reasons to be recorded in writing, within a further period of ninety days from the date of receipt of the complaint."

Both the provisos in Section 20 apply only when there exists general or special order under the said Section of the Lokpal Act. This will not be relevant when information is forwarded by the Government to the Lokpal in the scenario that is being contemplated here.

89. For the purpose of Section 17A all that ***Vineet Narain (supra)*** and the Constitution Bench in ***Subramanian Swamy (supra)*** have mandated is the need for an independent examination to uphold the rule of law. Information under Section 17A when being forwarded to the Lokpal may be inquired into by the Inquiry Wing or any agency as the Lokpal

may deem appropriate. Based on the report submitted to the Lokpal, the Lokpal may make a recommendation to the government which recommendation will be binding on the government for the grant or refusal of approval under Section 17A for all public servants Question of involvement of CVC does not arise here.

90. Similarly, the State Lokpal Acts are designed broadly on the same pattern as the Central Lokpal and Lokayuktas Act, 2013. To illustrate, under the Maharashtra Lokayukta and Upa-Lokayuktas Act, 1971, which is currently in force, the "public servant" is defined as under:-

> "(k) "public servant" denotes a person falling under any of the descriptions hereinafter following, namely:
>
> (i) every Minister referred to in Clause (h);
>
> (ii) every officer referred to in Clause (i);
>
> (iii) (a) every President, Vice-President and Councillor of a Zilla Parishad, Chairman, Deputy Chairman and Member of a Panchyat Samiti, and Chairman of the Standing or any Subjects Committee, constituted under the Maharashtra Zilla Parishads and Panchyat Samitis Act, 1961 (Mah. V of 1962);
>
> (b) every President, Vice-President and Councillor of a Municipal Council, and Chairman of the Standing or any Subjects Committee, constituted or deemed to be

constituted under the "Maharashtra Municipal Councils, Nagar Panchyats and Industrial Townships Act, 1965 (Mah. XL of 1965);
(c) every Mayor, Deputy Mayor and Councillor of all Municipal Corporations and Chairman of Standing or any Subject Committee, constituted under the Mumbai Municipal Corporation Act (Bom. III of 1888), the City of Nagpur Corporation Act, 1948 (C. P. and Berar II of 1950) and the Bombay Provincial Municipal Corporations Act, 1949 (Bom. LIX of 1949);

(iv) every person in the service or pay of,-

(a) any local authority in the State of Maharashtra, which is notified by the State Government in this behalf in the Official Gazette,

(b) any corporation (not being local authority) established by or under a State of Provincial Act and owned or controlled by the State Government,

(c) any Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one per cent. of the paid up share capital is held by the State Government, or any company which is a subsidiary of a company in which not less than fifty-one per cent. of the paid up share capital is held by the State Government,

(d) any society registered under the Societies Registration Act, 1860 (21 of 1860), which is subject to the control of the State Government and which is notified by that Government in this behalf in the Official Gazette,''

91. Section 7 deals with matters which may be investigated by the Lokayukta or Upa-Lokayuta, which reads as under:-

''**7. Matters which may be investigated by Lokayukta or Upa-Lokayukta.** (1) Subject to the provisions of this

Act, the Lokayukta may investigate any action which is taken by, or with the general or specific approval of,

(i) a Minister or a Secretary, or

(ii) any public servant referred to in sub-clause (iii) of clause (k) of section 2; or

(iii) any other public servant being a public servant of a class or sub-class of public servants notified by the State Government in consultation with the Lokayukta in this behalf,

in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Lokayukta, the subject of a grievance or an allegation.

(2) Subject to the provisions of this Act, an Upa-Lokayukta may investigate any action which is taken by, or with the general or specific approval of, any public servant not being a Minister, Secretary or other public servant referred to in sub-section (1) in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Upa-Lokayukta, the subject of a grievance or an allegation.

(3) Notwithstanding anything contained in sub-section (2), the Lokayukta may, for reasons to be recorded in writing, investigate any action which may be investigated by an Upa-Lokayukta under that sub-section whether or not a complaint has been made to the Lokayukta in respect of such action.

(4) Where two or more Upa-Lokayuktas are appointed under this Act, the Lokayukta may, by general or special order, assign to each of them matters which may be investigated by them under this Act:

Provided that, no investigation made by an Upa-Lokayukta under this Act and no action taken or thing

done by him in respect of such investigation shall be open to question on the ground only that such investigation relates to a matter which is not assigned to him by such order."

Apart from a Minister or a Secretary, any action which is taken by or with the general or specific approval of, a public servant referred to in Section 2(k)(iii), as extracted above, and any other public servant being a public servant of a class or sub-class of public servants notified by the State Government in consultation with the Lokayukta in his behalf, are all within the ken of the Lokayukta.

92. Section 10 deals with procedure for investigation and authorizes the Lokayukta or Upa-Lokayukta to carry a preliminary enquiry.

Section 10 reads as under:-

"**10. Procedure in respect of investigations.** (i) Where the Lokayukta or an Upa-Lokayukta proposes (after making such preliminary inquiry, as he deems fit) to conduct any investigation under this Act, he-

(a) shall forward a copy of the complaint or, the case of any investigation which he proposes to conduct on his own motion, a statement setting out the grounds therefore, to the public servant concerned and the competent authority concerned;

(b) shall afford to the public servant concerned an opportunity to offer his comments on such complaint or statement; and

(c) may make such orders as to the safe custody of documents relevant to the investigation, as he deems fit.

(2) Every such investigation shall be conducted in private and in particular, the identity of the complainant and of the public servant affected by the investigation shall not be disclosed to the public or the press whether before, during or after the investigation:

Provided that, the Lokayukta or an Upa-Lokayukta may conduct any investigation relating to a matter of definite public importance in public, if he, for reasons to be recorded in writing, thinks fit to do so.

(3) Save as aforesaid the procedure for conducting any such investigation shall be such as the Lokayukta or, as the case may be, the Upa-Lokayukta considers appropriate in the circumstances of the case.

(4) The Lokayukta or an Upa-Lokayukta may, in his discretion, refuse to investigate or ceases to investigate any complaint involving a grievance or an allegation if in his opinion,-

(a) the complaint is frivolous or vexatious, or is not made in good faith;

(b) there are no sufficient grounds for investigating or, as the case may be, for continuing the investigation; or

(c) other remedies are available to the complainant and in the circumstances of the case it would be more proper for the complainant to avail of such remedies.

(5) In any case where the Lokayukta or Upa-Lokayukta decides not to entertain a complaint or to discontinue any investigation in respect of a complaint, he shall record his

reasons therefore and communicate the same to the complainant and the public servant concerned.

(6) The conduct of an investigation under this Act in respect of any action shall not affect such action, or any power or duty of any public servant to take further action with respect to any matter subject to the investigation."

Similar provisions exist in other States.

93. In view of these provisions, insofar as public servants employed with the affairs of the Central Government and those public servants who are employed in bodies controlled by the Central Government, the Lokpal will conduct the inquiry. With regard to employees with the affairs of the State Government and with the agencies controlled by the State Government, the State Lokayukta will make an inquiry and forward the recommendation to the appropriate government/authority competent to remove.

94. If while forwarding the information received under Section 17A for screening and obtaining of recommendation any issue arises as to whether the concerned Lokpal will be Central Lokpal or the State Lokpal the issue will be resolved by applying the following test:-

With regard to the concerned public servant covered under Section 17, whether the Central Lokpal or the State Lokayukta would be the jurisdictional Lokpal/Lokayukta for receiving a complaint directly in case a complaint were to be made to the Lokpal directly?

Applying this test, the issue would be resolved and the information for approval received under Section 17A would be forwarded by the authorities concerned in Section 17A to the concerned Lokpal. For example, in the case of a public servant covered under Section 17A(c) if the authority competent to remove receives an information with a request for grant of approval, the authority competent to remove would apply the test set out hereinabove and forward the information to the concerned Lokpal/Lokayukta accordingly.

BODIES NOT COVERED UNDER THE JURISDICTION OF LOKPAL: -

95. Insofar as the judiciary is concerned, already ***Veeraswami (supra)*** and ***U.P. Judicial Officers' Association (supra)*** have provided a mechanism. Section 17A(c) could

also be attracted in cases where the body/organization/public servant is not covered within the jurisdiction of Lokpal. For such associations/bodies/public servants, when a scenario presents itself the authority competent to remove the public servant in question, would before grant or refusal of approval, commission any appropriate independent investigative agency to screen the information received and act in accordance with the recommendation of the said independent investigative agency.

96. This is the appropriate course to adopt for the reason that if the complainants were to proceed with the complaint to the Lokpal directly, there will be no choice but to follow the procedure under the Lokpal Act. That is the procedure the highest executives of the government at the Centre and of the States are being subjected to. Why cannot the public servants engaged in the affairs of the Union or the State or those covered under Section 17A be subjected to the same rigour? Merely for the reason that the information is not

lodged as a complaint in the Lokpal should a different procedure be adopted. There is no good reason to hold so. By this mechanism, what is being followed is the procedure laid down by Parliament and the State Legislature by setting up of an independent machinery. No prejudice will be caused to honest public servants also. Section 17A can be retained in its same form except that the procedure, as set out hereinabove, will have to be followed. A constitutional court faced with a challenge to the validity of the statute can always interpret a provision in the manner so as to save its validity and to harmonize it in such a manner that the provision does not fall foul of the provisions of the constitution or of any earlier binding judgments of the court.

TEST OF READING DOWN

97. In considering the validity of a statute, to save a statute from being rendered unconstitutional, the Court can apply the

test of reading down. In ***B.R. Enterprises*** vs. ***State of U.P. and Others***[16], this Court held as under:-

> "81…. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. **These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the Preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated…"**

98. Further, in ***Subramanian Swamy (supra),*** dealing with the concept of reading down, this Court mentioned as under:-

[16] (1999) 9 SCC 700

> **"61.** Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the "reading down" doctrine can be summarised as follows. Courts must read the legislation literally in the first instance. **If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. The above is a fairly well-established and well-accepted principle of interpretation which having been reiterated by this Court time and again would obviate the necessity of any recall of the huge number of precedents…"**

99. In the present case, the object of preventing frivolous and vexatious complaints against honest public servants is sub-served by Section 17A. The only aspect missing expressly from the statute is the provision for an independent screening mechanism. Section 17A has been enacted after the judgments of this Court in ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra).*** Two of the infirmities pointed out in those judgments, namely, that an executive instruction cannot go ultra vires to a statutory provision and that there has to be a valid classification among public servants have been

taken care of in the enactment of Section 17A. ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra)*** both emphasize the need for an independent screening mechanism before the grant or refusal of an approval to prosecute.

100. When Parliament enacts a law it is deemed to be conscious of the judicial pronouncements having a bearing on the subject-matter. Viewed in that light, one has to presume that Section 17A does contemplate in the grant or refusal of the previous approval of exercise of a screening by an independent mechanism. No doubt, it has not been expressly set out. However, the simultaneous enactment of the Lokpal and Lokayuktas Act in the Centre and the States and the Law Commission's recommendation that the approval itself under Section 17A has to vest with the Lokpal/Lokayukta do have a bearing on the interpretation of the provision. The Lokpal Act contemplates an Inquiry Wing, Investigation Wing and a Prosecution Wing. In this judgment, all that has been done is to avail the advantage of the independent Inquiry Wing for screening the information received under Section 17A for the

purpose of grant or refusal of approval. If direct complaints could be entertained by the Lokpal and those complaints could be subjected to the procedure under the Act, there is no reason why Section 17A information received by the Government cannot be screened by the Inquiry Wing of the Lokpal and why that recommendation of the Lokpal after the screening was done ought not to be binding on the Government. This interpretation will take care of the mischief pointed out in ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra).*** The SOP prevalent now is wholly unsatisfactory and does not address the serious infirmity pointed in ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra).***

101. We are a country governed by the rule of law and not by rule of men. Executives at the highest level, including the Prime Minister and Ministers have subjected themselves to the jurisdiction of the Lokpal. There is no reason why, as set out earlier, public servants against whom information is placed for previous approval with the concerned authority in

Section 17A cannot be subjected to the screening mechanism of the Lokpal/Lokayukta.

102. This interpretation will also address the discriminatory situation that would prevail if with regard to information received under Section 17A, Government/authority competent to remove is the screening authority and with regard to complaints directly addressed to the Lokpal/Lokayukta, the Lokpal/Lokayukta becomes the authority to proceed with after following the screening mechanism under the Act. The Lokpal is an independent body headed by people who have held high offices and who will bring to bear on the discharge of their duty a great deal of independence which the judgments in ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra)*** exhort.

103. If Section 17A is invalidated on the ground that prior approval should not exist at all, the immediate consequence would be that any complaint alleging corruption in official decision-making could straightaway result in a police inquiry

or investigation. This would permit immediate registration of FIRs, commencement of investigation and resort to coercive steps in cases involving recommendations and decisions in discharge of duty, regardless of whether the complaint is frivolous, motivated, or based on hindsight. Such a result would be regressive.

104. Under Section 20 of the Lokpal Act, the Lokpal may order a preliminary inquiry or may direct investigation. The use of the word "may" is significant. It reflects a deliberate legislative choice to vest the Lokpal with discretionary gatekeeping power at the very threshold of the process. The Lokpal does not automatically direct investigation upon receipt of a complaint. Instead, it exercises institutional judgment, often through a preliminary inquiry, before deciding whether further escalation is warranted. This demonstrates that screening is treated as an indispensable safeguard, even when oversight is exercised by an independent statutory body.

105. If Section 17A is struck down, there would be an anomalous situation:

- Complaints routed through the Lokpal would continue to be subject to screening and escalation whereas,
- Complaints routed through the police would face no screening at all.

This would create a structural imbalance, where identical allegations involving the same category of public servants are treated differently solely based on the fora chosen by the complainant. Such structural imbalances would result in parties bypassing the Lokpal Act to deny the public servant the benefit of the screening mechanism. This would result in undermining the Lokpal's role as an independent gatekeeper apart from perpetuating a dichotomy in procedure.

106. The Prevention of Corruption Act and the Lokpal Act operate in the same normative field. Both address allegations of corruption against public servants, both recognize the need for screening, and both seek to balance accountability with protection against misuse. My Sister B.V. Nagarathna, J., has

raised a hypothetical question as to what if the Lokpal Act of 2013 is repealed. If that were the line of enquiry, then one may as well ask the question – What if the Prevention of Corruption Act, 1988 itself is repealed? The constitutional validity of Section 17A has to be judged in the context of the existing legal regime and not on such hypothetical considerations.

107. Section 17A is textually neutral. It applies to any "public servant" in relation to a decision or recommendation taken in the discharge of official functions. The provision does not classify public servants by rank, level, or seniority. Protection under Section 17A depends not on who the public servant is, but on what the public servant did.

108. The assumption that lower-level officers merely perform clerical tasks and do not make recommendations is factually incorrect and inconsistent with administrative practice. In governance and administration:

- File notings, scrutiny reports, technical evaluations, and compliance assessments constitute recommendations in law;
- Numerous statutory and regulatory frameworks vest recommendatory power in officers below senior ranks;

The expression "recommendation" is deliberately broad and is not confined to final policy decisions alone.

CONSTRUCTIVE APPROACH TO REMOVE DICHOTOMY:

109. This Court in ***Vishundas Hundumal and Others*** vs. ***State of Madhya Pradesh and Others***[17] adopting a constructive approach to remove discrimination held as under: -

> **"6.** Conceding that this was discrimination unconsciously indulged into by inadvertence or oversight on the part of a governmental agency, by this order we only propose to rectify the same and not reject the whole scheme. Such an approach would be destructive of a wholesome effort towards nationalisation of bus transport which is generally undertaken in public interest. When discrimination is glaring the State cannot take recourse to inadvertence in its action resulting in discrimination. The approach is, what is the impact of State action on the fundamental rights of citizen. In this case denial of equal protection is complained of. And this denial of equal

[17] (1981) 2 SCC 410

protection flows from State action and has a direct impact on the fundamental rights of the petitioners. **We, therefore, propose to take a constructive approach by removing the discrimination by putting the present petitioners in the same class as those who have enjoyed favourable treatment by inadvertence on the part of the Regional Transport Authority.**

7. Accordingly we hereby direct that the order/conditions in permits curtailing the permits of the petitioners prohibiting them from passing over the overlapping portion of their route with the notified route be quashed and declared to be of no consequence till all the operators including those excluded and similarly situated are similarly treated."

110. In ***D.S. Nakara and Others*** vs. ***Union of India,***[18] while reading down the office memoranda and refusing to set aside the entire liberalized pension scheme, this Court again adopted a constructive approach and held as under:-

"58. Now if the choice of date is arbitrary, eligibility criteria is unrelated to the object sought to be achieved and has the pernicious tendency of dividing an otherwise homogeneous class, the question is whether the liberalised pension scheme must wholly fail or that the pernicious part can be severed, cautioning itself that this Court does not legislate but merely interprets keeping in view the underlying intention and the object, the impugned measure seeks to subserve? Even though it is not possible to oversimplify the issue, let us read the impugned memoranda deleting the unconstitutional part. Omitting it, the memoranda will read like this:

[18] (1983) 1 SCC 305

"At present, pension is calculated at the rate of 1/80th of average emoluments for each completed year of service and is subject to a maximum of 33/80 of average emoluments and is further restricted to a monetary limit of Rs 1000 per month. The President is, now, pleased to decide that with effect from March 31, 1979 the amount of pension shall be determined in accordance with the following slabs."

If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

59. In reading down the memoranda, is this Court legislating? Of course "not". When we delete basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.

60. We may now deal with the last submission of the learned Attorney-General on this point. Said the learned Attorney-General that principle of severability cannot be applied to augment the class and to adopt his words "severance always cuts down the scope, never enlarges it". We are not sure whether there is any principle which inhibits the court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. **Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the court**

can strike down the words of limitation in an enactment. That is what is called reading down the measure. We know of no principle that "severance" limits the scope of legislation and can never enlarge it. To refer to the *Jaila Singh case* [(1976) 1 SCC 602 : AIR 1975 SC 1436 : 1975 Supp SCR 428] , when for the benefit of allotment of land the artificial division between pre-1955 and post-1955 tenant was struck down by this Court, the class of beneficiaries was enlarged and the cake in the form of available land was a fixed quantum and its distribution amongst the larger class would pro tanto reduce the quantum to each beneficiary included in the class. Similarly when this Court in *Randhir Singh case* [(1982) 1 SCC 618 : 1982 SCC (L&S) 119] held that the principle of "equal pay for equal work" may be properly applied to cases of unequal pay based on no classification or irrational classification it enlarged the class of beneficiaries. Therefore, the principle of "severance" for taking out the unconstitutional provision from an otherwise constitutional measure has been well recognised. It would be just and proper that the provision in the memoranda while retaining the date for its implementation, but providing "that in respect of government servants who were in service on March 31, 1979 but retiring from service on or after that date" can be legally and validly severed and must be struck down. The date is retained without qualification as the effective date for implementation of scheme, it being made abundantly clear that in respect of all pensioners governed by 1972 Rules, the pension of each may be recomputed as on April 1, 1979 and future payments be made in accordance with fresh computation under the liberalised pension scheme as enacted in the impugned memoranda. No arrears for the period prior to March 31, 1979 in accordance with revised computation need be paid."

111. In the present case, there is no need to resort to the principle of severance. Section 17A has to be brought in line

with the pronouncements in ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra)*** so that while section remains on the statute book it ensures that there exists a screening mechanism by an independent agency before the grant or refusal or approval by the government and the recommendations of the independent agency are binding on the government. This will ensure that the otherwise salutary provision in preventing frivolous complaints against honest public servants is not completely set at naught.

112. Recently, in ***Association of old settlers of Sikkim and Others*** vs. ***Union of India and Another***[19], while interpreting explanation to Section 10 (26-AAA) of the Income Tax Act, it was held as under (M.R. Shah, J.):-

> **"43.** In view of the above and for the reasons stated above, we are of the firm opinion that Section 10(26-AAA) to the extent it excludes the Old Indian Settlers, who have settled in Sikkim prior to the merger of Sikkim with India on 26-4-1975, but whose names are not recorded as "Sikkim Subjects", from the definition of "Sikkimese" is ultra vires, being arbitrary, discriminatory and violative of Article 14 of the Constitution of India. The definition of "Sikkimese" in **Section 10(26-AAA) of the Income Tax Act shall also include all Indians, who have permanently settled in Sikkim prior to the merger of**

[19] (2023) 5 SCC 717

Sikkim with India on 26-4-1975 irrespective of the fact that whether their names have been recorded in the register maintained under the Sikkim Subjects Regulations, 1961 or not. Therefore, it is held that the "Sikkimese" like the petitioners, who are Old Indian Settlers and who have settled in Sikkim prior to the merger of Sikkim with India on 26-4-1975 shall also be entitled to the exemption under Section 10(26-AAA) of the Income Tax Act, 1961."

113. In the same judgment, B.V. Nagarathna, J. in an erudite opinion had the following to say on the explanation to Section 10 (26-AAA):-

"146. Hence, it has to be directed that till such amendment is made to the down the Explanation to Section 10(26-AAA) of the IT Act, 1961, all individuals domiciled in Sikkim up to 26-4-1975 shall be entitled to the exemption under the said provision. This direction is being issued in exercise of powers under Article 142 of the Constitution so as to eliminate discrimination and disparity in respect of the aforesaid category of Sikkimese, who subsequently have become citizens of India w.e.f. 26-4-1975 and to save the Explanation from being rendered unconstitutional vis-à-vis such individuals who form a small percentage of Sikkimese and who are also entitled to such an exemption. Such as approach is being adopted rather than striking down the Explanation to Section 10(26-AAA) of the IT Act, 1961 which would have the effect of withdrawing the benefit of exemption even from those categories of persons who are presently eligible for the same.

147. Hence, until the amendment is made, the following clause shall be read as a part of the Explanation to Section 10(26-AAA) of the IT Act, 1961, possibly as sub-clause (*iv*) thereof:

"(*iv*) any other individual, whose name does not appear in the Register of Sikkim Subjects but it is established

that such individual was domiciled in Sikkim on or before 26-4-1975."

This provision would extend the benefit of exemption to those individuals, domiciled in Sikkim on the day it merged with India i.e. 26-4-1975.

148. In the result, the writ petitions are disposed of in the following terms:

148.1. That the benefit of income tax exemption presently is restricted only to those Sikkimese who fall within the three clauses of the Explanation to Section 10(26-AAA) of the IT Act, 1961, or those persons domiciled in Sikkim, or are Sikkimese as covered under the 1961 Regulations.

148.2. In terms of the Sikkim (Citizenship) Order, 1975 as amended by the Sikkim (Citizenship) Amendment Order, 1989, issued by the Government of India any person who was a Sikkim Subject under the 1961 Regulations was to be deemed to be a citizen of India w.e.f. 26-4-1975. Conversely, it is held that all citizens of India, having a domicile in Sikkim on the day it merged with India i.e. 26-4-1975 must be covered under the Explanation in order to avail the benefit of the exemption under Section 10(26-AAA) of the IT Act, 1961.

148.3. The Union of India shall make an amendment to the Explanation to Section 10(26-AAA) of the IT Act, 1961, so as to suitably include a clause to extend the exemption from payment of income tax to all Indian citizens domiciled in Sikkim on or before 26-4-1975. The reason for such a direction is to save the Explanation from unconstitutionality and to ensure parity in the facts and circumstances of the case.

148.4. Till such amendment is made by Parliament to the Explanation to Section 10(26-AAA) of the IT Act, 1961, any individual whose name does not appear in the Register of Sikkim Subjects but it is established that such individual was domiciled in Sikkim on or before 26-4-1975, shall be entitled to the benefit of exemption.

148.5. This direction is being issued in exercise of powers under Article 142 of the Constitution so as to eliminate discrimination and disparity in respect of the aforesaid category of Sikkimese, who subsequently have become citizens of India w.e.f. 26-4-1975 and to save the Explanation from being rendered unconstitutional vis-à-

vis such individuals who form a small percentage of Sikkimese.

148.6. The proviso to Section 10(26-AAA), insofar as it excludes from the exempted category, "*a Sikkimese woman who marries a non-Sikkimese man after 1-4-2008" is hereby struck down as being ultra vires Articles 14, 15 and 21 of the Constitution of India*".

114. By a process of reading down and with no need to resort to Article 142, Section 17A can be aligned, in the present case, with ***Vineet Narain (supra)*** and ***Subramanian Swamy (Supra).*** In view of the precedents set out hereinabove, there is enough legal support for the course of action adopted.

ANALOGY WITH JUDICIARY – NOT TENABLE

115. One contention that the learned Solicitor General so strongly urged was the analogy drawn with the screening mechanism for the judiciary. The comparison is completely unjustified. The very nature of the functioning of the judiciary and the need for it to be completely insulated from the executive, demands the nature of protection that ***Veeraswami (Supra)*** envisaged. ***Vineet Narain (Supra)*** and ***Subramaniam Swamy (supra)*** have both dealt with similar contentions advanced and rejected the same. The learned Solicitor

General is right that the screening mechanisms provided are not confined to the constitutional court judges but to the members of the judiciary across the board. That does not denude the reasoning in ***Subramanian Swamy (Supra)*** and the ratio decidendi therein. Nothing more needs to be said on this aspect of the matter.

EXISTENCE OF JUDICIAL REVIEW – NOT ADEQUATE TO PASS THE SUBRAMANIAN SWAMY (SUPRA) TEST

116. Equally, the argument that orders granting or refusing approval being subject to Judicial review, there is enough check against the misuse of power by Government is not a tenable argument. Though attractive at first blush, it does not survive a deeper probe. The parameters for judicial review are well known and need no reiteration. A court in judicial review is primarily concerned not so much with the decision itself but the decision-making process. Unless the safeguard of a screening by Lokpal/Lokayukta is read into the validity of the section, it cannot be sustained in view of the binding earlier rulings of larger Benches. A court in judicial review

will only look at the screening done by the Government to uphold or reject the challenge. Hence, this argument of the learned Solicitor General, cannot be accepted.

POSTSCRIPT AND DIRECTIONS:

117. In a democracy governed by the rule of law, each organ of the State plays a significant part. Ultimately, as was echoed in the Constituent Assembly by late Shri Babu Rajendra Prasad and Dr. Babasaheb Ambedkar, the functioning of the organs will depend upon the persons who work them. Work they must do and do it well, for if they don't, the progress of the nation may come to a standstill.

118. One essential component of the executive wing are the bureaucrats and officers who engage in its operation and keep the wheels of governance moving. It is presumed that official acts are regularly performed and there is statutory backing too for the same.

119. Here is a case where Parliament in all its wisdom stepped in and engrafted a mechanism in the form of enacting Section 17A to give impetus to decision making by the administrative

machinery so that "policy paralysis" does not set in. The concern was that if it were not so, fearing that carefully built reputations could be casually tarnished, a "play it safe syndrome" may set in and decision making will be avoided, causing serious detriment to the progress of the nation.

120. The object of incorporating Section 17A of the Act was certainly not to condone official acts done for improper purposes or for extraneous considerations. The singular object is to protect bona fide recommendations and decisions taken by officials and bureaucrats.

121. For an honest person, personal integrity and reputation is priceless and is valued even higher than life. As was said in the sacred Bhagavad Gita -

"सम्भावितस्य चाकीर्तिर्मरणादतिरिच्यते"

" Sambhaavitasya cha akeerti, maranaat atirichyate "

"For a self-respecting man, death is preferable to dishonour."

In a similar vein, Divine Poet *Tiruvalluvar* said in his immortal work *Tirukkural:*

"மயிர்நீப்பின் வாழாக் கவரிமா அன்னார்
உயிர்நீப்பர் மானம் வரின்"

"Mayirnīppiṉ vāḻāk kavarimā aṉṉār
Uyirnīppar māṉam variṉ".

"Just as a yak, which is shorn of its wool does not survive,
A man of honour will not live if he loses it."

[Translated by Dr. S.M. Diaz and Dr. N. Mahalingam]

With the extent of public gaze prevalent today, propelled by social media, arrest and the consequential parading in court, of a honest person itself causes incalculable harm to the fair name and goodwill of the individual and the family. Even a subsequent exoneration in the investigation cannot redeem the permanent damage done to the integrity and reputation of the individual. It is no answer to say that protection is available at the stage of Section 19 when the file seeking sanction for prosecution is processed, for by then irreversible and immeasurable harm would have ensued.

122. If in the process of examining the validity of the said provision (Section 17A), to avoid dichotomy in procedure and to align it with the pronouncements of this Court, certain

safeguards are ensured for its implementation, that certainly does not tantamount to "substitution" or "judicial legislation".

123. The safeguards provided for will not only strengthen the hands of honest officers but will also ensure that the corrupt are brought to book. More importantly, the safeguards would guarantee that the administrative machinery continues to attract the best of talent for the service of the nation.

124. For the reasons stated above, the writ petition is disposed of with the following directions:-

i) Section 17A of the Prevention of Corruption Act, 1988 inserted by virtue of Section 12 of the Prevention of Corruption (Amendment) Act, 2018 is constitutionally valid, subject to the condition that grant or refusal of the approval by the competent authority mentioned therein will depend on the recommendation of the Lokpal/Lokayukta (in case of States) respectively in accordance with the reasoning set out in the body of the judgment.

ii) The Union of India or State Governments and the authorities competent to remove set out in Section 17A will, on receipt of the information under Section 17A, immediately forward the information to the Lokpal/Lokayukta (insofar as the States are concerned) and the Lokpal/Lokayukta shall in accordance with the reasoning set out in the body of the judgment may have an inquiry on the information in accordance with the provisions of the Lokpal/Lokayukta statutes and forward the recommendation to the appropriate authority who shall be bound and shall act in accordance with the recommendation insofar as grant or refusal of permission under Section 17A is concerned.

Bodies not covered under the jurisdiction of Lokpal: -

iii) Insofar as the judiciary is concerned, already ***Veeraswami (supra)*** and ***U.P. Judicial Officers Association (supra)*** have provided a mechanism. Section 17A(c) could also be attracted in cases where the body/organization/public servant is not covered within

the jurisdiction of Lokpal. For such associations/bodies/public servants, when a scenario presents itself the authority competent to remove the public servant in question, would before grant or refusal of approval, commission any appropriate independent investigative agency to screen the information received and act in accordance with the recommendation of the said independent investigative agency.

iv) The time-limit stipulated in the proviso to Section 17A shall apply and all the authorities concerned will act in accordance with the time-limit laid out therein.

v) Needless to say, the Lokpal/Lokayukta while forwarding their recommendation, shall set out reasons for the said recommendation.

No order as to costs.

.....J.
[**K. V. VISWANATHAN**]

New Delhi;
13th January, 2026

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO.1373 OF 2018

CENTRE FOR PUBLIC INTEREST LITIGATION ...PETITIONER

VERSUS

UNION OF INDIA ...RESPONDENT

J U D G M E N T

NAGARATHNA, J.

I N D E X

I have perused the judgment authored by my learned Brother K.V. Viswanathan, J. I wish to author a separate opinion by holding that Section 17A of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the Act") is contrary to the objects of the said Act and unconstitutional and hence ought to be struck down.

The reasons for saying so may be summarily stated as under:

(i) *Firstly,* the question is, **whether** prior approval within the meaning of Section 17A of the Act has to be given at all? The question is not about **who**, within the Government or outside the Government, should give such an approval.

In my view, no such prior approval is required to be taken for the reasons that I have explained hereinafter.

(ii) *Secondly,* the larger Benches of this Court in ***Vineet Narain vs. Union of India***, ***(1998) 1 SCC 226 ("Vineet Narain")*** (three-Judge Bench) and ***Subramanian Swamy vs. Director, Central Bureau of Investigation, (2014) 8 SCC 682 ("Subramanian Swamy")*** (five-Judge Bench) have struck down the Single Directive 4.7(3) as well as Section 6A of the Delhi Special Police Establishment Act, 1946 (for short, "DSPE Act, 1946), respectively.

In my view, Section 17A of the Act inserted in the year 2018 is nothing but another attempt to resurrect on the statute book, what was struck down by this Court earlier.

(iii) *Thirdly,* in my view, the requirement of prior approval within the meaning of Section 17A of the Act is contrary to the object and purpose of the Act, inasmuch as it forestalls an enquiry and thereby in substance protects the corrupt rather than seeking to protect the honest and those with integrity, who really do not require any such protection.

(iv) *Fourthly,* in view of the above, I do not concur with the view taken by my learned Brother K.V. Viswanathan, J. for seeking to substitute the expression "Government" in Section 17A of the Act and the expression "of the authority competent to remove him from his office" with "Lokpal" or "Lokayukta", as the case may be, as such substitution is impermissible by way of interpretation.

(v) *Fifthly,* by such an interpretation, the question as to whether the requirement of seeking prior approval within the meaning of Section 17A of the Act is justified has to be addressed and which I propose to discuss hereinafter.

(vi) The following aspects also require consideration which makes the provision arbitrary while considering a request for grant of approval under Section 17A of the Act:

(a) "policy bias" on the part of the public servants of an administrative department which could result in an absence of neutrality or objectivity while considering a request for approval for carrying out an enquiry, inquiry or investigation into a complaint vis-à-vis a recommendation made or decision taken by a public servant during the course of discharge of his duties;

(b) that no single public servant may be responsible for making a recommendation or taking a decision during the course of discharge of his public duties and therefore, the difficulty in giving approval for conducting an enquiry, inquiry or investigation into such matter in respect of a single public servant within the meaning of Section 17A of the Act.

(c) "conflict of interest" inasmuch as public servant entrusted with the power to grant or refuse approval for conducting an enquiry, inquiry or investigation under Section 17A of the Act may himself have played a vital role in making such a

recommendation or taking a decision either individually or collectively with other public servants. The rules of natural justice require that exercise of discretion must be without bias and not be arbitrary or unreasonable, therefore, fairness in action without any underlying bias is a requirement while considering a request for prior approval for conducting an enquiry, inquiry or investigation by a police officer.

(d) grant or refusal of approval to a police officer to conduct an enquiry, inquiry or investigation is an institutional decision emanating within the institution i.e. the Government department, which is arbitrary in itself.

Hence, my separate opinion.

Facts:

2. The instant writ petition has been preferred by the petitioner – Centre for Public Interest Litigation (for short, "CPIL"), a non-governmental organization assailing Section 17A of the Act as being unconstitutional, invalid and void. While the writ petition also sought to earlier challenge Section 7 of the Act, the said challenge has since been given up.

2.1 Section 17A was inserted as a new provision in the Act by way of Section 12 of the Prevention of Corruption (Amendment) Act, 2018 and came into effect from 26.07.2018. For ease of reference, the text of the provision has been extracted hereunder:

> **"17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties**.— No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—
>
> (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;
>
> (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:
>
> Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:
>
> Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing

by such authority, be extended by a further period of one month."

2.2 From a perusal of the aforesaid provision, it is evident that Section 17A functions as a mandatory pre-condition that restricts a police officer from conducting any inquiry/enquiry/investigation into an offence alleged to have been committed by a public servant in relation to any recommendation made or decision taken in discharge of their official duties without the prior approval of the concerned authority.

Section 17A of the Act : A Historical Perspective:

3. Learned counsel for the petitioner submitted that Section 17A of the Act is similar to Single Directive 4.7(3) as well as Section 6A of the DSPE Act, 1946 which were struck down by this Court and therefore, the said provision is contrary to the judgments of this Court and hence has to be struck down. It was contended that the provision once again attempts to protect corrupt public servants and therefore, the mandate of granting prior approval by the Government even for a preliminary inquiry to be made by a police officer. If the Government declines to grant prior approval then no

police officer can conduct an enquiry/inquiry/investigation within the meaning of Section 17A of the Act.

3.1 According to the submissions of learned Solicitor General, the essence of Section 17A of the Act is the need to protect decision-makers from harassment through frivolous complaints. Hence a screening mechanism has been devised under the said Section in order to filter out baseless allegations against officers/officials who discharge their duties with integrity so as to ensure effective governance and thereby maintain a balance between accountability and efficiency. Allegations without any basis or truth made against public servants can cause irreparable harm not only to the public servants concerned but also to the system of governance by the concerned department to which they belong. Hence, before a public servant is charged with a misdemeanour and a First Information Report (FIR) is lodged against a public servant, a suitable preliminary enquiry into the allegations made is necessary. Thus, there is a need to protect honest public servants from frivolous and vexatious complaints while discharging their official duties.

3.2 From a historical perspective, the Santhanam Committee Report, 1964 is relevant. Shri K. Santhanam was appointed as the Chairman of a Committee on Prevention of Corruption. Chapter 10 of the Report deals with the Special Police Establishment which was created by the Government of India in the year 1941 by an executive order and upon the establishment of the Central Bureau of Investigation (for short, "CBI") with effect from 01.04.1963, the Special Police Establishment has been made one of its divisions which exercises its powers under the Delhi Special Police Establishment Act, 1946 (for short, "DSPE Act, 1946). The aforesaid Committee, *inter alia,* had recommended that the request for grant of sanction to prosecute should be dealt with expeditiously.

3.3 In the year 1969, the Single Directive No.4.7(3), as a consolidated set of instructions was issued to the CBI by various ministries or departments through an executive order regarding the modalities of initiating an enquiry prior to registering a case against certain categories of civil servants. Directive No.4.7(3) reads as under:

"4.7(3)(i) In regard to any person who is or has been a decision making level officer (Joint Secretary or equivalent of above in the Central government or such officers as are or have been on deputation to a Public Sector Undertaking; officers of the Reserve Bank of India of the level equivalent to Joint Secretary of above in the Central Government, Executive Directors and above of the SEBI and Chairman & Managing Director and Executive Directors and such of the Bank officers who are one level below the Board of Nationalised Banks), there should be prior sanction of the Secretary of the Ministry/Department concerned before SPE takes up any enquiry (PE or RC), including ordering search in respect of them. Without such sanction, no enquiry shall be initiated by the SPE.

(ii) All cases referred to the administrative Ministries/Departments by CBI for obtaining necessary prior sanction as aforesaid, except those pertaining to any officer of the rank of Secretary or Principal Secretary, should be disposed of by them preferably within a period of two months of the receipt of such a reference. In respect of the officers of the rank of Secretary or Principal Secretary to Government, such references should be made by the Director, CBI to the Cabinet Secretary for consideration of a Committee consisting of the Cabinet Secretary as its Chairman and the Law Secretary and the Secretary (Personnel) as its members. The Committee should dispose of all such references preferably within two months from the date of receipt of such a reference by the Cabinet Secretary.

(iii) When there is any difference of opinion between the Director, CBI and the Secretary of the Administrative Ministry/Department in respect of an officer up to the rank of Additional Secretary or equivalent, the matters shall be referred by CBI to Secretary (Personnel) for placement before the Committee referred to in Clause (ii) above. Such a matter should be considered and disposed of by the Committee preferably within two months from the date of receipt of such a reference by Secretary (Personnel).

(iv) In regard to any person who is or has been Cabinet Secretary, before SPE takes any step of the king mentioned in (i) above the case should be submitted to the Prime Minister for orders."

3.4 The validity of Directive No.4.7(3) of the Single Directive was considered by this Court and it was struck down by holding that in the absence of any statutory requirement of prior permission or sanction for investigation, a mere executive order could not be imposed as a condition precedent for institution of an investigation. This was in the case of ***Vineet Narain.*** The details of the reasoning in the said judgment shall be dealt with later.

3.5 In the meanwhile, the Central Vigilance Commission (for short, "CVC") was set up by the Government of India by a resolution dated 11.02.1964. This was on the recommendation of the Santhanam Committee. Pursuant to the judgment of this Court in ***Vineet Narain,*** the Commission was accorded statutory status with effect from 25.08.1988 through the Central Vigilance Commission Ordinance, 1988 under which Section 8(1)(c) provided for a provision for granting of prior approval or otherwise for the conduct of an investigation into allegations of corruption under the Act against the persons mentioned in Section 6A of the DSPE Act,

1946. The amendment to the aforesaid Ordinance was first promulgated on 27.10.1988.

3.6 Thereafter, the Central Vigilance Commission Bill, 1988 was introduced in the Lok Sabha on 07.12.1988, which was then referred to the Parliamentary Standing Committee on Home Affairs and the Union Government accepted most of the amendments recommended by the said Committee. The Lok Sabha considered this bill and passed it on 15.03.1999 but before the Rajya Sabha could consider the same, the 12th Lok Sabha was dissolved on 26.04.1999 and consequently the Bill lapsed. The Central Vigilance Commission Bill, 1999, on the same lines as the earlier Bill, was introduced in the Lok Sabha and was referred to the Joint Committee of both the Houses of Parliament, namely, the Joint Parliamentary Committee (JPC). The JPC submitted its report and made its observations therein.

3.7 The 13th Lok Sabha as well as the Rajya Sabha extensively debated on the Central Vigilance Commission Bill, 1999 and the same was passed by both Houses of Parliament. The President gave

his assent on 11.09.2003 and consequently, the Central Vigilance Commission Act, 2003 came into effect from 11.09.2003.

3.8 Thereafter, the Hota Committee on Civil Services Reforms, 2004 noted that honest civil servants face vigilance/CBI probes under the Act in respect of *bona fide* commercial or policy decisions which may incidentally benefit private parties, leading to decision-paralysis. The said Committee recommended setting up experts' committees in various departments to scrutinize cases of the officers before initiating departmental action for alleged corrupt practices/launching prosecution against them under the Act, under the aegis of the CVC. According to this report, such a reform would encourage honest officers to take bold commercial decisions in public interest without any lurking fear of a vigilance/CBI enquiry.

3.9 Subsequently, the Second Administrative Reforms Commission submitted its 4th Report on "Ethics in Governance" in 2007, wherein in paragraphs 7.1 and 7.2, it was recorded as under:

> "7.1 The raison d'etre of vigilance activity is not to reduce but to enhance the level of managerial efficiency and effectiveness in the organisation. Risk-taking should form part of government functioning. Every loss caused to the

organisation, either in pecuniary or nonpecuniary terms, need not necessarily become the subject matter of a vigilance inquiry. One possible test for determining the bona-fides could be whether a person of common prudence working within the ambit of the prescribed rules, regulations and instructions, would have taken the decision in the prevailing circumstances in the commercial/operational interests of the organisation.

7.2 Even more than in government, managerial decision-making in public sector undertakings and day-to-day commercial decisions in public sector banks offers considerable scope for genuine mistakes being committed which could possibly raise questions about the bona fides of the decision-maker. The Central Vigilance Commission has recognized this possibility of genuine commercial decisions going wrong without any motive whatsoever being attached to such decisions…"

Consequently, in paragraph 7.9, the recommendations read as under:

"7.9 Recommendations:

a. Every allegation of corruption received through complaints or from sources cultivated by the investigating agency against a public servant must be examined in depth at the initial stage itself before initiating any enquiry. Every such allegation must be analyzed to assess whether the allegation is specific, whether it is credible and whether it is verifiable. Only when an allegation meets the requirements of these criteria, should it be recommended for verification, and the verification must be taken up after obtaining approval of the competent authority. The levels of competent authorities for authorizing verifications/ enquiries must be fixed in the anti-corruption agencies for different levels of suspect officers.

b. In matters relating to allegations of corruption, open enquiries should not be taken up straightaway on the basis of complaints/source information. When verification/secret enquiries are approved, it should be ensured that secrecy of such verifications is maintained and the verifications are done in such a manner that neither the suspect officer nor anybody else comes to know about it. Such secrecy is essential not only to protect the reputation of innocent and honest officials but also to ensure the effectiveness of an open criminal investigation. Such secrecy of verification/enquiry will ensure that in case the allegations are found to be incorrect, the matter can be closed without anyone having come to know of it. The Inquiry/Verification Officers should be in a position to appreciate the sensitivities involved in handling allegations of corruption.

c. The evaluation of the results of verification/enquiries should be done in a competent and just manner. Much injustice can occur due to faulty evaluation of the facts and the evidence collected in support of such facts. Personnel handling this task should not only be competent and honest but also impartial and imbued with a sense of justice.

xxx"

3.10 In the year 2013, an amendment to Section 6A of the DSPE Act, 1946 was sought to be made and a Bill was introduced in that regard. In ***Subramanian Swamy,*** this Court struck down Section 6A of the DSPE Act, 1946 by, *inter alia*, holding that the provision created an impermissible classification based solely on the status of the public servant in Government service (Joint Secretary and above in the Union and certain Public Sector Undertakings (PSUs)

Executives), in the matter of initiation of an enquiry/investigation under the provisions of the Act.

3.11 As a result, the Law Commission of India considered the Prevention of Corruption (Amendment) Bill, 2013 along with the proposed amendments in its 254th Report and gave its recommendations thereon. The Rajya Sabha Select Committee, 2016 sought opinions from stakeholders by holding certain consultations and thereafter made its recommendations and suggested amendments to the proposed Section 17A of the Act. On 26.07.2018, both the Houses of Parliament after debating the same, passed the Bill which received the assent of the President and was brought into force from that date. In this case, the *vires* of Section 17A of the Act is under challenge.

Submissions on behalf of the Petitioner:

4. Sri Prashant Bhushan, learned counsel for the petitioner at the outset submitted that the impugned amendment to the Act in the form of Section 17A renders the entire scheme of the said Act, ineffective, as it protects corrupt officials and would lead to an exponential rise of corruption in the country.

4.1 It was contended that the introduction of Section 17A functions as the third attempt by the Union of India to bring in a provision that requires prior approval for the purpose of initiating a bare investigation, despite similar attempts having been thwarted earlier by this Court in the case of ***Vineet Narain*** and ***Subramanian Swamy.*** That this Court in the aforesaid two judgments has found that provisions protecting public servants in a manner that would prevent the investigating agencies from even being able to collect material relating to an allegation is a form of curtailing their power and preventing their independence of functioning.

4.2 That in ***Vineet Narain,*** Directive 4.7(3) of the Single Directive issued by the Union Government in the form of a consolidated set of instructions to the CBI requiring prior sanction to initiate investigation into certain classes of public servants, namely, "decision-making level officers" was struck down by this Court on the basis of the said Directive being violative of Article 14 as a form of unreasonable classification. That the said Directive was also struck down on the basis of creating an impermissibility governing the power for investigation by the CBI that had been endowed by

way of statutory provisions enacted by Parliament, through executive action.

4.3 It was submitted that following the striking down of the said Directive for being unconstitutional and on the ground of executive overreach, the Union Government once again tried to introduce a prior approval requirement for commencement of investigations into allegations levelled against a public servant in the form of Section 6A of the DSPE Act, 1946 which also required prior approval to initiate investigations into the actions of certain classes of public servants, namely those at the level of Joint-Secretary and above as well as officers appointed by the Central Government in corporations, Government companies, societies and local authorities owned or controlled by the Government. That, this Court, in ***Subramanian Swamy*** held Section 6A of the DSPE Act, 1946 to be violative of Article 14 of the Constitution on the basis of it making an unreasonable classification between senior officers and junior officers in terms of the protection they would receive from being inquired/enquired/investigated into.

4.4 It was further submitted that this Court also held in ***Subramanian Swamy,*** that it would be impermissible for

investigating agencies to be prevented from being able to even collect material with respect to a certain allegation because of the requirement of prior approval. That this would result in the officer in question being put to notice as to the existence of a possible inquiry/enquiry/investigation into their actions. That only the investigating agencies would have the requisite expertise so as to decide, whether, to proceed with the investigation or not and, hence, the final decision to proceed with an investigation must be taken by the investigating agencies and not the Central Government.

4.5 It was vehemently contended that the aforementioned two judgments of this Court in ***Vineet Narain*** and ***Subramanian Swamy*** were not merely decided on the question of the validity of the classification between classes of officers but also took note of the overarching problem of corruption in India as a source of grave danger to our constitutional republic. That this Bench would be bound by the decisions in ***Vineet Narain*** and ***Subramanian Swamy*** as they were a three-Judge Bench and five-Judge Constitution Bench decision of this Court respectively. That the introduction of Section 17A was for the sole purpose of rendering

ineffective the judgments of this Court in ***Vineet Narain*** and ***Subramanian Swamy***. That this Court is required to interpret anti-corruption provisions in a manner that would enhance and not subdue their efficiency and functioning.

4.6 It was further submitted that the introduction of Section 17A is contrary to the position of law laid down by this Court in ***Lalita Kumari vs. Government of Uttar Pradesh, (2014) 2 SCC 1 ("Lalita Kumari")***, which held that registration of an F.I.R was mandatory upon the investigating officer receiving information of the commission of a cognizable offence.

4.7 It was contended that the effect of Section 17A would be an interference with the confidentiality and insulated nature of the investigations conducted by the investigating agencies, wherein there is a high likelihood of leaks and disclosures of information within a department of the Government, as the concerned authority granting the approval would have to be kept abreast of the particularities of the case.

4.8 That the requirement for prior approval to conduct an inquiry/enquiry/investigation is in violation of Articles 6(2) and 36

of the United Nations Convention Against Corruption, which India has ratified.

4.9 Further, under Section 17A of the Act, in linking the offence committed to any recommendation made or decision taken in discharge of official functions or duties places a burden on the investigating agency to establish such a linkage *prima facie* before being able to conduct any form of investigation, when on the other hand, investigation itself may be required to establish such a linkage to begin with.

4.10 It was submitted that the effect of Section 17A would be that when the public servants sought to be investigated are themselves of a higher level, an incongruous situation would arise where they would be in-charge of deciding on grant of approval in relation to their own case. That even otherwise, a high-ranking member of the same department could not be relied upon to be sufficiently impartial in relation to the case of a subordinate officer.

4.11 That it is erroneous to suggest that Section 17A has been introduced in compliance with the recommendation made by the 254th Law Commission report, which had recommended the

inclusion of a provision regarding grant of prior approval for inquiry/enquiry/investigation into alleged offences committed by a public servant with the approval required to be granted by the concerned Lokpal/Lokayukta and not by the Union/State Government. That if the goal was to protect honest officers from frivolous investigations, two safeguards in the form of Sections 17 and 19 of the Act already exist. That under Section 17, only certain, high-ranking police officers can investigate the actions of a public servant and under Section 19, prior sanction of the concerned authority would be required before taking cognizance in a matter involving allegations of corruption leveled against a public servant. That the conduct of a preliminary enquiry/inquiry/investigation on its own could not be claimed to cause prejudice or impede the functioning of a public servant.

4.12 It was further submitted that in the affidavit dated 07.05.2025 filed by the Union of India, which only contained data with respect to requests made by the CBI seeking grant of prior approval to commence inquiry/enquiry/investigation into allegations made against a public servant, such approval was denied in a worrying 41.3% of cases.

4.13 Hence, it was contended by learned counsel for the petitioner that for all of the aforesaid reasons, it would be necessary to strike down Section 17A as being violative of Articles 14 and 21 of the Constitution.

Submissions on behalf of the Respondents:

5. *Per contra,* learned Solicitor General of India Sri Tushar Mehta, vehemently opposed the aforesaid submissions and defended the *vires* of Section 17A.

5.1 At the outset, it was submitted that Section 17A of the Act is a salutary provision, containing sufficient in-built safeguards and modes to address grievances. That the provision was introduced with the goal of preventing harassment of honest public servants by subjecting even *bona fide* recommendations made or decisions taken by them to the process of investigation.

5.2 That the animating impetus from the time of the Single Directive, 1969 to Section 6A of the DSPE Act, 1946 and now to Section 17A has been to ensure that every decision taken or recommendation made by a public servant, merely by virtue of someone being disgruntled with the same or seeking to settle other

scores, is not frivolously challenged. That such frivolous challenges do not merely waste the time of the concerned public servant and cause them prejudice and harassment but further have a larger disadvantageous effect on the ability of government departments to function, as public servants would refrain from acting entirely so as to involve being dragged into an investigation. That this would contribute to "policy paralysis" and decision-making being shuffled from one officer to the other as nobody would wish to take responsibility for any decision of the department of the Government.

5.3 That pursuant to the Law Commission making its recommendation in its 254th Report, the Rajya Sabha Select Committee conducted extensive stakeholders' consultations and further engaged in an in-depth debate and held discussions before enacting Section 17A in its current form. That this is reflective of the deliberate and intentional framing of the provision in its current form as many of the concerns raised by the petitioner were raised in these debates and have been sufficiently addressed.

5.4 It was further contended that material differences exist between Section 6A of the DSPE Act, 1946 and Section 17A of the Act and the fact of the former having been struck down as being

unconstitutional does not have a bearing on the *vires* of the latter provision. That Section 6A of the DSPE Act, 1946 concerned the requirement of prior approval of the Central Government for the commencement of investigations by the CBI alone, protected only those Central Government officers who were at the rank of Joint Secretary and above and equivalent officers in certain Public Sector Undertakings (PSUs), had only a narrow exception where approval would not be required in trap cases and did not prescribe any timelines. That Section 17A, on the contrary, applies to the commencement of investigation by any agency, be it the CBI or the State police, protects all public servants and not any particular class, is narrowly tailored to cover only offences relating to any recommendation made or decision taken and prescribes a timeline of three months, with a possible one additional month of extension within which the concerned authority is required to either grant or deny approval.

5.5 It was submitted that Section 17A of the Act is not contrary to the precedents set by this Court either in the case of ***Vineet Narain*** or in the case of ***Subramanian Swamy***. That, in ***Vineet Narain***, the striking down of parts of the Single Directive was not

on the basis of any general impermissibility of a prior approval regime but instead hinged on the fact that a classification was being made between ranks of officers, leading to different regimes of investigation being applicable to different classes of officers. That such a classification did not have any rational nexus to the object of preventing frivolous allegations and harassment of public servants and was thus held to be violative of Article 14. Further, that the Single Directive functioned as a consolidated set of instructions issued to the CBI as to how it should go about prosecuting cases of corruption. That the Executive doing such an act through a directive as opposed to the Parliament through the enactment of statutory provisions was further held to be impermissible. Similarly, in ***Subramanian Swamy***, the main issue was as regards the classification made between officers holding the rank of Joint Secretary and above and all other officers and not the existence of a system of prior approval for conducting an investigation into alleged acts of corruption by a public servant itself.

5.6 It was submitted that as Section 17A of the Act does not engage in any such classificatory exercise and it is a validly enacted

statutory provision, it cannot be said to be a different *avatar* of either the Single Directive or Section 6A of the DSPE Act, 1946. Hence, there is no contravention of the principles laid down in either ***Vineet Narain*** or ***Subramanian Swamy*** in enacting Section 17A of the said Act.

5.7 It was contended that there is no merit to the claim that under Section 17A, there would be a situation where an officer accused of an offence under the Act would himself be in charge of granting approval to conduct an investigation in his own case. That a clear chain of command exists that would determine who the competent authority is in each case to grant the said approval.

5.8 It was submitted that some form of pre-investigation scrutiny has been upheld by this Court as being valid on various occasions and it is not anathema to the rule of law.

5.9 It was also submitted that in the case of ***K Veeraswami vs. Union of India, (1991) 3 SCC 655 ("Veeraswami")***, this Court recognized the purpose of prior sanction required to take cognizance of an offence under Section 6 of the Prevention of Corruption Act, 1947 as being for the purpose of preventing

"frivolous and vexatious prosecution". That the said case also upheld the duty of the competent authority to accord such sanction when the material on record discloses a *prima facie* commission of an offence.

5.10 That the *vires* of Section 197 of the Code of Criminal Procedure, 1898 (corresponding to Section 197 of the Code of Criminal Procedure, 1973), which mandates prior sanction to take cognizance of offences committed by public servants while acting in discharge of their official duty was upheld by this Court in the case of ***Matajog Dobey vs. H.C. Bhari, (1955) 2 SCC 388*** on similar grounds as ***Veeraswami***, namely that a classification between public servants and ordinary citizens was justified on the basis of the need for public servants to be protected against frivolous complaints and harassment as they attempt to carry out their duties.

5.11 It was submitted that a consideration of the aforesaid dicta of this Court would reveal that this Court has endorsed the need for a prior sanction regime so as to prevent vexation and harassment being caused to the public servant. That Section 17A is merely one other form of such a protective measure.

5.12 It was further contended by learned Solicitor General that the protection accorded under Section 17A is very narrowly tailored as prior approval would only be required if the offence alleged to have been committed satisfied the requirements that - a) it was in discharge of official duties and b) it related to any recommendation made or decision taken. Any offence under the Act that is alleged to have been committed by a public servant that can neither be said to be in discharge of his official duties nor relates to a recommendation made or decision taken would not require any form of prior approval. That this is exemplified by the fact that on the spot arrests do not require any prior approval to be proceeded with.

5.13 It was submitted that in a catena of High Court decisions in which the applicability of and adherence to Section 17A was in issue, the High Courts have abided by the aforementioned narrow scope of application of the provision. That no corrupt public servant has thus been shielded by the provision.

5.14 It was further contended by learned Solicitor General that Section 17A in no way violates the law laid down by this Court in ***Lalita Kumari*** as even in the said decision, the Court recognized

that there may exist instances where some form of prior investigation to determine if any offence is made out at all, based on the facts and circumstances of the case would be necessary before the registration of an FIR.

5.15 That the existence of Section 17A does not, in any way, impede the functioning of the Lokpal as Section 56 of the Lokpal and Lokayuktas Act, 2013 (for short, "the 2013 Act") clearly states that the 2013 Act would have an overriding effect over any other enactment. That if an investigation or the registration of an F.I.R was ordered by the Lokpal, there would be no scope for Section 17A to apply.

5.16 It was then submitted that the nature of review before the grant or denial of approval under Section 17A of the Act is not intended to be vetting or particularly detailed. That as the competent authority would likely not have much material before it, all that would have to be examined is a *prima facie* evaluation of whether an offence under the Act is, in fact, made out at all. That, as also observed by the Karnataka High Court in ***Shree Roopa vs. State of Karnataka, 2023 SCC OnLine Kar 68 ("Shree Roopa")***, all that is required is sufficient material to justify the need for an

investigation, which is drastically different from the nature of evaluation and material produced to determine if sanction should be awarded to take cognizance of an offence. That this further limits the possibility of abuse.

5.17 That the potential for abuse is also mitigated by way of the formulation of a detailed Standard Operating Procedure (SOP) that ought to be complied with. Therefore, there is no merit to the claim that there is no guidance in existence as to how the concerned authority must decide as to, whether, to grant or not grant approval under Section 17A.

5.18 It was further submitted that various Directive Principles of State Policy enshrined in the Constitution recognize the need for fearless governance as a mandate. That Section 17A merely assists in ensuring that officers do not shirk their responsibilities, thus ensuring that the government machinery is continually operational and serving the people of the country.

5.19 It was urged that the writ petition may be dismissed as being without any merits.

Reply Arguments:

6. By way of reply, learned counsel for the petitioner, Sri Prashant Bhushan contended that the fact that Section 17A was enacted after extensive research and deliberation by Parliament cannot supersede the fact that it is in violation of a three-Judge and five-Judge Bench decision of this Court. That the requirement for a sufficiently specialized body to decide as to whether a case must be investigated into or not was recognized in both ***Vineet Narain*** and ***Subramanian Swamy***, and Section 17A directly derogates this requirement by placing the decision-making in the hands of an unspecialized competent authority.

6.1 That the distinction between Section 6A of the DSPE Act, 1946 and Section 17A of the Act is immaterial as what was recognized in ***Subramanian Swamy*** was how a prior approval regime to even conduct any form of preliminary inquiry strikes at the heart of the rule of law and was entirely arbitrary. That when this Court in ***Subramanian Swamy*** did not find the reasoning that high-level officers were uniquely in need of protection to be convincing, despite the likely consequence of the decisions that they make needing them to be able to work unobstructedly, it is

not logically consistent to argue that a provision such as Section 17A which grants such a protection to all public servants would pass muster.

6.2 It was finally submitted that one possible way in which the independence of the investigating agency could be preserved while allowing for a regime of prior approval is by having the investigating officer conduct the preliminary enquiry and then submit a report on the same to either the jurisdictional Court or Magistrate or the Lokpal, to proceed with registration of an F.I.R.

Corruption in India:

7. The controversy in this case surrounds the interpretation of Section 17A of the Act, which is meant to prevent corruption in administration and governance of the country through the Union and State Governments and their instrumentalities. This Court has on a multitude of occasions taken note of the existence and persistence of corruption in the country and the manner in which it can be tackled by also bearing in mind other concomitant and competing considerations such as procedural fairness, the potential for abuse of anti-corruption provisions of law and the

requirement of a well-functioning and largely unimpeded system of public administration.

7.1 In the case of ***Sheonandan Paswan vs. State of Bihar (1987) 1 SCC 288 ("Sheonandan Paswan"),*** E.S. Venkataramiah, J. (as the learned Chief Justice of India then was) in the majority opinion, deciding on the correctness of an order of the Magistrate Court allowing for the withdrawal of prosecution in a case relating to allegations of corruption, noted the need to balance probity in public life by convicting corrupt public servants on one hand with a measured approach that ensures only genuine cases lead to a conviction on the other, by observing that:

> "37. … Corruption, particularly at high places should be put down with a heavy hand. But our passion to do so should not overtake reason. The court always acts on the material before it and if it finds that the material is not sufficient to connect the accused with the crime, it has to discharge or acquit him, as the case may be, notwithstanding the fact that the crime complained of is a grave one. …"

7.2 In the case of ***State of Haryana vs. Bhajan Lal, 1992 Supp 1 SCC 335 ("Bhajan Lal"),*** which laid down the now-familiar seven-prong indicative test as to when the powers under Article 226 of the Constitution or Section 482 of the Code of

Criminal Procedure, 1973 ("CrPC") could be exercised to quash a criminal proceeding, Ratnavel Pandian, J. rightly observed that:

> "4. Everyone whether individually or collectively is unquestionably under the supremacy of the law. Whoever he may be, however high he is, he is under the law. No matter how powerful he is, or how rich he may be.
>
> xxx
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> 9. Mere rhetorical preaching of apostolic sermons listing out the evils of corruption and raising slogans with catch words are of no use in the absence of practical and effective steps to eradicate them; because evil tolerated is evil propagated.
>
> 10. At the same time, one should also be alive to cases where false and frivolous accusations of corruption are maliciously made against an adversary exposing him to social ridicule and obloquy with an ulterior motive of wreaking vengeance due to past animosity or personal pique or merely out of spite regardless of the fact whether the proceedings will ultimately culminate into conviction or not.

7.3 In ***Vineet Narain,*** this Court held that:

> "56. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to under-developed countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant. Increasing corruption has led to investigative journalism which is of value to a free society. The need to highlight corruption in public life through the medium of public interest litigation invoking judicial review may be frequent in India but is not

unknown in other countries: *R v Secretary of State for Foreign and Commonwealth Affairs*.

57. Of course, the necessity of desirable procedures evolved by court rules to ensure that such a litigation is properly conducted and confined only to mattes of public interest is obvious. This is the effort made in these proceedings for the enforcement of fundamental rights guaranteed in the Constitution in exercise of powers conferred on this Court for doing complete justice in a cause. It cannot be doubted that there is a serious human rights aspect involved in such a proceeding because the prevailing corruption in public life, if permitted to continue unchecked, has ultimately the deleterious effect of eroding the Indian polity."

(underlining by me)

7.4 In the case of ***J. Jayalalitha vs. Union of India, (1999) 5 SCC 138 ("Jayalalitha"),*** Nanavati, J. when discussing the purpose behind the enactment of the Act held as under:

"15. Corruption corrodes the moral fabric of the society and corruption by public servants not only leads to corrosion of the moral fabric of the society but is also harmful to the national economy and national interest, as the persons occupying high posts in the Government by misusing their power due to corruption can cause considerable damage to the national economy, national interest and image of the country."

7.5 Further, Sethi, J. in ***State of M.P vs. Ram Singh, (2000) 5 SCC 88 ("Ram Singh"),*** observed as under:

"8. Corruption in a civilised society is a disease like cancer, which if not detected in time is sure to maliganise the polity of country leading to disastrous consequences.

It is termed as a plague which is not only contagious but if not controlled spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti-people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence shaking of the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society."

7.6 In the case of ***K.C. Sareen vs. CBI, (2001) 6 SCC 584***, this Court speaking through K.T Thomas, J. remarked on the possibility of a public servant who has been convicted of corruption continuing to hold office during the pendency of an appeal against the conviction, by stating that:

"12. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offices, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior court. The

mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably. When a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a court order suspending the conviction."

7.7 In the case of ***State of M.P. vs. Shambhu Dayal Nagar, (2006) 8 SCC 693 ("Shambhu Dayal Nagar")***, Dalveer Bhandari, J. noted that:

"32. It is difficult to accept the prayer of the respondent that a lenient view be taken in this case. The corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by the stink of corruption. It has deep and

> pervasive impact on the functioning of the entire country. Large scale corruption retards the national building activities and everyone has to suffer on that count. As has been aptly observed in *Swatantar Singh v. State of Haryana*, corruption is corroding like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralizing the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. The reputation of corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke."

7.8 This Court, speaking through Dr. B.S. Chauhan, J. in ***State of Maharashtra vs. Balakrishna Dattatrya Kumbhar, (2012) 12 SCC 384 ("Kumbhar"),*** wherein the suspension of the conviction of the respondent therein for offences under the Act was challenged, observed that:

> "17. The aforesaid order is therefore, certainly not sustainable in law if examined in light of the aforementioned judgments of this Court. Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. Thus, In the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. …"

7.9 In ***Manohar Lal Sharma vs. Principal Secretary, (2014) 2 SCC 532 ("Manohar Lal Sharma"),*** Lodha, J. (as the learned Chief Justice then was) observed that:

> "34. The abuse of public office for private gain has grown in scope and scale and hit the nation badly. Corruption reduces revenue; it slows down economic activity and holds back economic growth. The biggest loss that may occur to the nation due to corruption is loss of confidence in the democracy and weakening of rule of law.
>
> 35 In recent times, there has been concern over the need to ensure that the corridors of power remain untainted by corruption or nepotism and that there is optimum utilization of resources and funds for their intended purposes.
>
> 36. In 350 B.C.E., Aristotle suggested in the "Politics" that to protect the treasury from being defrauded, let all money be issued openly in front of the whole city, and let copies of the accounts be deposited in various wards. What Aristotle said centuries back may not be practicable today but for successful working of the democracy it is essential that public revenues are not defrauded and public servants do not indulge in bribery and corruption and if they do, the allegations of corruption are inquired into fairly, properly and promptly and those who are guilty are brought to book."

7.10 Further, in ***Subramanian Swamy***, R.M Lodha, C.J. held that:

> "72. Corruption is an enemy of nation and tracking down a corrupt public servant, however high he may be, and punishing such person is a necessary mandate under the PC Act, 1988. The status or position of public servant does

not qualify such public servant from exemption from equal treatment. The decision-making power does not segregate corrupt officers into two classes as they are common crimedoers and have to be tracked down by the same process of inquiry and investigation."

7.11 The irresistible conclusion that can be drawn from a survey of the aforementioned dicta is the unequivocal assertion by this Court that corruption is a scourge that must be rooted out in its entirety. Corruption is anathema to rule of law and to the spirit of the Constitution and to good governance. There is a fundamental incongruence between the existence of corruption in the country and the transformative vision of our Constitution, the rights it protects and the Preambular values it espouses. The existence and persistence of corruption in the country functions as a dire threat to the country's democracy, potential for development, economic stability and the very fabric of mutual trust and cooperation that keeps our polity functioning. It is trite to acknowledge that even a single act of corruption may have a deleterious and cascading impact on a multitude of stakeholders and certainly, on every single citizen whose faith in the Government and its institutions comes to be whittled away and who could be consequently deprived of good governance in accordance with rule of law. Corruption

facilitates the widening of existing schisms of inequality in the country, in its ability to impact the delivery of critical services to those who are most vulnerable and deserving. It further contributes to the breeding of cultures of complacency, inefficiency and lethargy and the ever-looming shadow of even the sincerest and most well-intentioned efforts being belied by institutional corruption, especially amongst the higher-rungs of decision-making in an institution. It is indubitable that corruption must be smitten out, and no form of clemency may be shown to those who indulge in corruption, regardless of its perceived magnitude. However, this Court has also amply cautioned against an approach driven by zeal alone, in a manner that doesn't consider the substance of the allegations in question.

United Nations Convention Against Corruption:

8. Learned counsel for the petitioner submitted that Section 17A is violative of Articles 6(2) and 36 of the United Nations Convention Against Corruption (for short, "UNCAC"). That, the UNCAC is an international instrument that seeks to combat corruption through the adoption of strategies and measures that seek to prevent, punish and mitigate negative consequences arising out of

corruption, especially through bolstered international cooperation and appropriate measures for financial recovery. It specifies what forms of activities must be criminalized and common best practices that may be followed to increase transparency and institutional integrity. The UNCAC was adopted by the United Nations General Assembly in the year 2003 and entered into force in the year 2005.

8.1 In May 2011, India ratified the UNCAC thereby indicating a steadfast, global commitment to combating corruption. For ease of reference, the aforesaid Articles are extracted hereunder:

> **"Article 6: Preventive anti-corruption body or bodies:**
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> 1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
>
> (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
>
> (b) Increasing and disseminating knowledge about the prevention of corruption.
>
> 2. Each State Party shall grant the body or bodies referred to in paragraph 1 [1] of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies

[1] Body or bodies tasked with implementing anti-corruption policies and spreading awareness about corruption.

to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided.

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Article 36: Specialized authorities:

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks."

8.2 It was submitted by learned counsel for the petitioner that the requirement to seek prior approval of the concerned government before the commencement of an inquiry/enquiry/ investigation, as the case may be, into an offence alleged to have been committed by a public servant is violative of the requirement under Article 6(2) that bodies tasked with preventing corruption are sufficiently independent. That it further violates the requirement for specialists in the field of combating corruption to function independently in deciding whether to conduct any inquiry/enquiry/investigation into the actions of any public

servant, as the approval-granting authority is the concerned government, usually in the form of the department to which the public servant belongs to and not a specialised, independent body.

8.3 It was further submitted that as a consequence of this lack of independence and specialisation, this Court ought to interpret Section 17A in such a manner that would render it in conformity with India's international obligations under the UNCAC.

8.4 Learned counsel for the petitioner placed reliance on the judgments of this Court in ***Gramophone Company of India vs. Birendra Bahadur Pandey, (1984) 2 SCC 534 ("Gramophone Company of India"), Vishaka vs. State of Rajasthan, (1997) 6 SCC 241 ("Vishaka"), Nilabati Behera vs. State of Orissa, (1993) 2 SCC 746 ("Nilabati Behera"), People's Union for Civil Liberties vs. Union of India, (1997) 3 SCC 433 ("People's Union for Civil Liberties")*** and ***Justice K.S. Puttaswamy (Retd.) vs. Union of India, (2017) 10 SCC 1 ("K.S. Puttaswamy").***

8.5 There are three courses of action that an Indian Court may take as regards an international legal obligation. In the event of a lacuna in the municipal law, international legal obligations may be

used to “paper over the cracks”, so to speak, in the form of using them as the basis to issue guidelines or directions until Parliament enacts a suitable legislation. In the event of a direct conflict between the international legal obligation and municipal law, the municipal law would prevail. However, in instances where there is no direct contradiction between the municipal law and the international legal obligation, the provisions of municipal law should be interpreted by the Court in such a manner that ensures compliance with the international legal obligation particularly in the case of Constitutional provisions.

8.6 In the instant case, the existence of a requirement for prior approval to commence an inquiry/enquiry/investigation into the alleged offences committed by a public servant under Section 17A belies the requirement for corruption to be investigated into by an independent agency, free of any form of undue influence and equipped with the necessary specialisation and resources. It is the duty of this Court to examine whether the existence of such a provision is justified in light of our domestic and international commitments to combating corruption. This aspect of the matter calls for consideration.

9. Further, the contention of the learned counsel for the petitioner is regarding the transgression of the dicta of this Court in enacting Section 17A of the Act. Hence, it is necessary to discuss those two judgments cited at the Bar in ***Vineet Narain*** and ***Subramanian Swamy*** before proceeding to answer the contentions raised by the respective parties.

Vineet Narain:

9.1 In ***Vineet Narain,*** the allegation in the writ petition filed under Article 32 of the Constitution of India as a Public Interest Litigation was that Government Agencies, such as the CBI and the Revenue Authorities had failed to perform their duties and legal obligations inasmuch as they had failed to properly investigate the matters arising out of the seizure of the so called "Jain Diaries" in certain raids conducted by the CBI. In the above context, the Single Directive issued by the Government which required prior sanction of the designated authority to initiate an investigation against officers of the Government, Public Sector Undertakings (PSUs) and Nationalised Banks above a certain level was considered. The Single Directive was a consolidated set of instructions issued to the CBI by various ministries or departments.

It was first issued in the year 1969 and thereafter amended on several occasions. The Single Directive contained certain directions to the CBI regarding the modalities of initiating an enquiry for registering a case against certain categories of civil servants. The Directive in its application was limited to officials at decision-making levels of the Government and certain other public institutions like the RBI, SEBI, Nationalised Banks etc. and the scope was limited to official acts. The object of the Directive was to protect decision making level officers from threat and ignominy of malicious and vexatious enquiries/ investigations. It was stated that the protection of the officers was required to save them from harassment for taking honest decisions; and that in the absence of such a protection it would adversely affect their efficiency and efficacy, leading to them avoiding taking any decisions which could later lead to harassment by any malicious and vexatious enquiry or investigation. The Directive was not to extend to any non-official acts of the Government servants and a time frame was provided for grant of sanction in order to avoid any delay. Two questions arose with regard to Directive No.4.7 (3) of the Single Directive), namely, its propriety or legality and the extent of its coverage, if it be valid.

9.2 In the meanwhile, a Committee called "Independent Review Committee" (IRC) was constituted by the Union Government which in its report had accepted the legality of the Single Directive by placing reliance on the decision of this Court in ***Veeraswami***. It had made certain recommendations after considering the functions of the CBI and the Directorate of Enforcement (ED) with regard to measures, *inter alia,* for speedy investigations and trials.

9.3 Considering the report of the IRC, this Court felt the need for its intervention in the matter in order to examine whether the Single Directive was valid in law. Taking into consideration Sections 3 and 4 of the DSPE Act, 1946, this Court observed that the Single Directive cannot include within its ambit cases of possession of disproportionate assets by the offender. The question with regard to the cases other than those of bribery, including trap cases and possession of disproportionate assets being covered by the Single Directive was considered. In paragraph 46, it was observed:

> "46. There may be other cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision, with nothing to prove directly any illegal gain to the decision-maker. Those are cases in which the inference drawn is that the

decision must have been made for a corrupt motive because the decision could not have been reached otherwise by an officer at that level in the hierarchy. This is, therefore, an area where the opinion of persons with requisite expertise in decision-making of that kind is relevant and, may be even decisive in reaching the conclusion whether the allegation requires any investigation to be made. In view of the fact that the CBI or the police force does not have the expertise within its fold for the formation of the requisite opinion in such cases, the need for the inclusion of such a mechanism comprising of experts in the field as a part of the infrastructure of the CBI is obvious, to decide whether the accusation made discloses grounds for a reasonable suspicion of the commission of an offence and it requires investigation. In the absence of any such mechanism within the infrastructure of the CBI, comprising of experts in the field who can evaluate the material for the decision to be made, introduction therein of a body of experts having expertise of the kind of business which requires the decision to be made, can be appreciated. But then, the final opinion is to be of the CBI with the aid of that advice and not that of anyone else. It would be more appropriate to have such a body within the infrastructure of the CBI itself."

(underlining by me)

9.4 Consequently, it was held that the Single Directive would not be upheld on the ground of it being an impermissible exercise of power of superintendence of the Central Government under Section 4(1) of the Act. The matter came to be considered *de hors* the Single Directive and consequently, certain directions were issued by this Court keeping in mind the salutary principles of

public life and standards in public life. Directions were issued on the following aspects:

a) CBI and CVC, the latter to be given a statutory status;

b) Enforcement Directorate;

c) Nodal Agency; and

d) Prosecution Agency

9.5 Directive No.4.7(3) of the Single Directive was struck down. However, the Report of the IRC and its recommendations that were similar to the extent of the directions issued by this Court were to be read along with the directions issued for a better appreciation of the matter. Consequently, the writ petitions were disposed of.

9.6 As noted above, the Single Directive was quashed by this Court in ***Vineet Narain*** by judgment dated 18.12.1997. Within a few months thereafter, on 25.08.1998, Section 6A was sought to be inserted to the DSPE Act, 1946 providing for previous approval of the CVC before investigation of the officers of the level of Joint Secretary and above. But this provision was deleted by issuance of another Ordinance on 27.10.1998. Thus, from the date of the decision in ***Vineet Narain*** till the insertion of Section 6A with effect from 12.09.2003, there was no requirement of seeking previous

approval except for a period of two months from 25.08.1998 to 27.10.1998.

Subramanian Swamy:

9.7 Section 6A of the DSPE Act, 1946 reads as under:

> "**6A. Approval of Central Government to conduct inquiry or investigation**.—(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to—
>
> (a) the employees of the Central Government of the level of Joint Secretary and above; and
>
> (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.
>
> (2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to Section 7 of the Prevention of Corruption Act, 1988 (49 of 1988)."

9.8 A five-Judge Constitution Bench of this Court in ***Subramanian Swamy*** considered the validity of Section 6A of the DSPE Act, 1946 in a writ petition which was filed by Sri Swamy

under Article 32 of the Constitution. The validity of Section 6A was questioned on the touchstone of Article 14 of the Constitution.

9.9 It was contended that Section 6A of the DSPE Act, 1946 was wholly irrational and arbitrary as it protected highly placed public servants from enquiry or investigation into allegations of corruption and was hence liable to be struck down for being violative of Article 14 of the Constitution of India. In paragraph 6, this Court noted the moot question to be considered in the case in the following words:

> "6. In short, the moot question is whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Article 14 of the Constitution are available or not as grounds to invalidate a legislation. Both the counsel have placed reliance on observations made in decisions rendered by a Bench of three learned Judges."

9.10 After referring extensively to the judgment of this Court in ***Vineet Narain***, the background to the introduction of Section 6A of the DSPE Act, 1946 was considered in light of the Central Vigilance Commission Act, 2003 (Act 45 of 2003). Section 26 of Act 45 of 2003 provided for the amendment of the DSPE Act, 1946 and clause (c) stated that after Section 6, Section 6A shall be inserted in the DSPE Act, 1946. Section 6A(1) of the Act required approval

of the Central Government to conduct enquiry or investigation where there were allegations of commission of an offence under the Act relating to an employee of the Central Government of the level of Joint Secretary and above.

9.11 The above writ petition challenging the said provision initially came up for admission before a three-Judge Bench and thereafter the matter was listed before the Constitution Bench of five-Judges. After considering the arguments made at the bar at length, this Court took note of the fact that Section 6A came to be enacted after the decision of this Court in ***Vineet Narain*** which was concerned with the constitutional validity of Single Directive No.4.7(3) and discussed several portions of the judgment in ***Vineet Narain*** which had declared Single Directive 4.7(3)(i) to be invalid. In paragraph 56 of ***Subramanian Swamy,*** this Court noted that Section 6A replicates Single Directive 4.7(3)(i) which was struck down in ***Vineet Narain***. It was further observed that **"*the only change is that the executive instruction is replaced by the legislation*"**. Now, insofar as the vice that was pointed out by this Court that powers of investigation which are governed by the statutory provisions under the DSPE Act, 1946 cannot be estopped

or curtailed by any executive instruction issued under Section 4(1) of that Act is concerned, it had been remedied.

9.12 But the question remained, whether Section 6A met the touchstone of Article 14 of the Constitution? This Court considered the question whether a classification can be made by creating a class of officers of the level of Joint Secretary and above, and certain officials in the Public Sector Undertakings for the purpose of enquiry/investigation into an offence alleged to have been committed under the Act. Whether sub-classification can be made on the basis of status and position of a public servant for the purpose of inquiry or enquiry or investigation into allegations of graft which amounts to an offence under the Act. This Court adopted an approach of taking into consideration the legislative policy relating to prevention of corruption enacted in the Act and the powers of enquiry/investigation under the DSPE Act, 1946. While discussing the nature of the classification in paragraph 59, this Court held that under Section 6A of the DSPE Act, 1946, the classification was on the basis of status in Government services which was not permissible under Article 14 of the Constitution, as it defeated the purpose of finding *prima facie* truth into the

allegations of graft which amounted to an offence under the Act. This Court questioned whether there could be sound differentiation between the corrupt public servants on the basis of status and held that there can be no distinction made between the public servants against whom there are allegations made amounting to an offence under the Act.

9.13 This Court observed that the classification sought to be made under Section 6A was not based on sound differentia inasmuch as the bureaucrats of Joint Secretary level and above who are working with the Central Government are offered protection under Section 6A while the same level officers who are working in the States do not get protection though both classes of these officers are accused of an offence under the Act and an enquiry/investigation into such allegations is to be carried out.

9.14 It was observed by this Court that the provision of Section 6A impedes tracking down the corrupt senior bureaucrats as without previous approval of the Central Government, the CBI would not even hold a preliminary enquiry much less an enquiry into the allegations and therefore the discrimination cannot be

justified on the ground that there is a reasonable classification or that it has a rational nexus to the objects sought to be achieved.

9.15 Discussing the provisions of the Act and the wide ramification that corruption in the governance has on the polity and people of the country, reference was made to another judgment of this Court in ***Manohar Lal Sharma*** where the question of the constitutional validity of Section 6A of the DSPE Act, 1946 was left open. It was also noticed that in ***Manohar Lal Sharma,*** the learned Attorney General had made a concession to the effect that in the event of the CBI conducting an enquiry, as opposed to an investigation into the conduct of a senior Government officer, no previous approval of the Central Government is required since the enquiry does not have the same adverse connotation that an investigation has. Insofar as an investigation is concerned, the Court observed that it may have some adverse impact but where the allegations of an offence are under the Act against a public servant, whether high or low, whether decision-maker or not, an independent investigation into such allegation is of utmost importance and unearthing the truth is the goal.

9.16 Ultimately, in paragraphs 98 and 99, this Court observed as under:

> "98. Having considered the impugned provision contained in Section 6-A and for the reasons indicated above, we do not think that it is necessary to consider the other objections challenging the impugned provision in the context of Article 14.
>
> 99. In view of our foregoing discussion, we hold that Section 6-A(1), which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to: (a) the employees of the Central Government of the level of Joint Secretary and above, and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, is invalid and violative of Article 14 of the Constitution. As a necessary corollary, the provision contained in Section 26(c) of Act 45 of 2003 to that extent is also declared invalid."

9.17 What is of significance in the judgment of this Court in ***Subramanian Swamy*** is what has been observed in paragraphs 61 and 62 which are extracted for ease of reference, as under:

> "61. The essence of police investigation is skilful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The previous approval from the Government necessarily required under Section 6-A would result in indirectly putting to notice the officers to be investigated before the commencement of investigation. Moreover, if CBI is not even allowed to verify complaints by preliminary enquiry, how can the case move forward? A preliminary

enquiry is intended to ascertain whether a prima facie case for investigation is made out or not. If CBI is prevented from holding a preliminary enquiry, at the very threshold, a fetter is put to enable CBI to gather relevant material. As a matter of fact, CBI is not able to collect the material even to move the Government for the purpose of obtaining previous approval from the Central Government.

62. It is important to bear in mind that as per the CBI Manual, (Para 9.10) a preliminary enquiry relating to allegations of bribery and corruption should be limited to the scrutiny of records and interrogation of bare minimum persons which being necessary to judge whether there is any substance in the allegations which are being enquired into and whether the case is worth pursuing further or not. Even this exercise of scrutiny of records and gathering relevant information to find out whether the case is worth pursuing further or not is not possible. In the criminal justice system, the inquiry and investigation into an offence is the domain of the police. The very power of CBI to enquire and investigate into the allegations of bribery and corruption against a certain class of public servants and officials in public undertakings is subverted and impinged by Section 6-A."

(underlining by me)

9.18 It is noted that Single Directive 4.7(3)(i) was struck down by this Court in ***Vineet Narain*** while issuing certain directions in paragraph 58 of the said judgment in the context of (i) CBI and CVC, (ii) Enforcement Directorate, (iii) Nodal Agency, and (iv) Prosecution Agency. In ***Subramanian Swamy,*** a Constitution Bench of this Court struck down Section 6A(1) of DSPE Act, 1946 as the basis of the classification of the public servants under the

said Section was held to be violative of Article 14 of the Constitution and hence discriminatory without going into other contentions raised. Consequently, Section 26(c) of the Act 45 of 2003 (CVC Act) was held to be invalid to that extent. It is thereafter that Section 17A has been inserted to the Act.

Analysis of Section 17A of the Act:

10. The approach that this Court must have while resolving the controversy in the instant case, can be envisaged through the following observations of Ganguly, J. in the case of ***Subramanian Swamy vs. Manmohan Singh, (2012) 3 SCC 64*** which are extracted as under:

> "68. Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of the Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our Preambular vision. Therefore, the duty of the court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it."
>
> (underlining by me)

11. The Prevention of Corruption Act, 1947 was amended in the year 1964 based on the recommendations of the Santhanam Committee. However, it was felt that the same was inadequate to deal with the offence of corruption effectively. In order to make the anti-corruption law more effective by widening its coverage and strengthening the provisions, the Prevention of Corruption Bill was introduced and both Houses of Parliament passed the Bill which received the assent of the President on 09.09.1988 and came into force on the said date itself.

11.1 The Act is a special statute and its Preamble shows that it has been enacted to consolidate and amend the law relating to the prevention of corruption and for the matters connected therewith. It is intended to make the corruption laws more effective by widening their coverage and by strengthening the provisions. It came to be enacted because the Prevention of Corruption Act, 1947 as amended from time to time was inadequate to deal with the offences of corruption effectively. The new Act now seeks to provide for speedy trial of offences punishable under the Act in public interest as the legislature had become aware of corruption amongst

the public servants. The Act enacts the legislative policy to meet corruption cases with a very strong hand. All public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences. [***State of A.P. vs. V. Vasudeva Rao, (2004) 9 SCC 319 : 2004 SCC (Cri) 968***].

11.2 The offences that can be committed by any public servant as defined under Section 2(c) of the said Act are enumerated in Chapter III thereof. The same can be listed as under:

> **"Section 7 – Offence relating to public servant being bribed (Substituted by Act 16 of 2018, Section 4 with effect from 26.7.2018)** – Section 7, before substitution dealt with "Public Servant taking gratification other than legal remuneration in respect of an official act".
>
> **Section 8 – Offence relating to bribing of a public servant (Substituted by Act 16 of 2018, Section 4 with effect from 26.7.2018) -** Section 8, before substitution dealt with "Taking gratification, in order, by corrupt or illegal means to influence public servant".
>
> **Section 9 – Offence relating to bribing a public servant by a commercial organization (Substituted by Act 16 of 2018, Section 4 with effect from 26.7.2018) -** Section 9, before substitution dealt with "Taking gratification, for exercise of personal influence with public servant".
>
> **Section 10 – Person incharge of commercial organization to be guilty of offence (Substituted by Act 16 of 2018, Section 4 with effect from 26.7.2018) -**

Section 10, before substitution dealt with "Punishment for abetment by public servant of offences defined in Sections 8 or 9".

Section 11 – Public servant taking undue advantage without consideration from the person concerned in proceeding or business transacted by such public servant.

Section 12 – Punishment for abetment of offences. - (Substituted by Act 16 of 2018, Section 4 with effect from 26.7.2018) - Section 12, before substitution dealt with "Punishment for abetment of offences defined in Sections 7 or 11".

Section 13 – Criminal misconduct by a public servant (Substituted by Act 16 of 2018, Section 7 with effect from 26.7.2018)

Section 14 – Punishment for habitual offender (Substituted by Act 16 of 2018, Section 8 with effect from 26.7.2018) - Section 14 before substitution dealt with "habitual committing of offences under Sections 8, 9 and 12".

Section 15 – Punishment for attempt

Section 16 – Matters to be taken into consideration for fixing fine."

11.3 Chapter IV of the Act deals with investigation into cases under the said Act. Section 17 speaks of persons authorised to investigate. It begins with a *non-obstante* clause inasmuch as the said provision states that notwithstanding anything contained in

the Code of Criminal Procedure, 1973, no police officer below the rank, -

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of Section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,

shall investigate any offence punishable under the Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant.

11.4 However, the first proviso states that if a police officer not below the rank of Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or

make arrest therefor without a warrant. The second proviso states that an offence referred to in clause (b) of sub-section (1) of Section 13 shall not be investigated without the order of a police officer not below the rank of Superintendent of Police.

11.5 Section 17 of the Act is in the nature of a safeguard in the matter of investigation to be conducted against a public servant, by requiring that the same be conducted by an authorized police officer, namely, Inspector of Police, Assistant Commissioner of Police or Deputy Superintendent of Police or a police officer of equivalent rank, as the case may be.

11.6 Section 17A was added pursuant to an amendment made by Act 16 of 2018 by virtue of Section 12 thereof. The said Section was enforced with effect from 26.07.2018. Section 17A deals with enquiry or inquiry or investigation of offences relatable to a recommendation made or a decision taken by a public servant in discharge of official functions or duties. This Section speaks about previous approval being a condition precedent before a police officer can conduct an enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under the Act, where the alleged offence is relatable to any

recommendation made or decision taken by such public servant in discharge of his official functions or duties. This Section apparently operates in a narrow compass inasmuch as the prior approval is sought only with regard to any enquiry or inquiry or investigation to be carried out:

(i) into any offence alleged to be committed by a public servant under the Act,

(ii) when the alleged offence is relatable to any recommendation made or decision taken by a public servant; and

(iii) when the recommendation or decision taken is in discharge of the public servant's functions or duties.

The previous approval has to be given –

(i) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, by that Government;

(ii) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in

connection with the affairs of a State, by that Government; and

(iii) in the case of any other person, by the authority competent to remove him from his office, at the time when the offence was alleged to have been committed.

Thus, the Union or State Government under which the public servant is or was working at the relevant point of time has to grant the previous approval within the meaning of clauses (i) and (ii) of Section 17A of the Act.

11.7 The first proviso to Section 17A of the Act states that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person. These relate to cases called “trap cases”. The second proviso to Section 17A states that the concerned authority shall convey its decision under this Section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

12. Recalling the contentions advanced at the Bar, the sum and substance of the arguments of Sri Prashant Bhushan, learned counsel for the petitioner was that the mandate of previous approval by the Government envisaged under Section 17A of the Act is only a method to frustrate any enquiry or investigation to be made by a police officer into the offences committed by a public servant under the Act and secondly, to protect corrupt public servants so as to not expose them to any investigation.

12.1 It was contended by Sri Bhushan that corruption is so rampant and widespread in the governance of this country that by the insertion of Section 17A to the Act and through the mechanism of previous approval to be taken before an enquiry or investigation can be made against a public servant by a police officer, there would virtually be no enquiry or inquiry or investigation at all inasmuch as the Government would inevitably refuse approval for conducting any such enquiry or investigation. Consequently, Section 17A is contrary to the sacrosanct and salient objectives of the Act itself inasmuch as the said Act seeks to prevent corruption and to deal with cases of corruption with a strong hand and not to protect corrupt public servants by the mechanism of declining

grant of approval to an enquiry or inquiry or investigation by a police officer.

12.2 It was further contended that Section 17A runs contrary to the salient dicta of this Court in the case of ***Vineet Narain*** as well as ***Subramanian Swamy,*** which are of larger Benches and therefore this Bench is bound by the observations made in the aforesaid two cases. He contended that unless Section 17A is struck down, the scourge of corruption would be on the rise in the country and there would be no good governance.

12.3 It was therefore emphasised that taking note of the strong observations made by this Court in the aforesaid matters speaking respectively through J.S. Verma, C.J. and Lodha, C.J., Section 17A may be struck down. It was emphasised by Sri Bhushan that Section 17A is nothing but another form of Section 6A of the DSPE Act, 1946 which has already been struck down by this Court and therefore, Section 17A also ought to be struck down.

12.4 In response to the aforesaid contentions, learned Solicitor General submitted the following points of distinction between Section 6A of the DSPE Act, 1946, which was struck down and

Section 17A of the Act which is under challenge in the present case. For the sake of convenience, paragraphs 6 and 7 of the written arguments submitted on behalf of the Union of India are extracted as under:

> "6. At this juncture, it is necessary to note the difference between Section 6A and Section 17A. The table is as under:

SECTION 6A	**SECTION 17A**
6A. Approval of Central Government to conduct, inquiry or investigation.— (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to— (a) the employees of the Central Government of the level of Joint Secretary and above; and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government. (2) Notwithstanding anything contained in sub-section (1), no such approval shall be	17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.— (1) No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval— (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government; (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in

SECTION 6A	SECTION 17A
necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988)]. 7. [Repeal of Ordinance 22 of 1946	connection with the affairs of a State, of that Government; (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed: Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person: Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

7. The following are the important points of distinctions:

a. Section 6A [Delhi Special Establishment Act, 1946 ("DSPE Act")] required prior Central Government approval only for the CBI to even begin inquiry/investigation;

Section 17A (PC Act) instead requires prior approval for enquiry/inquiry/investigation by any police officer – CBI or State police.

This makes it agency neutral.

b. Section 6A protected only the Central Government officers of Joint Secretary rank and above and equivalents in Central PSUs;

Section 17A of the PC Act instead protects all public servants without any arbitrary status-based classification.

This makes it status neutral.

c. Section 6A only had a narrow trap-case exception;

Section 17A is a narrow protection and a wide exclusionary clause ensuring that only offence relatable to a recommendation/decision taken in the ***discharge of official duties*** are protected [including the exclusion of trap cases]

This makes rule of law compliant.

d. Section 6A had no timeline;

Section 17A adds a timeline (3 months + 1 month extension) to decide.

This makes it reasonable."

12.5 Section 17A of the Act is applicable to every police officer who intends to make an enquiry, inquiry or investigation with regard to any public servant in respect of an offence said to have been committed under the provisions of the said Act relatable to a recommendation made or decision taken in the discharge of official duties.

12.6 According to learned Solicitor General, the scheme of Section 17A of the said Act is to protect those honest public servants who have not committed any offence under the Act, relatable to any recommendation made or decision taken by them

as a public servant in discharge of their official functions or duties. The object of the previous approval is to shield honest officers from frivolous and vexatious complaints being made against them for making a recommendation or taking a decision during the course of discharge of their official functions or duties.

12.7 Apparently, Section 17A is not to protect the persons who have committed an offence under the Act or corrupt public servants inasmuch as on an approval being given, an enquiry or inquiry or investigation can be conducted by a police officer whether belonging to the CBI or State Police. However, the contention of Sri Bhushan is that the object and purpose of inserting Section 17A to the Act is, in fact, to protect dishonest officers who have committed an offence under the provisions of the Act during the course of discharging their official functions or duties and while making a recommendation or taking a decision. In other words, the contention of learned counsel for the petitioner was that by not granting an approval, the Government can easily protect the officers who are guilty of corruption and who may be complicit with the higher-ups or even the political executives by committing offences under the Act during the course of discharge of their

official functions or duties while making a recommendation or taking a decision in the matter.

12.8 Whether, such an approval is required to be given, is the first question. This aspect pertains to the constitutional validity of Section 17A of the Act. Secondly, whether the approval should be given by the Government itself is another point of controversy. This question is considered independent of the first question regarding constitutional validity and relates to the working of Section 17A of the Act. The discussion to follow shall focus on these two aspects.

Meaning of "Government" under Section 17A of the Act:

13. Taking the second aspect first, the expression "Government" in Section 17A of the Act which is not defined therein can be considered. Under the General Clauses Act, 1897, the expression "Government" is defined as under:

> **"3. Definitions. –** In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—
>
> xxx
>
> (23) **"Government" or "the Government"** shall include both the Central Government and any State Government;"

13.1 The expressions used in clauses (a) and (b) of Section 17A is "Government" with reference to the affairs of the Union and

affairs of the State respectively, and "the authority competent to remove him from his office, at the time when the offence was alleged to have been committed" *vide* clause (c) of the said Section. These are the three authorities which have been conferred with the power to grant a prior approval before a police officer can conduct any inquiry or enquiry or investigation into any offence alleged to have been committed by a public servant under the Act where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties.

13.2 Although the expression "Government" has not been defined under the Act, the expression "authority competent to remove him from his office" is well indicated in the Constitution and in service jurisprudence.

13.3 What should be the meaning to be assigned to the expression "Government", when it relates to either the Union Government or State Government, is the crux of the matter in the instant case. This is because one of the contentions of the learned counsel for the petitioner is that a public servant who works either in the Union Government or the State Government would not be

dealt with in an impartial manner if that very Union Government or the State Government, as the case may be, is to grant prior approval before a police officer can make an inquiry or investigation into any of the offences alleged to have been committed by a public servant under the Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions and duties. Hence, it is necessary to unravel the connotation of the expression "Government" whether Union Government or State Government, as the case may be, in the context of Section 17A of the Act.

13.4 In ***Pashupati Nath Sukul vs. Nem Chandra Jain, (1984) 2 SCC 404,*** a three-Judge Bench of this Court observed that the expression "Government" generally connotes the three estates under the Constitution of India, namely, the Legislature, the Executive and the Judiciary, but in a narrow sense it is used to connote the Executive only. The meaning to be assigned to the expression "Government", therefore, depends upon the context in which it is used. In Section 17A of the Act the word "Government" means the Executive.

13.5 In ***National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad, (2011) 12 SCC 695,*** it was observed that the expression "Government" means a group of people responsible for governing the country. It consists of the activities, methods and principles involved in governing a country or other political unit such as the State. It is a political concept formulated to rule the nation. Also, "Government Department" means something purely fundamental i.e., related to a particular Government or to the practice of governing a country. Thus, the expression denotes essentially the Executive. Further, to perform the functions, the Government has its various departments and to facilitate its working, the government itself may be divided into various sections, such as, corporations of the Government which are in substance agencies of the Government. However, a government company is not a department of the Government as it has its own juristic identity and is distinct from the Government.

13.6 In ***Mohammed Ajmal Mohammad Amir Kasab vs. State of Maharashtra, (2012) 9 SCC 1,*** while considering the definition of "Government" under Section 3(23) of the General Clauses Act, 1987, this Court observed that in a narrower sense, "Government

of India" is only the executive limb of the State. It comprises of a group of people that constitute the administrative bureaucracy that controls the executive functions and powers of the State at a given time. That in certain contexts, the expression "Government of India" implies the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people.

Relevant Provisions of the Constitution:

14. Since the word "Government" essentially refers to the Executive, the relevant provisions of the Constitution under which it functions could be discussed. According to Article 53(1) of the Constitution, the executive power of the Union is vested in the President. However, this does not envisage that the President should personally approve all administrative orders passed by the Union Government. There is a mechanism by which the responsibility for decision-making would pass from the President to others even though power is formally vested in the President. In fact, Article 53(1) of the Constitution itself states that the President may exercise his executive powers "either directly or through officers subordinate to him in accordance with this Constitution".

Therefore, the President can act through Ministers and civil servants under Article 53(1). The power to make rules of business under Article 77(3) of the Constitution may be traced from Article 53(1) of the Constitution. The rules of business enable the powers to be exercised by a Minister or any official subordinate to him subject to the political responsibility of the Council of Ministers to the Legislature. The rules of business are administrative in nature for governance of its business of the Government of India framed under Article 77 of the Constitution. Article 77(1) states that all executive actions of the Central Government are to be expressed to be taken in the name of the President. In this context, Article 77(3) provides that the President shall make rules for the more convenient transaction of the business of the Government of India and for the allocation among Ministers of the said business. This Article provides for framing of rules for transaction of business as well as rules for allocation of business. Any decision made by a Minister or officer under the rules of business as per Article 77(3) is the decision of the President. Similarly, Article 154 of the Constitution states that the Executive power of the State is vested

in the Governor and the Article corresponding to Article 77 is Article 166 of the Constitution.

14.1 Article 77 of the Constitution speaks that all executive action of the Government of India shall be expressed to be taken in the name of the President. Distinction was drawn between executive power of the Union and the executive functions vested in the President by various Articles of the Constitution in ***Samsher Singh vs. State of Punjab, AIR 1974 SC 2192 ("Samsher Singh").*** Whenever any executive function is to be exercised by the President, whether such function is vested in the Union or in him as President, it is to be exercised on the advice of the Council of Ministers, the President being the constitutional head of the executive and as per allocation under Article 77(3), subject to certain exceptions, such as, the choice of the Prime Minister, dismissal of a State Government which has lost its majority in the House of People, dissolution of the House, etc. Thus, even those functions which are required by the Constitution to be performed on the subjective satisfaction of the President could be delegated by rules of business made under Article 77(3) of the Constitution, to a Minister or to a Secretary to the Government of India, because

satisfaction of the President does not indicate personal satisfaction but in the constitutional sense, the satisfaction of the Council of Ministers who advise the President. This may further be delegated to a particular Minister or official under the rules of business framed under Article 77(3) of the Constitution. Similarly, in Article 166(3) of the Constitution, the principle would apply *mutatis mutandis* in the case of Governor of a State. However, in fact, the order passed by the Minister, though expressed in the name of the President, remains that of the Minister and it cannot be treated to have been issued by the President personally and such an order is subject to judicial review. Article 77(3) of the Constitution does not speak about delegation of functions but allocation of functions and therefore, the order passed by a Minister who has been allocated that function is the order of the Minister. Thus, all orders which are expressed in the name of the President are authenticated in the manner laid down in Article 77(2) of the Constitution. Although, they do not require any personal signature of the President, the author of the order would sign it.

14.2 Thus, vesting of powers of the Union Government or the State Government does not envisage that each matter must be

disposed of by the President or the Governor, as the case may be, or for that matter, by the Cabinet or personally by the Minister. When powers are entrusted to the Minister by law, it is not envisaged that the department in his charge would be run personally by the Minister to reach a decision in each case. It is therefore necessary for the Minister's power to be exercised by officers (civil servants) in the concerned department and as a result, a large number of decisions are taken continuously by civil servants which are also taken collectively at times.

14.3 Article 77(3) of the Constitution enables the President to make rules for the more convenient transaction of the business of the Government of India and for the allocation of Ministers to the said business by the rules of business framed under Article 77(3) of the Constitution. A particular official of a Ministry may be authorised to take any particular decision or to discharge any particular functions, but when such authorised official does any act so authorised, he does so not as a delegate of the Minister but on behalf of the Government *vide* ***A Sanjeevi Naidu vs. State of Madras, AIR 1970 SC 1102 ("Sanjeevi Naidu").*** Thus, the act of the Minister or officer who is authorised by the rules of business is

the act of the President (or the Governor) or of the Government of India (or the State Government) in whom the function or power is vested by the Constitution or by any statute.

14.4 The business allocated to a Ministry is normally disposed of by or under the direction of the Minister except when it is necessary or desirable to submit a case to the Prime Minister or Chief Minister, as the case may be or the Cabinet or any of its Committees. Except the aforesaid matters, all other matters are disposed of by the civil servants in accordance with the Minister's directions and rules of business *vide* ***Ishwarlal Girdharilal Joshi vs. State of Gujarat, AIR 1968 SC 870 ("Ishwarlal Girdharilal Joshi").***

14.5 In ***Carltona Ltd. vs. Commissioner of Works, (1943) 2 All ER 560,*** the position in England has been explained by holding that the whole system of departmental organization and administration is based on the view that Ministers, being responsible to Parliament will ensure that important duties are committed to experienced officials. Sometimes, however, owing to political necessity and not because of legal necessity, a Minister must exercise power personally rather than delegating it to the

officers in his department. For ease of reference, the pertinent passage from the aforesaid judgment is extracted as under:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. <u>The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials.</u> If they do not do that, Parliament is the place where complaint must be made against them."
>
> (underlining by me)

14.6 The Government of India (Allocation of Business) Rules, 1961 and the Government of India (Transaction of Business) Rules, 1961 made by the President are for the more convenient

transaction of the business of the Government of India and for allocation among the Ministers of the said business. Similarly, under Article 166(3) of the Constitution, the Governor may make rules for the business of the State. These rules determine the official hierarchy which will act and take a decision in a particular matter. The decision of any Minister or officer under the Rules of Business made under Article 77(3) or 166(3) is regarded as the decision of the President or Governor, as the case may be as they are taken in their names. However, such powers and functions are exercised by civil servants according to the rules of business.

14.7 In ***Sanjeevi Naidu,*** in the context of Section 68(C) of the Motor Vehicles Act, 1939, when the validity of the draft scheme was challenged, the question was whether the opinion requisite under the aforesaid provision was not formed by the State Government but instead by the Secretary to the Government in the Industries, Labour and Housing Department, acting in pursuance of power conferred on him under Rule 23-A of the Madras Government Business Rules. In paragraph 10, this Court observed as under:

"10. The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Governmental functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hard working Minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day-to-day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the "Rules" or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates."

(underlining by me)

14.8 Reference could also be made to ***Emperor vs. Sibnath Banerji, LR 72 IA 241,*** wherein it was observed by the Judicial Committee of the Privy Council that it was within the competence

of the Governor to empower a civil servant to transact any particular business of the Government by making appropriate rules. That the Ministers, like civil servants, are subordinate to the Governor.

14.9 Additionally, reliance could be placed on ***Ishwarlal Girdharlal Joshi,*** wherein it was observed that the opinion formed by the Deputy Secretary under Section 17(1) of the Land Acquisition Act, 1894 is the opinion of the State Government. It was observed that in view of the Rules of Business and Instructions, a determination made by the Secretary became the determination of the Government. In other words, where an official performs the functions of a department, the said functions are the functions of the Minister and there is no delegation as such.

14.10 In ***Samsher Singh,*** this Court observed that the decision of any Minister or officer under the Rules of Business made under Article 77(3) is the decision of the President and similar is the position under Article 166(3) of the Constitution *vis-à-vis* the Governor.

14.11 Thus, the fact is that most of the decisions within the Ministry are taken by the officers authorised by the Rules of Business and the Minister exercises overall control over the working of the department. In practice, certain matters are referred to the Minster such as a matter involving policy; the rest are disposed of by the civil servants authorised to deal with them. Sometimes, Standing Orders are given and directions are issued by a Minister with regard to the classes of matters which have to be brought to the personal notice of the Minister. The Rules of Business and Standing Orders issued thereunder have statutory force and are binding in nature.

14.12 While the aforesaid discussion was about the structure of governance in the country, it is necessary to recapitulate the same while applying Section 17A of the Act when a request is made by a police officer under the said provision while seeking prior approval. The need for prior approval under Section 17A of the Act is in order to inquire/enquire/investigate into the conduct of a public servant when an offence under the provisions of the said Act is alleged. The precursors to the said provision may be discussed at this stage.

Functioning of Government Departments:

15. It is also relevant to note that public servants or officers/officials being part and parcel of an administrative department are interested in implementing the policies that they have envisaged. Therefore, inevitably, they would consciously or unconsciously have what can be termed as a "policy bias" and this could potentially lead to there being an absence of neutrality or objectivity while considering a request for approval for carrying out an inquiry or enquiry or investigation into a complaint *vis-à-vis* a recommendation made or a decision taken by a public servant during the course of discharge of official duties. If a public servant has been involved in making a recommendation or taking a decision in the context of implementation of a policy or if the majority of the public servants in the department are involved in the formulation and implementation of a policy, then a person from that very department may not possess the objectivity and neutrality to also consider such a request for prior approval for an inquiry/enquiry/investigation. The apprehension expressed by the petitioner can be understood as a predisposition which may not lead to an impartial exercise of power under Section 17A of the Act.

The maxim *nemo judex in re sua* literally means that a man should not be a judge in his own cause, meaning the deciding authority must be impartial which is exemplified as the rule against bias. Though, this maxim is essentially with regard to judicial or quasi-judicial adjudication and is applicable to courts of law and quasi-judicial authorities, in my view, the same would also apply in a matter such as where prior approval has to be given within the meaning of Section 17A of the Act. A consideration of a request for grant of prior approval under Section 17A of the Act is not purely an administrative act but would call for impartiality or neutrality in the exercise of discretion in that regard. A likelihood of bias on the part of an officer in the department while considering a request for prior approval would frustrate the object of the provision and no prior approval would be given.

15.1 Another difficulty which one should also envisage in the operation of Section 17A of the Act is that no single public servant may be responsible for making a recommendation or taking a decision during the course of discharge of his official duties. As discussed above, as per the Rules of Business, a number of public servants may be involved in making and approving of a

recommendation or taking a decision. Therefore, it becomes difficult for the public servant of that very department to grant approval for conducting an inquiry/enquiry/investigation into such a matter in respect of another public servant. Hence, there is need for an independent and autonomous person or body, who have nothing to do with the formulation and implementation of departmental policies or in the making of a recommendation or taking of a decision, to consider a request under Section 17A of the Act. Such a body within the Government as per the said provision is conspicuous by its absence inasmuch as the same is not spelt out in the provision. The provision is thus vague and any hierarchy of officers entrusted with the power to consider a request to give a prior approval is otherwise fraught with deficiencies. In my view, there ought to have been an independent body which is not controlled by the Government to consider a case for grant of prior approval to conduct an inquiry/enquiry/ investigation by a police officer. In the absence of such an independent and autonomous body which can make an impartial consideration with objectivity, Section 17A of the Act would be effectively frustrated for being vague and lacking in any guidance.

15.2 This is because there should not be any fetter while exercising powers under Section 17A of the Act. In fact, there should be a sense of detachment and impartiality while granting prior approval by a concerned department of the Government. On the other hand, if the Secretary of the department or any other officer of the same department or for that matter the Minister of the concerned department is vested with the power to grant such prior approval under Section 17A of the Act, in respect of a public servant of the very same department who is to be enquired into, there would be lack of neutrality in considering a request for grant of prior approval.

15.3 There would many a times also arise conflict of interest inasmuch as the higher officers of a department may have had a vital role in the making of a recommendation or taking a decision either individually or collectively by a meeting of minds. There are also practical difficulties which may arise. Then, who in the very same department should be entrusted to exercise power under Section 17A of the Act? Thus, in my view, the power to grant or refuse prior approval under Section 17A of the Act therefore has to be vested in an authority which is not involved in the formulation

of any policy of the Government or department and which is also not involved with the implementation of a policy in the context of making any recommendation or taking a decision which is sought to be enquired into or investigated by a police officer if the provision is to be sustained.

15.4 In fact, in ***Gullappalli Nageswara Rao vs. State of A.P., AIR 1959 SC 1376,*** this Court observed in a different context that the Secretary "is a part of the department" while the Minister "is only primarily responsible for the disposal of the business pertaining to that department". However, the view with regard to a Minister not being a part of a department may not be correct. Therefore, a public servant who has played a vital role in the making of a recommendation or taking of a decision which is sought to be inquired into or investigated on the basis of a complaint would not at all be the proper person to grant prior approval in the context of Section 17A of the Act in respect of another public servant who is to inquired into within the meaning of Section 17A of the Act. Further, the prior approval may be sought from the very officer within the department who is to be enquired into, who had discharged his duties within the meaning of Section

17A of the Act. Can such an officer grant an approval to a police officer to carry out an enquiry against himself? It is too far-fetched to expect a public servant granting an approval to enquire as against himself. Moreover, a Minister is also as integral a part of the department as any other civil servant. The civil servants carry out orders and functions under the direction of the Minister. The Minister is, in fact, an active policy-maker and interested in its implementation and therefore, there would be a much stronger "policy bias" than the officers or officials in his/her department who merely implement or execute the Minister's policy. This is because Section 17A is regarding making a recommendation or taking a decision while discharging official duties which would be essentially in the context of implementation of a policy of the department of the Government.

15.5 In this regard, reference could be made to the Administrative Procedure Act, 1946 ("APA", for short) in the United States, which sought to bring about a separation within the department between the functions of hearing objections or representations against some proposed policy and the making of the policy. The body which hears such objections or complaints

consists of "Administrative Law Judges", and is an independent body. In England, such inquiries were to be held by Inspectors. The Franks Committee recommended that the Inspectors who hold inquiries on behalf of the departments, "be placed under the control of a Minister not directly concerned with the subject matter of their work". However, this recommendation has not been implemented. *(Source: M P Jain & S N Jain, Principles of Administrative Law, Ninth Edition, K Kannan, Volume 2, LexisNexis).*

15.6 Therefore, there is a need to address inherent deficiencies in the working of Section 17A of the Act which makes the provision arbitrary as it does not serve the object of the Act. In this regard, judgments of this Court are instructive. In ***A.K. Kraipak vs. Union of India, AIR 1970 SC 150 ("Kraipak"),*** a Constitution Bench of this Court speaking through Hegde, J. stated in paragraphs 13, 17 and 20 as under:

> 13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For deter-mining whether a power is an administrative power or a *quasi-judicial* power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the

rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power…..

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17…….The horizon of natural justice is constantly expanding. The question how far the principles of natural justice govern administrative enquiries came up for consideration before the Queen's Bench Division In re H.K. (An Infant). [(1967) 2 QB 617 at p. 630] Therein the validity of the action taken by an Immigration Officer came up for consideration. In the course of his judgment Lord Parker C.J. observed thus:

> "But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely

bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

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20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debet esse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is

not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. University of Kerala [1968 SCC OnLine SC 9] the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

(underlining by me)

15.7 Thus, this Court sought to demolish the distinction between quasi-judicial and purely administrative functions and also brought in the concept of duty to act fairly, whether as an administrative or quasi-judicial authority. The principles of natural justice exemplified as "fair play in action" which is important in both an administrative proceeding and a quasi-judicial proceeding, were emphasised. In ***Kraipak,*** it was emphasised that there was no distinction between a quasi-judicial and administrative function for this purpose. Thus, if fair play in action was necessary while

taking an administrative decision to prevent miscarriage of justice, it cannot be said to be restricted to only a quasi-judicial inquiry. In other words, even in an administrative proceeding, there must be fair play when procedural fairness is embodied as a principle of natural justice, not restricted only to the rule of *audi alteram partem* but also includes taking a decision without any bias, such as while exercising power under Section 17A of the Act in the matter of granting prior approval to a police officer to conduct an inquiry/enquiry/investigation.

15.8 Fairness in action would imply to act in a fair, just and reasonable manner and not merely as a formality, with underlying bias. Since the holders of a public office hold the trust of the public, all their actions must be above board. Thus, when an inquiry/ enquiry/investigation is to be conducted by a police officer within the meaning of Section 17A of the Act, would the question of prior approval be considered in a fair manner without there being any bias and with complete neutrality by a department of the Government within which the officer enquired into is also functioning?

15.9 In ***Mohinder Singh Gill vs. Chief Election Commissioner, AIR 1978 SC 851,*** this Court observed that administrative power in a democratic setup is not allergic to fairness in action and discretionary executive justice cannot denigrate into unilateral injustice. It was further observed that *"for fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction".*

15.10 Further, under Section 17A of the Act, when the Union Government or the State Government, as the case may be, must grant prior approval to a police officer to conduct an inquiry/enquiry/investigation, it is a case of an institutional decision-making i.e. made within the institution of the Government itself. A Government is no doubt an impersonal entity but it functions through its Ministers and civil servants who are all public servants within the meaning of the Act. Further, it may be that a recommendation made or a decision taken would be jointly taken in the sense that expert opinions and perspectives of several officers of the department would have been involved. The authorship of a decision taken, or a recommendation made may not always be attributable to a single person. It cannot be

individualised as the recommendation made or a decision taken is by a concerned department. Sometimes, it can be related to a single public servant but that is not always the case. Ultimately, it is a constitutional and administrative process resulting in a recommendation made or a decision taken in a department of the Government. Notings on the files made by various officers would be seen before the final decision is arrived at. Much of the notings and views expressed on the files by various officers in the hierarchy before the file moves up to the higher reaches, when a final decision is formally taken, would involve many officers of a department. Therefore, even if a recommendation or formal decision is initiated on the file by one officer of the department, it is ultimately a collective decision. However, if the role played by an officer in making a recommendation or taking a decision is known and if the very same department has to consider a request of the police officer to give prior approval for conducting an inquiry/enquiry/ investigation against the officer making a recommendation or taking a decision in a matter, there would be a likelihood of bias. Therefore, it may not be appropriate for the very same department of the Government, as an institution, to consider a request for prior

approval before an inquiry/enquiry/investigation is to be commenced by a police officer. Who in the department of the Government can be entrusted with that responsibility? Would that responsibility be diluted by intra-departmental consultation? Will the power to be exercised by a designated officer in the department be abused by such officer being overpowered by his colleagues and/or subordinates in the department? Therefore, any responsibility given to an officer within a department of the Government to give prior approval within the meaning of Section 17A of the Act is fraught with many risks.

15.11 Moreover, this provision can be abused by a threat of an inquiry or investigation so as to make civil servants succumb to certain vested interests both within and outside the Government. What this means is that Section 17A of the Act would really be a handle for misuse within the Government in the absence of necessary safeguards at least in the following three scenarios:

Firstly, the badgering of officers/officials to remain silent on issues on which even the political executive requires a tight-lipped attitude on any matter;

Secondly, civil servants being overpowered by holding a Damocles' Sword of an enquiry/investigation over their heads so as to seek their support on certain issues and

Thirdly, when certain officers/officials seek to align themselves with the political executive by suppressing their independent opinions under a threat of approval for an inquiry or investigation which suppression may not be in the interest of good governance at all.

In all the above circumstances, prior approval under Section 17A of the Act may not be granted by the department even when public servants have to ideally be inquired/enquired/investigated within the meaning of Section 17A of the Act. This means the mechanism of a prior approval would be used to protect public servants who would align and against those who do not fall in line by a threat of commencing an inquiry/investigation against them.

15.12 No doubt, there is also a need to protect honest officers from being proceeded against frivolously and vexatiously for a recommendation made or a decision taken by them during the course of discharge of their official duties in accordance with the

requisite norms and rule of law. But in order to ascertain whether complaints against such officers need not be proceeded with and if such officers have to be protected, there has to be a preliminary enquiry in the first place. But, if prior approval is not granted, then there would be no method of ascertaining the truth.

15.13 In recent times, there may have been allegations made against public servants, some of which may not be true at all. Such allegations are against honest and sincere civil servants. If such frivolous and vexatious allegations have to be prosecuted merely because they have been made, possibly by certain vested interests or other bodies, then the reputation of a public servant would be unnecessarily tarnished. For that purpose also, a preliminary enquiry has to be held. But if it is not permitted to be held, such officers cannot come unscathed. Thus, any denial of prior approval would raise a doubt as to their credibility which would not be in the interest of the said officers.

15.14 In this regard, it would be useful to recall the observations of Hota Committee which are in the following words:

> "2.30 In the banking sector, in consultation with the Central Vigilance Commissioner, committees/advisory boards have been set up with experts drawn from different

disciplines, who scrutinize cases in which decisions for disbursement of loans have been taken by officials in the banks, to decide whether they were decisions taken in good faith. It is suggested that similar advisory boards be constituted in all government Departments for scrutiny of decisions taken by officers before investigation/launching prosecution against them under the Prevention of Corruption Act 1988. We are conscious that in our anxiety to protect honest officers, who take bona fide decisions on purchases and contracts, we are recommending constitution of Committees of Experts in different Ministries/Departments to scrutinize a decision taken by a civil servant before the CBI or any Vigilance Agency is permitted to submit charge sheet in a court of law under the Prevention of Corruption Act 1988 or before an officer faces a disciplinary proceeding. The Prevention of Corruption Act 1988 does not contain any such provision…."

(underlining by me)

15.15 Thus, the consideration of the request of a police officer for prior approval under Section 17A of the Act is an instance of institutional decision-making within the Government which has its own inherent defects, some of which are highlighted above. Therefore, Section 17A is *per se* on a shaky foundation in the context of its operation and therefore not at all a viable piece of amendment considering the inherent deficiencies in its operation.

Before moving on to the first question, it is necessary to discuss about the existing institutions engaged in the prevention of corruption in the country.

Institutions to Check Corruption:

Establishment of CVC, CBI and Lokpal & Lokayukta:

16. It is said that the problem of corruption has become endemic in the country. The decision-making process and administrative actions become distorted and motivated when surrounded by corruption. By leaving out relevant considerations and on the basis of irrelevant considerations, decisions are taken *de hors* the merits of a case. Hence, the need of the hour is for corruption to be checked and eliminated from governance and polity.

16.1 In this regard, the CVC was created by a resolution of the Government of India in February 1964 on the basis of the recommendation of the Santhanam Committee, which was appointed in the year 1962. Several States also had Vigilance Commissions to control corruption. In ***Vineet Narain,*** the Supreme Court directed that the CVC be given a statutory status and the CVC be made responsible for the efficient working of the CBI.

16.2 In fact, in the year 1963 by an executive resolution, the Government established the CBI and prior to that, there existed the Special Police Establishment (SPE) under the DSPE Act, 1946

to investigate offences committed by Central Government servants while discharging their official duties. With the creation of the CBI, the SPE was made a wing of the CBI for the purposes of investigation. The CBI derives its powers from the DSPE Act, 1946. The CBI functions under the administrative control of the Prime Minister. The CBI is a central police agency that investigates cases, *inter alia,* of bribery and corruption. In the year 1987, the Anti-Corruption Division was created in the CBI.

16.3 In ***Vineet Narain,*** the Supreme Court undertook a review of the functioning of the CBI and subsequently, a few directions were issued with the view to make the CBI an autonomous and effective investigation agency. The said directions were incorporated in the Delhi Special Police Establishment Act, 2003.

16.4 Pursuant to the observations of the Supreme Court in ***Vineet Narain,*** the CVC Act, 2003 was enacted comprising of a Central Vigilance Commissioner and two Vigilance Commissioners – a three-member body. The superintendence of the DSPE Act, 1946 insofar as it relates to investigation of offences under the Act vested in the CVC and in all other matters, the superintendence of the DSPE Act, 1946 vested in the Central Government.

The Indian Ombudsman System: Lokpal and Lokayukta:

17. Apart from the CVC, there have been many attempts to have an Ombudsman system as it functions in common law countries to operate in India also. The Administrative Reforms Commission in its Report dated 20.10.1966 proposed an Ombudsman type institution for redressal of citizens' grievances. According to the Commission, there was a need for an institution for the removal of prevailing criticism of administrative acts. Taking note of the public feeling against the prevalence of corruption, inefficiency and non-responsiveness to the needs of the people on the one hand and the necessity to render protection to the administration for its *bona fide* acts on the other hand, the Commission recommended an Ombudsman system to be instituted in India. The institution of an Ombudsman was to give access to a citizen to seek quick and inexpensive justice *vis-à-vis* the administrative system and governance. It was felt that the presence of an Ombudsman would make the administration more cautious in taking decisions. The aforesaid Commission suggested that there could be two special institutions for the redressal of citizens' grievances, one at the Central level to be designated as Lokpal and the other, at the State

level to be designated as Lokayukta. The Lokpal was to have the power to investigate an administrative act done by or with the approval of the Minister or Secretary to the Government at the Centre or at the State, if the complaint was made against such an act by a person who was affected by it and thereby, had suffered injustice. A citizen could directly make a complaint to the Lokpal. The Lokayukta also was to have powers similar to that of the Lokpal at the State level. The whole object of the institution of the Lokpal as well as the Lokayukta was to have jurisdiction to give relief to a person who had suffered injustice from maladministration. According to the Commission, the Lokpal was to be authorised to investigate any action taken in exercise of administrative functions but to exclude matters of "policy" from its purview. Another significant recommendation of the Commission was to give a constitutional status rather than a statutory status to the Lokpal and Lokayukta so as to make them independent of political interference.

17.1 There were several unsuccessful attempts to pass the Lokpal and the Lokayuktas Bill right from the year 1968 onwards. Ultimately, the 2013 Act called the Lokpal and Lokayuktas Act,

2013 was passed by both Houses of Parliament, received the assent of the President on 01.01.2014 and came into effect from 16.01.2014 as statutory bodies. This Act is to provide for the establishment of a body of Lokpal for the Union and Lokayukta for the States, wherever not yet established, *inter alia,* to inquire into allegations of corruption against certain functionaries and for the matters connected therewith and incidental thereto. The object of this Act is to provide clean and responsive governance through effective bodies and to contain acts of corruption. India, having ratified the United Nations Convention against Corruption has passed this Act to provide for prompt and fair investigation and prosecution into cases of corruption.

Scheme of the 2013 Act:

18. The salient provisions of the 2013 Act could be referred to by extracting the relevant Sections. Section 2(1)(d), (e), (f), (g), (m), (o), (s) and sub-section (2) read as under:

> **"2. Definitions.—**(1) In this Act, unless the context otherwise requires,—
>
> xxx
>
> d) "Central Vigilance Commission" means the Central Vigilance Commission constituted under sub-section (1) of

section 3 of the Central Vigilance Commission Act, 2003 (45 of 2003);

(e) "complaint" means a complaint, made in such form as may be prescribed, alleging that a public servant has committed an offence punishable under the Prevention of Corruption Act, 1988 (49 of 1988);

(f) "Delhi Special Police Establishment" means the Delhi Special Police Establishment constituted under sub-section (1) of section 2 of the Delhi Special Police Establishment Act, 1946 (25 of 1946);

(g) "investigation" means an investigation as defined under clause (h) of section 2 of the Code of Criminal Procedure, 1973 (2 of 1974);

xxx

(m) "preliminary inquiry" means an inquiry conducted under this Act;

xxx

(o) "public servant" means a person referred to in clauses (a) to (h) of sub-section (1) of section 14 but does not include a public servant in respect of whom the jurisdiction is exercisable by any court or other authority under the Army Act, 1950 (45 of 1950), the Air Force Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Coast Guard Act, 1978 (30 of 1978) or the procedure is applicable to such public servant under those Acts;

xxx

(s) "Special Court" means the court of a Special Judge appointed under sub-section (1) of section 3 of the Prevention of Corruption Act, 1988 (49 of 1988).

xxx

(2) The words and expressions used herein and not defined in this Act but defined in the Prevention of Corruption Act, 1988 (49 of 1988), shall have the meanings respectively assigned to them in that Act."

18.1 Chapter II of the 2013 Act deals with establishment of the Lokpal. Chapter III deals with the Inquiry Wing while Chapter IV deals with the Prosecution Wing. The jurisdiction in respect of inquiry is in Chapter VI of the 2013 Act. Section 14 states that jurisdiction of Lokpal shall include the Prime Minister, Ministers, Members of Parliament, Group A, B, C, D officers and officials of the Central Government. Sections 11 and 14 read as under:

> **"11. Inquiry Wing.—** (1) Notwithstanding anything contained in any law for the time being in force, the Lokpal shall constitute an Inquiry Wing headed by the Director of Inquiry for the purpose of conducting preliminary inquiry into any offence alleged to have been committed by a public servant punishable under the Prevention of Corruption Act, 1988 (49 of 1988):
>
> Provided that till such time the Inquiry Wing is constituted by the Lokpal, the Central Government shall make available such number of officers and other staff from its Ministries or Departments, as may be required by the Lokpal, for conducting preliminary inquiries under this Act.
>
> (2) For the purposes of assisting the Lokpal in conducting a preliminary inquiry under this Act, the officers of the Inquiry Wing not below the rank of the Under Secretary to the Government of India, shall have the same powers as are conferred upon the Inquiry Wing of the Lokpal under section 27.
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> xxx
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> **14. Jurisdiction of Lokpal to include Prime Minister, Ministers, Members of Parliament, Groups A, B, C and D officers and officials of Central Government.—**(1) Subject to the other provisions of this Act, the Lokpal shall

inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with, any allegation of corruption made in a complaint in respect of the following, namely:—

(a) any person who is or has been a Prime Minister:

Provided that the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against the Prime Minister,—

(i) in so far as it relates to international relations, external and internal security, public order, atomic energy and space;

(ii) unless a full bench of the Lokpal consisting of its Chairperson and all Members considers the initiation of inquiry and at least two-thirds of its Members approves of such inquiry:

Provided further that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone;

(b) any person who is or has been a Minister of the Union;

(c) any person who is or has been a Member of either House of Parliament;

(d) any Group 'A' or Group 'B' officer or equivalent or above, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) when serving or who has served, in connection with the affairs of the Union;

(e) any Group 'C' or Group 'D' official or equivalent, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) when serving or who has served in connection with the affairs of the Union subject to the provision of sub-section (1) of section 20;

(f) any person who is or has been a chairperson or member or officer or employee in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of Parliament or wholly or partly financed by the Central Government or controlled by it:

Provided that in respect of such officers referred to in clause (d) who have served in connection with the affairs of the Union or in any body or Board or corporation or authority or company or society or trust or autonomous body referred to in clause (e) but are working in connection with the affairs of the State or in any body or Board or corporation or authority or company or society or trust or autonomous body (by whatever name called) established by an Act of the State Legislature or wholly or partly financed by the State Government or controlled by it, the Lokpal and the officers of its Inquiry Wing or Prosecution Wing shall have jurisdiction under this Act in respect of such officers only after obtaining the consent of the concerned State Government;

(g) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not), by whatever name called, wholly or partly financed by the Government and the annual income of which exceeds such amount as the Central Government may, by notification, specify;

(h) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not) in receipt of any donation from any foreign source under the Foreign Contribution (Regulation) Act, 2010 (42 of 2010) in excess of ten lakh rupees in a year or such higher amount as the Central Government may, by notification, specify.

Explanation.—For the purpose of clauses (f) and (g), it is hereby clarified that any entity or institution, by whatever name called, corporate, society, trust, association of

persons, partnership, sole proprietorship, limited liability partnership (whether registered under any law for the time being in force or not), shall be the entities covered in those clauses:

Provided that any person referred to in this clause shall be deemed to be a public servant under clause (c) of section 2 of the Prevention of Corruption Act, 1988 (49 of 1988) and the provisions of that Act shall apply accordingly.

(2) Notwithstanding anything contained in sub-section (1), the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against any Member of either House of Parliament in respect of anything said or a vote given by him in Parliament or any committee thereof covered under the provisions contained in clause (2) of article 105 of the Constitution.

(3) The Lokpal may inquire into any act or conduct of any person other than those referred to in sub-section (1), if such person is involved in the act of abetting, bribe giving or bribe taking or conspiracy relating to any allegation of corruption under the Prevention of Corruption Act, 1988 (49 of 1988) against a person referred to in sub-section (1):

Provided that no action under this section shall be taken in case of a person serving in connection with the affairs of a State, without the consent of the State Government.

(4) No matter in respect of which a complaint has been made to the Lokpal under this Act, shall be referred for inquiry under the Commissions of Inquiry Act, 1952 (60 of 1952).

Explanation.—For the removal of doubts, it is hereby declared that a complaint under this Act shall only relate to a period during which the public servant was holding or serving in that capacity."

18.2 Chapter VII deals with the procedure in respect of preliminary inquiry and investigation. Section 20 deals with provisions relating to complaints and preliminary inquiry. Section 21 states that persons likely to be prejudicially affected shall be heard while Section 22 states that the Lokpal may require any public servant or any other person to furnish any other information, etc. Section 24 speaks of action or investigation against a public servant being the Prime Minister, Ministers or Members of Parliament. The powers of the Lokpal are delineated in Chapter VIII of the Act. The constitution of the special courts by the Central Government is in Section 35 of the Act (Chapter IX). Section 46 deals with prosecution for a false complaint and payment of compensation, etc., while Section 47 deals with a false complaint made by a society or association of persons or trust (Chapter XIV).

18.3 Section 56 states that the provisions of the 2013 Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act or in any instrument having effect by virtue of any enactment other than the Act. Section 57 states that the provisions of the 2013 Act are in

addition to, and not in derogation of, any other law for the time being in force.

18.4 Section 58 of the 2013 Act states that as a result of the enforcement of the said Act, the enactments specified in the Schedule to the Act thereto shall be amended in the manner specified therein. The schedules specify the amendments to certain enactments namely, Amendments to the Commissions of Inquiry Act, 1952; Amendments to the DSPE Act, 1946; Amendments to the Act; Amendment to the Code of Criminal Procedure, 1973; and Amendments to the Central Vigilance Commission Act, 2003.

18.5 Section 63 of the 2013 Act states that every State shall establish a body to be known as Lokayukta for the State, if not so established, constituted or appointed, by a law made by the State Legislature to deal with complaints relating to corruption against certain public functionaries, within a period of one year from the date of commencement of the Act.

18.6 It is significant to note that subsequent to the enactment of the 2013 Act, Section 17A has been inserted to the Act. On a combined reading of the provisions of the 2013 Act, in light of the

provisions of the Act and with particular reference to Section 17A, it is noted that the inquiry to be conducted under Section 14 of the 2013 Act into any of the offences alleged to have been committed by a public servant punishable under the Act can also include an offence relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties as envisaged under Section 17A of the Act. The inquiry envisaged under Section 14 of the 2013 Act is a preliminary inquiry under the said Act by an officer of the Inquiry Wing not below the rank of the Under Secretary to the Government of India. Even an inquiry, enquiry or investigation to be conducted under Section 17A of the Act is also a preliminary enquiry by a police officer but he has to obtain a previous approval from the Union Government or the State Government or from the authority competent to remove a public servant from office at the time when the offence was alleged to have been committed, depending upon under which Government or authority the public servant was working at the time when the offence was alleged to have been committed before commencing it. The crucial import of Section 17A is to obtain the previous approval to conduct a preliminary enquiry from the

Government when an offence within the meaning of the Act is said to have been committed by a public servant.

18.7 The expression "public servant" as defined under Section 2(c) of the Act may be compared with Section 2(o) of the 2013 Act. On a comparison of the two, what emerges is that the expression "public servant" under both the enactments has a similar meaning. Having regard to what has been stated above, in regard to an offence said to have been committed within the meaning of Section 17A of the Act, there could also be a complaint made to the Lokpal or Lokayukta under the 2013 Act or the State Enactment (Lokayukta Act), as the case may be, wherein an enquiry can be made under Section 14 of the 2013 Act.

18.8 When a citizen as a complainant can approach the Lokayukta or the Lokpal (which are independent bodies) for an inquiry to be conducted by the said bodies into any offence committed under the Act, why should a police officer who intends to conduct an inquiry or enquiry or investigation within the meaning of Section 17A of the Act seek the previous approval from the very Government of which the public servant is a part? The question is not as to who should give the prior approval. The

question is whether, the prior approval should be given at all? This is the crux of the matter. Therefore, there is a challenge to Section 17A of the Act.

The Overarching Object of the Act and Section 17A: At Odds ?

19. I have considered the issues raised in this Writ Petition from the point of view of the earlier judgments in the cases of ***Vineet Narain*** and ***Subramanian Swamy*** and also in light of the contentions raised before this Court by learned counsel for the petitioner as well as learned Solicitor General appearing for the respondent – Union of India and in light of the object of the Act.

19.1 One of the concerns raised by the petitioner is that having regard to the structure of the Government and the nature of the functions discharged by public servants, which have been discussed above, approval would inevitably not be granted by the department of a Government and as a result, the object and purpose of the Act would be frustrated by the insertion of Section 17A to the Act. In this regard, much emphasis was directed towards paragraphs 61 and 62 of the judgment of this Court in ***Subramanian Swamy*** by the Constitution Bench, wherein it was observed in the context of Section 6A of the DSPE Act, 1946 (which

also necessitated the previous approval from the Government before commencement of any investigation) to the effect that if a preliminary inquiry is prevented at the very threshold by a fetter, then the allegations against bribery and corruption would remain dormant and not acted upon. Therefore, it was submitted that Section 17A of the Act has to be struck down as it is not in consonance with the object of the enactment and does not advance the object and purpose of the Act.

19.2 In ***Manohar Lal Sharma***, this Court observed that in the criminal justice system the investigation of an offence is the domain of the police. The power to investigate cognizable offences by the police officer is ordinarily not impinged by any fetters. Such powers have to be exercised consistent with the statutory provisions and for a legitimate purpose. A proper investigation into a crime is one of the essentials of the criminal justice system and an integral facet of rule of law. It was further observed that while interpreting anti-corruption laws the aim should be to help in minimising the abuse of public office for private gain.

19.3 In ***Lalita Kumari***, the question for consideration was whether "a police officer is bound to register a First Information

Report (FIR) upon receiving any information relating to commission of cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (for short, "the CrPC") or, the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same". The scope of preliminary inquiry is not to verify the veracity, or otherwise, of the information received but only to ascertain whether the information reveals any cognizable offence. That, in corruption cases there is a need for such preliminary inquiry.

19.4 In ***Vineet Narain***, this Court observed that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a *prima facie* case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law is vindicated. It is the duty of the judiciary to enforce

the rule of law and therefore, to guard against erosion of the rule of law.

20. The undisputed object of the Act is to effectively address the menace of corruption that is stated to be rampant and pervasive in India. The legislation under consideration has been enacted with the critical social and public purpose of curbing corruption. Thus, it must be interpreted and implemented in such a manner that bolsters its ability to fulfil this purpose and any possibility of this purpose being rendered otiose must be guarded against. The Statement of Objects and Reasons for the Act states that the Bill was intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions.

20.1 With this being the object and purpose of the Act, the stated object of Section 17A being protection of honest public servants cannot have an overriding effect, or rather, cannot be privileged over the larger purpose of effectively "preventing corruption". No doubt an appropriate balance must be struck between protecting honest officers and enabling the effective investigation of allegations of corruption. Under Section 17A an inquiry/enquiry/

investigation is merely a preliminary step undertaken to ascertain if there is sufficient material to warrant setting the machinery of the criminal justice into motion. But the preservation of Section 17A in its present form would lead to an incongruent scenario where, under a framework seeking to effectively combat corruption, even a bare enquiry which may be required to even substantiate a complaint or allegation, to begin with, is entirely precluded without a prior approval.

20.2 It is needless to observe that even in the absence of a provision granting such prior approval, a balance continues to be struck and honest officers receive protection under Section 19 of the Act, wherein at the stage of taking cognizance, there is a requirement for prior sanction by the Union Government, State Government or competent authority, as the case may be. At that advanced stage, after the culmination of the inquiry/enquiry/ investigation, the discretion of the Union or State Government or competent authority is guided by the material placed before it to arrive at an informed decision as to whether, a case of corruption is made out against the public servant. Any prejudice that could be caused by a false or frivolous complaint could be prevented, at

the stage of taking of cognizance, by the denial of sanction under Section 19 of the Act, if the case appears to be motivated, spurious, malicious or baseless.

20.3 However, fears of prejudice being caused by even an inquiry/enquiry/investigation and thus needing to be prevented cannot pass muster when the concomitant outcome is that even credible allegations of corruption may go entirely unexamined if prior approval is denied. It must be borne in mind that while every complaint or information received as regards a decision made or recommendation taken by a public servant may not be genuine, the corollary is also that every such complaint or information may not be false or frivolous. Under Section 17A, there appears to be an underlying, unstated presumption that the complaints made, or information received by a police offer would necessarily be false and frivolous unless proven otherwise. Bearing in mind the broader purpose and object of the Act, there is no basis for such an underlying presumption to subsist. A determination as to the salience of the complaint made or information received can only be made after some form of inquiry/enquiry/investigation takes place.

20.4 It is important to note that Section 17A has been inserted to the Act subsequent to the enforcement of the 2013 Act. The 2013 Act has an overriding effect over all other enactments. Section 14 of the 2013 Act empowers the Lokpal to inquire or cause an inquiry to be conducted into any matter involved in, or arising from, or connected with any allegation of corruption made in a complaint in respect of, *inter alia,* any Group A or Group B officer or equivalent or above, from amongst the public servants defined in sub-clauses (i) and (ii) of clause (c) of Section 2 of the Act when serving or who has served, in connection with the affairs of the Union or State Government. Similarly, a provision is made with regard to Group C or Group D officers or equivalent. Section 20 of the 2013 Act deals with complaints and preliminary inquiry and investigation. As already noted, an inquiry to be conducted under Section 14 of the 2013 Act into any of the offences alleged to have been committed by a public servant punishable under the Act could also include an alleged offence relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties as envisaged under Section 17A of the Act. However, when a complaint is made before

the Lokpal or Lokayukta, as the case may be, no prior approval by the Government for conducting an investigation or enquiry is envisaged. It is because the said authorities are independent statutory bodies. A department of the Government cannot, however, be considered to be independent of its officers/officials. They in fact are the constituents of the department. Hence, the lack of neutrality and objectivity while considering a request by a police officer to conduct an enquiry/investigation within the meaning of Section 17A of the Act makes the said provision contrary to the objects of the Act and hence has to be struck down on that ground.

20.5 Next, in ***Subramanian Swamy,*** this Court observed that Section 6A replicates Single Directive 4.7(3)(i), which was struck down in ***Vineet Narain*** with the only change being that the executive instruction was replaced by the legislation. It further observed that corruption is the enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the Act. In paragraph 64 reference was made to ***Vineet Narain*** wherein it was observed as under:

> "Where there are allegations against a public servant which amount to an offence under the PC Act, 1988, no factor pertaining to expertise of decision making is

involved. Yet, Section 6-A makes a distinction. It is this vice which renders Section 6-A violative of Article 14. Moreover, the result of the impugned legislation is that the very group of persons, namely, high-ranking bureaucrats whose misdeeds and illegalities may have to be inquired into, would decide whether CBI should even start an inquiry or investigation against them or not. There will be no confidentiality and insulation of the investigating agency from political and bureaucratic control and influence because the approval is to be taken from the Central Government which would involve leaks and disclosures at every stage."

(Underlining by me)

Further, referring to Vohra Committee Report (Central Government had constituted a Committee under the Chairmanship of the former Home Secretary Sri N.N. Vohra) it was observed that the report paints a frightening picture of criminal-bureaucratic-political nexus — a network of high-level corruption. The impugned provision puts this nexus in a position to block inquiry and investigation by CBI by conferring the power of previous approval on the Central Government.

20.6 In ***Subramanian Swamy***, Section 6A of the DSPE Act, 1946 was held to be violative of Article 14 of the Constitution, *inter alia*, on the basis of the unreasonableness of the classification

made therein between decision-making officials at the highest levels and all other categories of public servants.

20.7 It was submitted by the learned Solicitor-General that the drawbacks identified by this Court in ***Vineet Narain*** and ***Subramanian Swamy*** have been rectified by the introduction of Section 17A, as the said provision was validly enacted by Parliament and does not engage in any classificatory exercise by being applicable to all classes of public servants. However, this contention is based on a myopic view of the earlier two dicta of this Court, where this Court took active notice of the prevalence of corruption in this country and also the various challenges in the operation of a prior approval regime.

20.8 That when in ***Subramanian Swamy,*** prior approval was held to be unjustified for even senior officers engaged in high-level decision-making of great consequence, it cannot follow that such prior approval is now made available to all classes of public servants if the submission of learned Solicitor General is to be accepted and thereby, the concerns raised in ***Subramanian Swamy*** have been sufficiently addressed.

20.9 Under Section 6A of the DSPE Act, 1946 protection from inquiry was extended to only employees of the Central Government of the level of Joint Secretary and above and such officers as are appointed by the Central Government in corporations, companies etc. owned or controlled by the Central Government. Similarly, under Section 17A the protection is extended only to those public servants who have the responsibility to make any recommendation or take any decision while discharging their official duties in connection with the affairs of the Union or State. It is observed that normally it is only public servants of a particular level and above who are responsible for making a recommendation or taking a decision in the discharge of their duties. Public servants who had been expressly protected under Section 6A of the DSPE Act, 1946 are the very class of public servants who now have the protection under Section 17A of the Act. This is because public servants who are below a certain level would not be recommending a course of action or taking a decision as such in discharge of their duties. The officers below a certain level would be mainly engaged in scrutinising the files and preparing notes for the higher officers to peruse and to make further recommendations or take decisions on

a matter as discussed above. The expression “recommendation made” in Section 17A has to be read in juxtaposition with the expression “decision taken” and the word “or” has been used in between the said expressions which make them inter changeable or synonymous. Therefore, the expression “recommendation made” takes colour from the expression “decision taken”. They are actions taken by higher-level officers after scrutinising the notings made by the lower-level officers in respect of a subject matter. It is only such class of public servants who are once again protected under the impugned provision.

20.10 This can be illustrated by an example. For instance, with regard to procurement of goods or services through a tender process, the scrutiny of the bids, whether technical or financial is made by the lower or the mid-level officers but the decision taken to award a tender to a particular bidder is on the basis of a recommendation which is made either collectively or individually and the same is at a higher level of the hierarchy or officers in a department. It is not expected that a lower-level official or officer would make a recommendation or take a decision to award a tender to a particular party. The object of Section 17A is to inquire or

investigate into the actions of public servants relatable to any recommendation made or decision taken and the same cannot be related to public servants who function at the level merely scrutinising the papers and making file notings for the consideration of the public servants who are at a higher level in the hierarchy. Though apparently, the protection of prior approval is extended to all classes of public servants in substance, it extends only to those public servants who take decisions and make recommendations in the discharge of their official duties. Such protection is, therefore, extended to the higher officers only. Hence, the provision is once again "narrowly tailored" in order to protect a select class of public servants in respect of whom prior approval has to be taken before a police officer seeks to make an inquiry, enquiry or investigation. This in my view, is in violation of Article 14 of the Constitution as it creates a classification having no nexus to the object sought to be achieved and is therefore not permissible. In other words, those public servants who are not entrusted with the task of making a recommendation or take a decision taken in a matter can be proceeded without any prior approval. Thus, there is in-substance a classification within the class of public servants

which does not satisfy the twin test under Article 14 of the Constitution of India.

20.11 Therefore, the reasons for striking down Section 6A of the DSPE Act, 1946 by this Court in ***Subramanian Swamy*** squarely apply to Section 17A of the Act. The insertion of Section 17A to the Act subsequent to the 2013 Act is one more attempt to protect public servants above a particular level in the hierarchy. Further, the amendment does not remove the basis of the striking down of Section 6A of the DSPE Act, 1946 by this Court. Section 17A is in fact a resurrection of Section 6A of the DSPE Act, 1946 though in a *different avatar*, in other words, it is old wine in a new bottle. Hence, Section 17A also has to be struck down for being contrary to the judgments of the larger Bench and Constitution Bench of this Court.

20.12 Concerns surrounding how allegations of corruption require to be investigated into by a specialised and sufficiently independent agency and the need to prevent any leaks of information that might put the public servant to notice about a potential complaint against his conduct, which had been raised in ***Subramanian Swamy*** continue to subsist in Section 17A. This

haunting feature of why should any prior approval be mandated and thereby shutting the door to a preliminary enquiry is contrary to the judgments of this Court.

20.13 In my view, Section 17A of the Act is, in fact, to grant protection to corrupt public servants. If an enquiry or investigation is to be made against a public servant lacking integrity, then the requirement of seeking a prior approval would, in fact, be a hurdle for carrying out any such investigation and consequently, any act which is an offence within the meaning of the Act would be covered up and would remain under wraps. Consequently, Section 17A, in a way, protects the public servants who are in fact offenders under the provisions of the Act. An analysis of the Single Directive No.4.7(3) and Section 6A of the DSPE Act, 1946 read with Section 17A brings out the substantive common aspects, while learned Solicitor General has attempted to highlight the differences which I have extracted above. While considering the substance and the true intent of Section 17A of the Act, in my view, it is nothing but another manifestation of the Single Directive No.4.7(3) and Section 6A of the DSPE Act, 1946 which have been quashed by larger Benches of this Court. Hence, having regard to the reasoning of

this Court in ***Vineet Narain*** and ***Subramanian Swamy*** which are of larger Benches, Section 17A is liable to be struck down.

20.14 It was submitted by learned Solicitor General that in today's world, it is sometimes difficult to identify false narratives and complaints from the truth. Then, should every false and frivolous complaint be enquired into straightaway by a police officer without there being scrutiny of the same? According to learned Solicitor General, Section 17A of the Act has been inserted precisely to scrutinize a request made by a police officer for enquiry, inquiry or investigation in order to ascertain whether it is a genuine complaint or a frivolous one. This, in my view, is like putting the cart before a horse. If a complaint is enquired into, the truth will unravel. If approval is not granted to even make a preliminary enquiry, the truth and genuineness of the complaint would not be known and the matter would be hanging in suspense. In the absence of there being any threshold enquiry on the genuineness of the complaint, greater damage and harm would be caused to the reputation of a public servant who is sincere and honest. If there are *bona fide* recommendations made and decisions taken, there would be no "policy paralysis" at all. Further, the absence of

Section 17A from the statute book does not make any difference to an honest public servant and he would not at all be affected by any "policy paralysis" syndrome. On the other hand, Section 17A would embolden public servants to make vitiated recommendations or take *mala fide* decisions which would be offences under the provisions of the Act, simply because prior to any inquiry or investigation being made by a police officer, approval has to be taken. It is only when a recommendation made or decision taken is relatable to an offence under the provisions of the Act, will a preliminary inquiry be made by a police officer. But in the absence of any offence having been committed under the Act, a decision taken or recommendation made would not be a subject matter of inquiry at all.

20.15 While the patent purpose of the provision is for the purpose of protecting honest public servants and preventing them from being subject to unjustified, frivolous and vexatious investigations, the latent object is that Section 17A should function as a shield that, in fact, protects the dishonest public servants. Blockading any form of enquiry or investigation at the very outset by making the same conditional on grant of approval results in corrupt officers

receiving undue protection and finding ways to scuttle the investigation and the criminal justice process. It is also necessary to emphasise that the police officer would also in the first instance scrutinise the veracity of the complaint before initiating the process of inquiry or investigation and thereafter, venture to commence the inquiry or the investigation, as the case may be. Frivolous complaints could be weeded out at the preliminary stage itself if an inquiry is held on the genuineness of the complaint by a police officer and not to mechanically proceed as and when a complaint is made to the police officer. The preliminary scrutiny of a complaint has to be made by the police officer before any inquiry or investigation is commenced. This is so in respect of criminal offences as has been highlighted by this Court in the Constitution Bench judgment of ***Lalita Kumari.***

Impermissibility of Substitution of Plain Meaning of Words in Section 17A:

21. There is another reason as to why the mechanism suggested by my learned Brother Viswanathan, J. for the operation of Section 17A as a constitutionally valid provision which is by involving the Lokpal and the Lokayukta, as the case may be, is also not

acceptable to me. This is for two reasons: *firstly,* because the words Lokpal or the Lokayukta cannot be read into the word "Government". Therefore, the expression "Government" used in the said provision cannot be substituted by the words "the Lokpal" as well as "the Lokayukta" by reading the same into Section 17A of the Act. Secondly, what would be the position if the 2013 Act is to be repealed? Then in such a situation, Section 17A cannot be operated as suggested by my learned Brother Viswanathan, J.

21.1 In the context of interpretation of statutes, the intention of the legislature has to be gathered from the express as well as implied words of the statute. Therefore, any addition or rejection of words has to be avoided by the court. Further, substituting some words of a provision with other words has to be refrained from. Therefore, the Court cannot reframe the provision of a statute as it has no power to legislate as such.

21.2 This Court has also held that the court must avoid rejection or addition of words and resort to that only in exceptional circumstances to achieve the purpose of the Act or to give a purposeful meaning to the Section. For instance, in construing the expression "establishment under the Central Government", this

Court refused to substitute "of" for "under" and held that an establishment not owned by the Central Government could fall within the said expression, if there is deep and pervasive control of the Central Government over the establishment *vide* ***C.V. Raman vs. Management of Bank of India, AIR 1988 SC 1369.***

21.3 Just as one cannot add words to fill in a gap or lacuna in a statute, efforts must be made to give meaning to each and every word used by the legislature. Correspondingly, it must be presumed that the legislature inserted every part of a provision for a purpose and the legislative intention is that every part of the statute should have effect. Thus, the legislature is deemed not to waste its words or to say anything in vain and a construction which would result in certain words of a provision being rendered redundant should not be attempted. The legislature enacts a particular phrase in a statute presuming that it says something specific, to which meaning should be given. For instance, the words "relationship in the nature of marriage" as used in Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 was interpreted to mean a relationship akin to a common law marriage and not every live-in relationship. This Court noted that by reading

"relationship in the nature of marriage" to simply mean "live-in relationship", the Court would be legislating in the garb of interpretation, which is not permissible *vide* ***D Velusamy vs. D Patachaiamal, AIR 2011 SC 479.***

21.4 In this context, it is also relevant to note that the words of a statute must be first understood in their natural, ordinary or popular sense and phrases and sentences must be construed in their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. This form of interpretation is called literal interpretation and the natural meaning of the words cannot be departed from unless, reading the statute as a whole, the context directs the Court to do so. Thus, the golden rule of interpretation is that the words of a statute must *prima facie* be given their ordinary meaning. Natural and ordinary meaning of words should not be departed from unless it can be shown that the legal context in which the words are used requires a different meaning. Therefore, a statute must be read in accordance with the golden rule of construction which is grammatically and terminologically, in the ordinary and primary sense which it bears

in its context, without omission or addition. If this cardinal rule of how a statute must be construed literally results in absurdity or the words are susceptible to contain another meaning, the Court may not adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. Thus, there must be a compelling reason for departing from the golden rule of construction by substitution of words. (*Source: G.P. Singh on Principles of Statutory Interpretation 15th Edition*).

Summary of Conclusions:

22. In view of the discussion above, the following are my conclusions:

(i) Section 17A of the Act is struck down as it is in violation of Article 14 of the Constitution inasmuch as it seeks to protect only those public servants who have the responsibility of making a recommendation or taking a decision in the discharge of their official duties which are limited to the officers above a particular level whether in the Union or State Governments or any other Authority. Hence, it protects only a class of public servants inasmuch prior approval is mandated

under the said provision for the aforesaid class of public servants, whereas for all other public servants, it does not do so. Thus, in substance, the classification based on the nature of duties is illegal and therefore violates Article 14 of the Constitution of India for reasons analogous to those in ***Subramanian Swamy*** and ***Vineet Narain***.

(ii) Section 17A is merely an attempt to reintroduce in a different form Single Directive 4.7(3) as well Section 6A of the DSPE Act, 1946, which have been struck down as being unconstitutional in ***Vineet Narain*** and ***Subramanian Swamy***, which are three-Judge and five-Judge Bench decisions of this Court respectively and are binding on this Bench. Hence, Section 17A is liable to be struck down for attempting to obviate the earlier decisions of this Court.

(iii) Section 17A is invalidated by the arbitrariness in its manner of operation, by foreclosing the possibility of even a bare inquiry/enquiry/investigation without prior approval, under the garb of being prejudicial, leading to the likelihood of corrupt public servants of a particular level and higher being

shielded, which is impermissible and contrary to the objects of the Act as well as rule of law.

(iv) In my view, prior approval being required for the purpose of protecting honest officers is not a valid reason for saving the provision from being declared unconstitutional as a regime of prior approval at the stage of inquiry/enquiry/investigation is fundamentally opposed to the objects and purpose of the Act and hence has to be struck down on that ground also.

(v) The expressions "Government" and "of the authority competent to remove him from his office" in Section 17A of the Act cannot be substituted, in light of no persisting ambiguity, absurdity or alternative meanings ascribable by any other expression as this would be an instance of judicial legislation. In fact, intentionally, the aforesaid expressions are used in order to ensure that no other independent body would have any say in the matter. Therefore, the said expressions cannot be substituted by the words "Lokpal" or "Lokayukta". Further, by merely shifting the authority which is to grant prior approval i.e. from Government to the Lokpal or Lokayukta, unconstitutionality does not vanish.

(vi) Irrespective of the aforesaid conclusions, the nature and functioning of government departments as discussed hereinabove make the process of grant of approval under Section 17A marred by lack of objectivity, neutrality and fairness, which are key facets of the rule of law *vide* ***Subramanian Swamy*** and hence, cannot be sustained. The following are some specific drawbacks thus identified:

(a) the possibility of existence of "policy bias";

(b) the lack of safeguards to prevent intra-departmental pressures and undue influences from playing a role in the grant of prior approval;

(c) the nature of decision-making in a department in implementing a policy and the associated difficulties in appropriate exercise of discretion; and

(d) the possibility of conflict of interest.

In the result, the Writ Petition is allowed in the above terms. No costs.

Post Script:

23. This Court in ***Shobha Suresh Jumani vs. Appellate Tribunal, Forfeited Property, (2001) 5 SCC 755***, took judicial

notice of the fact that because of the mad race of becoming rich and acquiring properties overnight or because of the ostentatious or vulgar show of wealth by a few or because of change of environment in the society by adoption of materialistic approach, there is cancerous growth of corruption which has affected the moral standards of the people and all forms of governmental administration.

23.1 Corruption is a result of greed and envy which give rise to an unhealthy competition to be acquisitive of material assets beyond known sources of income. A person may compete with another so as to portray materialistic superiority. This may result in acquiring wealth illegally. One's attitude of greed and envy ought to be curbed and erased from one's mind, otherwise corruption and bribery resulting in acquisition of wealth beyond the known sources of income cannot be reduced nor removed from our governance. One of the ways in which such tendencies could be curbed is to develop and enhance a spiritual bent of mind resulting in detachment from materialistic possessions and thereby, *inter alia*, focusing on service to the Nation.

23.2 The youth and the children of this country ought to shun anything acquired beyond the known sources of income by their parents and guardians rather than being beneficiaries of the same. This would be of a seminal service rendered by them not only towards good governance but also to the Nation.

.....J.
(B.V. NAGARATHNA)

NEW DELHI;
JANUARY 13, 2026

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO.1373 OF 2018

CENTRE FOR PUBLIC INTEREST LITIGATION ...PETITIONER

VERSUS

UNION OF INDIA ...RESPONDENT

ORDER OF THE COURT

Having regard to the divergent opinions expressed by us, we direct the Registry to place this matter before Hon'ble the Chief Justice of India for constituting an appropriate Bench to consider the issues which arise in this matter afresh.

.....J.
(B.V. NAGARATHNA)

.....J.
(K.V. VISWANATHAN)

NEW DELHI;
JANUARY 13, 2026