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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> xxx
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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.

xxx

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,—
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> 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;

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(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.
>
> xxx
>
> **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