IN THE SUPREME COURT OF INDIA

(EXTRA ORDINARY ORIGINAL JURISDICTION)

I.A. No. 10 OF 2015

IN

WRIT PETITION (CIVIL) NO. 13 OF 2015

SUPREME COURT ADVOCATES ON RECORD

ASSOCIATION ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ...RESPONDENTS

AND IN THE MATTER OF

ASHISH DIXIT ...INTERVENER

RESPONSE SUMISSIONS BY RAM JETHMALANI SENIOR ADVOCATE TO THE SUBMISSIONS OF THE ATTORNEY GENERAL, REPRODUCED IN PART I OF HIS WRITTEN SUBMISSIONS.

I. I have carefully gone through the Written Submissions handed over by the Attorney General on behalf of Union of India on 08.06.2015. The following are my brief answers to the propositions which he has indicated constitute his case in Para 4 on Page 2 of his Submissions.

A) **Proposition 4A-** 1. The power of Parliament is by no means a plenary power. In the first place mere majority support in both houses of the Parliament is not enough; it has at least to be a 2/3 majority. Moreover some parts of the Constitution are completely beyond the reach of the amending power. Even a unanimous vote in both houses of Parliament cannot alter these provisions. It is not mere abrogation of the Basic Structure which is barred but any alteration qualification or diluting it is also barred. However, addition or enlargement of the

number of such unimpeachable features is not barred, but that question does not arise in the present case.

2. To this proposition in 4-A the following last words "*...which has to be culled out from specific articles of the Constitution as originally enacted*..." is unintelligible and wrong . Though it is my submissions that even this requirement properly understood has been fully satisfied in the present case. The Constituent Assembly debate of 24th November 1948 and 25th November 1948 on Article 39-A which despite initial differences was unanimously passed on the 25th November 1948 mainly on the Speech of the Hon'ble Pandit Jawahar Lal Nehru, the then the Prime Minister of India. This point is being elaborated hereinafter:

We forgot the longstanding demand of Indian Politicians and intellectuals during British Rule that Judiciary and Executive must be separated. It was a disapproval of, and protest against the British system being used in India, appointment of Judge by Minister. See the Constituent Assembly debates; The great assembly of jurists and scholars had completely forgotten to deal with this and only at a late stage Dr. B.R. Ambedkar moved for his famous Article 39-A to be introduced by way of amendment of Draft Constitution. If the Constituent Assembly had forgotten to deal with the problem for all the time when the Draft Constitution was being prepared, this was good reason for Dr. Ambedkar not to worry because by imitating the British Model he thought that the supremacy of the Chief Justice was being brought in. Ultimately the Second Judges Case of 1993 expressly gave to India what in fact (though not technically) was the position in England. The amendment to the Draft Constitution by inserting Article 39-A which became Article 50 only formalised the position. The debates occupied full two days, the 24th November 1948

and the next day i.e. 25th November 1948 when Dr. Ambedkar moved the amendment of the amendment. In these two days it was unanimously resolved that Judiciary and the Executive must be separated as early as possible. (Also refer to reply to the proposition 4G).

B) **Proposition 4B-** 1. I am quite prepared to prove beyond reasonable doubt that this Act is intended only to get round the binding judgments of this Hon'ble Court in the Second and Third Judges Case of 1993 and 1998. In fact after this Hon'ble Courts decision not to refer this case to a larger bench, all further arguments by the Union of India and other Counsel appearing in support, is waste of judicial time. This whole Act is completely void and non-est because of the proposition in 4-A, slightly altered by me.

C) **Proposition 4C-** 1. The proposition No. 4-C is redundant and foolish. All laws enacted by Parliament are liable to be declared unconstitutional and void if they are in conflict with any Article in Part III of the Constitution and on the further ground that if it is so vague that it is not capable of precise enforcement and may bring in irrelevant and highly unreasonable consequences destructive of the policy and the purposes of the Statute. It is however true that every part of the Constitution is not entitled to perpetual existence, immune from alteration or repeal. A Parliamentary Statute which is an unreasonable restriction on Fundamental Rights for example- those arising out of Article 19, is bound to be declared void and the so called wisdom of Parliament will not prevent that result. Nobody has argued that the wisdom of anyone is subject to judicial review. Besides unreasonable restriction of Fundamental Rights is lack of wisdom.

D) **Proposition 4D-** This proposition is substantially correct except that the words ''checks and balances' in the first line must be dropped

and the last word 'holistically ' should be substituted by *'holy and untouchable by any parliamentary majority'*. Therefore the proposition 4D should be read as:

"...Independence of Judiciary and democracy are all part of the basic structure of the Constitution which must be considered holy and untouchable by any Parliamentary majority..."

E) **Proposition 4E-** The Second and Third Judges case cannot be reconsidered by this Bench. They are decision of a much larger bench and are binding on this Hon'ble Court. My submission is that by rejecting the reference to a larger bench as prayed for by the Respondents, without much more argument the Petitions should be allowed. The two decisions are absolutely binding.

F) **Proposition 4F-** This proposition does not make any sense. In the face of proposition 4-D, I am surprised that 4-F should find a place in any rational presentation.

G. **Proposition 4G-** 1. Article 50 was forgotten even by Pandit Jawahar Lal Nehru for quite some time but honest Home Ministers produced honest Judges and even an unconstitutional system worked well because political character was high. In substance it is Pandit Jawahar Lals' descendants who made mockery of the Constitution and the Judiciary and even inculcated a doctrine that Judges who accept the ruling party's philosophy, are alone fit to be appointed. One should not be surprised that even after the emergency the two judges who had become party to ADM, Jabalpur Judgment did not at the time First Judges Judgment of 1981 recall the solemn promise of a unanimous Constituent Assembly of India and the express promise made by Pandit Jawahar Lal Nehru in the Constituent Assembly on 25.11.1948 that independence of judiciary arising out of the separation mandated

by Article 50 will be forthwith implemented by the Government of India. It is matter of surprise that the Counsel who appeared in the matter forgot all about this Article and the promises solemnly made when the Constitution was being finalised. The Bar made up for this serious lapse when it compelled the Second Judges Judgment of 1993, almost wholly by invoking the promise of Article 50. Justice Pandian's concurring judgment and even the confession of dissenting Judge Mr. Justice Ahmadi have been read by me in my earlier address to this Hon'ble Court. The Third Judges case only filled up some lacuna in the Collegium System.

2. It is not true that the system created by these two cases did not exist in the Constitution it certainly did but was forgotten by the bar and the bench.

H) **Proposition 4H-** 1. This is a Constitutional heresy and an evil absurdity. The separation of the Judiciary and Executive mandated by Article 50 leads to the conclusion that Executive should have no vote in the appointment process but only a full opportunity of providing the consultee with all relevant information about the legal knowledge, freedom from fear, operation of any prejudice in favour of or hostile to one or the other litigants. It is difficult to understand what kind of new exigencies have arisen to warrant a change of the present system. Are we to take the assertion of the Attorney General as binding on this court that the character of politicians has now so improved that the Executive must have a significant role and power in the matter of appointment of Superior Judges and the so called eminent people with undefined qualifications must share the Judiciary's power of having the final and conclusive voice.

2. In this context even the 1977 judgment i.e. Union of India vs. Sankalchand Himatlal Sheth reported as **(1977) 4 SCC 193** had laid

down that if judge is transferred contrary to the perception and advice of the consultee Chief Justice, it will be a case for judicial review, obviously because the Chief Justice knows better. The 1993 (Second Judges Case) Judgment is just a step forward because even in the 1977 judgment (supra) nobody remembered Article 50 of the Constitution.

I) **Proposition 4H-** 1. This proposition is directly in the teeth of binding judgments namely the Second and Third Judges case. To these may be added I.R. Coelho vs. State of T.N reported as **2007 (2) SCC 1**.

2. In the Minerva Mills case i.e. Minerva Mills Ltd. & Ors. vs. Union of India & Ors reported as **1980 (3) SCC 625** a Five Judge bench of this Hon'ble Court struck down Article 368 (4) and (5) as introduced by 42nd Amendment Act. This Constitutional Amendment of Article 368 which tried to increase the power of amending the Constitution to much larger extent than before was declared null and void as being opposed to the Basic Structure of the Constitution. This case expressly followed Kesavananda Bharati's judgment.

3. In the judgment Para 53 at Page 652 the Court made it clear that "*...It is significant that though Part III and IV appear in the Constitution as two distinct fasciculus of Articles, the leaders of our independence movement drew no distinction between the two kinds of State's obligation- negative and positive. Both types of rights had developed as a common demand products of the national and social revolutions, of their almost inseparable intertwining, and of the character of the Indian politics itself...".* This is a quotation from Granville Austin.

4. The same idea is exemplified in Para 57 of the judgment *"... The goals set out in Part IV have, therefore, to be achieved without the*

abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to Form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution...".

5. Article 50 of our Constitution is the most important Article as was pointed out by the debates on Separation of the Judiciary and the Executive when the Constituent Assembly considered Draft Article numbered as Article 39-A. Separation of the two i.e. Judiciary and the Executive means the Executive possessing no power or role in appointing judges but only to provide data which they think relevant for the competent appointing authority to evaluate.

6. I do not deny that some Minister may have more integrity than some Judge but this tragic paradox is part of human life. The Executive having any role in the appointment process of the Judges creates a reasonable suspicion in the mind of the Litigant fighting against the State that Judges appointed by the Executive cannot be totally impartial. Appointment of a Judge by a Minister or some bureaucrat under him prosecuting a citizen in a criminal case may well lead the accused to entertain a reasonable suspicion of judicial bias. This violates Article 21 of the Constitution which has been held to be part of basic structure of the Constitution and is subject to no restriction.

Proposition 4-I- This proposition makes no sense, at all. This will be dealt with greater detail, later on.

Para 5 at page 4- The Attorney General has threatened that he will repel all the submissions of the Petitioners on the basis the

propositions enumerated in Para 4, he is welcome to so boast. It is an empty boast.

What follows hereinafter is a very brief elaboration of the points already mentioned above:

(a) I may start with a great principle of the interpretation of the Constitution which finds a very lucid formulation in the Poudyals Case i.e. R.C. Poudyal vs. Union of India reported as **AIR 1993 SC 1804** in Para 79 of the majority judgment delivered by Justice Venkatachaliah. This Para is quoted by Mr. Justice Pandian at Page 510 in Para 23 of the Second Judges case. In Para 24-25 the Court explained why the First Judges Case required to be reconsidered. No such reasons exist for reviewing Second and Third Judges case, at all. It is not without significance that even Mr. Justice Bhagwati who had decided First Judges Case was not happy with the judgment in the First Judges Case. While responding to the strident criticism that the process of selection and methodology of appointment of judges to superior judiciary has eroded the independence of judiciary had himself made some suggestions in the following words at Page 511 he suggested that the "*... recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for*

appointment of the high judiciary...". He did not venture into more details.

(b) I am myself one who has expounded long ago the idea of National Judicial Commission but certainly not a Commission which has two laymen who may have no knowledge whatsoever of what kind of intellectual equipment, integrity and experience they should possess. Mr. Justice Ahmadi was a dissenting Judge amongst the Nine, at Page 595 dealt with my arguments and summarised six main submissions which I made, first of them being that no attention or in any event no adequate attention was paid to Article 50 and 51-A. Mr. Justice Pandians Judgment is based upon this argument. Mr. Justice Ahmadi in Para 313 at Page 640 formulated his final conclusions, the first being his acceptance of my submission based upon Article 50 and held that *"... The concept of judicial independence is deeply ingrained in our constitutional scheme and Article 50 illuminates it. The degree of independence is near total after a person is appointed and inducted in the judicial family...".*

(c) The Attorney General is wholly wrong in thinking that independence is qualification only after appointment. Even the dissenting Judge Mr. Justice Ahmadi does not accept this. It is only when Article 50 is followed that the judge acquires and is believed to have acquired the required degree of independence.

(d) Mr. Justice Pandian in Para 31 at Page 515 explained Article 50, when the Article 50 mandates Separation of the Judiciary from the Executive which injects the enduring principle of Constitutional policy and which is the underlying strength of a sound judicial system. In other words, a method of appointment which is wholly a decision of Judiciary in which the executive has no role whatsoever is an indispensible foundation of a sound judicial system.

(e) This Hon'ble Court must pay special attention to **Paras 51-65.** In the last Para of this bunch namely Para 65 there was reference to 14th Law Commission which had *"...during its visits to High Courts heard bitter and revealing criticism about the appointment of Judges' and that 'the almost universal chorus of comment is that the selections are unsatisfactory and that they have been inducted by executive influence...".*

(f) No serious claim can be made by any one and none has been made on oath that this Act has been passed in response to popular demand. This is the evil ambition of the Executive for more power and influence and a somewhat uniformed majority supporting the bid in Parliament.

(g) Reference may also be made to Para 71-75 when the Constituent Assembly debates on Draft Article 39-A (corresponding to Article 50 of the Constitution) are fully reproduced. Para 76 shows how the Independence of the Judicairy means the Separation of the Judiciary from the executive. In Para 77 referring to Sankalchand's Case[1] it is pointed out that even Bhagwati J was impressed by the brooding omnipresence of Article 50. Granville Austin has referred to this provision as part of the Chapter which he describes as the conscience of the Constitution. I regret that the Attorney General has not noticed that even Justice Bhagwati proceeded to say that *"... and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals without any scope for doubt or debate, the intent of the Constitution makers to immunise the judiciary from any form of executive control or interference...".*

(h) The Kesavananda[2] judgment itself recognises that independence of judiciary means freedom from executive influence and freedom from

[1] Union of India vs. Sankalchand Himmatlal Sheth (1977) 4 SCC 193
[2] (1973) 4 SCC 225

any executive intervention in appointment as violation of basic feature of Constitution. In accord with all this the Chief Justice of the Australia stated *"... The Chief Justice of Australia on being dissatisfied with the Australian system for selection and appointment of Judges which provides an opportunity for political influence, advocated in July 1977 that the time is now ripe for a Judicial Appointments Committee to be set up in Australia composed of Judges, lawyers and, indeed laymen likely to be knowledgeable in the achievements of possible appointee. (Vide Garfield Barwick, "The State of Australian Judicature" 51 Aus. L.J. 480)..."*. It on the same principle that the British Parliament has in its legislation which came into force on 3rd April 2006 created a Commission from which politicians have been totally excluded. Every Minister in the government is party to most disputes in Court and he must not be allowed to have a vote in the matter of Judicial Appointments.

(i) The Attorney General has no answer to the criticism that the presence of the law minister in the Commission will create apprehension in the mind of a litigant who is fighting the Executive or seeking relief against illegal unconstitutional or mala fide actions of the Executive. The Law Minister with the power of the whole government and access to all its money can work wonders in getting any eminent persons' to support his choice of a Judge.

(j) Appointment of Superior Judges is a sacred duty and any lesser interest political, economic or a reasonable suspicion of its existence should be strictly excluded. A law Minister who has to retain power is more interested in securing votes, serving a limited constituency and doing or not doing things according to the exigencies of vote bank politics. He cannot possibly be allowed to participate and pollute this holy task.

(k) The so called 'eminent persons' must include a distinguished lawyer enjoying the confidence of the bar and the bench preferably an acknowledged jurist and second a trained Sociologist who understands the misery of the poor, the causes of poverty and legal reform connected with the grave problems of this unfortunate Nation. Other lesser mortals are not needed at all, reference to Caste and gender introduces other irrelevant consideration.

(l) I shall deal with the argument which arises out of the Proposition 4-A based upon the words "*...which has to be culled out from specific articles of the Constitution as originally enacted*..." . It is correct that the Constitution when passed did not enact in express words that the CJI will enjoy the primacy in the matter of appointment of superior judges; in fact it provided only the duty of the Executive entering into Consultation with the Judiciary. It is also right that consultation did not mean concurrence. However the Constitution had heavily borrowed the British Model, this is to be seen from the Shamsher Singh Judgment reported as **1974 (2) SCC 831** though the Constitution in express terms merely said that the Council of Ministers shall aid and advice the President, the Supreme Court by its Judicial decision ruled that the aid and advice of the Cabinet was binding on the President. In the other branch namely the appointment of judges the British Model all judges were appointed by the Lord Chancellor and the Lord Chancellor was the highest Judge in the Country so actually all Judges in England were being appointed by highest Judge but the confusion is created by the same dichotomy between the working of the Constitution and the conventions in operation. When the Lord Chancellor made the judicial appointments he was doing so in his character of being the highest Judge of England he was not making those appointments in his character of being

Minister of the Crown. It is very funny ambiguity in the British Model that highest Judge was a member of the Cabinet. So Dr. Ambedkar and his colleagues did not think that in India appointment will be made by a Minister though in words the Chief Justice was only a 'consultee' in substance everybody thought that like England the highest judge will make the appointment. The Relevant Article 39-A was framed and considered after Draft Constitution was already produced. Somebody then remembered the long standing demand of Indian politicians for the Separation of Judiciary and the Executive. Article 39-A shows that it was late discovery and whole work was completed in two days when the Prime Minister assured the Constituent Assembly that the change will be done immediately at the centre but the provinces may take some time therefore the three year time frame was removed on the Second day. Pandit Nehru forgot his promise till the bar thought of bad appointments during emergency and launched a movement for enforcing the promise of Article 50 which was binding.

On Page 15 in Para 26 the Attorney General has quoted Para 288 of from the Judgment of Mr. Justice Sikri in Keshavananda Bharti's Case (Supra), the quotation of this Para is out of context is almost unforgivable. This Para consisting of two lines must be read in conjunction with Para 281 to 287. This Court had set aside in this Case a Constitutional amendment. All the said Paragraphs which precede Paragraph 288 concluded that Secularism, Democracy and the freedom of the individual are permanent and unchangeable basic structure. There are implied limitation on the power of Parliament to amend, the word amendment itself has limitation and cannot bear the meaning suggested by the supporters of Constitutional Amendment. ***Democracy does not include the power of the legislature to***

destroy Democracy. Any other meaning of the word will one day lead to a social and economic revolution. In Para 287 he concludes that Fundamental Rights cannot be totally abrogated. Of course whether the Parliament wants to resort to any constitutional amendment it is for the Parliament to decide. In their wisdom they might initiate a Constitutional amendment but the Judiciary ultimately will have to make its own decision whether the amendment involves alteration of the basic feature. Parliament may decide upon need for a particular Constitutional amendment but that does not mean that the Courts are bound to uphold it. The reference to this Para by Attorney General just makes no sense.

Similarly reference to Para 1535 at Page 821 in the Judgment of Mr. Justice Khanna in Kesavananda Bharti's Case (Supra) is wholly useless. No public demand has taken place for destroying the collegium system created by Second and Third Judges case. There has been no public demand that the Judges supremacy in the matter of judicial appointments needs to be curtailed. It was not even mentioned in the election manifesto of Mr. Modi's party (or any other political party) in last election of May 2014. The current circumstances only disclose that the new government has decided to exercise some control over the Judges appointment. Even so neither the Attorney General nor any politician in parliament nor any jurist of repute enlightened the people of India that it needs a new kind of Judge. All that is clear is that the Government wants Judges who can be controlled by them. It was the duty of the Union of India to place before this Hon'ble Court almost conclusive evidence that society is clamouring for changes in the Judiciary. All that the last election showed was people's repugnance to corrupt politicians.

Equally no relevant argument arises from the Sanjeev Coke Manufacturing Co. vs. M/s Bharat **1983 (1) SCC 147** cited in Para 28 of the Written Submissions, the citation is wholly irrelevant. Equally irrelevant is the citation of Karnataka Bank Ltd Case **(2008) 2 SCC 254**.

The attention of this Hon'ble Court is invited to the approach adopted by United Nations on the independence of Judiciary as part of 'Human Rights in administration of Justice' envisaged by the Seventh United Nations Congress at Milan and endorsed by the U.N. General Assembly in 1985, which provide inter alia as under:

"...Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

"... Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary ***shall be guaranteed by the State and enshrined in the Constitution*** *or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be

created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions..."

Finally the Petitioners are not challenging the validity of any Parliamentary proceedings, at least I am not.