1/22

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH AT JODHPUR

Original Application No.52/2004 with

Misc. Application No.60/2009

And

Original Application No.96/2007 with

Misc. Application No.13/2011

Date of Decision: 30.3.2011

CORAM

HON'BLE DR. K.B. SURESH, JUDICIAL MEMBER
HON'BLE MR. SUDHIR KUMAR, ADMINISTRATIVE MEMBER

1. O.A. No.52/2004

1. Suresh Kumar S/o Shri Ram Kumar Ji, aged 34 years, R/o 83, Subhash Colony, Bhagat Ki Kothi, Jodhpur. Working as DAO Gr.II, PHED, Dist. (Regip) Dn.III, Jodhpur.

2. V.S.Gill S/o Shri Mukhtiar Singh, C/o Shri Arvind Sharma,1-P-4, Kamla Nehru Nagar, Pali. Working as DAO Gr.II PHED Division, Sojat City, District Pali.

3. A.K.Sharma S/o of late Shri Keshav Deo, R/o 1-P-4, Kamla Nehru Nagar, Pali. Working as DAO Gr.II, PHED Division, Pali.

4. H.S. Kushwaha S/o late Shri Ramadhar Kushwaha, 6-A-69, Kuri Bhagtasani, Housing Board, Jodhpur. Working as DAO Gr.II, NHW Division. Jodhpur.

5. S.S. Lakhawat S/o Shri D.D. Lakhawat, R/o VPO Dhanaanwa, Via Toshina, District Nagaur. Working as DAO Gr.II, PWD Division, Pali.

....Applicants

(By Advocate Mr.R.N. Upadhayay through A.K.Choudhary)

VERSUS

1. Union of India through the Finance Secretary, North Block, Central Secretariat, Government of India, New Delhi.

2. The Comptroller & Auditor General of India, 10, Bahadur Shah Zafar Marg, New Delhi.

3. The Accountant General (Accounts & Establishment), Rajasthan, Jaipur.

4. The State of Rajasthan through Secretary, Department of Finance, Government of Rajasthan. Jaipur.

...Respondents

(By Advocates : Mr. Sanjay Pareek for Respondents No..1to3
Mr. Kamal Dave for Respondent No.4.

2. O.A. No.96/2007

Gowardhan Lal Berwa S/o Shri Ramkaran Berwa, aged 38 years, R/o 5A-18, Bapu Nagar, Near P & T Colony, Bhilwara.

...Applicant

(By Advocate: Mr. J.K. Mishra)

VERSUS

1. The Union of India, through the Comptroller & Auditor General of India, 10, Bahadur Shah Zafar Marg, New Delhi.
2. The Accountant General (A&E), Office of Accountant General Rajasthan, Jaipur.
3. The Secretary, Ministry of Finance, Department of Expr. Government of India, New Delhi.
4. The Executive Engineer, PHED, Division Byawar, District Ajmer.

...Respondents

(By Advocates : Mr. Sanjay Pareek for Respondents No.1to3
None present for respondent No.4.

****

O R D E R

Per Dr. K.B. Suresh, Judicial Member

Both these cases being of same genre and on consent are being heard together. The O.A. 52/2004 is being taken as the leading case. Basically the fulcrum of the case is a question of law.

2. The Divisional Accountants appointed by the Comptroller and Auditor General of India and his subordinates are the applicants. They are presently serving in the State of Rajasthan

1/24

mainly concerned with Public Works Department. Following the State Government amending its financial rules (Public Works Financial and Accountants Rules) Recruitment Rules were inserted therein vide Rule 3(a) (b) and (c) and following this one Niranjan Singh challenged it vide SBCWP No. 176/78 in the Hon'ble High Court of Rajasthan on the grounds that the amendments were contrary to Articles 148, 149, 150 and 151 read with entry 76 of the 7th Schedule in List-I of the Constitution of India. On 24.7.1985 the Writ Petition No.176/78 was disposed of holding that the amendment was contrary to articles 148, 149, and 150 read with entry No.76 of the Constitution of India. Thereafter it seems that Letter No.F.2(1)/FD/Exp.III/75 dated July, 1990 was written by the Rajasthan State Government to the CAG of India regarding operating out the cadre of Divisional Accountants. It would be seen that there were several rounds of discussions on the point between the State Government on the one hand and the CAG on the other hand. A draft Scheme was apparently prepared in consultation with the State Government on 15.2.1991. Thereupon on 11.2.1992 Civil Writ Petition No.1987/91 was filed in the Hon'ble High Court of Rajasthan assailing the proposed cadre transfer but Hon'ble High Court held that it was not having any jurisdiction to hear service matters of Central Government employees and it was dismissed.

3. It would appear that thereupon on 27.5.1992 an OA was filed by the Divisional Accountants Association before the Central Administrative Tribunal Bench at Jaipur challenging the proposed

1/25

-4-

transfer. But it was dismissed on 31.7.2000 on the ground that it was premature as no finality had reached on the issue till then.

4. It would appear that thereafter on 28.10.1994 vide a letter dated on the same date written by the Under Secretary, Department of Expenditure, Ministry of Finance to the Office of CAG, that in consultation with the Ministry of Law it had decided to transfer the cadre of Divisional Accountants to the State Government through an Executive order. Apparently the letter suggested to frame a scheme based on agreement providing option to the incumbents for transfer of their service from CAG to State Government. **But the communication dated 28.10.1994 is silent about any consent or approval of his Excellency the President of India**. But in fact, the applicant says that the Ministry of Finance had no power in them to issue such a direction.

5. But in 1998 two Writ Petitions were apparently filed before the Hon'ble High Court by two Junior Accountants belonging to the Rajasthan Government service through K.C. Jain and G.S. Gupta respectively who had been taken on deputation in the Divisional Accountants Cadre and reverted back to the parent department in the State Government. One of the prayers in the Writ Petition was that though a decision had been taken to transfer the Divisional Accountants Cadre no follow up action has been taken in pursuance of this decision. Therefore, the Hon'ble High Court vide order dated 18.4.2001 disposed of the writ Petition saying that it is not passing an order on merit but directed for the disposal of the issues within six months.

1/26

-5-

Apparently it would appear that at this point of time the CAG office had actively supported transfer of Divisional Accountants cadre and the counsel appearing for it, it would appear, had taken a stand in favour of the Petitioners therein. It was probably made to appear that unless the scheme was implemented it will result in a contempt of court being committed, according to the applicants. The methodology of events point to such an eventuality being held out. There seems to be communications galore on this grounds. It would appear that on 20.1.2003 when Miscellaneous Application filed in the High Court seeking further extension of time as being to avoid any contempt of orders. On 18.2.2003 the application for extension was dismissed. It seems that on 10.3.2003 the CAG communicated that the scheme suggested by the State Government suffered from inherent lacunae and contradictions but it seems that on 20.3.2003 an application for initiating contempt against the CAG and others was filed for their failure to implement the High Court order dated 18.4.2001. Apparently it expedited the matters. On 21.1.2004 a draft scheme was received by the Accountant General and it was forwarded to CAG for further action and immediately the CAG had given a concurrence on 20.2.1004 itself and on the same day a notification No.RAJBIL/2000/1717/JPC/3588/02/2003-05 issuing the **Executive Order** taking over the Divisional Accountants under its administrative control was issued by the Government of Rajasthan. It is challenging this notification that these OAs had been filed.

1/27

6. But what is the actual situation available in that matrix? Is it concerning the service dispute alone of a few Divisional Accountants who apparently do not want to get reverted into the administrative control of the State Government? Why is the respondent Accountant General now opposing the notification? The learned counsel Shri Sanjay Pareek spoke against his own counter affidavit. We have brought to his notice that it is against the views as expressed by him in earlier proceedings. We had invited him thereupon to file a contradiction statement, which he was unable to do but he explained the situation. The order of the Hon'ble High Court on 18.4.2001 was determined as a mandatory direction to bring the Scheme into fruition as especially since the counsel for the State Government and the Counsel of the Union Government had both agreed with the proposition put up by the petitioners in that case. The communication which followed thereafter was expedited by the application for initiation of contempt which followed in the lines of irrevocability and the binding nature of the High Court order dated 18.4.2001. Therefore, we have gone through that order with anxious eyes and found that **"when all counsels represented a track of resolution, the court had simply allowed them to pursue a resolution within a time frame without passing any orders on merit."**

7. **In our view the cause which is before us canvasses matters within it which though primarily relating to service conditions of a few employees are also greatly involved in maters of great public importance as well lying implicit in it.**

8. **Who are conscience keepers of the law of financial accountability of the land? What are their duties? To what extent are they to be accountable? What about the sentinels to the keepers then? How are we to assess and analyze their existence, their function and their accountability is the crux of the issue in this matter. Thus the auditors are the keepers of transparency in governmental accounting procedure.**

9. We are advised that similar matters were pending in many other Benches of the Tribunal and Courts as similar issues have been taken up by Tribunals and High Courts all over India but as the primary adjudicatory authority, we are advised by the parties that the Hon'ble High Court of Rajasthan at Jaipur is awaiting our comments on the matter, as represented by the learned counsels and therefore on their request the matter was heard finally.

10. One main sentinel of democratic process is independent judiciary, which protects the people against all inroads into their rights and cares. Democracy is designed for the welfare of our citizens and independence of instrumentalities created for guardianship duties are to be protected, as otherwise parameters of governance would be eroded, and democratic quality suffer as a result. But what about the principles of public policy, that which is so essentially required for any legislative process to design social engineering for an executive machinery to bring into effect and implement such social engineering theories of the legislature? The power and policies of the

1/29

-8-

Executive as reflected through legislative decisions must therefore enhance and protect welfare of the people and in this context who has to decide as well for the welfare of the people? The primary prodder of social equilibrium is thus the legislative process. But then, through the constitutional matrix we have created areas of operation where it is clearly demarcated so that there will be institutional balance and harmony. Like the wheels of a chariot these processes must act in harmony for the democratic quality to succeed or even survive. The Indian constitutional matrix is considered to be more of a social document than a legal document. It is thus a unique document and not a mere pediatric touch. It embodies human values, cherished principles and spiritual norms. It upholds the dignity of man. It accepts the individual focal point of all development and not a mere core in the mighty State machines. **Therefore, constitutional provisions are to be understood in a broad horizon and as embodying the working principles of practical governance**. It may be thus indeed that the constitution is an expression of rational and free political society. As early as 1952 and as reported *in* AIR 1952 SC 252 ***(The State of Bihar Vs. Shri Kameshwar Singh)***, the Hon'ble Apex Court had held that the constitution had not ignored the individual but has endeavored to harmonize individual interest of the citizen in the paramount interest of the community. In ***Supreme Court Advocates on Record Association and another Vs. Union of India*** *reported in* AIR 1994 SC 268, the Hon'ble Apex Court held "interpretation of the constitution is a denial process. The institutions created there under, the concept

propounded by the framers, the words which are deemed in the constitutional process may go on changing in the hue with the process in the passage of time. **The constitutional matrix has not only to be read in the light of contemporary circumstances and values, but which is to be read in such a way that the circumstances and values of the present are given expression in its provision". Thus, the crux of the decision is that constitutional interpretation must be contemporaneous in nexus with time.**

11. Therefore, what are the institutional guarantees which provide for democratic quality to be continued unabated? Besides the basic pillars of judiciary, legislature and executive, there are still institutional guarantees that stand sentinel over the rights of people vis-a-vis the power of the State machinery. The state machinery must have power to implement the legislative process but they must do so within a bounded parameter and in accordance with the rules of law. But who is to ensure financial discipline? To ensure maintenance of the rule of law and the political continuance of democratic institutions; institutional mechanisms have been generated by constitutional process like Election Commission of India, Union Public Service Commission as also the Office of Comptroller and Auditor General of India. It is to be noted that institutional independence are guaranteed to these agencies so that their duties are unsullied by interference of executive. They are accorded a level of protection against the interference in any way, either in their existence or in their functioning. **This institutional mechanism of protection and independence**

granted to these agencies is one of the basic structures of the constitutional process. As explained more clearly in Kesavananda Bharathy, Minerva Mills case and also the Third Judges case, primary concern of constitutional institutions is to ensure functioning of state machinery within the parameters allotted to it. Therefore in Chapter V vide Articles 148 it will determine that there would be a Comptroller and Auditor General of India who shall be appointed by warrant and provides for his removal from office only in like grounds and in like manner as if of a Judge of the Supreme court. Thus it is trite the relevance and the importance the framers of the constitution had placed upon the position of Comptroller and Auditor General of India. It goes on to determine the various powers, privileges and functions of this office. It comes down to Article 148 and Clause (5) of which is as follows:

> *"Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor General."*

Sub Clause (6) of Article 148 is as follows:

> *"The administrative expenses of the office of the Comptroller and Auditor General including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India."*

12. In this context we also have to look into sub clause(4) of Article 148. We have to consider the cumulative effect of these

1/32

-11-

constitutional provisions in the context of survival of democratic quality which we will do a little later.

13. Article 149 of the Constitution of India lays down as follows:

> *"**Duties and powers of the Comptroller and Auditor General:-** The Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament, and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively."*

14. The effect of this article is that he is the sole authority who can audit the accounts of the Union and the State. His functions and powers are conducive to the ensurance of financial discipline in the standing pattern of funds of Union and States. Article 151 of the constitution reads thus:

> *"**Audit reports** (1) The reports of the Comptroller and Auditor General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.*
> *(2) The reports of the Comptroller and Auditor General of India relating to the accounts of a State shall be submitted to the Governor of the state, who shall cause them to be laid before the Legislature of the State."*

15. Therefore, the audit report relating to the Union shall be submitted by the Comptroller and Auditor General of India to the President who shall place it before each houses of parliament. It is to be noted in this connection that nowhere in it the

-12-

executive comes into the picture. The report goes straight to the President who shall lay it before the representatives of the people. It also lays down that relating to the State the report of the Comptroller and Auditor General shall be submitted to the Governor who shall cause them to be placed before the legislature of the State and then again without the intermediary of the executive machinery in the State. Thus the accounting process bypasses the State executive machinery by deliberate constitutional choice.

16. In fact in ***L. Chandrakumar*** *reported in* *1997 SCC(L&S) 577,* the Hon'ble Apex Court had expanded the scope "essential features" and basic structure of constitution. By the decision in Golaknath, Kesavananda Bharathi and Minerva Mills the Apex Court had painstakingly established what is the nature of essential features and basic structure of the constitution. In fact the basic rights ensured by the constitutional process is pure and simple the natural right in existence for man and as a reflection of the humanity in him. Hence it is not an endowment upon him but a mere acknowledgment of naturally existing rights. Thus the rights of the citizen to know the financial status of his nation is a natural right inherent in him as a citizen a person and as a participant in the democratic polity. Recognizing this as a cardinal feature the entire Chapter-V is dedicated to ensuring financial discipline and transparency in accounting.

17. Thus, the independence in functioning, jurisdiction, existence of the entire audit machinery including its servants is dealt with in Chapter V. The intention of the framers of the

1/54

-13-

constitution must be that there would be instances where the machinery of State may want to suppress any information from the eyes of the people or may want to propagate a picture which is different from actual state of affairs to be placed before the people and in order to prevent all these, functional independence is always in the Comptroller and Auditor General of India to be exercised by him as a duty imposed by constitutional process. In the exercise of this duty he is not bound by the advise of either the Union or the States. Thus, it would appear that the letter issued by the Ministry of Finance dated 28.10.1994 was ultra vires in their power and jurisdiction.

18. Let us examine the current issue in the conspectus of whatever is stated above. The factual matrix are as follows:

19. The applicants were appointed as Divisional Accountants by Indian Audit and Accounts department, Accountant General (A&E) Rajasthan in a scale of pay available at that point of time only for a Central Government employees belonging to that particular service. It is to be noted in this connection that while deciding their preliminary postings it was stipulated that they may be transferred to state Government in case the cadre of Divisional Accountants is transferred to State Government as per the terms and conditions of the Department. It was also stated that they will have to comply with the requirements of CCS (Conduct) Rules 1964, Therefore their appointment was as employees of the Union of India as Divisional Accountants in the scale of pay of Rs. 1400-2600 which is normal scale of AG's Office but not available in State Government service.

1/35

-14-

20. Rajasthan Government through its Finance Department, Expenditure Division issued a notification dated 20.2.2004 mentioning therein that following a decision of the Rajasthan High Court in SBCWP No.1395/98 and SBC WP No.4382/98 and with the approval of the President of India under Article 148(5) conveyed through the Government of India; Finance Ministry, as well as the concurrence of the Comptroller and Auditor General of India communicated vide D.O. Letter dated 20.2.2004, Rajasthan Government had decided to take over the existing cadre of Divisional Accountants, from the administrative control of the Accountant General (A&E) Rajasthan and had so vested it in the State Government on certain conditions. The status and composition of the cadre of transfer option to transfer to the service of Government of Rajasthan, Regulations and Conditions of Service, the age of superannuation as amended in view of the fact that there was at that time a difference between the age of superannuation of Central Government Officers and State Government Officers, the methodology for computing the seniority, recruitment and for promotions, under formulation of suitable rules to be provided later, with **transfers and postings which shall be made by the Director, Treasuries and Accounts, Rajasthan,** and such other related matters were formulated and published in the gazette in the said notification. The same is under challenge right now. Therefore, there are four factors, their jurisdiction and requirements, functional probity and accountability to the constitution in the case of cadre transfer, which is to be explained and looked into in this, according to the applicants.

1/36

-15-

21. The state of Rajasthan being Respondent No.4 has filed a detailed reply in O.A. No.52/2004. The Union of India and the Accountant General, in our view had taken an ambivalent stand. They concede that at one point of time the then CAG had given a concurrence. **But apparently the President had not approved the same even though it was made out to be that the President had granted approval.** There is a dispute as to what must be the methodology of according sanction in a matter like this. And why and how it has come out now that in fact sanction was not issued by the President, as approval was only for a draft scheme in 1994, which was later amended, but for the present let us assume that the President had granted sanction and approval. The stand of the CAG is that the constitutional independence of Divisional Accountants will be eroded if such cadre is allowed to be taken over from their cadre strength. It will prejudicially effect the cause of the people and therefore it should not be allowed. Therefore, we put it to them as to why they have not withdrawn the concurrence already given. The learned counsel was unable to give us any cogent reply on this. As like late dawned wisdom the stand of the CAG is not appreciated. We will explain this concept a little later.

22. On the other hand, the State of Rajasthan filed a detailed reply. They would say that the Divisional Accountants appointed in various divisions of state Government of Rajasthan essentially take care of the keeping and compilation of accounts relating to the Government of Rajasthan even though they render their accounts to AG, Rajasthan. It is the Government of Rajasthan,

which created the posts and salary and allowances are charged on the consolidated fund of the State of Rajasthan. The State of Rajasthan would say that these are persons who are with the State Government for all the purposes except **recruitment, promotions and transfer. Therefore, the Recruitment of the Divisional Accountants, their promotions and transfers are done by the Accountant General and not by the State government of Rajasthan**. They would say that in view of the High Court Judgment dated 18.4.2001 the Rajasthan Government had decided to take over the cadre of Divisional Accountants from the CAG. They would say that they have their own Accountants also and therefore by merger of all concerned they may have a more optimized structure in working. The state would say that applicants are estopped from challenging the notification in view of the fact that their appointment orders mentioned that they may be transferred to the state cadre if a decision is taken in that respect and therefore they have accepted the appointment and in view of the take over by the State Government, that they could not turn round and challenge the notification at this juncture. The State would say that the reliance of the applicants in the judgment of Hon'ble High Court of Rajasthan in WP No. 176/78 of Niranjan Singh Vs. Union dated 24.7.85 is not correct and it seeks to conceal that the Division Bench of the Hon'ble High Court have in DB CS. 9/89 set aside that judgment dated 24.7.85 by the Single Bench of the Hon'ble High Court. They would also say that the application may be termed to be barred by limitation as under Section 21 of the Act the Tribunal's jurisdiction has to be invoked within a year

and that as that had not been done, it may be taken as vitiated by a process of limitation. They would say that in the matter of policy decision judicial interdiction is not permissible and this is a policy decision of the Rajasthan Government even though it is an executive order. The State also has a grievance that the applicants ought to have approached them first for redressal of grievances before approaching this Tribunal. They would say that they have created promotional avenues which is not less than what is available under the administrative control of AG, Rajasthan. They would say that the judgment of the Hon'ble High Court in SB dated 18.4.2001 related to servants of the State who are also Accountants and their redressal of grievances. The decision of the High Court seems to be that in view of the admission of the Central Government that they had already taken a decision to transfer the cadre to State Government and State Government also agreed to this admitted fact and, therefore, it was directed that the concerned respondents should take a decision within a period of six months.

23. But the applicants point out that neither the applicants were a party to this and the court had only directed so based on submission made by the counsel for the Government that necessary decision will be taken within a period of six months. Therefore, the applicants would say that the prompting force, which is attributed to the High Court judgment, is actually absent.

1/29

-18-

24. The applicants would rely on an order passed by the High Court of Rajasthan in a related matter in SB CWP 1311/04 dated 23.4.2007 with the consent. In that matter when the Union of India submited that in the year 1994 while preparing draft rules for transfer of cadre service of Divisional Accounts Officers/Divisional Accountants sanction of the President was obtained and thereafter there was no need to obtain consent again, in other words this is the crux of the consent issued by the President. **The President had issued approval for a draft scheme in 1994 wherein the concurrence of the CAG seems to be on 20.2.2004. It is the concurrence of the Auditor General of India that is to be approved by the President and therefore the cart being before the horse it may not move at all, contends the applicants. Therefore, the Hon'ble Rajasthan High Court found that there is a strong prima facie case that the cadre service have been transferred by an executive order whereas per the Article 148(5) of the Constitution of India it is a legislative function. The court found that the draft rules have not been acted upon and when the process was again initiated sanction of the President is not obtained. Transfer of cadre/service is legislative function and the same cannot be performed by executive orders.** Therefore, the notification was stayed by the Hon'ble Rajasthan High Court. Apparently this was taken up in appeal. Then in a case the Hon'ble High Court had occasion to consider the matter in SWCP 15629/09 vide order dated 23.3.2010. As stated in the order it appears that in 1991 a decision was taken by the Comptroller

and Auditor General of India and the State of Rajasthan to transfer the cadre of Divisional Accountants to the State Government and accordingly a draft scheme was prepared. For the draft scheme the presidential assent was accorded in 1994. But some litigations intervened and this was not decided. Thereafter it seems that the State Government on 27.9.2001 issued new proposal. **Therefore, the draft scheme for which the presidential sanction was apparently obtained was no longer in existence.** It is a new proposal, which was put up by the state Government. It is to this that the Accountant General has given his concurrence. This process is challenged on the following grounds:

(i) It is merely an executive order and not a legislative exercise.

(ii) The Comptroller and Auditor General in view of his functions and jurisdiction cannot grant concurrence.

(iii) No presidential sanction or approval is available for the notification.

25. Therefore how to resolve the present issue?

26. The Constitution of India in its 7th Schedule has demarcated the area of operation for the Union Government and the State. India being a union of States but with a predominantly unitary government the classification by List is more important. Item No.76 in the list of Union is auditing of the accounts of the Union and the States. **This is in the Union List.** We had searched the state list to find a similar function being granted to State Government. Apparently there is no such

function assigned to the State Government. In the third list of concurrent list also a similar function does not seems to be available for the State. **Therefore, it appears that the function and duty of audit is not within the competence of the State.** While for the limited purpose of management and socio economic planning it could have Accounts Officers and a process of accounting, **for the purpose of satisfaction of the legislature regarding correctness of accounts of the Union and the State, such jurisdiction can be exercised only by the Union of India through the CAG alone**. It is suggested that by delegation therefore powers of the Union could be delegated to the State as well. Let us therefore examine this aspect also. The foreign policy of India and the strategic defence decisions are entirely in the field of operation of Union. Can the Union of India decide that this function shall be allocated to the State Government?. In our view it is not possible to do so particularly in view of the interaction between the federalist system and the unitary system provided in the Indian Constitution in the light of the need for the union of the land with different cultures, difference in people, 300 effective languages and the necessity of being fused to one. Therefore, the unitary structure of social machinery has to be maintained to the utmost with a view to the preservation of India as a unitary whole. Therefore, by no stretch of imagination can the pristine function which has been set apart for the Union of India can be allocated to the State Government. Let us try to find out as to what would happen when decisions as to which system of accounting as prevalent is to be resolved. **The Comptroller and**

Auditor General of India is an independent functional entity who reports to no executive authority. But the Director of Treasury is an officer under the Government and a lower level officer at that. In fact constitutional process demands high level of independence in ensurance of financial discipline. Under him the working conditions and prospects for career advancement of the Divisional Accountants would be entrusted. From a practical standpoint also this is an undesirable thing to happen. This is why the Hon'ble Apex Court held in innumerable cases that constitutional interpretations also must have a content of nexus and impact. With the enlargement of economic capability of State and the practical impossibility of representatives of people to be an effective watch dog of even legislative exercise as had been amply proven by failure of several subordinate legislations and rules under jurisdictional challenge, it is all the more important that constitutional institutions must be further strengthened and protected than dissolved.

27. Therefore, what we have to consider is the largest conspectus. As soon as the democratic state embarks upon the adventure of achieving the ideals of a welfare state, it inevitably turns to law as its created ally in the crusade. The function of the democratic state and its role assume wider proportions and cover a much larger horizon in assisting the state to achieve these ever expanding objectives, the functions and the role of law correspondingly enlarge and cover a wider horizon. We reach a stage in the progress of the democratic way of life where law ceases to be passive just as democracy ceases to be passive and

the purpose of law like that of democracy becomes dynamic; and that naturally raises the eternal question about the adjustment of the claims of individual liberty and freedom on the one hand, and the claims of social good on the other. It is a duel, which a dynamic democracy has to face and it is in the harmonious and rational settlement of this duel that law has to assist democracy.

28. When a controversy reaches the stage of hearing and formal adjudication, the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator's function may in part be that of a detective, whose purpose is to ferret out and establish a case. This may produce a state of mind incompatible with the objective impartiality, which must be brought to bear in the process of deciding. A man who has buried himself in on one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Therefore, the executive cannot have any role in auditing of accounts.

29. Recently, the Indian Supreme Court has re-stated the grounds of judicial review on the basis of Art 14 of the Constitution in a way that reflects the re-statement by Lord Diplock in the GCHQ case, viz illegality, irrationality, procedural impropriety and even proportionality. Thus, in **Neelima Misra**

vs. Harinder Kaur (involving the appointment of a university lecturer), K Jagnnath Shetty .J said that the holder of power has to act properly for the purpose for which the power has been conferred. He must take decisions in accordance with the statutory provisions. He must not be guided by extraneous or irrelevant considerations. He must not act illegally, irrationally or arbitrarily. Any such illegal, irrational or arbitrary action or decision whether in the nature of a legislative, administrative or quasi-judicial acts is liable to be quashed as being violative of Art 14 of the Constitution. The procedure to be followed has to be just fair and reasonable, and not violative of Art 14. Indeed the Supreme Court has gone ahead to act on the principle of proportionality which was only forseen by Lord Diplock in the GCHQ case as a future possibility and was thought to be violative of the jurisdictional principle by blurring the distinction between review and appeal by the House of Lords in Brind.

30. Reliance was placed on a decision of the Hon'ble Apex Court in ***U.P.Grama Panchayat AdhikariSangh and others Vs. Dayaram Saroj and others***, 2007(2) SCC 138. This decision recognized the transfer of cadre of Tube Well Operators as it was inconsonance with constitutional mandate and Article 243-G. Such does not seem to be the case here as constitutional mandate is about independence of the institution of auditing, transparency in reporting and direct access for the people to the report through their representatives.

31. Thus, let us examine the constitutional matrix and the interpretative process, which has relevance. The Hon'ble Apex

1/25

-24-

Court had held in **Ranjit Singh vs. Union Territory of Chandigarh** reported in AIR 1991 SC 2296 that the decision which violates the law or which is against the natural justice and without jurisdiction shall be quashed under a mandatory process. In **Simranjit vs. Union of India** reported in (1992) 4 SC 653, the Hon'ble Apex Court's held that even threat of infringement of fundamental right is enough to issue and justify the issuance of a writ. In **Indra Sawhney vs. Union of India** reported in (1992) Supp (3) SCC 217 and **S.C. Advocates Association vs. Union of India** reported in (1993) 4 SCC 441 wherein a constitution Bench of nine judges heard the matter and it was held that where a fundamental right is involved the doctrine of non-justifiability of political question has no application. Infact as reported by Henry Abrhams in his book "Judicial Process" II edition, he details the American Supreme Court acting against the Jerrymandering of Californian legislative constituencies against the advise that judicial jurisdictions do not permit entry into the political thicket and set aside the redefinition of political constituencies. In **Fertiliser Corporation of India vs. Union of India** reported in AIR 1981 SC 344, the Hon'ble Apex Court had held that judicial review and matters connected with it are the basic feature of the constitution which cannot be taken away by even amending under constitution Article 368. In **P.N. Kumar v. Municipal Corporation of Delhi** reported in (1987) SC 1159, the Hon'ble Apex Court held that the mandatory jurisdiction must be with the Court of first approach being High Court at that time. In fact Judicial review is less of a power than a responsibility placed on Judges.

-25-

32. In relation to the powers of the president through whom the executive power of the Union is to be exercised; under the Article 53 Sub-clause 3 (a) it is specified that **"Nothing in this article shall be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority."** Therefore, it is the plea of the applicant that other authority includes the CAG as well and since the constitution had seen it fit to confer upon him certain powers and responsibility, then, intrusion by any other authority including the President is not permissible. The effect of the Hon'ble Supreme Court's judgment in **Rao vs. Indira** reported in AIR 1971 SC 1002 and **Sanjeevi vs. State of Madras** reported in AIR 1970 SC 1102 would be held to be applicable as preventing the President from exercising any power in relation to the functions conferred specifically on any other authority including the CAG. Therefore, in this context, the Article 73 of the Constitution stipulates what is to be the extent of executive power of the Union and it shall to that extent be contemporaneous with the power of Parliament to make laws. But it shall not extend to any matter which is provided by law for any State. Thus, the executive power of the Union is contemporaneous with the list 1 as to the extent as is available to list 3 and not list 2 of Schedule 7 of the Constitution of India. One of the higher powers of the President is under Article 123 to promulgate Ordinances when the Parliament is not in session and similar is the power of Governor but the Hon'ble Apex Court held that successive repromulgation of Ordinances with the same text by the Governor of Bihar, without any attempt to get the

-26-

Bills passed by the State Assembly while it was in session, coupled with the habitual practice of proroguing the Assembly merely in order to enable the Governor to repromulgate the Oridnance in a routine manner would be **a fraud on the Constitution**, and the Ordinance so repromulgated is liable to be struck down. Similar is the decision in **D.C. Wadhwa vs. State of Bihar** reported in AIR 1987 SC 579. Therefore, according to it, even existence of powers itself is not to take a guarantee supportive of user at all and in all circumstances. In relation to the nine judges Bench of the Hon'ble Supreme Court deciding in **re Presidential Reference** reported in AIR 1999 SC 1, it had formulated methodology for consultation wholly of plurality of collegiums and other methodology and therefore had upheld the principle of best practices in good governance as a basic tenet, which should engage our attention.

33. In **S.P. Gupta vs. Union of India** reported in AIR 1982 SC 149 and **Union of India vs. Sankalchand Seth** reported in AIR 1977 SC 2328, the Hon'ble Apex Court held that even though expressed views after examining the merits do not mean concurrence, consultation must be effective. The applicant rely on this to point out that had there been effective consultation with the machinery relating to object of framing Articles 148, 150 and 151 in the first place and the pivotal functional role is of the CAG in it. Had effective consultation taken place, in view of the fact that it would have then brought out or should have brought out the need for the people to be informed about the State of the nation. It is suggested that it is not without any purpose that audit of the economic status of Union and States

148

-27-

had been kept out of list two. The whole purposes of Articles 148, 149, 150 and 151 of the Constitution coupled with entry 76 of the list 1 of the 7th Schedule of the Constitution would thus indicate a legislative intention of extreme transparency to be obtained in matter of finance discipline and accounting processes and procedure by ensuring that the report of the CAG would go directly to the representatives of the people. It would canvass a situation wherein executive is effectively bypassed whether it be at the Union level or the State level. Therefore, the legislative intention has thus been very clear and the whole process of discussion which ensued between the Finance Ministry, the CAG and the State Government are all beyond their powers and functional requirements. Notice may be had on Article 163 of the Constitution which is a comparable power of the Government or the power of the Council of Ministers to advice the Governor. Commenting on this, the Hon'ble Apex Court in **Bharat Coal vs. State of Bihar** reported in (1990) 4 SCC 557 held that "Where an entry in the State list, is expressly made subject to Parliament legislation (State List entry 23) the State ceases to have both legislative and executive power in respect of the matter to which the Parliamentary law relates". Thus, the lists are mutually exclusive even when a matter is in State list but without it and when it relates to regulations of mines which provided for a parliamentary law, then the States cease to have both legislative and executive power in the said matter. Therefore, it ensures that since audit of its own accounts is not part of the State list and even by legislative exercise the State cannot take over their functions as it is effectively prevented by

constitutional instruments. Therefore, not only had the Ministry of Finance and CAG had no power of dissolving the jurisdiction of the CAG, but also, the States do not have the power to receive the jurisdiction on their shoulders. All this is related to the essential feature of the Constitutional right of the people of the land to know the full truth of financial affairs of the Union or the States. This cannot be watered down.

34. The Constitutional process under Article 212 prohibits a Court from inquiring into proceedings of the legislature but in **Sharma vs. Sri Krishna** reported in AIR 1960 SC 1186 and **State of Kerala vs. Sudarsan** reported in AIR 1984 Ker 1, the Court declared that want of legislative competence is not cured by Article 212. Therefore, while proceedings inside the legislature cannot be called in the question of competency of the instrumentalities an exercise of powers can be looked into and will be looked into. Relating to the powers of legislature, the Hon'ble Apex Court in **S.R. Bhagwat vs. State of Mysore** reported in AIR 1996 SC 188 and had held that legislation which seeks to do away with judgments, decrees and order of any court is impermissible and is unconstitutional and void. This is again a reflection of best practices in governance **as a concomitant to this is any exercise of powers which seeks to do away with the impact of constitutional machinery would also be unconstitutional and void**. Article 246 of the Constitution states specifically that Parliament has an exclusive power to make laws with respect to any of the matters enumerated in list 1 in the 7th Schedule of the Constitution. In no field of constitutional law is the comparative approach more

useful than in regard to the doctrine of pith and substance. This is an established doctrine and derives its genesis from the approach adopted by the courts. Basically what the doctrine means is where the question arises of determining whether a particular law or procedure relates to a particular subject mentioned in one list or another, the Court looks to the substance of the matter. Thus if the substance falls within the Union list, then the incidental encroachment by the law on the State list does not make it invalid. In **Indian Oil Corporation vs. Municipal Corporation** reported in AIR 1990 P & H 99 the Hon'ble Apex Court held that the State legislature cannot empower municipal committees to levy tax, only on the entry of goods within the local areas, when those goods are not meant for consumption, sale or use within that area. Thus, the pith and substance theory is to be used. The Hon'ble Apex Court in **Attorney General of India vs. Amratlal Pranjivandas** reported in (1994) 5 SCC 54 held that even if the 'security of State' and 'security of India' are different expressions, the Parliament can enact legislation for preventive detention of smugglers (COFEPOSA) and for the forfeiture of assets generated by smuggling. Construing the Union list and the Entry 66, the Hon'ble Apex Court held that the University Grants Commission has jurisdiction to coordinate and maintain the standards of higher education in view of the requirement of functions ambient in it vide decision in **University of Delhi vs. Raj Singh** reported in AIR 1995 SC 336. In **Union of India vs. Harbhajan Singh Dhillon** reported in AIR 1972 SC 1061, the Hon'ble Apex Court held that there is nothing in the Constitution

to prevent Parliament from combining its powers under Entry 86, List I, with its powers under Entry 98, List I, even though the Wealth-tax act covers under Entry 49, List II. The Article 249 of the Constitution of India declares the power of Parliament to legislate with respect to a matter in the State list in the national interest, but the contrary is not true and even if there is conflict and inconsistency the law as promulgated by the Parliament shall prevail. This expression is reflective of our federalist structure which is more leaning towards a more unitary state in view of requirement for ensurance of absolute cohesion and nation hood.

35. The scheme of distribution of legislative powers and inconsonance of executive powers -- such distribution being a necessary component of a federal political structure it raises interesting issues. Such problem arises either because the Union or a State may illegally encroach upon the province of the other. Whether the subject matter of the legislation or the executive process in question falls within either the Union list or the State list only, the question is to be decided with reference to legislative competence. Since the Indian Constitution confers exclusive jurisdiction upon Parliament for the matters in the Union list and upon a State Legislature for the matters in the State list, therefore an encroachment is to be construed as ultra vires. In this situation, it is a case of mutually exclusive jurisdiction and since one of the processes must be void, no question of inconsistency also arises and only one process would survive depending on in which list it falls. The test of repugnancy arises only in concurrent list, the Hon'ble Apex Court

had considered these matters in **Deep Chand vs. State of Uttar Pradesh** reported in AIR 1959 SC 648, **Premnath vs. State of Jammu & Kashmir** reported in AIR 1959 SC 749, **Ulkha vs. State of Maharashtra** reported in AIR 1963 SC 1531, **Bar Council of Uttar Pradesh vs. State of Uttar Pradesh** reported in AIR 1973 SC 231, **T. Barai vs. Henry** reported in AIR 1983 SC 150, **Hoechst vs. State of Bihar** reported in AIR 1983 SC 1019, **L.T.C. vs. State of Karnataka** reported in (1985) Supp. SCC 476 and **Lingappa vs. State of Maharashtra** reported in AIR 1985 SC 389. In **Abdul Kadir vs. State of Kerala** reported in AIR 1976 SC 182, the Hon'ble Apex Court held that by giving his assent to a subsequent Bill, the President cannot validate, with retrospective effect an earlier Act which had failed for want of the President's assent under Article 255 so as to validate acts done under the invalid statue, because it would amount to a declaration that non-compliance with Article 255 was of no consequence, which is a declaration beyond the competence of the President. Thus, the power, which was established in the President under Article 52 of the Constitution of India is bounded by the sound parameters of competence and constitutional probity as held in all these decisions. Therefore, the Constitution operates as a fundamental law. The government organs owe their origin to the Constitution and derive their authority from, and discharge their responsibilities within the framework of the Constitution. The Union Parliament and the State Legislature are not sovereign in itself. The Constitution is not to be construed as a mere law, but as the machinery by which laws are made. A

Constitution is a living and organic thing which, of all instruments has the greatest claim to be construed broadly and liberally but with focus. Therefore, the essentials of constitutional matrix and interpretational methodology revolved around the requirements of need for good governance. The right of the people to know the financial situation of the nation directly and as expeditiously as possible without leaving it to the tender mercy of the executive to apprise them of a situation; is a cardinal crux of the constitutional governance. This is recognized as early in the year 1950 and which prompted the engagement and giving to ourselves under Articles 148 and 151 of the Constitution of India provisions which engineered a situation of ensuring knowledge to the people relating to the finances of Union or State. **Since this knowledge translates into effective control of the popular sovereign in the democratic process it is thus an essential feature and basic structure of the Constitution of India**. Thus, the right of the people further enshrined in the legal process in the Right to Information Act has been acknowledged earlier in relation to larger canvass in relation to financial discipline of the Union or State. It may be considered that it might be in the interest of an executive formulation with a limited vision to keep away from the gaze and knowledge of the common people, the correct nature of financial dealings of the State. We will assume that they may do so with the best of motives but can it be left to them to decide then what is best for people to know or not know! Constitution provides otherwise. True, that we have made provisions for sub-merging such information relating to the

intelligence or security requirements by process of the law not to attract direct public attention by various methodology and in all probability it is done for a good cause as well but that cannot be extended to all features of the State action as the result would be financial anarchy and detriment and inadequacy of governance. Therefore, even in the requirement of sphere of practical governance, internal checking mechanisms which are not responsible to the spender himself has to be ensured and what is done by the Articles 150 and 151 of the Constitution of India is just that it is trite that this functional requirement cannot be watered down or dissolved by anybody.

36. It is fundamental principle of our constitutional scheme, and we have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and have to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are the departments of the State amongst which the powers of Government are divided; the Executive and Legislature and the Judiciary. Under our Constitution, we have no rigid separation of powers as in the United State of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, a certain degree of overlapping is inevitable. The reason for this broad separation of powers is that the "concentration of powers in anyone organ may" to quote the words of Chandrachud J (as he then was) in **Smt. Indira**

1
55

-34-

Gandhi's case (AIR 1975 SC 2299) "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged". Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a mater fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the

-35-

limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Arts.32 and 226 of the Constitution. Speaking about draft Art.25 corresponding to present Article 32 of the Constitution, Dr. Ambedkar, the principal architect of our Constitution said in the Constituent Assembly on 9th December 1948:

"If I was asked to name any particular article in this Constitution as the most important – an article without which this Constitution would be a nullity—I would not refer to any other article except this one the Article 32 . It is the very soul of the Constitution and the very heart of it and I am glad that the House has realized its importance." **(C.A. Debates, Vol.VII, p.953)**. It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitation. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the Government whether to be the legislature of the executive or any other authority, be conditioned by the Constitution and the law." The power of judicial review is an integral part of our constitutional system and without it, there

1/57

will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. We are of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to our mind, part of the basic structure of the constitution. Of course, when we say this we should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what we wish to emphasize is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole Judge of the constitutional validity of what it has done and that would,

in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. Thus neither legislative nor executive process shall transgress the essential elements and basic structure of Constitution of India.

37. Constitutional purposes behind Article 148 and other articles are the reliance that there must be instant accounting and audit functionaries who are not under the control of the executive machinery. Once the audit functionaries can be brought under executive control, the independence of audit becomes a myth. For all practical purposes if in such a situation there will not be any need for any such auditing functionaries. Therefore, we have to hold that the notification under challenge is neither in public interest nor in harmony with the constitutional matrix. Let us now examine the vires of it. It is part of constitutional fundamental that vigilant institutions are to be independent of State control lest transparency in processes like elections, selections to posts and in audit be diminished. This is also a deliberate scheme of the constitution. That is why separate institutions with its own functions and traditions are constitutionally developed.

38. The doctrine of the rule of law demands that law consist of known, predictable rules. Thus, it presupposes a positivistic view of law on the part of legal officials and citizens. But while lawyers tend to think of the doctrine as a professional invention it is, as historical analyses demonstrate, the result of economic and political necessities. It serves the need for security of

economic transactions and the general conditions of individual liberty which accompany that need. But it also serves the technical and ideological needs of the state and more generally of the efficient structuring of power relations. Public bureaucracies follow legal rules, it has been argued, because of the economic structure within which they operate, because of their internal organisational needs for resources, legitimacy and order, and because of the socialisation of officials to rule-following attitudes and behaviour. The comprehensive framework of rational law and rules not only thus facilitates dispute resolution but, much more importantly in complex modern societies, helps to prevent friction and dispute by setting out more or less clear guidelines for permissible action; this is thus preventive channelling of conduct and expectations efficient co-ordination and administration to avoid disruption of the intricate patterns of social life which is characterized by adequate legal process. In the dynamically changing social scenario, thus we have to invent new machineries and methodologies. Static nature of requirements would not thus serve our purpose. Rather, it depends on the continual reformulation of rules and practices in experience. Thus, whatever the importance of the rule of law as ideology, as a legitimation of government, it can be doubted whether a comprehensive system of legal rules binding state agencies and citizens alike has ever been a primary basis of social order. In the nineteenth-century heyday of the doctrine it applied only to relatively limited spheres of social life. In England, for example, Dicey ignored the problem of vicarious liability in relation to

-39-

Crown servants. Because of the immunity of the Crown from liability it could not be held responsible for the acts of its officials, a matter only rectified gradually and not necessarily satisfactorily long after Dicey's time. Dicey wrote (thinking of the personal liability of officials and citizens): 'In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit'. But, all these were in the past. The evolving social set up and economic progression requires newer tools in resolution of constitutional matrixes. While the upper classes and rising middle classes could make use of the relatively rational legal processes of the former, the lower classes met 'the law' only in caricature in the processes of the latter, which Max Weber scathingly termed 'Khadi justice'- decision-making based on subjective reaction to the individual case rather than on the careful application of known legal rules and procedures. For Max Weber, this two-tier system amounted to a systematic denial of justice to the poor. In the light of rapid advances of economic progression coupled with widely expanded executive Horizon, newer tools to impose transparency are inevitable and required for continued existence of civil society and sense of liberty.

39. The growth of discretionary regulation has been observed in a proliferation of twentieth-century statutory provisions creating wide areas of official discretion particularly in fields of regulation associated with the welfare state, such as housing, town and country planning, personal social services, health and education provision and environment. Discretionary powers in the criminal justice system became more extensive as

'treatment' of the offender and management of deterrence tended to supplant retribution as an expressed aim of the system and hence administrative decision-making became important at the expense of legal assessments of guilt. Whether sentencing in the criminal justice process is more or less consistent today than in the past is a matter for debate but two British commentators have noted that 'sentencers currently have an almost unlimited discretion in dealing with cases involving serious criminal violations'.

40. Discretionary regulation has seemed to increase in scope as the legal system has more extensively intervened in organisation of the lives of the poor and the working class. Administration of social security law often tends to foster the ides of 'requesting assistance' rather than asserting rights, and claimants and their advisers often have difficulty finding out whether or not certain benefits are allowed. Consequently, social welfare agencies exercise control through their ability to fix entitlements and to delay or expedite action on claims. Sometimes, modes of exercise of discretion or interpretations of welfare rules can facilitate the most intrusive moral controls on claimants' private lives.

41. Let us leave aside for a moment the question of presidential consent or whether it was granted or not. The sanction given in 1994 to a draft scheme have undergone an amendment process and thus on a fresh genesis could not be said to have been placed for the approval of the President. This is especially so in the light of the fact that concurrence of the AG

cannot be given for an approval already granted by the President in 1994 by letter dated 20.2.2004. We are refraining ourselves from commenting on this as the particular person is not before us. But we have to say that he has failed in his constitutional function and jurisdiction.

42. The constitutional function of the Accountant General is to jealously guard inviolable the economic state of the nation. His functional independence coupled with the independence granted to his servants and the requirement of extreme probity keeps him and his servants on a special pedestal which is akin to independence of judiciary. The independence of judiciary is a required watchdog of democratic quality. So is the functional quality of the auditor. That is why for the adequate reasons the framers of the constitution had placed them on a special pedestal. Therefore, the question would be; can such a functionary decide then himself for a dissolution of his jurisdiction. By agreeing to grant the cadre of Divisional Accountants to the State Government the functional premise thus obtaining would be there not anymore as for independent auditors in the state. It will be therefore, a dilution of functional jurisdiction of the Comptroller and Auditor General and also withholding the quality of governance from the people which had been adequately provided for in Articles 150 and 151 of the Constitution of India. **Therefore, we have to hold that the Comptroller and Auditor General has no jurisdiction to decide over the dissolution of his jurisdiction.** The terms in Article 148 sub clause (5) only means that for the internal management of the system of the officers and their service

1/63

-42-

conditions the rules made by the President shall be after consultation with the Comptroller and Auditor General. This internal administrative mechanism does not and is not capable of conferring upon the Comptroller and Auditor General of India the power to dissolve any part of his jurisdiction. This is more so when we understand it in the light of sub clause (4) and (6) of Article 148 which provide for absolute cohesion and focus of functional working of the office of the Accountant General. **Therefore, we hold that the concurrence apparently given by the order dated 20.2.2004 is beyond the powers of the Comptroller and Auditor General and it is hereby quashed.**

43. What are the powers of the president in this respect. Article 52 of the Constitution of India lays down that there shall be a President in the Union of India and that the executive power of Union shall be vested in the President and shall be exercised by him either directly or through officers in accordance with the constitution. Therefore, the executive power of the Union shall be exercised by the President only in accordance with the constitution. The Hon'ble Apex Court in ***Maganbhai Ishwarbhai Patel Vs. Union of India and another*** *(AIR 1969 SC 783)* and ***Rai Sahib Ram Jawaya Kapur and others Vs. The State of Punjab*** *(AIR 1955 SC 549)* has clarified that the executive powers so long as does not violate the constitution or the law must be exercised. **Article 148 of the constitution is one among the basic structures of the constitution which provides for transparency in administration and management of the funds of the union and State. It**

1/64

-43-

cannot be diluted at the cost of the people of the land. Therefore, we have to hold that the President also does not have the power to order the dissolution of constitutional entity to the prejudice of the people.

44. Thus, constitutional process measured in terms of essential features, best practices of good governance, democratic quality enhancement, transparency in essential procedures, right of the people to know the truth coupled with the essential need for protection of independent existence and functioning of even subsidiary sentinels of Constitutional process like the Election Commission of India, Central Vigilance Commission, Union Public Service Commission as also the office of the Controller and Auditor General of India, the notification No.RAJBIL/2000/1717/JPC/3588/02/2003-05 dated 20.02.2004 alongwith all its processes and procedures are declared as unconstitutional, ultra vires and void. They are, therefore, quashed as every limb of the Constitution is against it as well as the aspiration of the Indian Constitutional process.

45. Thus, both these OAs are allowed. The consequences of quashment of notification shall follow immediately. No order as to costs.

46 M.A. No.60/2009 and M.A.No. 13/2011 also stand disposed of.

[Sudhir Kumar]
Administrative Member

[Dr. K.B. Suresh]
Judicial Member

ks-rss