R.K. Jain vs Union Of India And Ors on 14 May, 1993

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Author: A.M. Ahmadi

Bench: A.M. Ahmadi, M.M. Punchhi, K. Ramaswamy

PETITIONER:
R.K. JAIN

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT14/05/1993

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
PUNCHHI, M.M.
RAMASWAMY, K.

CITATION:
1993 AIR 1769 1993 SCR (3) 802
1993 SCC (4) 119 JT 1993 (3) 297
1993 SCALE (2)843

ACT:
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Customs Excise and Gold Control Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1987: Rules 2c,3,6, 10.-CEGAT-President-Appointment of- Appointment of senior Vice-President as President-Legality and validity of -Appointment held valid but need for appointing a sitting or retired High Court Judge as President emphasised-Need for amendment of Rule 10(4) emphasised.
CEGAT-Writ in public interest-Allegation of mal-functioning in CEGAT-Examination of allegation by a high level team directed.
Indian Evidence Act, 1872: Sections 123, 124 and 162. State Documents-Right of Government to claim immunity from

disclosure-Scope of-Claimfor immunity, should be supported by affidavit by head of department indicating reasons for claim-Oath of office secrecy adumberated in Article74(5) and Schedule III of Constitution does not absolve Minister from stating reasons in support of immunity-It is dun, of Court and not executive to decide whether a document needs immunity from disclosure.

Constitution of India, 1950:

Article 75(3) and Schedule III-Cabinet-Role and functions of-Cabinet documents-Need for secrecy-,Extent of immunity from disclosure.

Article 74 (2)-Scope of-Advice tendered by Ministers to President-Bar of judicial review is to the factum of advice tendered by Council of Ministers to President-but not to record ie. material on which advice is founded.

Articles 323A and 323B-Tribunals set tip under-Need for a study In, law Commission suggesting measures for improved functioning of Tribunals emphasised.

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Judicial Review-Is basic feature of Constitution-Cannot be dispersed with by creating Tribunals tinder Articles 323A and 323B of Constitution-Alternative Mechanism devised for judicial review should be effective and efficient-Court's anguish over in effectively of alternative mechanism devised for judicial review expressed Appeal to a Bench of two Judges of High Court over orders of Tribunal suggested.

Service Law-Selection-Rule conferring power on Central Government to make appointment-Court cannot sit over the choice of selection.

Service Law-Challenge to legality of offending action-Only, aggrieved person has locus-Third party, has no locus to canvass the legality. of action.

Maxim: Salus Popules Cast Suprema Lax-Meaning of

HEADNOTE:

By a letter dated December 26, 1991 addressed to the Chief Justice of India, the petitioner, Editor, Excise Law Times, complained that ever since the retirement of president of the Customs, Excise and Gold control Appellate Tribunal (CEGAT) in 1985 no appointment of President was made as a result of which the functioning of the Tribunal was adversely affected. He also alleged malfunctioning in the CEGAT and sought directions for immediate appointment of the President as well as an enquiry into the mal-functioning of CEGAT. The letter was treated as a Writ Petition in public interest litigation and on February 25,1992, this Court issued Rule Nisi to Union of India to make immediate appointment of the President of CEGAT, preferably a senior High Court Judge. After the directions were issued by this Court, Respondent No. 3, who was initially appointed as judicial Member and subsequently as Senior Vice-President of

the Tribunal, was appointed as President.

The petitioner filed another petition challenging the appointment of President and sought to quash the same on the grounds that (1) the appointment was in breach of judicial order passed by this Court on February 25, 1992 because as per the convention a sitting or retired Judge of the High Court should have been appointed as President in consultation with the Chief Justice of India; even though High Court Judges were available no serious attempt was made to requisition the services of one of them for appointment as President; (2) before the Act was made a positive commitment was made time and again by the Government on the floor of the House that judicial independence of CEGAT is sine qua non to sustain the confidence of the

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litigant public. The appointment of any person other than sitting or a retired judge of the High Court as President would be in its breach; and (3) the appointment of Respondent No. 3 as a Judge of the Delhi High Court was turned down by Chief Justice of India doubting his integrity, therefore appointment (of such a person as President of CEGAT would undermine the confidence of the litigant public in the efficacy of judicial adjudication. even though Rules may permit such appointment.

The petitioner also prayed that Rules 10(1)(3) and (4) of the CEGAT Members (Recruitment and Conditions of Service) Rules, 1987 should be struck down as violative of Article 43 of the Constitution. the rules were ultra vires of the basic structure of the Constitution, namely independence of Judiciary. On May 4,1992 this Court issued Rule Nisi and on the next date of bearing the relevant rile on which decision regarding the appointment of President was made produced in the Court but on behalf of the Union of India an objection was taken by the Additional Solicitor General that this Court cannot inspect the rile as he intended to claim privilege`. Accordingly, pursuant to the directions given by this Court that a formal application may be made setting out the grounds on which the claim for privilege was founded, the Finance Secretary and the Minister of State for Finance filed affidavits claiming privilege under Sections 123 and 124 of the Indian Evidence Act and Article 74 (2) of the Constitution stating that the Government had no (objection for the Court to peruse the rile but claimed privilege to disclose the contents of the rile to the petitioner.

On behalf of the Union of India it was contended that a Cabinet SubCommittee approved the appointment of Respondent No. 3 as President of CEGAT and by operation of Article 77(3) and 74(1), the appointment was made by the President. The rile constitutes Cabinet documents forming part of the preparation (if the documents leading to the formation of the advice tendered to the President. Section'123 of the Evidence Act and Article 74 (2) precluded this Court from

enquiring into the nature of the advice tendered to the President and the documents were, therefore, immune from disclosure. The disclosure would cause public injury preventing candid and frank discussion and expression of views by the bureaucrats at higher level and by the Minister/Cabinet Sub-Committee causing serious injury to public service.

On behalf of Respondent No.3 it was contended that (1) he had an excellent and impeccable record of service without any adverse remarks and dropping of his recommendation for appointment as a Judge of Delhi High

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Court could not be construed adverse 'to him; (2) the Government had prerogative to appoint any member, or Vice Chairman or Senior Vice President as President and Respondent No.3 being the Senior Vice President, was considered and recommended by the Cabinet Committee for appointment. Hence he was validly appointed as President.

Disposing the petitions, this Court,

HELD: Per Ramaswamy, J.

1.The claim in the affidavits of the State Minister for Finance and the Secretary for immunity of state documents from disclosure is unsustainable. However, having perused the file and given anxious considerations,the Court is of the view that on the facts and circumstances of the case and in the light of the view taken, it is not necessary to disclose the contents of the records to the petitioner or his counsel.

1.1.Section 123 of the Evidence Act gives right to the Government to claim privilege, in other words immunity from disclosure of the unpublished official state documents in public interest. The initial claim for immunity should be made through an affidavit generally by the Minister concerned, in his absence by the Secretary of the department or head of the Department indicating that the documents in question have been carefully read and considered and the deponent has been satisfied, supported by reasons or grounds valid and germance, as to why it is apprehended that public interest would be injured by disclosure of the document summoned or called for. The claim for immunity should never he on administrative routine nor be a garb to avoid in convenience, embarrassment or adverse to its defence in the action, the latter themselves a ground for disclosure.

1.2.When a claim for public interest immunity has been laid for nondisclosure of the State documents, it is the Minister's due discharge of duty to state on oath in his affidavit the grounds on which and the reasons for which he has been persuaded to claim public interest immunity from disclosure of the State papers and produce them. He takes grave risk on insistence of oath of secrecy to avoid filing an affidavit or production of State documents and the Court may be constrained to draw such inferences as are available at law. Accordingly the oath of office of secrecy

adumbrated in Article 75(4) and Schedule III of the Constitution does not absolve the Minister either to state the reasons in support of the public interest immunity to produce the State documents or as to how the matter was dealt with or for their production when discovery order nisi or rule nisi was issued. On the other hand it is his due
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discharge of the duty as a Minister to obey rule nisi or discovery order nisi and act in aid of the Government.
Attorney General v. Jonathan Cape Ltd., 1976 Q.B. 752; Sankey v. Whitlan, [1979] 53 A.L. R. 11 and Whitlam v. Australian Consolidated Press, [1985] 60 A.L.R. 7, referred to.
1.3. If the Court is satisfied from the affidavit and the reasons assigned for withholding production or disclosure, the Court may pass an appropriate order in that behalf If the Court still desired to peruse the record for satisfying itself whether the reasons assigned in the affidavit would justify withholding disclosure, the court would, in camera, examine the record and satisfy itself whether the public interest subserves withholding production or disclosure or making the documents as part of the record.
1.4. By operation of Section 162 of Evidence Act the final decision in regard to the validity of an objection against disclosure raised under Section 123 would always be with the Court.
1.5. The Court is not bound by the statement made by the Minister or the Head of the Department in the affidavit and it retains the power to balance the injury to the State or the public service against the risk of injustice.
The real question which the Court is required to consider is whether public interest is so strong to override the ordinary right and interest of the litigant that he shall he able to lay before a Court of justice the relevant evidence. In balancing the competing interests it is the duty of the court to see that there is the public interest that harm shall not be done to the nation or the public service by disclosure of the document and there is a public interest that the administration of justice shall not be frustrated by withholding documents which must he produced if justice is to be done.
1.6. The basic question to which the court would, therefore, have to address itself for the purpose of deciding the validity of the objection would be, whether the document relates to affairs of State or the public service and if so, whether the public interest in its non-disclosure is so strong that it must prevail over the private interest in the administration of justice and on that account, it should not be allowed to be disclosed.
State of U.P. v. Raj Narain & Ors., [1975] 2 S.C.R. 333; S.P. Gupta Ors.
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etc. etc. v. Union of India & Ors. etc. etc., 1982 (2)

S.C.R. 365; relied on.
Conway v. Rimmer, 1968 A.C. 910 (H.L); D. v. National Society for the Prevention of Cruelty to Children, 1978 A.C. 171 (H.L.); Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England, 1980 A.C. 1090 (H.L.); Butters Gas and Oil Co. v. Hammer, 1982 A.C. 888 (H.L.); Air Canada v. Secretary of State for Trade, [1983] 2 A.C. 394 (H.L.); Council of Civil Service Unions v. Minister for the Civil Service, 1985 A.C. 374 (H.L.); United State v. Reynolds, (1935) 345 U.S. 1; Environmental Agency, v. Pats), T Mink, 410 U.S. 73 (35) L. Ed. 2nd 11 9; Newyond Times v. U.S., [1971] 403 U.S. 713; U.S. v. Richard M. Nixon, [1974] 418 U.S. 683 = 41 L.Ed. 2nd 1035; Robindon v. State of South Australia, 1931 A.C. 704 (PC); Shankey v. Whitlan, [1979] 153 A.L.R. 1; FAI Insurances Ltd. v. The Hon Sir, Henn, Arthur Winneke and Ors., [1982] 151 C.L.R. 342; Whitlan v. Australian Consolidated Press Ltd., [1985] 60 A.L.R. 7; Minister for Arts Heritage and Environment and Ors. v. Peko Wallsend Ltd. and Ors. [1987] 75 A.L.R. 218; Commonwealth of Australia v. Northern Land Council and Anr. [1991] 103 A.L.R. 267; R. v. Shinder, 1954 S.L.R. 479 Gagnon v. Ouebec Securities Commission, 1964 S.C.R. 329; Bruce v. Waldron, 1963 V.L.R. 3; Re Tunstall, Ex.P. Brown, [19661 84 W.N. (Pt2) (N.S.W.); Corbett v. Social Security Commission, 1962 N.Z.L.R. 878; Greednz Inc. v. Governor General, [1981] 1 N.L.R. 172. Apponhamy v. Illangarutute, [1964] 66 C.L.W. 17; Jamaica in Allen v. Byfields (No.2) [1964] 7 W.I.R.69 and Scotland in Glasgow Corporation v. Central Land Board, [1956] Scotland Law Time 4, referred to.
Mecormic on Evidence, 4th Edn. by John w. Strong, referred to.
1.7.Every communication which proceeded from one of ricer of the State to another or the officers inter se does not necessarily per-se relate, to the affairs of the State. Whether they so relate has got to be determined by reference to the nature of the consideration, the level at which it was considered, the contents of the document or class to which it relates to and their indelible impact on public administration or public service and administration of justice itself.
2. The power to issue 'discovery order nisi' is express as well as inherent as an integral power of judicial review and process in the Court to secure the attendance of any person or discovery or production of any document or to order investigation in that behalf. However, in an appropriate case, depend -
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ing on facts on hand. Court may adopt such other procedure as would be warranted. The petitioner must make a strong prima facie case to order discovery order nisi, etc. and it must not be a haunting expedition to fish out some facts or an attempt to cause embarrassment to the respondents nor for publicity. But on issuance of rule nisi by this Court under

Article 32 or a discovery order nisi the Government or any authority, constitutional, civil, judicial, statutory or otherwise or any person, must produce the record in their custody and disobedience thereof would be at the pain of contempt.

3. The Cabinet known as Council of Ministers headed by Prime Minister under Article 75 (3) is the driving and steering body responsible for the governance of the country. Collective responsibility under Article 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his consideration or shall become known to him as Minister except as may be required for the 'due discharge of his duty as Minister'. The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Article 75(3) but also from its pragmatism.

Satwant Singh Sawhney v. D. Ramarathnam Asstt. Passport Officer, [1967] 3 S.C.R. 525; Magnbhai Ishwarbhai Patel v. Union of India and Anr., [1969] 3 S.C.R. 254; Shamsher Singh v. State of Punjab, [1975] 1 S.C.R. 814; Rai Sabhib Ram Jawaya Kapur & Ors. v. State of Punjab, [1955] 2 S.C.R. 225 and Commonwealth of Australia v. Northern Land Council & Anr., [1991] 103 A.L.R. 267, referred to.

Sir Ivor Jennings, Cabinet Government; Patrick Gordon Walker, The Cabinet, 1973 Revised Ed. P. 178; John P. Mackintosh, The British Cabinet, 2nd Edn. p.1 1; 0 Hood Phillips and Paul Jackson, Constitutional and Administrative Law, 7th Edn. P. 301; Walker, The Cabinet, p. 183; Halsbury Laws of England, 4th Edn. Vol. 8 para 820; Bagehot and The English Constitution, 1964 Edn., referred to.

3.1. The Court would be willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved. Information relating to national security, diplomatic relations, internal security or sensitive diplomatic corre-

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spondence per se are class documents and that public interest demands total immunity from disclosure. Even the slightest divulgence would endanger the lives of the personnel engaged in the services etc. The maxim Salvs Populs Cast Suprema Lax which means that regard for public welfare is the highest law, is the basic postulate for this immunity.

Asiatic Petroleum v. Anglo-Persian oil, 1916 K.B. 822; Duncan v. Cammell Laird, 1942 A.C. 624; Council of Civil Service Union v. Minister for Civil Service, 1985 A.C. 374 and

Mark Hosemball R. v. Home Secretary exparte Hosenball, [1977] 1 W.L.R. 766, referred to.

3.2. But it would be going too far to lay down that no document in any particular class or one of the categories of Cabinet papers or decisions or contents thereof should never, in any circumstances, be ordered to he produced.

Robinson v. State of South Australia, [1931] A.C. 704 (PC); S.P. Gupta v. Union of India & Ors., [1982] 2 S.C.R. 365; State of U. P. v. Raj Narain & Ors., [1975] 2 S.C.R.333; Conway v..Rimmerl968A.C.910 (HL);Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England, 1980 A.C. 1090 (HL); Reg. v. Lewes Justices, Ex Parte Secretary of State for the Home Department, 1973 A.C. 388 and D. V. National Society for the Prevention of Cruelty to Children, [1978] A.C. 171; Air Canada v. Secretary of State for Trade, [1983] 2 A.C. 394 (HL); Shankey v. Whitlan, [1979] 53 A.L.R. 1; Harbour Corp of Queensland v. Vessey Chemicals Pvt. Ltd., [1986] 67 A.L.R 100; Manthal Australia Pvt. Ltd. v. Minister for Industry, Technology and Commerce, [1987] 71 A.L.R. 109; Koowarta v. Bjelke-Petersen, [1988] 92 F.L.R. 104; United States v. Richard M. Nixon, [1974] 418 U.S. 683=41 Lawyers Ed. 2nd Ed. 1039; Attorney General v. Jonathan Cape Ltd. 1976 Q.B. 752; Minister for Arts Heritage and Environment and Ors. v. Pekowallsend Ltd. and Ors., (1987) 75 A.L.R. 218; Commonwealth of Australia, v. Northern Land Council and Anr., [1991] 103 A.L.R. 267; Australian Community Party & Ors. v. Commonwealth & Ors., [1950-51] 83 C.L.R. 1 and Queen v. Tohey, [1982-83] 151 C.L.R. 170, referred to.

3.3. Undoubtedly, the Prime Minister is enjoined under Article 78 to communicate to the President all decisions of the Council of Minister relating to the administration of the affairs of the Union and proposals for legislation and to furnish such information relating to the administration or reconsideration by the Council of Minister if the President so requires and submit its

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decisions thereafter to the President. That by itself is not conclusive and does not get blanket public interest immunity from disclosure. The Council of Ministers though shall be collectively responsible to the House of the people, their acts are subject to the Constitution; Rule of law and judicial review are parts of the scheme of the Constitution as basic structure and judicial review is entrusted to this Court (High court under Article 226).

3.3.1.The communication of cabinet decisions or policy to

the President under Article 74(1) gives only limited protection by Article 74(2) of judicial review of the actual tendered to the President of India. The rest of the file and all the records forming part thereof are open to in camera inspection by this Court. Each case must be considered on its own facts and surrounding scenario and decision taken thereon.

Jyoti Prakash Mitter v. Chief Justice Calcutta High Court, [1965] 2 S.C.R. 53 and Union of India v. Jyoti Prakash, [1971] 3 S.C.R. 483, referred to.

3.3.2.Article 74(2) is not a total bar for production of the records. Only the actual advice tendered by the Minister or Council of Ministers to the President and the question whether any, and if so, what advice was tendered by the Minister or Council of Ministers to the President, shall not be enquired into by the Court. In other words, the bar of judicial review is confined to the factum of advice, its extent, ambit and scope, but not the record i.e. the material on which the advice is founded.

S.P. Gupta v. Union of India & Ors., [1982] 2 S.C.R. 365, referred to.

4.Judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to made or the procedure adopted whether fair, just and reasonable. Exercise of Judicial Review is to protect the citizen from the abuse of the power etc. by an appropriate Government or department etc. In Court's considered view granting the compliance of the above power of appointment was conferred on the executive and confided to be exercised wisely. When a candidate was found qualified and eligible and was accordingly appointed by the executive to hold an office as a Member or Vice-President or President of Tribunal, this Court cannot sit over the choice of the selection, but it be left to the executive to select the personnel as per law or procedure in this behalf.

Shri Kumar Padma Prasad v. Union of India & Ors., [1992] 2 S.C.C. 428,

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distinguished.

5. In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has not locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public spirited person. Therefore, the contention that there was need to evaluate the comparative merits of Respondent and the senior most Member for appointment as President would not be gone into in a public interest litigation. Only in a proceedings initiated by an aggrieved person it may be open to be considered.

6. It is expedient to have a sitting or retired senior Judge or retired Chief Justice of a High Court to be the

President. The rules need amendment immediately. Government had created a healthy convention of providing that the Tribunals will be headed by a President who will be a sitting or a retired judge of the High Court This Court to elongate the above objective directed the Government to show whether the convention is being followed in appointment of the President of CEGAT and further directed to consider appointment of a Senior Judge or a retired Chief Justice of the High Court as it President Admittedly Chief Justice of India was not consulted before appointing Respondent No.3 as President of CEGAT The solemn assurance given to the Parliament that the Tribunal bears a judicious blend by appointment of a High Court Judge as President was given a go-bye.

6.1.While making statutory rules the executive appears to have made the appointment of a sitting or retired High Court Judge as President unattractive and Directly frustrating the legislative animation. A sitting Judge, when he is entitled to continue in his office upto 62 years, would not he willing to opt to serve as President, if his superannuation as President is co-terminus with 62 years. He would he attracted only if he is given extended three years more tenure after his superannuation. But Rule 10 (3) says that the total period of the enure of the President by a sitting or retired Judge is 'a period of three years or till he attains the age of 62 years, whichever is earlier', i.e. co-terminus with superannuation as a Judge of the High Court. The, proviso is only discretionary at the whim of the executive depleting independence and is an exception to the rule. Thereby, practically the spirit of the Act, the solemn assurance given by the Government to the Parliament kindling hope in the litigant public to have a sitting or a retired Judge appointed as President has been frustrated deflecting the appointment of a

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judicially trained judge to exercise judicial review. Court is constrained to observe that the rules, though statutory, were so made as to defeat the object of the Act.

7.There are persistent allegations against mal-functioning of the CEGAT and against Respondent No. 3 himself. Though this Court exercised self restraint to assume the role of an investigator to charter out the ills surfaced, suffice to say that the Union Government cannot turn a blind eve to the persistent public demands and 'the Court directs to swing into action, an indepth enquiry made expeditiously by an officer or team of officers to control the malfunctioning of the institution. It is expedient that the Government should immediately take action in the matter and have fresh look.

8. The Tribunals set up under Articles 323A and 323B of the Constitution or under an Act of legislature are creatures of the Statute and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold the office under

the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision.

M.B. Majumdar v. Union of India, [1990] 3 S.C.R. 946; Union of India v. Paras Laminates Ltd., [1990] 49 E.L.T. 322 (SC); Krishna Sahai & Ors. v. State of U. P. & Ors., [1990] 2 S.C.C. 673, and Rajendra Singh Yadav & Ors.v.State of U.P. & Ors.. [1990] 2 S.C.C. 763, referred to.

8.1.Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the Tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India should make an in-depth study in this behalf including the desirability of bringing CEGAT under the control of Law and Justice Department in line with Income-tax Appellate Tribunal and make appropriate urgent recommendations to the Government of India who should take remedial steps by an

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appropriate legislation to overcome the handicaps and difficulties and make the Tribunals effective and efficient instruments for making judicial review efficacious, inexpensive and satisfactory.

8.2. For inspiring confidence and trust in the litigant public they must have an assurance that the person deciding their causes is totally and completely free from the influence or pressure from the Government. To maintain independence imperativity it is necessary that the personnel should have at least modicum of legal training, learning and experience. Selection of competent and proper people instill people's faith and trust in the office and help to build up reputation and acceptability. Judicial independence which is essential and imperative is secured and independent and impartial administration of justice is assured. Absence thereof only may get both law and procedure wronged and wrong headed views of the facts and may likely to give rise to nursing grievance of injustice Therefore, functional fitness, experience at the Bar and aptitudinal approach are fundamental for efficient judicial adjudication. Then only as repository of the confidence, as its duty, the Tribunal would properly and efficiently

interpret the law and apply the law to the given set of facts. Absence thereof would be repugnant or derogatory to the Constitution.

Union of India v. Sankal Chand Himatlal Sheth & Anr. [1978] 1 S.C.R. 423, referred to.

9. Judicial review is the basic and essential feature of the Indian constitutional scheme entrusted to the judiciary. It cannot be dispensed with by creating Tribunal under Articles 323A and 323B of the Constitution. Any institutional mechanism or authority in negation of judicial review is destructive of basic structure, So long as the alternative institutional mechanism or authority set up by an Act is not less effective than the High Court, it Ls consistent with constitutional scheme. The faith of the people is the bed-rock on which the edifice of judicial review and efficacy of the adjudication are founded. The alternative arrangement must, therefore, be effective and efficient.

Keshwanand Bharati v. Union of India, [1973] Suppl. S.C.R. 1; Waman Rao v. Union of India, [1980] 3 S.C.R. 587; Raghunathrao Ganpatrao v. Union of India [1993] 1 SCALE 363; Krishna Swathi v. Union of India, 1199214 S.C.C. 605; S.P. Sampat Kumar v. Union of India & Ors., [1987] 1 S.C.R. 435 and J.B. Chopra v. Union of India, [1987] 1 S.C.C. 422, referred to.

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9.1. It is necessary tip express Court's anguish over the ineffectivity of the alternative mechanism devised for judicial review. The judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the Tribunals is much to be desires. Court is not doubting the ability of the members or Vice-Chairman (non-judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiency be administered by advocate Judges. The remedy of appeal by special leave under Article 136 to this Court also proves to be costly and prohibitive and far-flung distance too is working as a constant constraint to litigant public who could ill afford to reach this Court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the Tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of iNjustice of those who can ill-afford to approach the Supreme Court.

10. No one can suppose that the executive will never be guilty of the sins common to all people. Sometimes they may do things which they ought not to do or will not do things they ought to do. The Court must be alive to that possibility of the executive committing illegality in its process, exercising its powers, reaching a decision which no reasonable authority would have reached or otherwise abuse its powers, etc. If the proceeding, decision (or order is

influenced extraneous considerations which ought not to have been taken into account, it cannot stand and needs correction, no matter of the nature of the statutory body or status or stature of the constitutional functionary though might have acted in good faith. It is, therefore, the function of the Court to see that lawful authority is not abused.

10.1. Under modern conditions of responsible Government, Parliament should not always be relied on as a check on excess of power by the Council (of Ministers or Minister. Though the Court would not substitute its views to that of the executive on matters of policy, it is its undoubted power and duty to see that the executive exercises its power only for the purpose for which it is granted. It is the constitutional, legitimate and lawful power and duty of this Court to ensure that powers, constitutional statutory or executive are exercised in accordance with the Constitution and the law. This may demand, though no doubt only in limited number of cases, Yet the in networkings of government may be exposed to public gaze.

Per Ahmadi J. (For himself and Punchhi J.) (Concurring)

1. This Court cannot sit in judgment over the wisdom of the Central

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Government in the choice of the person to be appointed as a President so long as the person chosen possesses the prescribed qualification and is otherwise eligible for appointment. Respondent No. 3 was a Senior Vice-President when the question of filling up the vacancy of the President came up for consideration. He was fully qualified for the post under the Rules. No challenge is made on that count. Under Rule 10 (1), the Central Government is conferred the power to appoint one of the Members to be the President. Since the validity of the Rule is not questioned there can be no doubt that the Central Government was entitled to appoint Respondent No. 3 as President.

1.1. This Court cannot interfere with the appointment of Respondent No. 3 on the ground that his track record was poor or because of adverse reports on which account his appointment as a High Court Judge had not materialised. Assuming that the allegations against Respondent No. 3 are factually accurate, this Court cannot sit in judgment over the choice of the person made by the Central Government over the choice of the person made by the Central Government for appointment as a President if the person chosen is qualified and eligible for appointment under the Rules.

2. However, to instill the confidence of the litigating public in the CEGAT, the Government must make a sincere effort to appoint a sitting Judge of the High Court as a President of the CEGAT in consultation with the Chief justice of India and if a sitting Judge is not available the choice must fall on a retired Judge as far as possible.

3. Sub-rule (4) of Rule 10 of the CEGAT Members

(Recruitment and Conditions of Service) Rules, 1987 needs a suitable change to make it sufficiently attractive for sitting High Court judges to accept appointment as the President of the CEGAT. The rules empower the Central Government to appoint any member as the President of the CEGAT. It is true that under subrule (4), a serving Judge and under the proviso thereto, a retired Judge, can also be appointed a Member and President simultaneously.

In the case of a serving Judge his age of superannuation is fixed at 62 years but in the case of the retired Judge he may be appointed for a period of three years at the most. Insofar as a service High Court Judge is concerned, he holds office until he attains the age of 62 years, vide Article 217 of Constitution. It, therefore, beats common sense why a sifting Judge of tile High Court would opt to serve as the President of the CEGAT if he is to retire at the same age without any benefit. On the contrary, he would lose certain

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perks which are attached to the office of a High Court Judge. Even status-wise he would suffer as his decisions would he subject to the writ jurisdiction of the High Court under Article 226,227 of the Constitution. He may agree to accept the offer only if he had an extended tenure of at least three years.

4. The allegations made by Petitioner in regard to the working the CEGAT are grave and the authorities can ill-aford to turn a Nelson's eye to those allegations made by a person who is fairly well conversant with the internal working of the Tribunal. Refusal to inquire into such grave allegations, some of which are capable of verification, can only betrays indifference and lack of a sense of urgency to tone up the working of the Tribunal. It is high time that the administrative machinery which is charged with the duty to supervise the working of the CEGAT wakes-up from its slumber and initiates prompt action to examine the allegations by appointing a high level team which would immediately inspect the CEGAT, identify the causes for the crises and suggest remedial measures. This cannot brook delay.

5.1. The time is ripe for taking stock of the working of the various Tribunals set up in the country after the insertion of Articles 323A and 323B in the Constitution. A sound justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two articles, Acts have been enacted where under Tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have served the purpose and objectives for which they were constituted.

5.2. Complaints have been heard in regard to the functioning of other Tribunals as well and it is time that a body like the Law Commission of India ha, a comprehensive look-in with a view to suggesting measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis where of Tribunals may be constituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of Tribunals under various statutes with a view to ensuring their independence so that the public confidence in such Tribunals may increase and the quality of their performance may improve. It is strongly recommended to the Commission of India to undertake such an exercise
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on priority basis.
6. On the facts of the case it is not necessary to disclose the contents of the records to the petitioner or his counsel.

JUDGMENT:

CIVIL, ORIGINAL JURISDICTION: Writ Petition Nos. 90 & 312 of 1992.

Under Article 32 of the Constitution of India. , D.D. Thakur, Tapash Ray, M.L. Verma, Gauray Jain, and Ms. Abha Jain for the Petitioner in W.P. No. 90 of 1992. R.P. Gupta for the Petitioner in W.P. No. 312/92. G. Ramaswamy, Attorney General, D.P. Gupta, Solicitor General, B. Parthasarthy, C.V.S. Rao, A.S. Bhasme and Chava Badri Nath Babu for the Respondent.

R. K. Jain, and Rajan Mukherjee for the customs, Excise & Gold (Control) Appellate Tribunal.

K.K. Venugopal, Ms. Pallav Shisodia and C.S.S. Rao for the Respondent.

The Judgments of the Court were delivered by AHMADI, J. We have had the benefit of the industry, erudition and exposition of the constitutional and jurisprudential aspects of law on the various questions urged before us in the judgment of our esteemed Brother K. Ramaswamy, J. But while concurring with the hereinafter mentioned conclusions recorded by him we would like to say a few words to explain our points of view. Since the facts have been set out in detail by our learned Brother we would rest content by giving an abridged preface which we consider necessary.

It all began with the receipt of a letter dated December 26, 1991, from Shri R.K. Jain, Editor, Excise Law Times, addressed to then Chief Justice of India, Shri M.H. Kania, J., complaining that as the Customs, Excise and Gold Control Appellate Tribunal (for short 'the CEGAT) was without a President for the last over six months the functioning of the Tribunal was adversely affected, in that, the Benches sit for hardly two hours or so, the sittings commence late at about 10.50 a.m., there is a tendency to adjourn cases on one pretext or the other so much so that even passing of interim

orders, like stay orders, etc., is postponed and inordinately delayed, and the general tendency is to work for only four days in a week. The work culture is just not there and the environmental degradation that has taken place is reflected in the letter of Shri G. Sankaran dated June 3, 1991 who prematurely resigned as the President of the CEGAT. Lastly, he says that there were nearly 42,000 appeals and approximately 2000 stay petitions pending in the CEGAT involving revenue worth crores of rupees, which will remain blocked for long. Three directions were sought, namely, "(i) the immediate appointment of the President to the CEGAT, preferably a senior High Court Judge-,

(ii) order an enquiry into the mal-functioning of the CEGAT; and

(iii) issue all other directions as your Lordship may deem fit and necessary."

This letter was directed to be treated as Public Interest Litigation and notice was issued to the Union of India restricted to relief No. (i) i.e. in regard to the appointment of the President of the CEGAT. On April 29, 1992, the learned Additional Solicitor General informed the Court that the appointment of the President was made. On the next date of hearing the relevant file on which the decision regarding appointment was made was produced in a sealed envelope in Court which we directed to be kept in safe custody as apprehension was expressed that the file may be tempered with. The focus which was initially on the working of the CEGAT and in particular against the conduct and behaviour one of its Members now shifted to the legality and validity of the appointment of respondent No. 3 as its President. Serious allegations were made against respondent No. 3 and his competence to hold the post was questioned. It was contended that his appointment was made in violation of the Rules and convention found mentioned in the message of Shri Y.V. Chandrachud, the then Chief Justice of India, dated October 5, 1992 forwarded on the occasion of the inauguration of the CEGAT. The further allegation made is that even though High Court Judges were available no serious attempt was made to requisition the services of one of them for appointment as President of the CEGAT. To put a quietus to the entire matter at an early date we called the file from the Registry on May 4,1992 but when we were about to peruse the same the learned Additional Solicitor General contended 'that the Court cannot inspect it because he desired to claim privilege'. We, therefore, directed that a formal application may be made in that behalf before the next date of hearing and returned the file to enable the making of such an application.

Accordingly, the then Finance Secretary filed an affidavit claiming privilege under sections 123 and 124, Evidence Act, and Article 74(2) of the Constitution. The Minister of State in the Finance Department was also directed to file an affidavit in support of the claim for privilege which he did. It is in this context that the question of privilege arose in the present proceedings.

Our learned Brother Ramaswamy, J. dealt with this question elaborately. After referring to the provisions of the relevant Statutes and the Constitution as well as the case law of both foreign and Indian courts, the authoritative text books. etc. he has concluded as under:

> "Having perused the file and given our anxious consideration we are of the opinion that on the facts of the case..... it is not necessary to disclose the contents of the records of the petitioner or his counsel."

We are in respectful agreement with this conclusion recorded by our learned Brother though not entirely for in the reasons which have weighed with him.

On the question of appointment of respondent No. 3 as the President of the CEGAT we must notice a few provisions contained in the CEGAT Members (Recruitment anti Conditions of Service). Rules, 1997 (hereinafter called 'the Rules'). Rule 2(c) defines a member, to include the President of the CEGAT also; Rule 3 prescribes the qualifications for appointment and Rule 6sets out the method of recruitment of 'a member through a Selection Committee consisting of a Judge of the Supreme Court of 'India nominated by the Chief Justice of India. Rule 10 provides for the appointment of the President. It says that the Central Government shall appoint one of the members to be the President. Sub-rule (2) then provides as under

> "(2) Notwithstanding anything contained in rule 6. a sitting or retired judge of a High Court may also he appointed by the Central Government as a member and President simultaneously."

Sub-rule (4) and the proviso thereto bear reproduction "(4) Where a serving judge of a High Court is appointed as a member and President, he shall hold office as President for a period of three years from the date of his appointment or till he attains the age of 62 years, whichever is earlier:

> Provided that where a retired judge of a High Court above the age of 62 years is appointed its President. he shall hold office for such period not exceeding three years as may be determined by the Central Government at the time of' appointment or re-appointment."

> It will thus he seen that the rules empower the Central Government to appoint any member as the President of the CEGAT. It is true that under sub-rule (4), a serving judge and under the proviso thereto, a retired judge, can also be appointed a Member and President simultaneously. In the case of a serving judge his age of superannuation is fixed at 02 years but in the case of a retired judge he may be appointed for it period of three years at the most. Insofar as a serving High Court Judge is concerned, he holds office until he attains the age of 62 years, vide Article 217 of the Constitution. It therefore, heats common sense why a sitting Judge of he High Court would opt to serve as the President of tile CEGAT if lie is to retire At the same age without any benefit. On tile contrary he would lose certain perks which are attached to tile office of a High Court Judge. Even status-wise lie would suffer as his decisions would he subject to the writ jurisdiction of the High Court under Articles 226/227 of tile Constitution. He may agree to accept the offer only if he had an extended tenure of at least three years. We are, therefore, in agreement with our learned Brother that sub-rule (4) of Rule 10 of the Rules needs a suitable change to make it sufficiently attractive for sitting High Court Judges to accept appointment as the President of the CEGAT. We also agree with our learned brother that to instill the confidence of the litigating public in the CEGAT. the Government must make a sincere effort to appoint a sitting Judge of the High Court is a President of the CEGAT

in consultation of the Chief Justice of India and it a sitting Judge is not available the choice must fall on a retired Judge as far as possible. This would he consistent with the assurance given by the Finance Department as is reflected in the letter of Shri Chandrachud, extract wherefrom is reproduced by our learned Brother in his judgment.

Shri Harish Chandra was a Senior Vice-President when the question of' filling, up the vacancy of the President came up for consideration. He was fully qualified for the post under the Rules. No challenge is made on that count. Under Rule 10(1) the Central (Government is conferred the power to appoint one of the Members to be the President. Since the validity of the Rule is not questioned there can be no doubt that the Central Government was entitled to appoint respondent No. 3 as the President. But it was said that the track record of respondent No. 3 was poor and he was hardly fit to hold the post of the President of the CEGAT. It has been averred that respondent No. 3 had been in the past proposed for appointment as a Judge of the Delhi High Court but his appointment did not materialise due to certain adverse reports. Assuming for the sake of argument that these allegations are factually accurate, this Court cannot sit in judgment over the choice of the person made by the Central Government for appointment as a President if the person chosen is qualified and eligible for appointment under the Rules. We, therefore, agree with our learned Brother that this Court cannot sit in judgment over the wisdom of the Central Government in the choice of the person to be appointed as a President so long as the person chosen possesses the prescribed qualification and is otherwise eligible for appointment. We. therefore, cannot interfere with the appointment of respondent No. 3 on the ground that his track record was poor or because of adverse reports on which account his appointment as a High Court Judge had not materialised.

The allegations made by Shri R.K. Jain in regard to the working of the CEGAT are -rave and the authorities can ill afford to turn a Nelson's eve to those allegations made by a person who is fairly well conversant with the internal working of the Tribunal.

Refusal to inquire into such grave allegations, some of which are capable of verification, can only betray indifference and lack of a sense of urgency to tone up the working of the tribunal. Fresh articles have appeared in the Excise Law Times which point to the sharp decline in the functioning of the CEGAT pointing to a serious management crises. It is high time that the administrative machinery which is charged with the duty to supervise the working of the CEGAT wakes-up from its slumber and initiates prompt action to examine the allegations by appointing a high level team which would immediately inspect the CEGAT, identify the causes for the crises and suggest remedial measures. This cannot brook delay.

Lastly, the time is ripe for taking stock of the working of' the various Tribunals set up in the country after the insertion of Articles 323A 323B in the Constitution. A sound

justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can deliver the goods. After the incorporation of these two articles,Acts have been enacted whereunder tribunals have been constituted for dispensation of justice. Sufficient time has passed and experience gained in these last few years for taking stock of the situation with a view to finding out if they have serve the purpose and objectives for which they were constituted. Complaints have been heard in regard to the functioning, of other tribunals as well and it is time that a body like the Law Commission of India has comprehensive look-in with a view to suggesting- measures for their improved functioning. That body can also suggest changes in the different statutes and evolve a model on the basis whereof tribunals may be constituted or reconstituted with a view to ensuring greater independence. An intensive and extensive study needs to be undertaken by the Law Commission in regard to the constitution of tribunals under various statutes with a view to ensuring their independence so that the public confidence in such tribunals may increase and the quality of their performance may improve. We strongly recommend to the Law Commission of India to undertake such an exercise on priority basis. A copy of this judgment may be forwarded by the Registrar of this Court to the Member-Secretary of the Commission for immediate action.

We have thought it wise to clarify the extent of our concurrence with the views expressed by our learned Brother in his judgment to avoid possibility of doubts being raised in future. We accordingly agree with our learned Brother that the writ petitions should stand disposed of accordingly with no order as to costs.

K.RAMASWAMY, J.: The same facts gave birth to the twin petitions for disposal. by a common judgment. On October 11, 1982, the Customs Central Excise and Gold (Control) Appellate Tribunal for short 'CEGAT' came into existence with Justice F.S. Gill as its President. After he retired in 1985 no Judge was appointed as President. In letter dated December 26, 1991, addressed to the Chief Justice of India, the petitioner highlighted the mal-functioning of the CEGAT and the imperative to appoint a sitting or retired judge of the High Court as President to revitalise its functioning and to regenerate warning and withering faith of the litigant public of the efficacy of its adjudication. Treating it as writ petition on February 25, 1992 this court issued rule nisi to the first respondent, initially to make immediate appointment of the President of the CEGAT, prefer- ably a senior High Court Judge. On March 30, 1992 when the Union's counsel stated that the matter was under active consideration of the government, having regard to the urgency, this court hoped that the decision would he taken within two weeks from that date. On April 20, 1992 the learned Addl. Solicitor General reported that the appointment of the President had been made, however. the order was not placed on record. In the meanwhile die petitioner filed writ petition No. 312 of 1992 impugning the appointment of Sri Harish Chander, as President and sought to quash the same being in violation of the direction issued by

this ('our(on February 25, 1992 and to strike down Rules 10(1), (3) and (4) of the CEGAT Members (Recruitment and Conditions of Service) Rules 1987, for short the 'Rule' as violative of Art. 43 of the Constitution. Rule nisi was also issued to the respondents in that writ petition on May 4, 1992. The tile in a sealed cover was produced. The first and the third respondents were directed to file their counters within four weeks. This court also directed the first respondent "to reflect in the counter what was the actual understanding in regard to the convention referred to in the letter of the then Chief Justice of India dated October 5, 1982"; "What procedure was followed at the time of the appointment by first respondents" and "whether Chief Justice of India was consulted or whether the first respondent was free to choose a retired or a sitting Judge of the High Court as President of the Tribunal with or without consultation of the Chief Justice of India". "It should also point out what procedure it had followed since then in the appointment of the President of the Tribunal". It should also clarify whether "before the third respondent was appointed as the President, "any effort or attempt was made to ascertain if any retired or a sitting Judge of the High Court could be appointed as the President of the Tribunal"

and directed to post the cases for final disposal on July 21, 1992. At request, to enable to government to file a counter, the rile was returned.

The Solicitor General though brought the file on July 21, 1992. objected to our inspecting the file and desired to claim privilege. The file was directed to be kept in the custody of the Registrar-General till further orders. The union was directed to file written application setting out the grounds on which the claim for privilege is founded and directed the Registry to return the sealed envelop as the Solicitor General expressed handicap to make precise claim of the privilege for want of file. Thereafter an application was filed supported by the affidavit of the Secretary, Finance and the State Minister also filed his affidavit. Counter affidavits and rejoinders were exchanged in the writ petitions. The Attorney General also appeared on behalf of the Union. The government's claim for privilege is founded upon s. 123 of the Indian Evidence Act and Art. 74 (2) of the Constitution of India. Later on the Solicitor General modified the stand that the government have no objection for the court to peruse the file but claimed privilege to disclose the contents of the file to the petitioner.

Section 123 of the Indian Evidence Act, 1872 postulates that "no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. Section 124 provides that no public officer shall be compelled to disclose communications made to him in official confidence, "when he considers that the public interests would suffer by the disclosure". S. 162 envisages procedure on production of the documents that a witness summoned to produce a document shall, if it is in his possession or power, bring it to the court, notwith- standing any

objection which there may be to its production or to its admissibility.

"The validity of any such objection shall be decided by the court." The court, if it deems fit, may inspect the documents, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

The remedy under Art. 32 of the Constitution itself is a fundamental right to enforce the guaranteed rights in Part

111. This court shall have power to issue writ of habeas- corpus, mandamus, certiorari, quowarranto or any other appropriate writ or direction or order appropriate to the situation to enforce any of the fundamental right (power of High court under Art. 226 is wider). Article 144 enjoins that all authorities, civil and judicial, in the territory of India shall act in aid of this Court. Article 142 (1) empowers this Court to make such orders as is necessary for doing complete justice in any cause or matter pending before it. Subject to the provisions of any law made in this behalf by the Parliament, by Clause 2 of Art. 142. this Court "shall have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents,or the investigation or punishment of any contempt of itself."

When this Court was moved for an appropriate writ under Art. 32, rule nisi would be issued and for doing complete justice in that cause or matter, it has been invested with power to issue directions or orders which includes ad interim orders appropriate to the cause. All authorities, constitutional, civil judicial, statutory or persons in the territory of India are enjoined to act in aid of this court. This court while exercising its jurisdiction, subject to any law, if any, made by Parliament consistent with the exercise of the said power, has been empowered by Cl. 2 of Art. 142 with all and every power to make any order to secure attendance of any person, to issue "discovery order nisi" for production of any documents, or to order investigation .... Exercise of this constituent power is paramount to enforce not only the fundamental rights guaranteed in Part III but also to do complete justice in any matter or cause, presented or pending adjudication. The power to issue "discovery order nisi" is thus express as well as inherent as an integral power of Judicial review and process in the court to secure the attendance of any person or discovery or production of any document or to order investigation in that behalf. However. in an appropriate case, depending on facts on hand, court may adopt such other procedure as would be warranted. The petitioner must make strong prima facie case to order discovery order nisi, etc. and it must not be a hunting expedition to fish out some facts or an attempt to cause embarrassment to the respondents nor for publicity. But on issuance of rule nisi by this Court under Art. 32 or a discovery order nisi the government or any authority, constitutional, civil, judicial. statutory or otherwise or any person, must produce the record in their custody and disobedience thereof would be at the pain of contempt.

Section 123 of the Evidence Act gives right to the government, in other words, to the minister or in his absence head of the department, to claim privilege, in other words immunity from disclosure of the unpublished official state documents in public interest. In a democracy, governed by rule of law

State is treated at par with a person by Art. 19(6) in commercial/industrial activities. It possessed of no special privileges. This Court in State of U.P. v. Raj Narain & Ors. [1975] 2 SCR 333 at 349 held that an objection claiming immunity should be raised by an affidavit affirmed by the head of the department. The court may also require a Minister to affirm an affidavit. They must state with precision the grounds or reasons in support of the public interest immunity. It is now settled law that the initial claim for public interest immunity to produce unpublished official records for short "state documents"

> should be made through an affidavit generally by the Minister concerned, in his absence by the Secretary of the department or head of the Department. In the latter case the court may require an affidavit of the Minister himself to be filed. The affidavit should indicate that the documents in question have been carefully read and considered and the deponent has been satisfied, supported by reasons or grounds valid and germane, as to why it is apprehended that public interest would be injured by disclosure of the document summoned or called for. If the court finds the affidavit unsatisfactory a further opportunity may be given to file additional affidavit or be may be summoned for cross-examination. If the court is satisfied from the affidavit and the reasons assigned for withholding production or disclosure, the court may pass an appropriate order in that behalf. The Court though would give utmost consideration and deference to the view of the Minister, yet it is not conclusive. The claim for immunity should never be on administrative routine nor be a garb to avoid inconvenience, embarrassment or adverse to its defence in the action, the latter themselves a ground for disclosure. If the court still desires to peruse the record for satisfying itself whether the reasons assigned in the affidavit would justify withholding disclosure, the court would, in camera, examine the record and satisfy itself whether the public interest subserves withholding production or disclosure or making the document as part of the record. On the one side there is the public interest to be protected; on the other side of the scale is the interest of the litigant who legitimately wants production of some documents, which he believes will support his own or defeat his adversary's case. Both are matters of public interest, for it is also in the public interest that justice should be done between litigating parties by production of all relevant documents for which public interest immunity has been claimed. They must be weighed one competing public interest in the balance as against another equally competing public administration of justice. The reasons are: there is public interest that harm shall not be done to the nation or the public service by disclosure of the document in question and there is public interest that the administration of justice shall not be frustrated by withholding the document which must be produced, if justice is to be done. The court also should be satisfied whether, the evidence relates to the affairs of the State under sec. 123 or not; evidence is relevant to the issue and admissible. As distinct from private interest, the principle on which protection is given is that where a conflict arise between public and private interest, private interest must yield to the public interest. In S.P. Gupta & Ors. etc. etc v. Union of India & Ors. etc. etc. [1982] 2 SCR 365, this court by seven Judges' bench held that the court would allow the objection to disclosure if it finds that the

document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest in the administration of justice in the particular case before it overrides all other aspects of public interest, it will overrule the objection and order disclosure of the document.

When an objection was raised against disclosure of a particular document that it belongs to a class which in the public interest ought not to be disclosed, whether or not it would be harmful to disclose that class document or the contents of that particular document forming part of the class would be injurious to the interest of the state or the public service, it would be difficult to decide in vacuum the claim because it would almost invariably be supported by an affidavit made either by the Minister or head of the department and if he asserts that to disclose the contents of the document would or might do to the nation or the public service a grave injury, the court out of deference will be slow to question his opinion or to allow any interest, even that of justice, to prevail over it unless there can be shown to exist some factors suggesting either lack of good faith or an error of judgment on the part of the minister or the head of the department or the claim was made in administrative routine without due consideration or to avoid inconvenience or injury to their defence. However, it is well-settled law that the court is not bound by the statement made by the minister or the head of the department in the affidavit and it retains the power to balance the injury to the State or the public service against the risk of injustice. The real question which the court is required to consider is whether public interest is so strong to override the ordinary right and interest of the litigant that he shall be able to lay before a court of justice of the relevant evidence. In balancing the competing interest it is the duty of the court to see that there is the public interest that harm shall not be done to the nation or the public service by disclosure of the document and there is a public interest that the administration of justice shall not be frustrated by withholding documents which must be produced if justice is to he done. It is, therefore, the paramount right and duty of the court not of the executive to decide whether a document will be produced or may he withheld. The court must decide which aspect of public interest predominates or in other words whether the public interest which requires that the document should not be produced out weighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weight one competing aspect of the public interest against the other, and decide where the balance lies. If the nature of the injury to the public interest is so grave a character then even private interest or any other interest cannot be allowed to prevail over it. The basic question to which the court would. therefore, have to address itself for the purpose of deciding the validity of the objection would be, whether the document relates to affairs of State or in other words, is it of such a character that its disclosure would be against the interest of the State or the public service and if so, whether the public interest in- it-; non-disclosure is so strong that it must prevail over the private

interesting the administration of justice and on that account, it should not be allowed to be disclosed. By operation of Sec. 162 of Evidence Act the final decision in regard to the validity of an objection against disclosure raised under section 123 would always be with the court. The contention, therefore, that the claim of public interest immunity claimed in the affidavit of the State Minister for Finance and the Secretary need privacy and claim for immunity of state documents from disclosure is unsustainable.

The same is the law laid down by the Commonwealth countries, see Conway v. Rimmer. 1968 A.C. 910, (H.L.); D. v. National Society for the Prevention of Cruelty to Children 1978 AC

171. (H.L.); Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England, 1980 AC 1090 (H.L.); Butters Gas and Oil Co. v.Hammer 1982 AC 888 (H.L.); Air Canada v. Secretary of State for Trade [1983] 2 AC 394 (H.L.); and Council of Civil Service Unions v. Minister for the Civil service,1985 AC 374 (H.L.); Pursuant to the law laid down in Conway's, case the Administration of Justice Act, 1970 was made enabling the court to order disclosure of the documents except where the court, in exercise of the power under sections 31 to 34, considered that compliance of the order would be injurious to the public interest consistent with the above approach is the principle laid by this court in S.P. Gupta's case.

In United States of America the Primacy to the executive privilege is given only where the court is satisfied that disclosure of the evidence will expose military secrecy or of the document relating to foreign relations. In other respects the Court would reject the assertion of executive privilege. hi United States v. Reynolds [1935] 1 345 U.S. 1, Environment Protection Agency v. Patsy T. Mink [410] U.S. 73 (35) L.Ed. 2nd 11; Newyork Times v. U. S. [1971] 403 US 731; Pentagan Papers case and U. S. v. Richard M. Nixon [1974] 418 US 683 = 41 L.Ed 2nd 1035. What is known as Watergate Tapes case, the Supreme Court of U.S.A. rejected the claim of the President not to disclose the conversation he had with the officials. The Administrative Procedure Act 5, Art 552 was made. Thereunder it was broadly conceded to permit access to official information. Only is stated hereinbefore the President is to withhold top secret documents pursuant to executive order to be classified and stamped as "highly sensitive matters vital to our national defence and foreign policies". In other respects under the Freedom of Information Act, documents are accessible to production. In the latest Commentary by McCormick on Evidence, 4th Ed. by John W. Strong in Chapter 12, surveyed the development of law on the executive privilege and stated that at p. 155, that "once we leave the restricted area of military and diplomatic secrets, a greater role for the judiciary in the determination of governmental claims of privilege becomes not only desirable but necessary..... Where these privileges. are claimed, it is for the judge to determine whether the interest in governmental secrecy is out weighed in the particular case by the litigant's interest in obtaining the evidence sought. A satisfactory striking of this balance will, on the one hand, require

consideration of the interests giving rise to the privilege and an assessment of the extent to which disclosure will realistically impair those interests. On the other hand, factors which will affect the litigant's need will include the significance of the evidence sought for the case. the availability of the desired information from other sources, and in some instances the nature of the right being, asserted in the litigation."

In Robinson v. State of South Australia, 1931 A.C. 704 PC, Shankey v. Whitlan [1979] 53 ALR p.1; FAI Insurances Ltd. v. The Hon. Sir, Henry Arthus Winneke and ors, [1982] 151 CLR 342, whitlan v. Australian Consolidated Press Ltd.,[1985] 60 ALR p.7; Minister for Arts Heritage and Environment and Ors. v. Pekoi Wallsend Ltd and Ors. [1987] 75 ALR 218 and Commonwealth of Australia v. Northern Land Council, and Anr. [1991] 103 ALR 267, Australian Courts consistently rejected the executive privilege and exercise the power to determine whether the documents need immunity from disclosure in the public interest. The same view was endorsed by the Supreme Court of 'Canada in R. v. Shinder 1954 SLR 479 and Gagnon v. Quebec, Securities Commission 1964 SCR 329; The Supreme Court of Victoria in Bruce v. Waldron. [1963] VLR p.3; The Court of Appeal of New south Wales in Re Tunstall. Ex. P. Brown, [1966] 84 W.N. (Pt. 2) [N.S.W.] 13. The Court of Appeal of the New Zealand in Corbett v.Social Security Commission [1962] N.Z.L.R. 878, Creednz Inc v. Governor General [1981] 1 N.L.R. p. 172; The Supreme Court of Ceylon in Apponhamy v. Illangaretute, [1964] 66 C.L.W. 17. The Court of Appeal of Jamaica in Allen v. By field [No.2] [1964] 7 W.I.R. 69 at page 71 and The Court of Session in Scotland in Glasqow Corporation v. Central Land Board, [1956] Scotland Law Time p.4. The learned Solicitor General contended that a Cabinet sub- committee constituted under Rules of Business approved the appointment of Harish Chander as President of CEGAT. The President accordingly appointed him. By operation of Art. 77 (3) and 74(1), the appointment was made by the President. The file constitutes Cabinet documents forming part of the Preparation of the documents leading to the formation of the advice tendered to the President. Noting of the officials which lead to the Cabinet note and Cabinet decision and all papers brought into existence to prepare Cabinet note are also its part. Section 123 of the Evidence Act and Article 74(2) precludes this court from inquiring into the nature of the advice tendered to the President and the documents are, therefore, immuned from disclosure. The disclosure would cause public injury preventing candid and frank discussion and expression of views by the bureaucrats at higher level and by the Minister/Cabinet Sub-committee causing serious injury to public service. Therefore, Cabinet papers, Minutes of discussion by heads of departments; high level documents relating to the inner working of the government machine and all papers concerned with the government policies belong to a class documents which in the public interest they or contents thereof must be protected against disclosure.

The executive power of the Union vested in the President by Operation of Art. 53(1) shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. By operation of Art. 73(1), subject to the provisions of the constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Article 75(1) provides that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister; Art. 75(3) posits that the Council of Ministers shall be collectively responsible to the House of the People; Art.

75(4) enjoins that before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule to the Constitution. Article 74(1) as amended by section 11 of the Constitution 42nd Amendment Act, 1976 with effect from January 3, 1977 postulates that there shall be a Council of Ministers with the Prime Minister as the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. The proviso thereto added by section 11 of the Constitution 44th Amendment Act, 1978 which came into effect from June 20, 1979 envisages that "provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration." Clause (2) declares that "the question whether any, and if so what, advice was tendered by Minister to the President shall not be inquired into in any court." In Satwant Singh Sawhney v. D. Ramarathnam. Asstt. Passport Officer [1967] 3 SCR 525, and in Maganbhai Ishwarbhai Patel v. Union of India and anr. [1969] 3 SCR 254, this Court held that the Ministers are officers subordinate to the President under Art. 53 (1) or 'the Governor under Art. 154 (1),. as the case may be. The President exercises his executive power under Art: 74 (1) through the Council of Ministers with the Prime Minister as its head who shall be collectively responsible to the House of People. The exercise of the power would be as per the rules of business for convenient transaction of the Govt. administration made under Art. 77(3), viz., the Govt. of India (Transaction of Business) Rules, 1961 for short the 'Business Rules'. The Prime Minister shall be duty bound under Art. 78 to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation etc. The details whereof are not material. Article 77(1) prescribes that "all executive actions of the Govt. of India shall be expressed to be taken in the name of the President and shall be authenticated in the manner specified in the Rules made by the President. The President issued business rules and has allocated diverse functions to the Council of Ministers, its committees and the officers subordinate to them.

In Shamsher Singh v. State of Punjab [1975] 1 SCR 814, a Bench of seven Judges, speaking through Ray, C.J., held that the executive power is generally described as the residue which does not fall within legislative or judical power but executive power also partakes of legislative or judicial, actions. All powers and functions of the President, except his legislative powers, are executive powers of the Union vested in the President under Art. 53(1). The President exercises his functions, except conferred on him to be exercised in his discretion, with the aid and advice of the Council of Ministers as per the business rules allocated among his Ministers or Committees. Wherever the constitution requires the satisfaction of the President, the satisfaction required of him by the Constitution is not the personal satisfaction of the President, but is of the Cabinet System of Govt. The Minister lays down the policies. The Council of Ministers settle the major policies. The civil servant does it on behalf of the Govt. as limb of the Govt. The decision of any Minister or officer under the rules is the decision of the President.

Cabinet is a constitutional mechanism to ensure that before important decisions are reached many sides of the question are weighed and considered which would mean that much work must be done beforehand in interdepartmental discussions and in the preparation of papers for Cabinet Committees. Political decisions of importance are in their nature complies and need sufficient time and considerate thought. Equally, the decisions relating to public service need probity and diverse

consideration. The Cabinet system is extremely well adapted to making considered decisions with all due speed and expedition. The principle of ministerial responsibility has a verity of meanings precise and imprecise, authentic and vague. Parliament rarely exercises direct control over Ministers. Though the floor of the House is the forum for correcting excesses of the government but rarely a place where a Minister can be expected to keep the information secret. Therefore, the Minister is answerable for his decision to the Parliament is fanciful. Sir Ivor Jennings,in his Cabinet Government, stated that the Cabinet is the supreme directing authority. It integrates what would otherwise be a heterogeneous collection of authorities exercising a vast variety of functions. Neither the Cabinet nor the Prime Minister, as such, claims to exercise any powers conferred by law. They take the decision, but the acts which have legal effect are taken by others the Privy Council, a Minister, a statutory commission and the like. At page 81, it is stated, that the existence and activities of these coordinating ministers does not impair or diminish the responsibility to Parliament of the departmental ministers whose policies they co- ordinate. The ministers are fully accountable to Parliament for any act of policy or administration within their departmental jurisdiction. It does not follow that the coordinating ministers are non-responsible. Having no statutory powers as coordinating ministers, they perform in that capacity no formal acts. But they share in the collective responsibility of the Govt. as a whole, and, as Minister they are accountable to Parliament. At page 233, he stated that the Cabinet has to decide policy matters. Cabinet is policy formulating body. When it has determined on a policy, the appropriate department carries it out, either by administrative action within the law or by drafting a bill to be submitted to Parliament so as to change the law. The Cabinet is a general, controlling body. It neither desires, nor is able to deal with all the numerous details of the Govt. It expects a minister to take all decisions which are not of real political importance. Every Minister must, therefore, exercise his own discretion as to what matters arising in his department ought to receive cabinet sanction. At page 35 1, he stated that civil servants prepare memorandum for their Ministers. Ministers discuss in Cabinet. Proposals are debated in the House of Commons. At the, persons involved are peculiar people and nobody knows what the man in the back street thinks of it all, though the politician often thinks he does. On the Cabinet Minister's responsibility at page 449, he stated that when it is said that a Minister is responsible to Parliament, it is meant that the House of Commons (in our constitution Lok Sabha) may demand an explanation. If that explanation is not considered satisfactory and the responsibility is collective, the House will vote against the Govt. and so compel a resignation or a dissolution. If the responsibility is not collective, but the act or advice was due to the negligence of or to an error of judgment by a Minister and the House disapproves, the Minister will resign.

In Halsbury's Laws of England, Fourth Ed., Vol. 8, para 820, it is stated that the Cabinet control of legislative and executive functions, the "modern English system of government is the concentration of the control of both legislative and executive functions in a small body of men, presided over by the Prime Minister, who are agreed on fundamentals and decide the most important questions of policy secretly in the Cabinet. The most important check on their power is the existence of a powerful and organised parliamentary opposition, and the possibility that measures proposed or carried by the government may subject them to popular disapproval and enable the Opposition to defeat them at the next general election and supplant them in their control of the executive. In Great Britain, Cabinet system is based on conventions. Patrick Gordon Walker in his 'The Cabinet' 1973 Revised Ed. at p. 178 stated that basically Cabinet is a constitutional mechanism to ensure that before

important decisions are reached many sides of the question are weighed and considered. This means that much work must be done beforehand in interdepartmental discussions and in the preparation of papers for Cabinet Committees and the Cabinet. Cabinet that acts without briefs or over hastily' think for themselves' usually, in my experience, make mistaken decisions. Political decisions of importance are in their nature complex and need some time and thought. The cabinet system is extremely well adapted to making considered decisions with all due speed. Cabinet discussions as distinct from Cabinet decisions must, from their nature, be kept secret. At page 184 he maintained that the main effective change towards less secrecy would be for the Cabinet to share with Parliament and public more of the factual information on which the government makes some of their decisions. Moves in this direction have begun to be taken. In his "the British Cabinet" John P. Mackintosh, 2nd Edn. at p. 11 stated that if there is dissension between Ministers, matters may be thrashed out in private and the contestants plead in turn with the Prime Minister, but it is in the Cabinet that the conflict must be formally solved, the minority either accepting the decision and assuming joint responsibility or, if they cannot tolerate it, tender their resignations. At p.529, he stated that some decisions are taken by the Prime Minister alone, some in consultation between him and the senior Ministers, while others are left to heads of departments, to the full Cabinet, to the concerned Cabinet Committee, or to the permanent officials. Of these bodies the Cabinet holds the central position because, thou oh it does not often govern in that sense, it is the place where disputes are settled, where major policies are endorsed and where the balance of the forces emerge if there is disagreement. In the end, most decisions have to be reported to the Cabinet and Cabinet Minister are the only ones who have the right to complain, if they have not been informed or consulted. 0. Hood Phillips and Paul Jackson in their Constitutional and Administrative Law, 7th Ed. at p.301 stated that the duties of Cabinets are:

> "(a) the final determination of the policy to be submitted to Parliament', (b) the supreme control of the national executive in accordance with the policy prescribed by the Parliament, and (c) the continuous coordination and delimitation in the interests of the several departments of State." The Cabinet, giving collective ..advice" to the Sovereign through the Prime Minister, was said to exercise under Parliament, supreme control over all departments of State, and to be the body which coordinate the work on the one hand of the executive and the legislature, and on the other hand of the organs of the executive among themselves.... At p.307, they stated that "committee system has increased the efficiency of the Cabinet, and enables a great deal more work to be done by Ministers". The Cabinet itself is left free to discuss controversial matters and to make more important decisions, and its business is better prepared. The system also enables non-Cabinet Ministers to be brought into discussions. At p.309 it is stated that "the responsibility of Ministers is both individual and collective". The individual responsibility of a Minister for the performance of his official duties is both legal and conventional: it is owed legally to the sovereign and also by convention to Parliament. Responsibility is accountability or answerability. The responsible Minister is the one under whose authority an act was, done, or "who must take the constitutional consequences of what has been done either by himself or in his department".

In 'the Cabinet Walker, at page 183 stated that the feeling is widespread that the Cabinet shrouds its affairs in too much secrecy and that Parliament, Press and public should be able to participate to a greater degree in formulation of policy. With few exceptions Cabinet decisions have to be made public in order to he made effective, although a small number that do not need to be executed, do not become known, for instance talks with a foreign country or a decision not to take some action. All other cabinet decisions are necessarily disclosed and are subject to public scrutiny. Cabinet discussions as distinct from Cabinet decisions must, from their nature, be kept secret. Cabinet discussions often depend upon confidential advice from civil servants or reports from Ambassadors. If those are disclosed and thus become subject to public attack, it would be extremely difficult for the cabinet to secure free and frank advice. In Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab [1955] 2 SCR 225 at 236, this Court held that the existence of the law is not a condition precedent for the exercise of the executive power. The executive power connotes the residual government function that remain after legislative and judicial functions are taken away, subject to the provisions of the Constitution or the law.

It would thus be held that the Cabinet known as Council of Ministers headed by Prime Minister under Art. 75(3) is the driving and steering body responsible for the Governance of the country. They enjoy the confidence of the Parliament and remain in office so long as they maintain the confidence of the majority. They are answerable to the Parliament and accountable to people. They bear collective responsibility and shall be bound to maintain secrecy. Their executive function comprises of both the determination of the policy as well as carrying it into execution, the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, direction of foreign policy. In short the carrying on or supervision of the general administration of the affairs of Union of India which includes political activity and carrying on all trading activities, the acquisition, holding and disposal of property and the making of contracts for any purpose. In short the primary function of the Cabinet is to formulate the policies of the Govt. in confirmity with the directive principles of the Constitution for the Governance of the nation; place before the Parliament for acceptance and would carry on the executive function of the State as per the provisions of the Constitution and the laws. Collective responsibility under Art. 75(3) of the Constitution inheres maintenance of confidentiality as enjoined in oaths of office and of secrecy set forth in Schedule III of the Constitution that the Minister will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under his/her consideration or shall become known to him/her as Minister except as may be required for the "due discharge of his/her duty as Minister". The base and basic postulate of its significance is unexceptionable. But the need for and effect of confidentiality has to be nurtured not merely from political imperatives of collective responsibility envisaged by Art. 75(3) but also from its pragmatism. Bagehot in his 'The English Constitution', 1964 Edition at p. 68 stated that the most curious point about the Cabinet is that so very little is known about it. The meetings are not only secret in theory, but secret in reality. By the present practice, no official minute in all ordinary cases is kept of them. Even a private note is discouraged and disliked..... But a Cabinet, though it is a committee of the legislative assembly,is a committee with a power which no assembly would-unless for historical accidents, and after happy experience-have been persuaded to entrust to any committee. It is a committee which can dissolve the assembly which appointed it; it is a committee with a suspensive veto-a committee with a power of appeal.

In Commonwealth of Australia v. Northern Land Council & Anr. [1991] 103 Australian Law Reports, p. 267, the Federal Court of Australia General Division, was to consider the scope of confidentiality of the cabinet papers, collective responsibility of the Council of Ministers and the need for discovery of the Cabinet note-books and dealt with the question thus : "The conventional wisdom of contemporary constitutional practice present secrecy as a necessary incident of collective responsibility. But historically it seems to have derived from the 17th century origins of the cabinet as an inner circle of Privy Councillors, sometimes called the Cabinet Council who acted as advisors to the monarch..... However, that basis for confidentiality has to be assessed in the light of the political, imperatives of collective responsibility." Confidentiality has been described as' the natural correlative of collective responsibility. It is said to be difficult for Ministers to make an effective defence in public of decisions with which it is known that they have disagreed in the course of Cabinet discussions. The Cabinet as a whole is responsible for the advice and conduct of each of its members. If any member of the Cabinet seriously dissents from the opinion and policy approved' by the majority of his colleagues it is his duty as a man of honour to resign. Cabinet secrecy is an essential part of the structure of government which centers of political experience have created. To impair it without a very strong reason would be vandalism the wanton rejection of the fruits of civilisation.

By operation of Art. 75 (3) and oaths of office and of secrecy taken, the" individual Minister and the Council of Ministers with the Prime Minister as its head, as executive head of the State as a unit, body or committee are individually and collectively responsible to their decisions or acts or policies and they should work in unison and harmony. They individually and collectively maintain secrecy of the deliberations both of administration and of formulating executive or legislative policies. Advice tendered by the Cabinet to the President should be unanimous. The Cabinet should stand or fall together. Therefore, the Cabinet as a whole is collectively responsible for the advice tendered to the President and for the conduct of business of each of his/her department. They require to maintain secrecy and confidentiality in the performance of that duty of office entrusted by the Constitution and the laws. Political promises or aims as per manifesto of the political party are necessarily broad; in their particular applications, when voted to power, may be the subject of disagreement among the members of the Cabinet.

Each member of the Cabinet has personal responsibility to his conscience and also responsibility to the Government. Discussion and persuasion may diminish disagreement, reach unanimity, or leave it unaltered. Despite persistence of disagreement, it is a decision, though some members like it less than others. Both practical politics and good Government require that those who like it less must still publicly support it. If such support is too great a strain on a Minister's conscience or incompatible to his/her perceptions of commitment and find it difficult to support the decision, it would be open to him/her to resign. So the price of the acceptance of Cabinet office is the assumption of the responsibility to support Cabinet decisions. The burden of that responsibility is shared by all. Equally every member is entitled to insist that whatever his own contribution was to the making of the decision, whether favourable or unfavourable, every other member will keep it secret. Maintenance of secrecy of an individual's contribution to discussion, or vote in the Cabinet guarantees most favourable and conducive atmosphere to express views formally. To reveal the view, or vote, of a member of the Cabinet, expressed or given in Cabinet, is not only to disappoint an

expectation on which that member was entitled to rely, but also to reduce the security of the continuing guarantee, and above all, to undermine the principle of Collective responsibility. Joint responsibility supersede individual responsibility; in accepting responsibility for joint decision, each member is entitled to an assurance that he will be held responsible not only for his own, but also as member if the whole Cabinet which made it; that he will be held responsible for maintaining secrecy of any different view which the others may have expressed. The obvious and basic fact is that as part of the machinery of the Government, Cabinet secrecy is an essential part of the structure of the government. Confidentiality and collective responsibility in that scenario are twins to effectuate the object of frank and open debate to augment efficiency of public service or effectivity of collective decision to elongate public interest. To hamper and impair them without any compelling or at least strong reasons, would be detrimental to the efficacy of public administration. It would tantamount to wanton rejection of the fruits of democratic governance, and abdication of an office of responsibility and dependability. Maintaining of top secrecy of new taxation policies is a must but leaking budget proposals a day before presentation of the budget may be an exceptional occurrence as an instance.

Above compulsive constraints would give rise to an immediate question whether the minister is required to disclose in the affidavit the reasons or grounds for public interest immunity of disclosure and the oath of secrecy is thereby whether breached or whether it would be a shield for non-production of unpub-

lished state documents or an escape route to- acts impugned as fondly pleaded and fervently argued by Attorney General. It is already held that on issuance of rule nisi or discovery order nisi" every or,-,an of the State or the authority or a person is enjoined to act in aid of this court and pursuant thereto shall be required to produce the summoned documents. But when a claim for public interest immunity has been laid for non-disclosure of the state documents, it is the Minister's "due discharge of duty" to state on oath in his affidavit the grounds on which and the reasons for which he has been persuaded to claim public interest immunity from disclosure of the state papers and produce them. The oath of secrecy the Minister had taken does not absolve him from filing the affidavit. It is his due discharge of constitutional duty to state in the affidavit of the grounds or reasons in support of public interest immunity from producing the state documents before the Court, In Attorney General v. Jonathan Cape Ltd. [1976] Queen's Bench, 752, Lord Widgery, C.J., repelled the contention that publication of the diaries maintained by the Minister would be in breach of oath of secrecy. In support of the plea of secrecy reliance was placed on the debates on cabinet secrecy, that took place on December 1, 1932 in the House of Lords. An extract from the official report of House of Lords, at Column 520 Lord Hailsham's speech emphasised the imperative to maintain secrecy and the limitation which rigidly hedged around the position of a Cabinet Minister thus: "having heard that oath read your Lordships will appreciate what a complete misconception it is. to suppose, as some people seem inclined to suppose, that the only obligation that rests upon a Cabinet Minister is not to disclose what are described as the Cabinet's minutes. He is sworn to keep secret all matters committed and revealed unto him or that shall be treated secretrly in council". He went on to point out that:-

> "I have stressed that because, as my noble and learned friend Lord Halsbury suggested and the noble Marquis, Lord Salisbury, confirmed, Cabinet conclusions did not exist until 16 years ago. The old practice is set out in a book which bears the name of the noble Earl's father, Halsbury's Laws of England, with which I have had the honour to be associated in the present edition."

Then in column 532 of the speech Lord Hailsham, stated that the oath of secrecy should be maintained. "Upon matters on which it is their shorn duty to express, their. opinions. with complete frankness and to give all information, without any haunting fear that what happens may hereafter by publication create difficulties for themselves or, what is far more grave, may create complications for the king and country that they are trying to serve. For those reasons I hope that the inflexible rule which has hitherto prevailed will be maintained in its integrity, and that if there has been any relaxation or misunderstanding, of which I say nothing, the debate in this House will have done something to clarify the position and restate the old rule in all its rigour and all its inflexibility."

As a Council of Minister, his duty is to maintain the sanctity of oath and to keep discussions and information he had during its course as secret. Lord Widgery after considering the evidence of a former Minister examined in that case who did not support the view of Lord Hailsham, held thus: "that degree of protection, afforded to cabinet papers and discussions cannot be determined by single rule of thumb. Some secrets require a high standard of protection for short time, other requires protection till a new political generation has taken over. In the Present action against the literary executors, "the perpetual injunction against them restraining from their publication was not proper". It was further held that the draconian remedy when public interest demands it would be relaxed. In Sankey v. Whitlan 1979 153 Australian Law Journal Reports, 11, while considering the same question, Gibbs, A.,C.J., at p.23, held that the fact that members of the Executive Council are required to take a binding oath of secrecy does not assist the argument that the production of State papers cannot be compelled. The plea of privilege was negatived and the Cabinet papers were directed to be produced. The contention that the Minister is precluded to disclose in his affidavit the grounds or the reasons as to how he dealt with the matter as a part of the claim for public interest immunity is devoid of substance. It is already held that it is the duty of the Minister to file an affidavit stating the grounds or the reasons in support of the claim from public interest immunity. He takes grave risk on insistence of oath of secrecy to avoid filing an affidavit or production of State documents and the court may be constrained to draw such inference as are available at law. Accordingly we hold that the oath of office of secrecy adumberated in Article 75(4) and Schedule III of the Constitution does not absolve the Minister either to state the reasons in support of the public interest immunity to produce the state documents or as to how the matter was dealt with or for their production when discovery order nisi or rule nisi was issued. On the other hand it is his due discharge of the duty as a Minister to obey rule nisi or discovery order nisi and act in aid of the court. The next limb of the argument is that the Cabinet Sub- committee's decision is a class document and the contents of state documents required to be kept in confidence for efficient functioning of public service including candid and objective expression of the views on the opinion by the Ministers or bureaucrats etc. The prospects of later disclosure at a at a litigation would hamper and dampen candour causing serious incursion into the efficacy of public service and result in deterioration in proper functioning of the public service. This blanket shielding of disclosure was

disfavoured right from Robinson v. State of South Australia [1931] Appeal Cases, (P.C.), p. 704 Lord Warrington speaking for the Board held that the privilege is a narrow, one and must sparingly be exercised. This court in Raj Narain's case considering green book, i.e., guidelines for protecting VVIPs on tour, though held to be confidential document and be wihheld from production, though part of its contents were already revealed, yet it was held that confidentiality itself is not a head of privilege. In S.P. Gupta's case, Bhagwati, J., speaking per majority, reviewing the case law and the privilege against disclosure of correspondence exchanged between the Chief Justice of the Delhi High Court, Chief Justice of India and the Law Minister of the Union concerning extension of term or appointment of Addl. Judges of the Delhi High Court, which was not dissented, (but explained by Fazal Ali,J.) held that in a democracy, citizens are to know what their Govt. is doing. No democratic Govt. can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Govt. It is only if the people know how the Govt. is functioning and that they can fulfill their own democratic rights given to them and make the democracy a really effective participatory democracy. There can be little doubt that exposure to public scrutiny is one of the surest means of running a clean and healthy administration. Disclosure of information in regard to the functioning of the Govt. must be the rule and secrecy can be exceptionally justified only where strict requirements of public information was assumed. The approach of the court must be to alleviate the area of secrecy as much as possible constantly with the requirement of public interest bearing in mind all the time that the disclosure also serves an important' aspect of public interest. In that case the correspondence between the constitutional functionaries was inspected by this court and disclosed to the opposite parties to formulate their contentions.

In Conway's case, the speech of Lord Reid is the sole votery to support the plea of confidentiality emphasising that, "the business of Govt. is difficult enough as it is no Govt. could contemplate with equanimity the inner workings of the Govt. machine being exposed to the gazes of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind". Other Law Lords negated it. Lord Morris of Borth-y-Gest referred it as "being doubtful validity". Lord Hodson thought it "impossible to justify the doctrine in its widest term. Lord Pearce considered that "a general blanket protection of wide classes led to a ocomplete lack of common sense". Lord Upjohn found it difficult to justify the doctrine "when those in other walks of life which give rise to equally important matters of confidence in relation to security and personal matters as in the public service can claim no such privilege". In Burmah Oil Co's. case House of Lords dealing with the cabinet discussion laid that the claim for blanket immunity "must now be treated as having little weight, if any". It was further stated that the notion that "any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off- chance that they might have to be produced in a litigation as grotesque". The plea of impairment of public service was also held not available stating "now a days the state in multifarious manifestations impinges closely upon the lives and activities of individual citizens. Where this was involved a citizen in litigation with the state or one of its agencies, the candour argument is an utterly insubstantial ground for denying his access to relevant document". The candour doctrine stands in a different category from that aspect of public interest which in appropriate circumstances may require that the "Sources and nature of information confidentially tendered" should be with held from disclosure. In Reg v., Lewes Justices, Ex Parte Secretary of state for the Home Department

[1973] A.C. 388 and D.V National Society ,for the Prevention of Cruelty to Children [1978] A.C. 171, are cases in point on that matter and needs no reiteration.

It would, therefore, be concluded that it would be going too far to lay down that no document in any particular class or one of the categories of cabinet papers or decisions or contents thereof should never, in any circumstances, be ordered to be produced. Lord Keith in Burnnah Oil's case considered that it would be going too far to lay down a total protection to cabinet minutes. The learned Law Lord at p. 1134 stated that "something must turn upon the subject matter, the persons who dealt with it, and the manner in which they did so. In so far as a matter of government policy is concerned, it may be relevant to know the extent to which the policy remains unfulfilled, so that its success might be prejudiced by disclosure of the considerations which led to it. In that context the time element enters into the equation. Details of an affair which is stale and no longer of topical significance might be capable of disclosure without risk of damage to the public interest..... The nature of the litigation and the apparent importance to it of the documents in question may in extreme cases demand production even of the most sensitive communications to the highest level." Lord Scarman also objected total immunity to Cabinet documents on the plea of candour. In Air Canada's case, Lord Fraser lifted Cabinet minutes front the total immunity to disclose, although same were entitled to a hi oh degree of protection ....."

In Jonathan Cape Ltd.'s case, it was held that, "it seen-is that the degree of protection afforded to Cabinet papers and discussions cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until new political generation has taken over. Lord Redcliff Committee, appointed pursuant to this decision, recommended time gap of 15 years to withhold disclosure of the cabinet proceedings and the Govt. accepted the same. Shanky's case ratio too discounted total immunity to the Cabinet document as a class and the plea of hampering, freedom and candid advice or exchange of views and opinions was also rejected. It was held that the need for protection depends on the facts in each case. The object of the protection is to ensure the proper working of the Govt. and not to shield the Ministers and servants of the crown from criticism however, intemperate and unfairly based. Pincus J. in Harbour Corp. of Queensland v. Vessey Chemicals Ply Ltd. [1986] 67 ALR 100; Wilcox J. in Manthal Australia Pty Ltd. v. Minister for industry, Technology and commerce 11987171 ALR 109; Koowarta v. Bjelke-Petersen [1988] and 92 FLR 104 took the same view. In Australia, the recognised rule thus is that the blanket immunity of all Cabinet documents was given a go-bye. In United States v. Richard M. Nixon [1974] 418 US 683 = 41 Lawyers Ed., 2nd Ed., 1039, a grand jury of the United States District Court for the District of Columbia indicted named individuals, charging them with various offences, including conspiracy to defraud the United States and to obstruct justice; and Mr Nixon, the President of United States was also named as an unindicted coconspirator. The special prosecutor issued a third party subpoena duces tecum directing the President to produce at the trial certain tape recordings and documents relating to his conversations with aides and advisors known as Watergate rapes. The President's executive privilege again st disclosure of confidential communications was negatived holding that the right to the production of all evidence at a criminal trial has constitutional dimensions under sixth amendment. The fifth amendment guarantees that no person shall be deprived of liberty without due process of law. It was, therefore, held that it is the manifest duty of the court to vindicate those guarantees, and to accomplish that, it is essential that

all relevant and admissible evidence be produced. Though the court must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of his responsibilities, it is an inroad on the fair administration of criminal justice. In balancing between the President's generalised interest in confidentiality and the need for relevant evidence in the litigation, civil or criminal and though the interest in preserving confidentiality is weighty indeed "and entitled to great respect."

Allowing privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas constitutional need for production of relevant evidence in a criminal proceeding is specific, and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. If the privilege is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. Exemptions were engrafted only to the evidence relating to "the security of the State, diplomatic relations and defence". It was held that "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interest to the detriment of the decision-making process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. 11 powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers, the protection of the confidentiality of Presidential communications has similar constitutional underpinnings. However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

In a clash of public interest that harm shall be done to the nation or the public service by disclosure of certain documents and the administration of justice shall not be frustrated by withholding the document which must be produced if justice is to be done, it is the courts duty to balance the competing interests by weighing in scales, the effect of disclosure on the public interest or injury to administration of justice, which would do greater harm. Some of the important considerations in the balancing act are thus: "in the interest of national security some information which is so secret that

it cannot be disclosed except to a very few for instance the state or its own spies or agents just as other counters have. Their very lives may be endangered if there is the slighest hint of what they are doing. In Mark Hosenball. R. v. Home Secretary. ex parte Hosenball [1977] 1 WLR 766, in the interest of national security Lord Denning, M.R. did not permit disclosure of the information furnished by the security service to the Home Secretary holding it highly confidence The public interest in the security of the realm was held so great that the sources of the information must not be disclosed nor should the nature of the information itself be disclosed.

There is a natural temptation for people in executive position to regard the interest of the department as paramount forgetting that there is yet another Greater interest to be considered, namely, the interest of justice itself. Inconvenience and justice are often not on speaking terms. No one can suppose that the executive will never be guilty of the sins common to all people. Sometimes they may do things which they on which they on ought not to do or will not do things they ought to do. The court must be alive to that possibility of the executive committing illegality in its process, exercising its powers, reaching a decision which no reasonable authority would have reached or otherwise abuse its powers, etc. If and when such wrongs are suffered or encountered injustice by an individual what would be the remedy? Just as shawl is not suitable for winning the cold, so also mere remedy of writ of mandamus, certiorari, etc. or such action as is warranted are not enough, unless necessary foundation with factual material, in support thereof, are laid. Judicial review aims to protect a citizen from such breaches of power, non-exercise of power or lack of power etc. The functionary must be guided by relevant and germane considerations. If the proceeding, decision or order is influenced by extraneous considerations which ought not to have been taken into account, it cannot stand and needs correction, no matter of the nature of the statutory body or status or stature of the constitutional functionary though might have acted in good faith. Here the court in its judicial review, is not concerned with the merits of the decisions, but its legality. It is, therefore, the function of the court to see that lawful authority is not abused. Every communication that passes between different departments of the Govt. or between the members of the same department interse and every order made by a Minister or Head of the Department cannot, therefore, be deemed to relate to the affairs of the-state, unless it related to a matter of vital importance, the disclosure of which is likely to prejudice the interest of the state.

Confidentiality, candour and efficient public service often bear common mask. Lord Keath in Burmah Oil's case, observed that the notion that any' competent or conscientious public servant would be inhibited in the candour of his writings by consideration of the off-chance that they might have to be produced inlitigationisgrotesque. The possibility that it impairs the public service was also nailed. This court in S. P. Gupta's case also rejected the plea of hampering candid expression of views or opinion by constitutional functionaries and bureaucrats. In Whitlam v. Australian Consolidated Press [1985] 60 ALR p. 7, the Supreme Court of Australia Capital territory in a suit for damages for defamation, the plaintiff, the former Prime Minister of Australia was called upon to answer certain interrogatories to disclose discussions and words uttered at the meeting of the Cabinet or of the Executive Council at which the plaintiff had been present. The commonwealth intervened and claimed privilege prohibiting the plaintiff to disclose by answering those interrogatories. The claim was based on two grounds: (i) the oath taken by the plaintiff as a member of the Executive Council; and also immunity from disclosing of the Cabinet meetings and both were

public policies. It was also contended that it would be in breach of the principle of collective Cabinet responsibility. The court held that the oath taken by the plaintiff did not in itself provide a reason for refusing to answer the interrogatories whether immunity from disclosure would be granted depends upon the balancing of two competing aspects, both of public policy, on the one hand the need to protect a public interest which might be endangered by disclosure, and on the other the need to ensure that the private rights of individual litigants are not unduly restricted. The disclosure of the meeting of the Cabinet or of the Executive Council would not be a breach of the principle of other two responsibilities. Bagehot stated, protection from disclosure is not for the purpose of shielding them from criticism, but of preventing the attribution to them of personal responsibility. It was stated that "I am not required to lay down a precise test of when an individual opinion expressed in Cabinet becomes of merely historical interest". The Cabinet minutes and minutes of discussion are a class. They might in very special circumstances be examined. Public interest in maintaining Cabinet secrecy easily outweighs the contrary public interest in ensuring that the defendant has proper facilities for conducting its case, principally because of the enormous importance of Cabinet secrecy by comparison with the private rights of an individual and also because of the relative unimportance of these answers to the defendant's case. Answers to interrogatories 87 (vii),

(viii) and (ix) were restrained to be disclosed which relates to the members of the Council who expressed doubts as to whether the borrowing was wholly for temporary purpose and to identify such purpose. In Jonathan Cape Ltd. case, Lord Widgery CJ. held that publication of the Cabinet discussion after certain lapse of time would not inhibit free discussion in the Cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago. It is difficult to say at what point the material loses its confidential character. on the ground that publication will no longer undermine the doctrine of joint Cabinet responsibility. The doctrine of' joint Cabinet responsibility is not undermined so long as the publication would not "inhibit free discussion in the Cabinet and the court decides the issue'. In Minister for Arts Heritage and Environment and Ors. v. Peko-Wallsend Ltd. and Ors. 11987175 ALR 218, Federal Court of Australia General Division, the respondent had mining lease under the existing law. In 1986 the Cabinet decided that portion of the same land covered by KNP Kakadu National Park in the Northern Territory (State 2) was earmarked for inclusion in the World Heritage List (the List) which had been established under the World Heritage Convention (the Convention) and to submit to Parliament aplan of management for the national park which differed from a previous plan "which enabled exploration and mining to take place outside pre-existing leases with the approval of the Governor-General". Under the Convention on listing, could be made without the "consent" of the State party concerned. The respondents laid the proceedings to restrain the appellants from taking further steps to have Stage 2 nominated for inclusion on the list on the basis that Cabinet was bound by tile rules of natural justice to afford the man opportunity to be heard and that it failed to do so. The Single Judge declared the action as void. Thereafter the National Park and Wildlife conservation Amendment Act, 1987 came into force adding sub-s. (IA) to s. 10 of that Act which provides that "No operations for the recovery of' minerals shall be carried on in Kakadu National Park". While allowing the appeal, the full court held that the Executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from the prerogative rather than a statutory source. The decision taken for the prerogative of the Cabinet is subject to judicial review. In Commonwealth of Australia v. Northern Land Council and

Anr. [1991] 103 ALR p.267, in a suit for injunction for Northern Land Council (NLC) against the Commonwealth sought production of certain documents including 126 Cabinet notebooks. A Judge of the Federal Court ordered the Commonwealth to produce the notebooks for confidential inspection on behalf of NLC. On appeal it was held that information which may either directly or indirectly enable the party requiring them either to advance his own case or to damage the case of his advisory are necessary. The class of Cabinet papers do not afford absolute protection against disclosure and is not a basis for otherwise unqualified immunity from production. The Commonwealth cannot claim any immunity for public interest immunity from production. The court should decide at the threshold balancing of the public interest in the administration of justice. The court does not have to be satisfied that, as a matter of likelihood rather than mere speculation, the materials would contain evidence for tender at trial.

In a democracy it is inherently difficult to function at high governmental level without some degree of secrecy. No Minister, nor it Senior Officer would effectively discharge his official responsibilities if every document prepared to formulates sensitive policy decisions or to make assessment of character rolls of coordinate officers at that level if they were to be made public. Generally assessment of honesty and integrity is a high responsibility. At high co- ordinate level it would be a delegate one which would furthered compounded when it is not backed up with material. Seldom material will be available in sensitive areas. Reputation gathered by an officer around him would form the base. If the reports are made known, or if the disclosure is routine, public interest grievously would suffer. On the other hand, confidentiality would augment honest assessment it) improve efficiency and integrity in the officers. The business of the Govt., when transacted by bureaucrats, even in personal level, it would be difficult to have equanimity if the inner working of the Govt. machinery is needlessly exposed to the public. On such sensitive issues it would hamper the expression of frank and forthright views or opinions. Therefore, it may be that at that level the deliberations and in exceptional cases that class or category of documents get protection in particular, on policy matters. Therefore. the court would he willing to respond to the executive public interest immunity to disclose certain documents where national security or high policy, high sensitivity is involved.

In Asiatic Petroleium v. Anglo-Persian Oil 1916 K.B. 822, the court refused production of the letter concerning the Govt. plans relating to Middle Estern campaigns of the First World was. as claimed by the Board of Admiralty. Similarly, in Duncan v. Cammell Laired, 1942 A.C. 624, tile House of lords refused disclosure of the design of sub-marine. The national defence as a class needs protection in the interest of security of the State. Similarly to keep good diplomatic relations the state documents or official or confidential documents between the Govt. and its agencies need immunity from production.

In Council of Civil Service Union v. Minster for Civil Service 1985 A.C. 374. the Govt. Communications headquarters (GCHQ) functions were to ensure the security of military and official communications and to provide the Govt. with signals intelligence. They have to handle secret information vital to national security. The staff of CCHQ was permitted to be members of the trade union, but litter on instructions were issued, without prior consultation, amending the Staff rules and directed them to dissociate from tile trade union activities. The Previous practice of prior

consultation before amendment was not followed. Judicial review was sought of the amended rules pleading that failure to consult the union before amendment amounts to unfair act and summoned the records relating to it. An affidavit of the cabinet Secretary was filed explaining the disruptive activities, the national security, and the union actions designed to damage Govt. agencies. Explaining the risk of participation by the members in further disruption, the House held that executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from a common law, or prerogative, rather than a statutory source and a minister acting under a prerogative power might, depending upon its subject matter, whether under the same duty to act fairly as in the case of action under a statutory power. But, however, certain information. on consideration of national security, was withheld and the failure of prior consultation of the trade union or its members before issue the amended instruction or amending the rules was held not infracted. In Burmah Oil Co's. case. at an action by the Oil Company against the Bank for declaration that the sale of units in British Petroleum held by the company at 2.30 Pounds per unit was unconscionable and inequitable. The oil company sought production of the cabinet decision and 62 documents in possession and control of the bank. The state claimed privilege on the basis of the certificate issued by the Minister. House of Lords per majority directed to disclose certain documents which were necessary to dispose of the case fairly. Lord Scarman laid that they were relevant, but their significance was not such a:, to override the public interest objections to their production. Lords Wilberforce dissented and held that public interest demands protection of them.

In The Australian Communist Party & Ors. v. Commonwealth & Ors. [1950-51] 83 C.L.R. p. 1, at p. 179, Dixon, J. while considering the claim of secrecy and non-availability of the proclamation or declaration of the Governor General in Council based on the advice tendered by the Minister rejected the privilege and held that the court would go into the question whether the satisfaction reached by the Governor General in Council was justified. The court has ,one into the question of competence to dissolve a voluntary or corporate association i.e. Communist Party as unlawful within the meaning of Sec. 5(2) of the Constitutional Law of the Commonwealth. In The Queen v. Toohey [1982-83] 151 C.L.R. 170, the Northern Territory (Self-Government) Act, 1978 provides appointment of an Administrator to exercise and perform the functions conferred under the Act. The Town Planning Act, 1979 regulates the area of land to be treated as towns. The Commissioner exercising powers under the Act held that part of the peninsula specified in the schedule was not available for town Planning Act. When it was challenged. there was a change in the law and the Minister filed an affidavit claiming the privilege of certain documents stating that with a view to preserve the land to the original, the Govt. have decided to treat that the land will continue to be held by or on behalf of the originals. Gibbs,. CJ. held that under modern conditions, a responsible Govt., Parliament could not always be relied on to check excesses of power by the Crown or its Ministers. The court could ensure that the statutory power is exercised only for the purpose it is granted. The secrecy of the counsel of the Crown is by no means complete and if evidence is available to show that the Crown acted for an ulterior purpose, it is difficult to see why it should not be acted upon. It was concluded thus: "In my opinion no convincing reason can be suggested for limiting the ordinary power of the courts to inquire whether there has been a proper exercise of a statutory power by giving to the Crown a special immunity from review. If the statutory power is granted to the Crown for one purpose, it is clear that it is not lawfully exercised if it is used for another. The courts have the power

and duty to ensure that statutory powers are exercised only in accordance with law". The factors-to decide the "public interest immunity would include" (a) where the contents of the documents are relied upon, the interests affected by their disclosure; (b) where the class of documents is invoked, where the public interest immunity for the class is said to protect; (c) the extent to which the interests referred to have become attenuated by the passage of time or the occurrence of intervening events since the matters contained in the documents themselves came into existence; (d) the seriousness of the issues in relation to which production is sought; (e) the likelihood that production of the documents will affect the outcome of the case; (f) the likelihood of injustice if the documents are not produced. In President Nixon's case, the Supreme Court of the United States held that it is the court's duty to construe and delineate claims arising under express powers, to interpret claims with respect to powers alleged to derive from enumerated powers of the Constitution. In deciding whether the matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of the court as ultimate interpreter of the Constitution. Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The separation of powers given in the Constitution were not intended to operate with absolute independence when essential criminal statute would upset the constitutional balance of "a workable government"

> and gravely impair the role of the courts under Art. III. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of needed evidence. The afore discussion lead to the following conclusions. The President while exercising the Executive power under Art.73 read with Art. 53, discharges such of those Powers which are exclusively conferred to his individual discretion like appointing the Prime Minister under Art. 75 which are not open to judicial review. The President exercises his power with the aid and advice of the Council of Ministers with the Prime Minister at the head under Art. 74 (1). They exercise the power not as his delegates but as officers subordinate to him by constitutional mechanism envisaged under Art. 77 and express in the name of President as per Rules of Business made under Art.77(3). They bear two different facets (i) the President exercise his power on the aid and advice; (ii) the individual minister or Council of Minister with the Prime Minister at the head discharge the functions without reference to the President. Undoubtedly the Prime Minister is enjoined under Art. 78 to communicate to the President all decisions of the Council of Minister relating to the administration of the affairs of the Union and proposals for legislation and to furnish such information relating to the administration or reconsideration by the Council of Ministers if the President so requires and submit its decisions thereafter to the President. That by itself is not conclusive and does not get blanket public interest immunity from disclosure. The Council of Ministers though shall be collectively responsible to the House of the People, their acts are subject to the Constitution, Rule of law and judicial review are parts of the scheme of the

Constitution as basic structure and judicial review is entrusted to this Court (High Court under Art.226). When public interest immunity against disclosure of the state documents in the transaction of business by Council of Ministers of the affairs of State is made, in the clash of those interests, it is the right and duty of the court to weigh the balance in the scales that the harm shall not be done to the nation or the public service and equally of the administration of justice. Each case must be considered on its backdrop. The President has no implied authority under the Constitution to withhold the documents. On the other hand it is his solemn constitutional duty to act in aid of the court to effectuate judicial review. The Cabinet as a narrow centre of the national affairs must be in a possession of all relevant information which is secret or confidential. At the cost of repetition it is reiterated that information relating to national security, diplomatic relations. internal security or sensitive diplomatic correspondence per se are class documents and that public interest demands total immunity from disclosure. Even the slightest divulgence would endanger the lives of the personnel engaged in the services etc. The maxim Salus Popules Cast Supreme Lax which means that regard for public welfare is the highest law, is the basic postulate for this immunity. Political decisions like declaration of emergency under Art. 356 are not open to judicial review but it is for the electorate at the polls to decide the executive wisdom. In other areas every communication which preceded from one officer of the State to another or the officers inter se does not necessarily per-se relate, to the affairs of the State. Whether they so relate has got to be determined by reference to the nature of the consideration, the level at which it was considered, the contents of the document or class to which it relates to and their indelible impact on public administration or public service and administration of justice itself. Article 74(2) is not a total bar for production of the records. Only the actual advice tendered by the Minister or Council or Ministers to the President and the question whether any, and if so, what ad\-ice was tendered by the Minister or Council of ministers to the President, shall not be enquired into by the court. In other words the bar of judicial review is confined to the factum of advice, its extent, ambit and scope but not the record i.e. the material on which the advice is founded. In S.P. Gupta's case (his court held that only the actual advice tendered to the President is immuned from enquiry and the immunity does not extend to other documents or records which form part of the advice tendered to the President.

There is discernible modern trends towards more open government than was prevalent in the past. In its judicial review the court would adopt in camera procedure to inspect the record and evaluate the balancing act between the competing public interest and administration of justice.It is equally the paramount consideration that justice should not only be done but also would be publicly recognised as having been done. Under modern conditions of responsible government, Parliament should not always he relied on as a check on excess of power by the Council of Ministers or Minister. Though the court would not substitute its views to that of the executive on matters of policy, it is its undoubted power and duty

to see that the executive exercises its power only for the purpose for which it is granted. Secrecy of the advice or opinion is by no means conclusive. Candour, frankness and confidentiality though are integral facets of the common genus i.e. efficient governmental functioning, per se by no means conclusive but be kept in view in weighing the balancing act. Decided cases how that power often was exercised in excess thereof or for an ulterior purpose etc. Sometimes the public service reasons will be decisive of the issue, but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the documents was not to be disclosed, and the likely injury to the cause of justice must also be assessed and weighed. Its weight will very according to the nature of the proceedings in which disclosure is sought, level at which the matter was considered-, the subject matter of' consideration, the relevance of the documents and the degree of likelihood that the document will be of importance in the litigation. it striking the balance, the court may always, if it thinks it necessary, itself inspect the documents. It is therefore the constitutional, legitimate and lawful power and duty of this court to ensure that powers constitutional statutory or executive are exercised in accordance with the constitution and the law. This may demand though no doubt only in limited number of cases yet the inner workings of government may be exposed to public gaze. The contentions of Attorney General and Solicitor General that the inner workings of the government would be exposed to public gaze, and that some one who would regard this as an occasion without sufficient material to ill-informed criticism is no longer relevant. Criticism, calculated to improve teh nature of that working as affecting the individual citizen is welcome.

In so far as unpublished government policy is concerned, it may be relevant to know the extent to which the policy remains unfulfilled, so that its success might be prejudiced by disclosure of the considerations which led to it. In that context the time element becomes relevant.Details of affairs which are stale and no longer of significance might be capable of disclosure without risk of damage to the public interest .But depending on teh nature of he litigation and the apparent importance to it of the documents in question may in extreme case demand production even of the most be considered on its backdrop. President has no implied authority to withhold the document. On the other hand it is his solemn constitutional duty to act in aid of the court to effectuate judicial review. The Cabinet as a narrow centre of the national affairs must be in possession of all relevant information which is secret or confidential. Decided cases on comparable jurisdiction referred to earlier did held that executive had no blanket immunity to withhold cabinet proceedings or decisions. We therefore hold that the communication decisions or policy to teh President under Art. 74(1) gives only protection by Art. 74(2) of judicial review of the actual advice tendered to the president of India. The rest of the file and all the records forming part thereof are open to in camera inspection by this court. Each case must be considered on its own facts and surrounding scenario and decision taken thereon.

In Jyoti Prokash Mitter v. Chief Justice Calcutta High Court [1965] 2 SCR 53 the question was whether the President exercised the powers under Art. 217(3) of the Constitution was his discretionary one or acts with the aid and advice of Council of Ministers. The Constitution Bench held that the dispute as be decided by the President.The satisfaction on the correctness of age is that of he President. Therefore the matter has to be placed before the President. The President has to give an opportunity to the judge to place his version, before teh President considers and decides the age of the judge. Accordingly it would be the personal satisfaction of the President and not that of the Council of Ministers.In the latter judgement sequential to this judgement in Union of India v. Jyoti Prakash [1971] 3SCR 4831, it was held that the mere fact that the President was assisted by teh machinery of Home Affaris Ministry in serving notices or receiving communications addressed to the learned judge cannot lead to an inference that he was guided review, this court upheld the decision of the President. In this context it was held that the orders of the president, even though made final can be set aside by court in an appropriate case though the Court will not sit in appeal over order and will not substitute its own opinion to that of the president by weighing the evidence placed before the president. The third category of case namely the decision taken at level of the minister or by the authorised Secretary at the Secretary level though expressed in the name of the President is not immured from judicial scrutiny and are to be produced and inspected by the court. If public interest immunity under Art. 74(2) or Sec 123 of Evidence ACt is claimed, the court would first consider it in camera and decide the issue as indicated above. Teh immunity must not be claimed on administrative route and it must be for valid, relevant and strong grounds or reasons stated in the affidavit filed in that behalf. Having perused the file and given our anxious considerations. We are of the view that on th facts of the case and in the light of the view we have taken, it is not necessary to disclose the contents of the records to the petitioner or his counsel.

The first schedule of the business rules provide constitution of Cabinet Standing committees with function specified therein. Item 2 is "Cabinet Committee on appointments". Which is empowered to consider in item 1 all recommendations and to take decisions on appointments specified in the Annexure to the first Schedule. Therein under the residuary heading all other appointments item 4 provides that all other appointments which are made by the Govt. of India or which required the approval of the Govt. of India carrying a salary excluding allowances or a maximum salary excluding allowances of less than Rs. 5, 300 require the approval of the Cabinet Sub-Committee. As per item 37 of the Third Schedule read with Rule 8 of the business Rules it shall be submitted to the Prime Minister for appointment.

Mr. Harish Chander was appointed as judicial Member on October 29, 1982. He was later on appointed on january 15, 1991 as Senior Vice President of CEGAT after the direction were issued by this Court, he was appinted as the President Mr. Jain assailed the validity of his appointment on diverse grounds. It was pleaded and Sri

Thakur, his learned senior counsel, argued that as per the convention, a sitting or a retired judge of the High JCourt should have beenappointed as president of the CEGAT in consultation with the Chief Jusftice ofIndia and Harish Chander has been appointed in disregafrd of the express directions of this Court, It was, therefore, contended that it was in breach jof the judicial orderpassed by this Court. It was therefore, contended that it was in breach of the judicial orderpassed by this Court under Art, 32 Secondly it was contended that before the Actwas made a positive commitment was made time and again by the Govt. on the floor of the House that judicial independence of CEGAT is sifne qua non to sustain the confidence of the litigant public. The appointment of any person other thansitting or a retired judge of the High Court as President would be in its breach. Inits support it was cited the instance of Mr. Kalyansundaram as being the seniormost member, his claim should have been considered before Harish Chander was appointed. Sri Thakur further argued that when recommendations of HarishChander for appointment as a Judge of the Delhi High Court was turned down by the Chief Justice of India doubting his integrity, the appointment of such personof doubtful integrity as President would erode the independence of the judiciary and undermine the confidence of the litigant public in the efficacy of judicial adjudication, even though the rules may permit such an appointment. The rules are ultra vires of the basic structure, namely, independence of judiciary, Sri Thakur, to elaborate these conditions, sought permission to peruse the record.

Sri Venugopal , the learned Senior Counsel for Harish Chander argued that his client being the senior Vice President was fvalidly appointed as President of the CEGET. Harish Chander has an excellent and impeccable record of service without any adverse remarks. His recommendation for appointment as a judge of the Delhi High Court, was "apparently dropped" which would not be construed to be adverse to Harish Chander. On behalf ofCentral Govt. it was admitted in thecounter affidavit that since rules do not envisage consultation with the Chidf Justice consultation was not done. It was argued that the Govt. have prerogative to appoint any member or Vice Chairman or Senior Vice President as President of CEGAT. Harish Chander being the senior Vice President, his case was considered and was recommended by the cabinet sub Committee for appointment. Accordingly he was appointed.

Under section 129 of the Customs Act 52 of 1962 for short the Act. The Central Govt. shall constitute the CEGAT consisfting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred by the Act. Subject to making the statement of the case for decision on any question of law arising out of orders of the CEGAT by the High Court under section 130: it) resolve conflict of decisions by this Court under section 130A, the orders of the CEGAT by operation of sub-sectiton (4) of Section 129B. "shall be final". The President of CEGAT is the controlling authority as well as Presiding authority of the tribunals constituted at different places. Constitution of the CEGAT came to be made pursuant to the 5th Schedule of the Finance Act 2 of 1980 with effect from October 11, 1982.

> The President of India exercising the power under proviso it) Art. 309 of the Constitution made the Rules. Rule 2(c) defined "member" means a member of the Tribunal and unless the context otherwise requires, includes the President, the Senior Vice President, a Vice President, a judicial member and a technical member. 2(d) defines "President" means the President of the Tribunal. Rule 6 prescribes Method of Recruitment. Under Sub-rule (1) thereof for the purpose of recruitment to the Post of member, there shall be a Selection Committee consisting of - (i) a judge of the Supreme Court of India as nominated by the Chief Justice of India to preside over as Chairman; (ii) the Secretary to the Govt. of India in the Ministry of Finance, (Department of Revenue); (iii) the Secretary to the Govt. of India in the Ministry of Law (Department of legal Affairs); (iv) the President; (v) such other persons, not exceeding two, as the Central Govt. may nominate.

Sub-Rule (4) - Subject to the provisions of Section 10, the Central Govt. shall, after taking into consideration the recommendations of the Selection Committee. make a list of persons selected for appointment as members. Rule 10 provides thus: (1) The Central Govt. shall appoint one of the member to be the President.

(2) Notwithstanding anything contained in rule 6 a sitting, or retired judge of a High Court may also be appointed by the Central Government use member and President simultaneously.

(3) Where a member (other than a sitting or retired judge of a High Court is appointed as President, he shall hold the office of the President for a period of three years or till he attains the age of 67 years, whichever is earlier. (4) Where a serving judge of a High Court is appointed as a member and President, he shall hold office as President for a period of three years from the date of his appointment or till he attains the age of 62 years. whichever is earlier. Provided that where a retired judge of a High Court above the age of 62 years is appointed as President. he shall hold office for such period not exceeding, three years as may he determined by the Central Govt. At the time of appointment or reappointment. The Jha Committee in its report in para 16(22) recommended to constitute an independent Tribunal for excise or customs taking away the appellate powers from the Board. The Administrative Inquiry Committee in its report 1958-59 in para 4.15 also recommended that every effort should be made to enhance the prestige of the appellate tribunal in the eyes of the public which could be achieved by the appointment of a High Court Judge as the President. They, therefore, recommended to appoint the serving or retired High Court Judge as President of the Tribunal for a fixed tenure. In Union of India v. Pares Laminates Pvt. Ltd. [1990] 49 ELT 322 (Supreme Court), this Court held that GEGAT is a judicial body and functions as court within the limits of its jurisdiction. As a fact the Minister time and again during the debates when the Bill was under discussion assured both the Houses of Parliament that the CEGAT would be a judicial body presided over by a High Court Judge. In Keshwa nand Bharti v. Union of India [1973] Supp. SCR 1, Mathew and Chandrachud, JJ. held that rule of law and judicial review are basic features of the Constitution. It was reiterated in Waman Rao v. Union of India [1980] 3 SCC 587, As per directions therein the Constitution Bench reiterated in Sri Raghunathrao Ganpatrao v. Union of India [1993] 1 SCALE 363. In Krishna Swami v. Union of India [1992] 4 SCC 605 at 649 para 66 one of us (K.R.S.J.) held that judicial review is the touchstone and repository of the supreme law of the land.

Rule of law as basic feature permeates the entire constitutional structure Independence of Judiciary is sine quo non for the efficacy, of the rule of law. This court is the final arbiter of the interpretation of the constitution and the law.

In S.P. Sampat Kumar v. Union of India & Ors.[1987] 1 SCR

435. this Court held that the primary duty of the judiciary is to interpret the Constitution and the laws and this would preeminently be a matter fit to be decided by the judiciary, as judiciary 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. The Constitution has, therefore created an independent machinery i.e. judiciary to resolve the disputes which is vested with the power of judicial review to determine the legality of the legislative and executive actions and to ensure compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercising the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution and to provide alternative institutional mechanism or arrangement forjudicial review, provided it is no less efficacious than the High Court. It must, therefore, be read as implicit in the constitutional scheme that the law excluding the jurisdiction of the High Court under Arts. 226 and 227 perrmissible under it, must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it which must be equally effective and efficacious in exercising the power of judicial review. The Tribunal set up under the Administrative Tribunal Act, 1985 was required to interpret and apply Arts. 14, 15, 16 and 311 in quite an large number of cases. Therefore, the personnel manning the administra- tive tribunal in their determinations not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input would undeniably be more important and sacrificing the legal input and not givino it sufficient weityhtage would definitely impair the efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that the appropriate rule should be made to recruit the members; and consult the Chief Justice of India in recommending appointment of the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by judge of the Supreme Court to recruit the members for appointment. In M.B. Majiundar v. Union of lndia [1990] 3 SCR 946, when the members of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this court held that they are not on par with the judges but a separate mechanism created for their appointment pursuant to Art. 323-A of the Constitution. Therefore, whatwas meant by this court in Sampath Kumar's ration is that the Tribunals when exercise the power and function, the Act created institutional alternative mechanism or authority to adjudicate the service disputations. It must be effective and efficacious to exercise the power of judicial review. This court did not appear to have meant that the Tribunals are substitutes of' the High Court under Arts. 226 and 227 of the

Constitution. J.B. chopra v. Union of lndia [1987] 1 SCC 422, merely followed the ratio of Sampath Kumar.

The Tribunals set up under Arts. 323A and 323B of the Constitution or under an Act of legislature are creatures of the Statute and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those oft7ices under the State are called upon to dischargee judicial or quasi-judicial power. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws.The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise for discussion and decision. In Union of India v. Sankal Chand Himatlal Sheth & Anr. [1978] 1 SCR 423 at 442, this court at p. 463 laid emphasis that, "independence of the judiciary is a fighting faith of our Constitution. Fearless justice is the cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great judges in the past. In England too, judicial independence is prized as a basic value and so natural and inevitable it has come to be reorded and so ingrained it has become in the life and thought of the people that it would be regarded an act of insanity for any one to think otherwise." At page 471 it was further held that if the beacon of the judiciary is to remain bright, court must be above reproach, free from coercion and from political influence. At page 491 it was held that the independence of the judiciary is itself a necessitous desideratum of public interest and so interference with it is impermissible except where other considerations of public interest are so strong, and so exercised as not to militate seriously against the free flow of public justice. Such a balanced blend is the happy solution of a delicate, complex, subtle, yet challenging issue which bears on human rights and human justice.The nature of the judicial process is such that under coercive winds the flame of justice flickers, faints and fades. The true judge is one who should be beyond purchase by threat or temptation, popularity or prospects. To float with the tide is easy, to counter the counterfeit current is uneasy and yet the Judge must be ready for it. By ordinary obligation for written reasoning, by the moral fibre of his peers and elevating tradition of his profession, the judge develops a stream of tendency to function 'without fear or favour, affection or ill-will', taking care, of course, to outgrow his prejudices and weaknesses, to read the eternal verities and enduring values and to project and promote the economic, political and social philosophy of the Constitution to uphold which his oath enjoins him. In Krishnaswaini's case in para 67 at p. 650, it was observed that "to keep the stream of justice clean and pure the judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of rule of law and the working of the constitution itself. In Krishna Sahai & Ors.v.State of U.P. & Ors.[1990] 2 SCC 673, this court emphasised its need in constitution the U.P. Service Tribunal that it would he appropriate for the State of Uttar Pradesh to change it manning and a sufficient number of people qualified in law should he on the Tribunal to ensure adequate dispensation of justice and to maintain judicial temper in the functioning of the Tribunal". In Rajendra Singh Yadav & Ors v. State of U.P. & Ors. [1990] 2 SCC 763, it was further reiterated that the Services Tribunal mostly consist of Administrative Officers and the judicial element in the manning part of the Tribunal is very small.

The disputes require judicial handling and the adjudication being, essentially judicial in character it is necessary that adequate number of judges of the appropriate level should man the Services Tribunals. This would create appropriate temper and generate the atmosphere suitable in an adjudicatory Tribunals and the institution as well would command the requisite confidence of the disputants. In Shri Kumar Padma Prasad v. Union of India & Ors. [1992] 2 SCC 428, this court emphasised that, "Needless to say that the independence, efficiency and integrity of the judiciary can only he maintained by selecting the best persons in accordance with the procedure provided under the Constitution. The objectives enshrined in the constitution cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility".

In a democracy governed by rule of law surely the only acceptable repository of absolute discretion should be the courts. Judicial is the basic and essential feature of the Indian constitutional scheme entrusted to the judiciary. It cannot he dispensed with by creating tribunal under Art. 323A and 323B of the Constitution. Any institutional mechanism or authority in negation of judicial review is destructive of basic structure. So long as a the alternative institutional mechanism or authority set up by an Act is not less effective than the High court, it is consistent with constitutional scheme. The faith of the people is the bed-rock on which the edifice of judicial review and efficacy of the adjudication are founded. The alternative arrangement must, therefore, be effective and efficient. For inspiring confidence and trust in the litigant public they must have an assurance that the person deciding their causes is totally and completely free from the influence or pressure from the Govt. To maintain independence and imperativity it,is necessary that the personnel should have at least modicum of legal training, learning and experience. Selection of competent and proper people instill people's faith and trust in the office and help to build up reputation and acceptability. Judicial independence which is essential and imperative is secured and independent and impartial administration of justice is assured. Absence thereof only may get both law and procedure wronged and wrong headed views of the facts and may likely to give rise to nursing grievance of injustice. Therefore, functional fitness, experience at the liar and aptitudinal approach are fundamental for efficient judicial adjudication. Then only as a repository of the confidence. as its duty, the tribunal would properly and efficiently interpret the law and apply the law to the given set of facts. Absence thereof would be repugnant or derogatory to the constitution. The daily practice in the courts not only gives training to Advocates to interrect the rules but also adopt the conventions of courts. In built experience would play vital role in the administration of justice and strengthen and develop the qualities, of intellect and character, forbearance and patience, temper and resilience which are very important in the practice of law. Practising Advocates from the Bar generally do endow with those qualities to discharge judicial functions. Specialised nature of work gives them added advantage and gives benefit to broaden the perspectives. "Judges " by David Pannick (1987 Edition), at page 50, stated that, "we would not allow a man to perform a surgical operation without a thorough training and certification of fitness. Why not require as much of a trial judge who daily operates on the lives and fortunes of others". This could be secured with the initial training given at the Bar and later experience in judicial adjudication. No-one should expect expertise in such a vast range of subjects, but famliarity with the basic terminology and concept coupled with knowledge of trends is essential. A premature approach would hinder the effective performance of judicial functions. Law is a serious matter to be left exclusively to the judges, because judges necessarily have an important role to play

in making and applying the law There is every reason for ensuring that their selection, training and working practice facilitate them to render their ability to decide the cases wisely on behalf of the community. If judges acts in injudicious manner, it would often lead to miscarriage of justice and a brooding sense of injustice rankles in an agrieved person.

The CEGAT is a creature of the statute. yet intended to have all the flavour of judicial dispensation by independent members and President. Sri Justice Y.V. Chandrachud, Chief Justice of India, in his letter dated October 5, 1982 stated that "Govt. had Created a healthy convention of providing that the Tribunals will be headed by a President who will be a sitting or a retired judge of the High Court. Added to that is the fact that selection of the members of the Tribunal is made by a Committee headed by a judge of the Supreme Court... I am sure that the Tribunal will acquire higher reputation in the matter of its decision and that the litigants would look upon it as an independent forum to which they can turn in trust and confidence". This court to elongate the above objective directed the Govt. to show whether the convention is being followed in appointment of the President of CEGAT and further directed to consider appointment of a Sr. Judge or a retired Chief Justice of the High Court as its President. Admittedly Chief justice of India was not consulted before appointing Sri harish Chander as President. Several affidavits filed on behalf of the Govt. do not also bear out whether the directions issued by this court were even brought to the notice of the Hon'ble Prime Minister before finalising the appointment of Sri Harish Chander. The solemn assurance given to the Parliament that the Tribunal bears a judicious blend by appointment of a High Court Judge as President was given a go-bye. While making statutory rules the executive appears to have made the appointment of it sitting or retired High Court Judge as President unattractive and directory frustrating the legislature animation. A sitting Judge when is entitled to continue in his office upto 62 years would he he willing to opt to serve as President, if his superannuation as President is conterminous with 62 years. He would be attracted only it he is given extended three years more tenure after his superannuation. But Rule 10(3) says that the total period of the tenure of the President by a sitting, or retired judge is "a period of three years or till he attains the age of 62 years, whichever is earlier", i.e. coterminus with superannuation as a Judge of the High Court. The proviso is only discretionary at the whim of the executive depleting independence and as an exception to the rule. Thereby practically tile spirit of the Act, the solemn assurance given by the Govt. to the Parliament kindling hope in the litigant public to have a sitting or a retired judge appointed as President has been frustrated deflecting the appointment of a judicially trained judge to exercise judicial review. We are constrained to observe that the rules, though statutory, were so made as to defeat the object of the Act. The question then is: can and if yes, whether this court would interfere with the appointment made of Flarish Chander as President following the existing, rules.

Judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and reasonable. Exercise of judicial review is to protect the citizen from the abuse of the power etc. by an appropriate Govt. or department etc. In our considered view granitic the compliance of the above power of appointment was conferred on the executive and confided to be exercised wisely. When a candidate was found qualified and eligible and was accordingly appointed by the executive to hold an office as a Member or Vice-President or President of a tribunal. we cannot sit over the choice of the selection, but it be left to tile executive to select the personnel as per law or procedure

in this behalf. In Sri Kumar Prasad case K.N. Srivastava, M.J.S., Legal Remembrance, Secretary to law and Justice. Govt. of Mozoram did not possess the requisite qualifications for appointment as a Judge of the High Court prescribed under Art.217 of the Constitution, namely, that he was not a District Judge for 10 years in State Higher Judicial Service, which is a mandatory requirement for a valid appointment. Therefore, this Court declared that he was not qualified to be appointed as a judge of the High Court and quashed his appointment accordingly. The facts therein are clearly glaring and so the ratio is distinguishable.

Sri Harish Chander, admittedly was the Sr. Vice President at the relevant time. The contention of Sri Thakur of the need to evaluate the comparative merits of Mr. Harish Chander and Mr. Kalyansundaram a senior most Member for appointment as President would not be one into in a public interest litigation. Only in a proceedings initiated by an aggrieved person it may be open to be considered. This writ petition is also not a writ of quo-warranto. In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee it) assail the legality of the offending action. Third party has no locus stand it to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public spirited person.

But this conclusion does not give quietus at the journey's end. There are persistent allegations against malfunctioning of the CEGAT and against Harish Chander himself. Though we exercised self-restraint to assume the role of an Investigator to charter out the ills surfaced, suffice to say that the union Govt. cannot turn a blind eye to the persistent public demands and we direct to swing into action, an indepth enquiry made expeditiously by an officer or team of officers to control the mal-functioning of the institution. It is expedient that the Govt. should immediately take action in the matter and have fresh look. It is also expedient to have a sitting or retired senior Judge or retired Chief Justice of a High Court to be the President. The rules need amendment immediately. A report on the actions taken in this behalf be submitted to this court.

Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Art. 136 to this Court also proves to be costly and prohibitive and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this court. An appeal to a Bench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would as usage a growing feeling of injustice of those who can ill effort to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would make an indepth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income-tax Appellate Tribunal and to make appropriate urgent recommendations to the Govt. of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review

efficacious, inexpensive and satisfactory. The writ petitions are disposed of with the above direction, but in the circumstances with no order as to costs.

T.N.A. Petitions disposed of.