Govt. Of Nct Of Delhi vs Union Of India on 14 February, 2019

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Author: A.K. Sikri

Bench: Ashok Bhushan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2357 OF 2017

GOVT. OF NCT OF DELHI .....APPELLANT(S)

VERSUS

UNION OF INDIA

.....RESPONDENT(S)

WITH

CONT. PETITION (CIVIL) NO. 175 OF 2016
IN
WRIT PETITION (CRIMINAL) NO. 539 OF 1986

CIVIL APPEAL NO. 2360 OF 2017

CIVIL APPEAL NO. 2359 OF 2017

CIVIL APPEAL NO. 2363 OF 2017

CIVIL APPEAL NO. 2362 OF 2017

CIVIL APPEAL NO. 2358 OF 2017

CIVIL APPEAL NO. 2361 OF 2017

CRIMINAL APPEAL NO. 277 OF 2017

AND

CIVIL APPEAL NO. 2364 OF 2017

JUDGMENT

A.K. SIKRI, J.

Prologue All these appeals arise out of the judgment dated August 04, 2016 rendered by the High Court of Delhi in writ petitions filed before it under Article 226 of the Constitution of India. We would refer to the subject matter of those writ petitions and the manner in which the High Court dealt with and decided the same at the appropriate stage. However, it would be pertinent to point out that in the said impugned judgment, main issue related to the status of National Capital Territory of Delhi (NCTD) and in, particular, about administration of NCTD, powers exercisable by and functions of the elected Government of NCTD (GNCTD) vis-a-vis the Central Government (or to put it more precisely, in juxtaposition to the Lieutenant Governor (LG) of GNCTD, as nominee of the President of India). This issue centered around the interpretation that needed to be given to Article 239AA of the Constitution of India.

2) Undoubtedly, NCTD was and remains Union Territory and continues to be governed by Part VIII of the Constitution which pertains to 'the Union Territories'. Article 239, which substituted the original Article by the Constitution (Seventh Amendment) Act, 1956, w.e.f., 01 November, 1956 deals with administration of Union Territories. As the nomenclature itself suggests, such territories are that of 'Union", i.e., Union of India. That is why Article 239 stipulates that every Union Territory is to be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. The opening words of Article 239, however, are 'save as otherwise provided by Parliament by law', which meas that Parliament by law can provide different schemes of administration for such Union Territories, i.e., different than what is stated in Article 239. In the year 1962, Article 239A was inserted, providing a little departure from the Scheme of administration contained in Article 239, insofar as Union Territory of Puducherry is concerned. Likewise by the Constitution (Sixty Ninth Amendment) Act, 1991 special provision with respect to Delhi stood incorporated. This Article, inter alia, provides for a Legislative Assembly for NCTD, Legislative Assembly which comprises of Members who are elected representatives. It means that voters of NCTD elect their representatives to the Legislative Assembly.

3) The seminal issue which arose for consideration before the High Court in the writ petitions concerned the powers exercisable by such elected Government and the manner in which NCTD is to be administered. As noted above, as per Article 239, it is the President of India which administers a Union Territory and he can do so through an Administrator to be appointed by him with appropriate designation. Such a designation generally is that of Administrator or Lieutenant Governor. In respect of Delhi, designation bestowed is that of Lieutenant Governor. With the aforesaid special provision inculcated by the insertion of Article 239AA and by providing for Legislative Assembly, the moot question arose as to what are the powers of the elected government of Delhi vis-a-vis the Lieutenant Governor of Delhi.

4) To state in a nutshell and in precise manner, the High Court of Delhi held that since NCTD remains a Union Territory, it is the President who continues to administer NCTD as well as Territory of the Union, i.e., the Central Government and his nominee, namely, the Lieutenant Governor enjoys the overlapping powers. When these appeals came up before the Division Bench of this Court, the Division Bench found that issues raised are of seminal constitutional importance and needed to be referred to a Constitution Bench in terms of the provisions contained in Clause 5(5) of Article 143 of the Constitution. The matters were, accordingly, referred to the Constitution Bench to answer the aforesaid question, namely, ambit and scope of the powers of the GNCTD in juxtaposition to that of the Lieutenant Governor. The Constitution Bench has given the answers to the various nuances of the otherwise thorny and ticklish issues, vide its judgment dated July 04, 2018. There are three opinions. The majority opinion is penned by Justice Dipak Misra, Chief Justice of India (as his Lordship then was) to which Justice Khanwilkar and one of us (Justice A.K. Sikri) concurred. Two other separate opinions are rendered by Justice Dr. D.Y. Chandrachud and one of us (Justice Ashok Bhushan). After giving answers to the moot questions that arise, all these appeals were directed to be listed before the Regular Bench for deciding the individual issues and disputes that arise in these appeals. This is how the matters were heard, on its own merits, depending upon subject matter of each of these appeals, by this Bench. We propose to decide these disputes by means of the present judgment. Issues:

> 5) At this juncture, we would like to state in brief the precise subject matter of these appeals:
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> 6) As pointed out above, Civil Appeal No. 2357 of 2017 arises out of the common judgment dated August 04, 2016 passed by the High Court in a batch of writ petitions. In these writ petitions, number of notifications passed by the Government of India, or by the GNCTD were questioned by the writ petitioners. Some writ petitions were filed by GNCTD; one by Union of India and few others by some individuals. The orders and/or actions, validity whereof was questioned by the petitioners before the High Court is stated by the High Court in the impugned judgment itself in a tabulated form. It would be convenient to reproduce the same as that captures the essence of subject matter of dispute in each of the writ petition.

S.No. Case No. Parties Impugned order/action

1. W.P.(C) GNCTD vs. Notifications dated 21.05.2015 No.5888/2015 UOI and 23.07.2014 issued by the Govt. of India, Ministry of Home Affairs empowering the Lt. Governor to exercise the powers in respect of matters connected with 'Services' and directing the ACB Police Station not to take cognizance of offences against officials of Central Government.

2. W.P.(C) Rajender Notification dated 11.08.2015 No.7887/2015 Prashad vs. issued by the Directorate of GNCTD & Vigilance, GNCTD under the Ors. Commissions of Inquiry Act, 1952 without placing before the Lieutenant Governor for his views/concurrence.

3. W.P.(C) Naresh Notification dated 04.08.2015 No.7934/2015 Kumar vs. issued by the Revenue GNCTD & Department, GNCTD revising Ors. minimum rates of agricultural land (circle rates) under the provisions of Indian Stamp Act, 1899 and Delhi Stamp (Prevention of Undervaluation of Instrument) Rules without placing before the Lieutenant Governor for his views/concurrence.

4. W.P.(C) Sandeep Order passed by the No.8190/2015 Tiwari vs. Department of Power, GNCTD GNCTD & under Delhi Electricity Reforms Ors. Act, 2000 read with Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 appointing the Nominee Directors on Board of Electricity Distribution Companies without placing before the Lieutenant Governor for his views/concurrence.

5. W.P.(C) M.A. Notification dated 11.08.2015 No.8382/2015 Usmani vs. issued by the Directorate of UOI & Anr. Vigilance, GNCTD under the Commissions of Inquiry Act, 1952 without placing before the Lieutenant Governor for his views/concurrence.

6. W.P.(C) UOI vs. Notification dated 11.08.2015 No.8867/2015 GNCTD & issued by the Directorate of Anr. Vigilance, GNCTD under the Commissions of Inquiry Act, 1952 without placing before the Lieutenant Governor for his views/concurrence.

7. W.P.(C) Sandeep Policy Directions dated No.9164/2015 Tiwari vs. 12.06.2015 issued by the GNCTD & Department of Power, GNCTD Ors under Section 108 of Electricity Act, 2003 without placing before the Lieutenant Governor for his views/concurrence.

8. W.P.(C) Ramakant Notification dated 22.12.2015 No.348/2016 Kumar vs. issued by the Directorate of GNCTD Vigilance, GNCTD under Commission of Inquiry Act, 1952 constituting the Commission of Inquiry without placing before the Lieutenant Governor for his views/concurrence.

9. W.P.(Crl.) GNCTD vs. Order passed by the No.2099/2015 Nitin Lt.Governor, NCT of Delhi Manawat under Section 24 of Cr.P.C.

appointing a Special Public Prosecutor to conduct the trial in FIR No.21/2012 in the Special Court under PC Act

7) From the above, it can be discerned that following issues arise for consideration:

(i) The powers of GNCTD vis-a-vis Lieutenant Governor in respect of matters connected with 'services'. It may be mentioned, at this juncture itself that in Delhi there is no Public Service Commission. Since it is the Union Territory, the manpower/public servants which are assigned to Delhi are either those who belong to All India Services like Indian Administrative Service, Indian Police Service etc. or those who are recruited for Union Territories, commonly known as NCT of Delhi, Andaman & Nicobar Islands, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli Civil Service (DHANICS). Admittedly these officers/public servants do not belong to Union Territory of Delhi exclusively or, for that matter, at all. They are placed at the disposal of NCTD by the Central Government. To this extent there is no dispute. However, bone of contention is about their mobility, i.e. their posting within Delhi itself from one place/department to other. To put it otherwise, the issue is as to whether such posting orders are to be passed by the President of India (or for that matter the Lieutenant Governor) or it is the Government of NCTD which is competent to exercise such a power once the manpower is assigned to it.

(ii) Other issue relates to the setting up of Anti-Corruption Bureau Police Station (ACB Police Station). Vide Notifications dated May 21, 2015 and July 23, 2014 the Government of India, Ministry of Home Affairs empowered the Lieutenant Governor to exercise such a power and directed ACB Police Station not to take cognizance of offences against officials of Central Government. These Notifications were challenged by the GNCTD on the ground that ACB Police Stations are empowered to take cognizance of offences against officials of the Central Government as well, so long as they are posted in Delhi.

(iii) Another dispute between the GNCTD and the Central Government arises out of Commission of Inquiry Act, 1952 (COI Act). It is : Whether GNCTD is empowered to set up Commission of Inquiry under the said Act of its own and without placing the matter before the Lieutenant Governor for his views/concurrence.

(iv) Delhi Electricity Reforms Act, 2011 is enacted which is State Legislative. Delhi Electricity Reforms (Transfer Schemes) Rules, 2001 have also been framed under this Act. The GNCTD issued orders under the said Act and Rules appointing the nominee Directors on the Board of Electricity Distribution Companies without placing the matter before the Lieutenant Governor for his views/concurrence. The competence of the GNCTD to pass such executive order is another subject matter of dispute.

(v) Another area of conflict is about the appointment of Public Prosecutors under Section 24 of the Code of Criminal Procedure. Issue is as to whether this power lies with the Lieutenant Governor to the exclusion of GNCTD or it is the GNCTD which is competent to appoint Public Prosecutors, including Special Public Prosecutors in individual cases.

Judgment of the Constitution Bench

8) Before we come to the grip of these issues it would be essential to discuss in brief the provisions of Article 239AA of the Constitution, as interpreted by the Constitution Bench judgment dated July 04, 2018 (hereinafter referred to as CB Judgment).

9) Relevant Articles of the Constitution, which need to be noted amongst others in this behalf, are Articles 239 and 239AA, which read as under :

> "239. Administration of Union territories.—(1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
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> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers.

239-AA. Special provisions with respect to Delhi.—(1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor.

(2)(a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.

(b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.

(c) The provisions of Articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National Capital Territory and the members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the members thereof respectively; and any reference in Articles 326 and 329 to 'appropriate Legislature' shall be deemed to be a reference to Parliament.

(3)(a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:

> Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory:
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> Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly. (4) There shall be a Council of Ministers consisting of not more than ten per cent of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion:
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> Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.
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> (5) The Chief Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the President.
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> (6) The Council of Ministers shall be collectively responsible to the Legislative Assembly.

{(7)(a)} Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto. {(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.} (8) The provisions of Article 239-B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the

Legislative Assembly, as they apply in relation to the Union territory of {Puducherry}, the administrator and its Legislature, respectively; and any reference in that article to 'clause (1) of Article 239-A' shall be deemed to be a reference to this article or Article 239-AB, as the case may be."

10) As pointed above, the Court in aforesaid Constitution Bench judgment took note of the fact that with insertion of Article 239AA, which gave special status to the Union Territory of Delhi known as National Capital Territory of Delhi (NCTD), the NCTD has its own Legislative Assembly which is elected body through the election process by the voters of NCTD. The principal question, therefore, was as to whether this amended constitutional provision had transformed the status of Delhi and what is the extent and power which are to be accorded to the Legislative Assembly as well as the Executive as a result of these elections, i.e., Government of NCT of Delhi. In the majority opinion, it was emphasised at the beginning itself that while entering into the process of interpretation of Article 239AA of the Constitution, the Court is supposed to take aid of new tools such as constitutional pragmatism having due regard for sanctity of objectivity, realisation of the purpose in truest sense by constantly reminding one and all about the sacrosanctity of democratic structure envisaged by our Constitution, elevation of the precepts of constitutional trust and morality, and the solemn idea of de-centralisation of power. This method of understanding is described in the judgment as 'confluence of the idea and spirit of the Constitution'. The court also emphasised that interpretation of Article 239AA of the Constitution is not to be done in an exclusive compartment but in the context in which it has been introduced and also keeping in view the conceptual structure of the other relevant Articles of the Constitution.

11) In this process, the Court recapitulated brief history of Delhi from its inception as Capital of India in the year 1911 upto the stage of insertion of Article 239AA in the Constitution, which was the result of a detailed report submitted by Balakrishnan Committee. This narration in the judgment is as follows:

> "15. On 12-12-1911, Delhi became the capital of India. Delhi Tehsil and Mehrauli Thana were separated from Punjab and annexed to Delhi headed by a Commissioner and it came to be known as the Chief Commissioner's province. In 1912, the Delhi Laws Act, 1912 came into force with effect from 1-10-1912 making certain laws prevalent in Punjab to be applicable to Delhi. The Delhi Laws Act, 1915 empowered the Chief Commissioner, Delhi to determine application of laws by issuing appropriate notification in the Gazette of India. The Government of India Act, 1919 and the Government of India Act, 1935 retained Delhi as a Centrally administered territory. On coming into force of the Constitution of India on 26-1-1950, Delhi became a Part C State. In the year 1951, the Government of Part C States Act, 1951 was enacted providing, inter alia, for a Legislative Assembly in Delhi. Section 21(1) of the 1951 Act empowered the Legislative Assembly to make laws on all matters of List II of the Seventh Schedule of the Constitution except (i) public order; (ii) police (including railway police); (iii) constitution and powers of municipal corporations and local authorities, etc. — public utility authorities; (iv) lands & buildings vested in/in possession of the Union situated in Delhi or New Delhi; (v) offences against

laws about subjects mentioned from (i) to (iv); and (vi) jurisdiction of courts with respect to the above matters and court fee thereon.

16. On 19-10-1956, the Constitution of India (Seventh Amendment) Act, 1956 was passed to implement the provisions of the States Reorganisation Act, 1956 which did away with Part A, B, C and D States and only two categories, namely, States and Union Territories remained and Delhi became a Union Territory to be administered by an Administrator appointed by the President. The Legislative Assembly of Delhi and the Council stood abolished. In the year 1953, the Government of Union Territories Act, 1963 was enacted to provide for Legislative Assemblies and Council of Ministers for various Union Territories but the provisions of the said Act were not made applicable to Delhi. The Delhi Administration Act, 1966 was enacted to provide for limited representative Government for Delhi through a Metropolitan Council comprising of 56 elected Members and five nominated Members. In the same year, on 20-8-1966, the Ministry of Home Affairs issued S.O. No. 2524 that provided, inter alia, that the Lieutenant Governor/Administrator/Chief Commissioner shall be subject to the control of the President of India and exercise such powers and discharge the functions of a State Government under the Commissions of Inquiry Act, 1952 within the Union Territories. In the year 1987, the Balakrishnan Committee was set up to submit its recommendations with regard to the status to be conferred on Delhi and the said Committee recommended that Delhi should continue to be a Union Territory but there must be a Legislative Assembly and Council of Ministers responsible to the said Assembly with appropriate powers; and to ensure stability, appropriate constitutional measures should be taken to confer the National Capital a special status. The relevant portion of the Balakrishnan Committee Report reads as follows:

"6.5.5. In Paras 6.5.2. and 6.5.3. we have briefly summarised the arguments for and against making Delhi a constituent State of the Union. After the most careful consideration of all the arguments and on an objective appraisal, we are fully convinced that most of the arguments against making Delhi a State of the Union are very substantial, sound and valid and deserve acceptance. This was also the view expressed before us by some of the eminent and knowledgeable persons whom we interviewed. As these arguments are self-evident we find it unnecessary to go into them in detail except those relating to constitutional and financial aspects covered by them.

6.5.6. The important argument from the constitutional angle is based on the federal type of our Constitution under which there is a constitutional division of powers and functions between the Union and the State. If Delhi becomes a full-fledged State, there will be a constitutional division of sovereign, legislative and executive powers between the Union and the State of Delhi. One of the consequences will be that in respect of matters in the State List, Parliament will have no power on jurisdiction to make any law except in the special and emergency situations provided for under the

> Constitution and to that extent the Union Executive cannot exercise executive powers or functions. The constitutional prohibition on the exercise of powers and functions will make it virtually impossible for the Union to discharge its special responsibilities in relation to the National Capital as well as to the nation itself. We have already indicated in an earlier chapter the special features of the National Capital and the need for keeping it under the control of the Union Government. Such control is vital in the national interest irrespective of whether the subject-matter is in the State field or Union field. If the administration of the National Capital is divided into rigid compartments of State field and Union field, conflicts are likely to arise in several vital matters, particularly if the two Governments are run by different political parties. Such conflicts may, at times, prejudice the national interest....
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> xx xx xx 6.5.9. We are also impressed with the argument that Delhi as the National Capital belongs to the nation as a whole and any constituent State of the Union of which Delhi will become a part would sooner or later acquire a predominant position in relation to other States. Sufficient constitutional authority for Union intervention in day-to-day matters, however vital some of them may be, will not be available to the Union, thereby prejudicing the discharge of its national duties and responsibilities.
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> xx xx xx LIEUTENANT GOVERNOR AND COUNCIL OF MINISTERS 6.7.19. As a necessary corollary to the establishment of a responsible Government for Delhi the structure of the executive should be more or less on the pattern provided by the Constitution. Accordingly, there should be a Head of the Administration with a Council of Ministers answerable to the Legislative Assembly. As Delhi will continue to have the status of a Union Territory, Article 239 will apply to it and so it will have an Administrator with such designation as may be specified. The present designation of the Lieutenant Governor may be continued and recognised in the Constitution itself. ... xx xx xx 6.7.21. The Administrator should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The expression "to aid and advice" is a well-understood term of art to denote the implications of the Cabinet system of Government adopted by our Constitution.

Under this system, the general rule is that the exercise of executive functions by the Administrator has to be on the aid and advice of his Council of Ministers which means that it is virtually the Ministers that should take decisions on such matters. However, for Delhi, the following modifications of this general rule will have to be adopted:

> (i) Firstly, the requirement of acting on the aid and advice of the Council of Ministers cannot apply to the exercise by the Administrator of any judicial or quasi-judicial functions. The reason is obvious because in respect of such functions there is no question of acting on the advice of another person.
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> (ii) Secondly, the requirement is only in relation to matters in respect of which the Legislative Assembly has the powers to make laws. This power will be subject to the

restrictions already dealt with earlier in the Report. Accordingly, the Council of Ministers will not have jurisdiction to deal with matters excluded from the purview of the Legislative Assembly.

(iii) Thirdly, there is need for a special provision to resolve differences between the Administrator and his Council of Ministers on any matter concerning the administration of Delhi. Normally, the general principle applicable to the system of responsible Government under the Constitution is that the Head of the Administration should act as a mere constitutional figurehead and will have to accept the advice of the Council of Ministers except when the matter is left to his discretion. However, by virtue of Article 239 of the Constitution, the ultimate responsibility for good administration of Delhi is vested in the President acting through the Administrator. Because of this the Administrator has to take a somewhat more active part in the administration than the Governor of a State. It is, therefore, necessary to reconcile between the need to retain the responsibility of the Administrator to the Centre in this regard and the need to enforce the collective responsibility of the Council of Ministers to the Legislature. The best way of doing this is to provide that in case of difference of opinion which cannot be resolved between the Administrator and his Council of Ministers, he should refer the question to the President and the decision of the President thereon will be final. In cases of urgency, if immediate action is necessary, the Administrator may direct action to be taken pending such decision of the President. A provision of this kind was made for this very reason not only in the 1951 Act, but also in the 1963 Act relating to the Union Territories as well as in the 1978 Bill."

12) The majority opinion thereafter took note of the arguments of both sides. Discussion that followed thereafter was on the following aspects:

• Ideals/principles of representative governance • Constitutional morality • Constitutional objectivity • Constitutional governance and the conception of legitimate constitutional trust • Collective responsibility • Federal functionalism and democracy • Collaborative federalism • Pragmatic federalism • Concept of federal balance • Interpretation of the Constitution • Purposive interpretation • Constitutional culture and pragmatism

13) After discussing in detail the aforesaid tools necessarily required for proper and just interpretation of the concerned provisions, the Court undertook the exercise of interpreting Articles 239, 239A and 239AA of the Constitution.

14) Since, this interpretation is material and significant for deciding specific issues which have been raised in these appeals, we would like to incorporate the portions of the majority judgment which have interpreted these Articles:

"Interpretation of Articles 239 and 239-A:

> 174. The aforesaid passages set two guidelines. First, it permits judicial creativity and second, it mentions one to be conscious of pragmatic realism of the obtaining situation and the controversy.

That apart, there is a suggestion to take note of the behavioural needs and norms of life. Thus, creativity, practical applicability and perception of reality from the societal perspective are the warrant while engaging oneself with the process of interpretation of a constitutional provision.

175. To settle the controversy at hand, it is imperative that we dig deep and perform a meticulous analysis of Articles 239, 239-A, 239-AA and 239-AB all of which fall in Part VIII of the Constitution bearing the heading, "The Union Territories". For this purpose, let us reproduce the aforesaid Articles one by one and carry out the indispensable and crucial task of interpreting them.

176. Article 239 provides for the administration of Union Territories. It reads as follows:

> "239. Administration of Union Territories.—(1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
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> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the Administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers." (emphasis supplied)

177. The said Article was brought into existence by the Constitution (Seventh Amendment) Act, 1956. Clause (1) of Article 239, by employing the word "shall", makes it abundantly clear that every Union Territory is mandatorily to be administered by the President through an Administrator unless otherwise provided by Parliament in the form of a law. Further, clause (1) of Article 239 also stipulates that the said Administrator shall be appointed by the President with such designation as he may specify.

178. Clause (2) thereafter, being a non obstante clause, lays down that irrespective of anything contained in Part VI of the Constitution, the President may appoint the Governor of a State to act as an Administrator of a Union Territory which is adjacent and/or contiguous to the State of which he is the Governor. The Governor of a State who is so appointed as an Administrator of an adjoining UT shall exercise his functions as an Administrator of the said UT independently and Autonomously and not as per the aid and advice of the Council of Ministers of the State of which he is the Governor.

179. In this regard, the Court, in the case of Shamsher Singh (supra), has observed thus:-

> "54. The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in Articles to which reference has been made. To illustrate, Article 239(2) states that where a Governor is appointed an

> Administrator of an adjoining Union Territory he shall exercise his functions as such Administrator independently of his Council of Ministers."

180. Again, the Court, while interpreting Article 239 in Union of India and others v. Surinder S. observed:-

> "The unamended Article 239 envisaged administration of the States specified in Part C of the First Schedule of the Constitution by the President through a Chief Commissioner or a Lieutenant Governor to be appointed by him or through the Government of a neighbouring State. This was subject to other provisions of Part VIII of the Constitution. As against this, amended Article 239 lays down that subject to any law enacted by Parliament every Union Territory shall be administered by the President acting through an Administrator appointed by him with such designation as he may specify. In terms of clause (2) of Article 239 (amended), the President can appoint the Governor of a State as an Administrator of an adjoining Union Territory and on his appointment, the Governor is required to exercise his function as an Administrator independently of his Council of Ministers. The difference in the language of the unamended and amended Article 239 makes it clear that prior to 1-11-1956, the President could administer Part C State through a Chief Commissioner or a Lieutenant Governor, but, after the amendment, every Union Territory is required to be administered by the President through an Administrator appointed by him with such designation as he may specify. In terms of clause (2) of Article 239 (amended), the President is empowered to appoint the Governor of State as the Administrator to an adjoining Union Territory and once appointed, the Governor, in his capacity as Administrator, has to act independently of the Council of Ministers of the State of which he is the Governor."

"181. Now, let us proceed to scan Article 239-A of the Constitution which deals with the creation of local legislatures or Council of Ministers or both for certain Union Territories. It reads as follows:

> "239-A. Creation of local legislatures or Council of Ministers or both for certain Union Territories.—(1) Parliament may by law create for the Union Territory of Puducherry—
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> (a) a body, whether elected or partly nominated and partly elected, to function as a legislature for the Union Territory, or
>
> (b) a Council of Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law.
>
> (2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

182. The aforesaid Article was brought into force by the Constitution (Fourteenth Amendment) Act, 1962. Prior to the year 1971, under Article 239-A, Parliament had the power to create by law legislatures and/or Council of Ministers for the then Union Territories of Himachal Pradesh, Tripura, Manipur, Goa and Daman and Diu. Thereafter, on 25-1-1971, Himachal Pradesh acquired Statehood and consequently, Himachal Pradesh was omitted from Article 239-A. Subsequently, on 21-1-1972, Tripura and Manipur were granted Statehood as a consequence of which both Manipur and Tripura were omitted from Article 239-A.

183. Likewise, with the enactment of the Goa, Daman and Diu Reorganisation Act, 1987 on 30-5-1987, both Goa and Daman and Diu were omitted from Article 239-A. Parliament, under the Government of Union Territories Act, 1963, created legislatures for the then Union Territories and accordingly, even after 30-5-1987, the applicability of Article 239-A stands limited to UT of Puducherry.

184. As a natural corollary, the Union Territory of Puducherry stands on a different footing from other UTs of Andaman and Nicobar Islands, Daman and Diu, Dadra and Nagar Haveli, Lakshadweep and Chandigarh. However, we may hasten to add that Puducherry cannot be compared with the NCT of Delhi as it is solely governed by the provisions of Article 239-A. P. Interpretation of Article 239-AA of the Constitution

185. We shall now advert to the interpretation of Articles 239-AA and 239-AB of the Constitution which are the gravamen of the present batch of appeals. The said Articles require an elaborate interpretation and a thorough analysis to unearth and discover the true intention of Parliament while inserting the said Articles, in exercise of its constituent power, by the Constitution (Sixty-ninth Amendment) Act, 1991. The said Articles read as follows:

> "239-AA. Special provisions with respect to Delhi.—(1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union Territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the Administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor. (2)(a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by Members chosen by direct election from territorial constituencies in the National Capital Territory.
>
> (b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.
>
> (c) The provisions of Articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National Capital Territory and the Members thereof as they apply, in relation to a State, the Legislative

Assembly of a State and the Members thereof respectively;

and any reference in Articles 326 and 329 to "appropriate Legislature" shall be deemed to be a reference to Parliament.

(3)(a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List insofar as any such matter is applicable to Union Territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union Territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:

Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory:

Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

(4) There shall be a Council of Ministers consisting of not more than ten per cent of the total number of Members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except insofar as he is, by or under any law, required to act in his discretion:

Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

(5) The Chief Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the President.

(6) The Council of Ministers shall be collectively responsible to the Legislative Assembly.

(7)(a) Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.

(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.

(8) The provisions of Article 239-B shall, so far as may be, apply in relation to the National Capital Territory, the Lieutenant Governor and the Legislative Assembly, as they apply in relation to the Union Territory of Puducherry, the Administrator and its legislature, respectively; and any reference in that Article to "clause (1) of Article 239-A" shall be deemed to be a reference to this Article or Article 239-AB, as the case may be.

239-AB. Provision in case of failure of constitutional machinery.—If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied—

(a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of Article 239-AA or of any law made in pursuance of that Article; or

(b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of Article 239-AA or of all or any of the provisions of any law made in pursuance of that Article for such period and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of Article 239 and Article 239-AA." (emphasis supplied)
"186. We deem it appropriate to refer to the Statement of Objects and Reasons for the amendment which reads thus:

"1. The question of reorganisation of the administrative set-up in the Union Territory of Delhi has been under the consideration of the Government for some time. The Government of India appointed on 24-12-1987 a Committee to go into the various issues connected with the administration of Delhi and to recommend measures inter alia for the streamlining of the administrative set-up. The Committee went into the

> matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the national capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union Territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence the arrangements should be incorporated in the Constitution to give the National Capital a special status among the Union Territories.
>
> 2. The Bill seeks to give effect to the above proposals." The aforesaid, as we perceive, really conceives of conferring special status on Delhi. This fundamental grammar has to be kept in view when we penetrate into the interpretative dissection of Article 239-AA and other articles that are pertinent to understand the said provision.

187. The aforesaid, as we perceive, really conceives of conferring special status on Delhi. This fundamental grammar has to be kept in view when we penetrate into the interpretative dissection of Article 239-AA and other articles that are pertinent to understand the said provision."

15) After interpreting the provisions in the manner aforesaid, the Court concentrated on the status of NCTD, in particular. In the process, it referred to earlier judgment in the case of Samsher Singh vs. State of Punjab1, from which it culled out the powers of the Governor in a State where the Governor was empowered to act 'in his discretion'. It observed:

> "192. Thereafter, A.N. Ray, C.J. discussed the provisions of the Constitution as well as a couple of paragraphs of the Sixth Schedule wherein the words "in his discretion" are used in relation to certain powers of the Governor to highlight the fact that a Governor can act in his discretion only when the provisions of the Constitution so permit.
>
> 193. In this context, we may refer with profit to the authority in Devji Vallabhbhai Tandel v. Administrator of Goa, Daman & Diu [Devji Vallabhbhai Tandel v. Administrator of Goa, Daman & Diu, (1982) 2 SCC 222 : 1982 SCC (Cri) 403] . In the said case, the 1 (1974) 2 SCC 831 issue that arose for consideration was whether the role and functions of the Administrator stipulated under the Union Territories Act, 1963 is similar to those of a Governor of a State and as such, whether the Administrator has to act on the "aid and advice" of the Council of Ministers. The Court considered the relevant provisions and after comparing the language of Articles 74 and 163 of the Constitution with the language of Section 44 of the Union Territories Act, 1963, it observed that the Administrator, even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi-judicial functions, is not bound to act according to the advice of the

> Council of Ministers and the same is manifest from the proviso to Section 44(1). The Court went on to say: (SCC pp.

229-30, paras 14-15) "14. ... It transpires from the proviso that in the event of a difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer the matter to the President for decision and act according to the decision given thereon by the President. If the President in a given situation agrees with what the Administrator opines contrary to the advice of the Council of Ministers, the Administrator would be able to override the advice of the Council of Ministers and on a reference to the President under the proviso, obviously the President would act according to the advice of the Council of Ministers given under Article 74. Virtually, therefore, in the event of a difference of opinion between the Council of Ministers of the Union Territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union Territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers.

15. The second limb of the proviso to Section 44(1) enables the Administrator that in the event of a difference of opinion between him and the Council of Ministers not only he can refer the matter to the President but during the interregnum where the matter is in his opinion so urgent that it is necessary for him to take immediate action, he has the power to take such action or to give such directions in the matter as he deems necessary. In other words, during the interregnum he can completely override the advice of the Council of Ministers and act according to his light. Neither the Governor nor the President enjoys any such power. This basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is so glaring that it is not possible to hold on the analogy of the decision in Samsher Singh case [Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : 1974 SCC (L&S) 550] that the Administrator is purely a constitutional functionary bound to act on the advice of the Council of Ministers and cannot act on his own." (emphasis supplied)

16) Thereafter, various other judgments were taken note of including Nine Judge Bench in NDMC v. State of Punjab2 case which specifically deal with the status of NCTD. Following paragraphs on this aspect need a reproduction:

> "199. The Governor of a State, as per Article 163, is bound by the aid and advice of his Council of Ministers in the exercise of his functions except where he is, by or under the Constitution, required to exercise his functions or any of them in his discretion. Thus, the Governor may act in his discretion only if he is so permitted by an express provision of the Constitution.
>
> 200. As far as the Lieutenant Governor of Delhi is concerned, as per Article 239-AA(4), he is bound by the aid and advice of his Council of Ministers in matters for which the Delhi Legislative Assembly has legislative powers. However, this is subject to the proviso contained in clause (4) of Article 239-AA which gives the power to the Lieutenant Governor that in case of any difference between him and his

Ministers, he shall refer the same to the President for a binding decision. This proviso to clause (4) has retained the powers for the Union even over matters falling within the legislative domain of the Delhi Assembly. This overriding power of the Union to legislate qua other Union Territories is exposited under Article 246(4)."

17) The Court, thereafter, specifically focused on the executive power of the Council of Ministers of Delhi and made following remarks on this particular aspect:

2 (1997) 7 SCC 339 "204. Drawing an analogy while interpreting the provisions of Article 239-AA(3)(a) and Article 239-AA(4) would reveal that the executive power of the Government of NCT of Delhi is conterminous with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239-AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239-AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

205. The legislative power conferred upon the Delhi Legislative Assembly is to give effect to legislative enactments as per the needs and requirements of Delhi whereas the executive power is conferred on the executive to implement certain policy decisions. This view is also strengthened by the fact that after the Seventh Amendment of the Constitution by which the words "Part C States" were substituted by the words "Union Territories", the word "State" in the proviso to Article 73 cannot be read to mean Union Territory as such an interpretation would render the scheme and purpose of Part VIII (Union Territories) of the Constitution infructuous."

18) Next facet of discussion was on the essence of Article 239AA of the Constitution. It would be of use to take note of the following discussion on this aspect:

"207. At the outset, we must declare that the insertion of Articles 239-AA and 239-AB, which specifically pertain to NCT of Delhi, is reflective of the intention of Parliament to accord Delhi a sui generis status from the other Union Territories as well as from the Union Territory of Puducherry to which Article 239-A is singularly applicable as on date. The same has been authoritatively held by the majority judgment in NDMC case [NDMC v. State of Punjab, (1997) 7 SCC 339] to the effect that the NCT of Delhi is a class by itself.

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215. We have highlighted this difference to underscore and emphasise the intention of Parliament, while inserting Article 239-AA in the exercise of its constituent power, to treat the Legislative Assembly of the National Capital Territory of Delhi as a set of elected representatives of the voters of NCT of Delhi and to treat the Government of NCT of Delhi as a representative form of Government.

216. The Legislative Assembly is wholly comprised of elected representatives who are chosen by direct elections and are sent to Delhi's Legislative Assembly by the voters of Delhi. None of the Members of Delhi's Legislative Assembly are nominated. The elected representatives and the Council of Ministers of Delhi, being accountable to the voters of Delhi, must have the appropriate powers so as to perform their functions effectively and efficiently. This is also discernible from the Balakrishnan Committee Report which recommended that though Delhi should continue to be a Union Territory, yet it should be provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man.

217. Sub-clause (a) of clause (3) of Article 239-AA establishes the power of the Delhi Legislative Assembly to enact laws for NCT of Delhi with respect to matters enumerated in the State List and/or Concurrent List except insofar as matters with respect to and which relate to Entries 1, 2 and 18 of the State List.

218. Sub-clause (b) of clause (3) lays down that Parliament has the powers to make laws with respect to any matter for a Union Territory including NCT of Delhi or any part thereof and sub-clause (a) shall not derogate such powers of Parliament.

Sub-clause (c) of clause (3) gives Parliament the overriding power to the effect that where any provision of any law made by the Legislative Assembly of Delhi is repugnant to any provision of law made by Parliament, then the law made by Parliament shall prevail and the law made by the Delhi Legislative Assembly shall be void to the extent of repugnancy.

219. Thus, it is evident from clause (3) of Article 239-AA that Parliament has the power to make laws for NCT of Delhi on any of the matters enumerated in the State List and the Concurrent List and at the same time, the Legislative Assembly of Delhi also has the legislative power with respect to matters enumerated in the State List and the Concurrent List except matters with respect to entries which have been explicitly excluded from Article 239-AA(3)

(a).

220. Now, it is essential to analyse clause (4) of Article 239-AA, the most important provision for determination of the controversy at hand. Clause (4) stipulates a Westminster style Cabinet system of Government for NCT of Delhi where there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Delhi Legislative Assembly has power to enact laws except in matters in respect of which the Lieutenant Governor is required to act in his discretion.

221. The proviso to clause (4) of Article 239-AA stipulates that in case of a difference of opinion on any matter between the Lieutenant Governor and his Ministers, the Lieutenant Governor shall refer it to the President for a binding decision. Further, pending such decision by the President, in any case where the matter, in the opinion of the Lieutenant Governor, is so urgent that it is necessary for

him to take immediate action, the proviso makes him competent to take such action and issue such directions as he deems necessary.

222. A conjoint reading of Article 239-AA(3)(a) and Article 239-AA(4) reveals that the executive power of the Government of NCT of Delhi is coextensive with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239-AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239-AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

223. Article 239-AA(3)(a) reserves Parliament's legislative power on all matters in the State List and Concurrent List, but clause (4) nowhere reserves the executive powers of the Union with respect to such matters. On the contrary, clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has power to legislate. The legislative power is conferred upon the Assembly to enact whereas the policy of the legislation has to be given effect to by the executive for which the Government of Delhi has to have coextensive executive powers. Such a view is in consonance with the observation in Ram Jawaya Kapur [Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549] which has been discussed elaborately in the earlier part of the judgment.

224. Article 239-AA(4) confers executive powers on the Government of NCT of Delhi whereas the executive power of the Union stems from Article 73 and is coextensive with Parliament's legislative power. Further, the ideas of pragmatic federalism and collaborative federalism will fall to the ground if we are to say that the Union has overriding executive powers even in respect of matters for which the Delhi Legislative Assembly has legislative powers. Thus, it can be very well said that the executive power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239-AA(3)(a). Such an interpretation would thwart any attempt on the part of the Union Government to seize all control and allow the concepts of pragmatic federalism and federal balance to prevail by giving NCT of Delhi some degree of required independence in its functioning subject to the limitations imposed by the Constitution.

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239. The proviso to Article 239-AA(4), we say without any fear of contradiction, cannot be interpreted in a strict sense of the mere words employed treating them as only letters without paying heed to the thought and the spirit which they intend to convey. They are not to be treated as bones and flesh without nerves and neurons that make the nerves functional. We feel, it is necessary in the context to read the words of the provision in the spirit of citizenry participation in the governance of a democratic polity that is republican in character. We may hasten to add that when we say so, it should not be construed that there is allowance of enormous entry of judicial creativity, for the construction one intends to place has its plinth and platform on the Preamble and precedents pertaining to constitutional interpretation and purposive interpretation keeping in view the conception of sense and spirit of the Constitution. It is, in a way, exposition of judicial sensibility to

the functionalism of the Constitution. And we call it constitutional pragmatism."

19) The majority opinion also concentrated on the GNCTD Act, 1991 as well as Transaction of Business of the GNCTD Rules, 1993. Its analysis of various provisions of the said Act and Rules led to, inter alia, the following discussion:

> "244. Upon scanning the anatomy of the 1991 Act, we find that the Act contains fifty-six sections and is divided into five Parts, each dealing with different fields. Now, we may refer to some of the provisions contained in Part IV of the 1991 Act titled "Certain Provisions relating to Lieutenant Governor and Ministers" which are relevant to the case at hand. Section 41 deals with matters in which the Lieutenant Governor may act in his discretion and reads thus:
>
> "41. Matters in which Lieutenant Governor to act in his discretion.—(1) The Lieutenant Governor shall act in his discretion in a matter—
>
> (i) which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President;

or

(ii) in which he is required by or under any law to act in his discretion or to exercise any judicial or quasi-judicial functions.

(2) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.

(3) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is required by any law to exercise any judicial or quasi-judicial functions, the decision of the Lieutenant Governor thereon shall be final.

245. A careful perusal of Section 41 of the 1991 Act shows that the Lieutenant Governor can act in his discretion only in matters which fall outside the legislative competence of the Legislative Assembly of Delhi or in respect of matters of which powers are entrusted or delegated to him by the President or where he is required by law to act in his discretion or to exercise any judicial or quasi-judicial functions and, therefore, it is clear that the Lieutenant Governor cannot exercise his discretion in each and every matter and by and large, his discretionary powers are limited to the three matters over which the legislative power of the Delhi Legislative Assembly stands excluded by clause (3)(a) of Article 239-AA.

253. Another important provision is Section 49 of the 1991 Act which falls under Part V of the Act titled "Miscellaneous and Transitional Provisions" and stipulates the relation of the Lieutenant

Governor and his Ministers to the President. Section 49 reads thus:

> "49. Relation of Lieutenant Governor and his Ministers to President.—Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time-to-time be given by the President."
> "254. Section 49 of the 1991 Act discloses that the set-up in NCT of Delhi is one where the Council of Ministers headed by the Chief Minister on one hand and the Lieutenant Governor on the other are a team, a pair on a bicycle built for two with the President as its rider who retains the general control. Needless to say, the President, while exercising this general control, acts as per the aid and advice of the Union Council of Ministers."

20) We would now like to reproduce, in entirety, the conclusions which the majority judgment arrived at. These are as under:

"The conclusions in seriatim

284. In view of our aforesaid analysis, we record our conclusions in seriatim:

284.1. While interpreting the provisions of the Constitution, the safe and most sound approach for the constitutional courts to adopt is to read the words of the Constitution in the light of the spirit of the Constitution so that the quintessential democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated. The courts must adopt such an interpretation which glorifies the democratic spirit of the Constitution.

284.2. In a democratic republic, the collective who are the sovereign elect their law-making representatives for enacting laws and shaping policies which are reflective of the popular will. The elected representatives being accountable to the public must be accessible, approachable and act in a transparent manner. Thus, the elected representatives must display constitutional objectivity as a standard of representative governance which neither tolerates ideological fragmentation nor encourages any utopian fantasy, rather it lays stress on constitutional ideologies.

284.3. Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. In order to realise our constitutional vision, it is indispensable that all citizens and high functionaries in particular inculcate a spirit of constitutional morality which negates the idea of concentration of power in the hands of a few.

284.4. All the three organs of the State must remain true to the Constitution by upholding the trust reposed by the Constitution in them. The decisions taken by constitutional functionaries and the process by which such decisions are taken must have normative reasonability and acceptability. Such decisions, therefore, must be in accord with the principles of constitutional objectivity and symphonious with the spirit of the Constitution.

284.5. The Constitution being the supreme instrument envisages the concept of constitutional governance which has, as its twin limbs, the principles of fiduciary nature of public power and the system of checks and balances. Constitutional governance, in turn, gives birth to the requisite constitutional trust which must be exhibited by all constitutional functionaries while performing their official duties.

284.6. Ours is a parliamentary form of Government guided by the principle of collective responsibility of the Cabinet. The Cabinet owes a duty towards the legislature for every action taken in any of the Ministries and every individual Minister is responsible for every act of the Ministry. This principle of collective responsibility is of immense significance in the context of "aid and advice". If a well-deliberated legitimate decision of the Council of Ministers is not given effect to due to an attitude to differ on the part of the Lieutenant Governor, then the concept of collective responsibility would stand negated.

284.7. Our Constitution contemplates a meaningful orchestration of federalism and democracy to put in place an egalitarian social order, a classical unity in a contemporaneous diversity and a pluralistic milieu in eventual cohesiveness without losing identity. Sincere attempts should be made to give full-fledged effect to both these concepts.

284.8. The constitutional vision beckons both the Central and the State Governments alike with the aim to have a holistic edifice. Thus, the Union and the State Governments must embrace a collaborative federal architecture by displaying harmonious coexistence and interdependence so as to avoid any possible constitutional discord. Acceptance of pragmatic federalism and achieving federal balance has become a necessity requiring disciplined wisdom on the part of the Union and the State Governments by demonstrating a pragmatic orientation. 284.9. The Constitution has mandated a federal balance wherein independence of a certain required degree is assured to the State Governments. As opposed to centralism, a balanced federal structure mandates that the Union does not usurp all powers and the States enjoy freedom without any unsolicited interference from the Central Government with respect to matters which exclusively fall within their domain.

284.10. There is no dearth of authorities with regard to the method and approach to be embraced by constitutional courts while interpreting the constitutional provisions. Some lay more emphasis on one approach over the other, while some emphasise that

a mixed balance resulting in a unique methodology shall serve as the best tool. In spite of diverse views on the said concept, what must be kept primarily in mind is that the Constitution is a dynamic and heterogeneous instrument, the interpretation of which requires consideration of several factors which must be given their due weightage in order to come up with a solution harmonious with the purpose with which the different provisions were introduced by the Framers of the Constitution or Parliament.

284.11. In the light of the contemporary issues, the purposive method has gained importance over the literal approach and the constitutional courts, with the vision to realise the true and ultimate purpose of the Constitution not only in letter but also in spirit and armed with the tools of ingenuity and creativity, must not shy away from performing this foremost duty to achieve constitutional functionalism by adopting a pragmatic approach. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution which we call constitutional pragmatism. The spirit and conscience of the Constitution should not be lost in grammar and the popular will of the people which has its legitimacy in a democratic set-up cannot be allowed to lose its purpose in simple semantics.

284.12. In the light of the ruling of the nine-Judge Bench in NDMC [NDMC v. State of Punjab, (1997) 7 SCC 339] , it is clear as noonday that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme. The status of NCT of Delhi is sui generis, a class apart, and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

284.13. With the insertion of Article 239-AA by virtue of the Sixty-ninth Amendment, Parliament envisaged a representative form of Government for NCT of Delhi. The said provision intends to provide for the Capital a directly elected Legislative Assembly which shall have legislative powers over matters falling within the State List and the Concurrent List, barring those excepted, and a mandate upon the Lieutenant Governor to act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision. 284.14. The interpretative dissection of Article 239-AA(3)(a) reveals that Parliament has the power to make laws for the National Capital Territory of Delhi with respect to any matters enumerated in the State List and the Concurrent List. At the same time, the Legislative Assembly of Delhi also has the power to make laws over all those subjects which figure in the Concurrent List and all, but three excluded subjects, in the State List. 284.15. A conjoint reading of clauses (3)(a) and (4) of Article 239-AA divulges that the executive power of the Government of NCTD is coextensive with the legislative power of the Delhi Legislative Assembly and, accordingly, the executive power of the Council of Ministers of Delhi spans over all subjects in the Concurrent List and all, but three excluded subjects, in the State List. However, if Parliament

makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the State must conform to the law made by Parliament.

284.16. As a natural corollary, the Union of India has exclusive executive power with respect to NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This, however, is subject to the proviso to Article 239-AA(4) of the Constitution. Such an interpretation would be in consonance with the concepts of pragmatic federalism and federal balance by giving the Government of NCT of Delhi some required degree of independence subject to the limitations imposed by the Constitution.

284.17. The meaning of "aid and advise" employed in Article 239-AA(4) has to be construed to mean that the Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers and this position holds true so long as the Lieutenant Governor does not exercise his power under the proviso to clause (4) of Article 239-AA. The Lieutenant Governor has not been entrusted with any independent decision-making power. He has to either act on the "aid and advice" of Council of Ministers or he is bound to implement the decision taken by the President on a reference being made by him.

284.18. The words "any matter" employed in the proviso to clause (4) of Article 239-AA cannot be inferred to mean "every matter".

The power of the Lieutenant Governor under the said proviso represents the exception and not the general rule which has to be exercised in exceptional circumstances by the Lieutenant Governor keeping in mind the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and cultivated idea of respect for a representative Government. The Lieutenant Governor should not act in a mechanical manner without due application of mind so as to refer every decision of the Council of Ministers to the President.

284.19. The difference of opinion between the Lieutenant Governor and the Council of Ministers should have a sound rationale and there should not be exposition of the phenomenon of an obstructionist but reflection of the philosophy of affirmative constructionism and profound sagacity and judiciousness. 284.20. The Transaction of Business Rules, 1993 stipulate the procedure to be followed by the Lieutenant Governor in case of difference between him and his Ministers. The Lieutenant Governor and the Council of Ministers must attempt to settle any point of difference by way of discussion and dialogue. By contemplating such a procedure, the 1993 TBR suggest that the Lieutenant Governor must work harmoniously with his Ministers and must not seek to resist them at every step of the way. The need for harmonious resolution by discussion is recognised especially to sustain the representative form of governance as has been contemplated by the insertion of Article 239-AA. 284.21. The scheme that has been conceptualised by the insertion of Articles

239-AA and 239-AB read with the provisions of the GNCTD Act, 1991 and the corresponding the 1993 TBR indicates that the Lieutenant Governor, being the administrative head, shall be kept informed with respect to all the decisions taken by the Council of Ministers. The terminology "send a copy thereof to the Lieutenant Governor", "forwarded to the Lieutenant Governor", "submitted to the Lieutenant Governor" and "cause to be furnished to the Lieutenant Governor" employed in the said Rules leads to the only possible conclusion that the decisions of the Council of Ministers must be communicated to the Lieutenant Governor but this does not mean that the concurrence of the Lieutenant Governor is required. The said communication is imperative so as to keep him apprised in order to enable him to exercise the power conferred upon him under Article 239-AA(4) and the proviso thereof.

284.22. The authorities in power should constantly remind themselves that they are constitutional functionaries and they have the responsibility to ensure that the fundamental purpose of administration is the welfare of the people in an ethical manner. There is requirement of discussion and deliberation. The fine nuances are to be dwelled upon with mutual respect. Neither of the authorities should feel that they have been lionised. They should feel that they are serving the constitutional norms, values and concepts.

284.23. Fulfilment of constitutional idealism ostracising anything that is not permissible by the language of the provisions of the Constitution and showing veneration to its sense, spirit and silence is constitutional renaissance. It has to be remembered that our Constitution is a constructive one. There is no room for absolutism. There is no space for anarchy. Sometimes it is argued, though in a different context, that one can be a "rational anarchist", but the said term has no entry in the field of constitutional governance and rule of law. The constitutional functionaries are expected to cultivate the understanding of constitutional renaissance by realisation of their constitutional responsibility and sincere acceptance of the summon to be obeisant to the constitutional conscience with a sense of reawakening to the vision of the great living document so as to enable true blossoming of the constitutional ideals. The Lieutenant Governor and the Council of Ministers headed by the Chief Minister are to constantly remain alive to this idealism.

285. The Reference is answered accordingly. Matters be placed before the appropriate regular Bench."

21) The lucid and equally well considered opinions have been rendered by Justice Dhananjay Y. Chandrachud and one of us (Justice Ashok Bhushan) which are substantially on the same lines as the majority opinion. There is, however, a slight difference in approach and to some extent discordant note is expressed in the opinion of Justice Ashok Bhushan. We would advert to these opinions and as well as the area of difference at the appropriate stage.

Ratio of the Judgment:

> 22) There is some dispute as to the exact ratio laid down in the judgment of the Constitution Bench as well as the precise principles set out therein. As per the the appellants, the Constitution Bench has accepted that in a democratic setup where a

> Government is formed on the basis of elections by the people, it is that Government, through Council of Ministers, which has the right to govern. Accepting this fundamental principle as enshrined in the Constitution, the Constitution Bench has recognised that Legislative Assembly for NCTD has the power to make laws for the whole or any part of the NCTD, with respect to any of the matters enumerated in the State List or in the Concurrent List. The only exclusion where the Legislative Assembly of NCTD is debarred from making laws, are the subject matters of Entries 1, 2 and 18 of the State List and Entries 64, 65, 66 of the State List insofar as these Entries related to the said Entries 1, 2 and 18. The CB judgment specifically addressed the issue of the executive power of the GNCTD, viz., whether it is co-extensive with the legislative power. To that extent, the principle of such co-extensive executive power, which is recognised for the Union/Central Government as well as State Governments, has been accepted in the case of GNCTD as well. Thus, in this hue, the Constitution Bench has also accepted that the Lieutenant Governor is to act on the aid and advice of the Council of Ministers in all his acts, except those functions where the Lieutenant Governor is permitted to exercise his own discretion.

23) Since this executive power is co-extensive with legislate power, the appellants emphasised before us that the Constitution Bench has categorically held that this power extends over all the subjects except three subjects in the State List, i.e., Entries 1, 2 and 18. The executive power also extends to all subjects in the Concurrent List. The appellants also submitted that this executive power is to the exclusion of the executive power of the Union with respect to such matters, meaning thereby such power exclusively vests with the GNCTD.

24) The aforesaid manner of reading the Constitution Bench judgment is disputed by the respondents. Insofar as legislative domain of the Legislative Assembly of Delhi is concerned, though the respondents accept that the Legislative Assembly has the power to make laws in respect of all the Entries in List II except matters with respect to Entries 1,2 and 18 and Entries 64, 65 and 66 of List II insofar as they relate to said Entries 1, 2 and 18 and also power to legislate in respect of subject matters contained in the Concurrent List (List III). However, their submission is that this power is not exclusive to the Legislative Assembly of Delhi. On the contrary, the power of the Union, i.e., Parliament to legislate on any entries of List II as well as List III remains intact. Further, wherever Union has exercised the power by making laws in respect of any such subject matter, it is the Union's law which shall prevail in case of any repugnancy in the light of Article 246 of the Constitution.

25) Insofar as executive power of the GNCTD is concerned, the submission of the respondents is that though the Constitution Bench has held that such executive power is co-extensive with the legislative power, but it has nowhere held that such a power is exclusively conferred upon the GNCTD, i.e., to the exclusion of the Union. Here also, according to the respondents, power of the Union remains intact, which is clear from the plain language of Article 239AA of the Constitution itself.

26) The detailed submissions which were made by M/s. C.A. Sundaram, Rakesh Dwivedi and Maninder Singh, learned Senior Counsel who appeared for Union of India in different appeals are of the following nature:

27) It is submitted that two primary contentions had been raised on behalf of the Government of NCT of Delhi before the Delhi High Court as well as before this Court. It had been contended that:-

(i) Article 239 has no applicability whatsoever in the case of NCT of Delhi; and

(ii) NCT Delhi deserves to be treated as a State and not as a Union Territory because it has an elected Council of Ministers like any other State.

28) It is argued that the above-mentioned contentions had been raised on behalf of the Government of NCT of Delhi only with a view to claim exclusive Executive jurisdiction in relation to Entries in List II and List III of the 7th Schedule of the constitution of India (except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries a, 2 and 18). This claim was founded on its basic contention that since there is an elected Council of Ministers in NCT Delhi, it should be treated as equivalent to a State. It was in support of this contention raised by GNCTD that the prayer for non-applicability of Article 239 in the case of NCT Delhi had also been made.

29) On the other hand, on behalf of the Union of India, it had been contended before this Court that the Scheme in the Constitution of India envisages at the threshold – vestige of executive power in the President of India under Article 53 of the Constitution of India to be exercised by the President on the aid and advice of the Union Council of Ministers. It is only after the vestige of the executive power takes place under Article 53 of the Constitution of India that the subsequent provisions of Article 73 and Article 246 define the extent of Executive and Legislative powers of the Union by dividing the Entries in the 3 Lists of the 7 th Schedule, between the Union on the one hand and the States on the other. In the same manner, the provision of Article 152 applies the same rule of vesting of the executive power in relation to all items mentioned in List II of the 7th Schedule, in the Governor of any State to be exercised by the Council of Ministers of the said State Government. In other words, it had been submission of both Government of NCT of Delhi and Union of India before the constitution Bench of this court that unless and until this Court accepts the claim of the Government of NCT of Delhi that NCT Delhi would deserve to be treated as a State, the claim that Exclusive Executive Jurisdiction in relation to all items in List II (except matters with respect of Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1, 2 and 18 would vest in NCT Delhi – could not be accepted and would deserve to be rejected. It is argued that the claim of GNCTD that a 'State' is specifically rejected by the Constitution Bench.

30) Further, having regard to the critical fact of the NCT Delhi being the National Capital and all eventual responsibilities rest on the shoulders of the Union Government, the President of India shall continue to exercise Exclusive Executive Jurisdiction with regard to Item Nos. 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries e,w and 18 and shall continue to possess the non-exclusive executive jurisdiction in relation to all other entries in List II as well as List III of the Seventh Schedule.

31) The respondents further argued that there are three prominent features of the judgment of this Court in the case of Rai Sahib Ram Jawaya Kapur & Ors. v. State of Punjab3. Those prominent three features are:-

> (i) There has to be a vestige of executive power in any Government before it makes any claim to exercise the said executive power before framing of any legislation. It paragraphs 12 and 14 of the said judgment in Ram Jawaya Kapur's case, this Court has referred to the vestige of executive power in the President of India under Article 53 and in the Governor of each State under Article 152 of the Constitution of India.
>
> (ii) Having considered the above-mentioned aspect of vestige of executive power in the Government, this Court held that with reference to all the Entries in List I, the Union Government shall have the Exclusive Executive Jurisdiction co-extensive with the legislative power and would be able to exercise the said executive power without framing any legislation. Similarly, the State shall have executive power in relation to subjects in List II and List III of the Constitution of India.
>
> (iii) However, once the Parliament and/or any State Legislature frames 3 AIR 1995 SC 549 any legislation, the executive power of the respective governments shall be strictly in accordance with the provisions of any said legislation. [Para 12 of the judgment in Ram Jawaya Kapur]
>
> 32) The above-mentioned third proposition as has been held by this Court in Ram Jawaya Kapur's judgment, has been reiterated in various subsequent judgments of this Court including in the judgment of the Constitution Bench of this court in the present case on July 04, 2018 where the following dictum had been incorporated:-
>
> "……..277 ….(xv)…..However, if the Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the State must conform to the law made by the Parliament……."
>
> 33) The respondents point out that in all the three opinions constituting the judgment dated July 04, 2018, this Court has specifically and categorically rejected both the above-mentioned contentions raised on behalf of the NCT Delhi and has categorically held that Article 239 continues to apply to NCT Delhi and further that NCT Delhi is not a State but continues to remain a Union Territory. Reference in this regard may be made to the following paras:

"196. Thus, NDMC [NDMC v. State of Punjab, (1997) 7 SCC 339] makes it clear as crystal that all Union Territories under our constitutional scheme are not on the same pedestal and as far as NCT of Delhi is concerned, it is not a State within the meaning of Article 246 or Part VI of the Constitution. Though NCT of Delhi partakes a unique position after the Sixty-ninth Amendment, yet in sum and substance, it remains a Union Territory which is governed by Article 246(4) of the Constitution and to which Parliament, in the exercise of its constituent power, has given the appellation of the "National Capital Territory of Delhi".

xx xx xx

201. In the light of the aforesaid analysis and the ruling of the nine-Judge Bench in NDMC [NDMC v. State of Punjab, (1997) 7 SCC 339] , it is clear as noonday that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

Authored by Dr. Justice D.Y. Chandrachud:

The Government of Union Territories Act, 1963

373. On 10-5-1963, the Government of Union Territories Act, 1963 was enacted. The 1963 Act defined the expression "Administrator" in Section 2(1)(a) as:

"2. (1)(a) "Administrator" means the administrator of a Union Territory appointed by the President under Article 239;" "Section 3 provided for a Legislative Assembly. Section 18 provided for the extent of legislative power in the following terms:

"18. Extent of legislative power.—(1) Subject to the provisions of this Act, the Legislative Assembly of the Union Territory may make laws for the whole or any part of the Union Territory with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution insofar as any such matter is applicable in relation to Union Territories.

(2) Nothing in sub-section (1) shall derogate from the powers conferred on Parliament by the Constitution to make laws with respect to any matter for the Union Territory or any part thereof." Sub-section (1) of Section 18 was similar in language to Article 239-AA(3)(a), without the exclusion of matters relating to Entries 1, 2 and 18 and Entries 64, 65 and 66. Sub-section (2) was similar in language to Article 239-AA(3)(b). Section 21 provided that if there was any inconsistency between a law made by Parliament and a law made by the Legislative Assembly, the law made by Parliament would prevail to the extent of repugnancy [this provision is similar in nature to Article 239-AA(3)(c)].

453. The judgment of the majority also holds that all Union Territories are not situated alike. The first category consists of Union Territories which have no legislature at all. The second category has legislatures created by a law enacted by Parliament under the Government of Union Territories Act, 1963. The third category is Delhi which has "special features" under Article 239-AA. Though the Union Territory of Delhi "is in a class by itself", it "is certainly not a State within the meaning of Article 246 or Part VI of the Constitution". Various Union Territories — the Court observed — are in different stages of evolution. However, the position remains that these Union Territories, including the NCT are yet Union Territories and not a State.

Authored by Justice Ashok Bhushan:

> 559. After examining the constitutional scheme delineated by Article 239-AA, another constitutional principle had been laid down by the Constitution Bench that Union Territories are governed by Article 246(4) notwithstanding their differences in respective set-ups and Delhi, now called the "National Capital Territory of Delhi" is yet a Union Territory. The Constitution Bench had also recognised that the Union Territory of Delhi is in a class by itself, certainly not a State. Legislative power of Parliament was held to cover Union Territories including Delhi.
>
> 583. The submission of the appellants that proviso to clause (4) of Article 239-AA envisages an extreme and unusual situation and is not meant to be a norm, is substantially correct. The exercise of power under the proviso cannot be a routine affair and it is only in cases where the Lieutenant Governor on due consideration of a particular decision of the Council of Ministers/Ministers, decides to make a reference so that the decision be not implemented. The overall exercise of administration of the Union Territory is conferred on the President, which is clear from the provisions contained in Part VIII of the Constitution. Although, it was contended by the appellant that Article 239 is not applicable with regard to NCTD after Article 239-AA has been inserted in the Constitution. The above submission cannot be accepted on account of the express provisions which are mentioned under Article 239-AA and Article 239-AB itself. Article 239-AA clause (1) itself contemplates that Administrator appointed under Article 239 shall be designated as the Lieutenant Governor. Thus the Administrator appointed under Article 239 is designated as the Lieutenant Governor. Article 239-AB is also applicable to NCTD.

Article 239-AB in turn refers to any apply Article 239. The provisions contained in Part VIII of the Constitution have to be looked into in its entirety. Thus, all the provisions of Part VIII have to be cumulatively read while finding out the intention of the Constitution-makers, which makes it clear that Article 239 is also applicable to NCTD."

34) From the above, contention raised is that the necessary and inevitable position which emerges is that when in paragraph 217, 218 and 219, the majority judgment, acknowledged the exclusive Executive jurisdiction of the Union Government in relation to Entries 1, 2 and 18 of List II (and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1,2 and 18) of the Seventh

Schedule, this Court did not and could not have held that "exclusive" executive jurisdiction vests with the Government of NCT of Delhi in relation to all other entries in List II of the Seventh Schedule.

35) On the contrary, argued the appellants, this Court has held the existence and vestige of non-exclusive Executive Jurisdiction in relation to the remaining entries of List II that of List III for NCTD, since this court has categorically held that NCTD is a Union Territory and not a State, Article 239 continues to apply in relation to NCTD and further the same principle of Ram Jawaya Kapur of co-extensive executive power with the legislative power of any Government also applies to the Union government in relation to the Union Territory of NCTD.

36) After highlighting the above aspect, submission on behalf of Union of India/Lieutenant Governor is that the true and correct scope and interpretation of Article 239AA in relation to NCTD in the entire constitutional scheme (and as laid down in the judgment dated July 04, 2018 passed by the Constitution Bench of this Court including in paras 217, 218 and 219 of the majority judgment), brings into existence the position as tabulated below:

Union		GNCTD	
Exclusive Executive Power of the Union	Non-Exclusive Executive Power of the Union	Exclusive Executive Power of GNCTD	Non-Exclusive Executive Power of GNCTD
All the entries in List I and Entries 1,2 ad 18 of the List II and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1,2 and 18. All the entries in the List II and List III excluded by the phrase 'insofar as any such matter is applicable to Union Territories."	All entires in List II and List III of the 7th Schedule, other than Entries 1,2 and 18 of List II and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1,2 and 18. -to be exercise through the route of Proviso to Article 239AA(4)	NIL [Exclusive Executive Power under the constitution is available only to a State and not to any Union Territory. It is held in the judgment dated 04.07.2018 that NCT Delhi is a Union Territory and not a State.]	Entries in List II and List III of the 7th Schedule, other than Entries 1,2 and 18 of List II and Entries 64,65 and 66 of that List insofar as they relate to the said Entries 1,2 and 18, and also other than those excluded by the phrase "insofar as any such matter is applicable to Union Territories."

37) It is also submitted that it is neither compatible nor can the

argument co-exist that even when the Constitution Bench categorically rejected the contentions of Government of NCTD, including the contention that it is a State and Article 239 would not apply in the case of NCT Delhi, it can still be said that Government of NCTD would possess the exclusive Executive jurisdiction in relation to all Entries in List II (except matters with respect to Entries 1,2 and 18 of the State List and Entries 64,65 and 66 of that List insofar as they relate to the said Entries 1,2 and 18) of the Seventh Schedule. Such a contention would lead to an anomalous reading of the judgment dated July 04, 2018 passed by the Constitution Bench of this court and would deserve rejection by this Court.

38) It is further submitted that the intention of Parliament to confer overriding executive powers to the Central Government is evident from the provisions of Section 49 of the 1991 Act which empowers the President to exercise general control and to issue directions to the Lieutenant Governor and his Council of Ministers. Section 52 stipulates that all contracts relating to the administration of the Capital are made in exercise of the executive power of the Union and suits and proceedings in connection with the administration can be instituted by or against the Union Government. Reliance is placed on paras 86 ad 87 of the opinion authored by Justice D.Y., Chandrachud, which are as under:

> "86. Section 49 establishes the principle of the "general control" of the President over the Lieutenant Governor and the Council of Ministers:
>
> "49. Relation of Lieutenant Governor and his Ministers to Presi-dent.—Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President." "As an incident of control, the Lieutenant Governor and Council of Ministers must comply with the particular directions issued by the President. Such directions are obviously issued on the aid and advice of the Union Council of Ministers.
>
> Section 52 stipulates that all contracts relating to the administration of the Capital are made in exercise of the executive power of the Union and suits and proceedings in connection with the administration can be instituted by or against the Union Government.
>
> 87. This survey of the provisions of the GNCTD Act, 1991 indicates that there is a significant interface between the President and the Lieutenant Governor in matters relating to the administration of the Capital. The Lieutenant Governor has been conferred with certain specific powers by the provisions of the Act including, among them, requirements of seeking the prior recommendation of the President to the introduction of financial Bills. As we have seen, the Lieutenant Governor has been subjected to a wider obligation to reserve Bills for the consideration of the President and in regard to withholding of his assent to a Bill which has been passed by the Legislative Assembly in comparison with the duties of a Governor of a State. Matters such as the presentation of the annual financial statement or supplementary,

> additional or excess grants require previous sanction of the President. The President has been conferred with the power to issue directions in regard to the official language of the National Capital Territory. The Lieutenant Governor has been vested with the power to act in his own discretion in matters which fall outside the ambit and power of the Legislative Assembly and which have been delegated to him by the President as well as in regard to those matters where he is required under law to exercise his own discretion or to act in exercise of judicial or quasi-judicial functions. Rules for the Conduct of Business are framed by the President in relation to the National Capital Territory, including for the allocation of business.

They would include the procedure to be followed where there is a difference of opinion between the Lieutenant Governor and the Council of Ministers. Section 49, which has a non obstante provision, subjects the Lieutenant Governor and the Council of Ministers to the general control of the President and to such directions as may be issued from time to time."

39) Reference is also made to Articles 239AB and 356 of the Constitution of India.

> "239AB. Provision in case of failure of constitutional machinery.
>
> If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied-
>
> (a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of article 239AA or of any law made in pursuance of that article; or
>
> (b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of article 239 and article 239AA.

356. Provisions in case of failure of constitutional machinery in State (1) If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with he provisions of this Constitution, the President may be Proclamation

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the president to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this constitution relating to any body or authority in the State Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts....."

40) On the strength of these provisions it is argued that it is abundantly clear that in the case of States, the Constitution envisages that in a case of failure of constitutional machinery, the President (i.e., the Union Executive) shall 'assume to himself" the functions of the State Government and the powers vested in the Governor. However, in the case of Union Territory of Delhi, since the executive power remains vested in the President and there is no independent exclusive vestage of executive power in the Council of Ministers of NCTD – there was neither any occasion nor any requirement for the Constitution makers to provide for in the provisions of Article 239AB – any "assumption of functions" by the Union Executive since the executive power vests in the Union Executive itself. Since there is never any exclusive vestage in the Council of Ministers of NCT Delhi, there is no need to assume/take it back by the President. Further, Article 239AB provides that in the case of NCT of Delhi the President can suspend the operation of Article 239AA even in a case where the President [i.e. the Union Executive] is satisfied that it is necessary to do so for proper administration of NCTD.

41) In nutshell, submission on behalf of the Union of India is that when the judgment dated July 04, 2018 passed by the Constitution Bench comprising three separate opinions is read as a whole in the manner projected above and there is a harmonization of the three opinions to discern the law which has been laid down by this Court – the legal position projected by the respondents gets strengthened. As per the appellant, such a reading of the judgment dated July 04, 2018 would also be in consonance with the observation made in para 144 of the opinion authored by Justice D.Y. Chandrachud, wherein it has been observed that there is a broad coalescence ("coming together to form one mass or whole; process of merger of two or more droplets of particles to become one single droplet") between the view expressed in the three opinions in the said judgment dated 04.07.2018.

42) We may record at this stage that Dr. Abhishek Manu Singhvi, learned Senior Advocate who appeared for the intervenor, Reliance Industries Limited supported the aforesaid stand taken by the Union of India. He also submitted that no exclusive executive power has been conferred upon the GNCTD, i.e, to the exclusion of the Central Government. He argued that the Scheme behind Article 239AA of the Constitution was 'hybrid' in nature relatable to Lists II and III. Detailed submission of Dr. Singhvi in this behalf would be taken note of while dealing with the issue pertaining to ACB.

43) We may point out at this stage that learned senior counsel appearing for the Union of India have also argued, in the alternative, that if the interpretation suggested by them to the aforesaid judgment of the Constitution Bench is not acceptable, the matter needs to be referred to the Constitution Bench again. To put it differently, the submission is that if this Bench interprets that

the Constitution Bench has held that the executive power conferred upon the GNCTD under Article 239AA of the Constitution is to the exclusion of the power of the Union, then such an interpretation given by the Constitution Bench is contrary to the scheme of Article 239AA. Efforts were made to show as to how such a view (if it is the view of the Constitution Bench) would be contrary to not only the constitutional scheme, but contrary to specific provisions of the GNCTD Act, 1991, particularly Sections 44 as well as Rule 23 of the Transaction of Business Rules. However, we are of the opinion that no such reference to the larger Bench is required and, therefore, we have not reproduced submissions of the learned senior counsel of Union of India on this aspect.

44) M/s. Kapil Sibal, P.C. Chidambaram, Shekhar Naphade and Ms. Indira Jaising argued the matter on behalf of NCTD, appearing in different appeals. Insofar as the aforesaid interpretation suggested by learned counsel appearing for the Union of India is concerned, a strong refutation on behalf of the NCTD is that the judgment, in no uncertain terms, holds that the executive power of NCTD is co-extensive with its legislative power. According to them, the Constitution Bench has specifically held that this executive power pertains to all the Entries in List II, (except Entries 1, 2 and 18, which are specifically excluded), as well as all the Entries in the Concurrent List, i.e. List III. Such a power is 'exclusive' which belongs to GNCTD to the exclusion of the Central government. Specific reference was made to the discussion contained in paragraphs 217 to 219 as well as Conclusions (xv), (xvi) and (xvii) of the majority opinion. Attention was also drawn to the discussions contained in paragraphs 174 to 176, 187 and 239 of the said judgment, which have already been reproduced above.

45) Expanding the proposition that the Constitution Bench has already held that apart from the three explicitly excluded Entries (i.e. Entries 1, 2 and 18 in List II), the Delhi Assembly and GNCTD have legislative and executive powers over all other Entries in List II and III, it was argued that specific contention of the Union of India to the contrary was clearly repelled by the Constitution Bench. Submission in this behalf was that the majority judgment clearly records the submission of the Central Government in para 38 which reads as under:

> "38. The respondents also contend that although Article 239AA confers on the Legislative Assembly of Delhi the power to legislate with respect to subject matters provided in List II and List III of the Seventh Schedule, yet the said power is limited by the very same Article when it employs the phrase "in sofaras any such matter is applicable to Union Territories..." and also by specifically excluding from the legislative power of the Assembly certain entries as delineated in Article 239AA(3)(a). This restriction, as per the respondents, limits the power of the Legislative Assembly to legislate and this restriction has to be understood in the context of conferment of special status."
>
> 46) The above contention is answered specifically in para 214 of the majority judgment of the Constitution Bench, where it is held that the Delhi Assembly has Legislative Power with respect to all matters in the State and Concurrent List except "matters with respect to entries which have been explicitly excluded from Article 239AA(3)(a)". Thus, the contention of the Union of India was that matters in List II

and List III can be excluded in two different ways, explicitly and implicitly, on account of use of the phrase "insofar as any such matter is applicable to Union Territories" and the Constitution Bench has negated that argument and held that power of the Delhi Assembly and Government spans over all subjects except what has been excluded explicitly.

47) The learned counsel also submitted that at least at seven other places, the majority judgment has made it clear that Delhi Assembly/Government has Legislative/Executive Competence over all subjects except three subjects and as a corollary, the executive power of the Union Government in Delhi is limited to three excluded subjects in List II. These paragraphs are:

(a) In Para 199, it is observed that executive power of Delhi Government is co-terminus with executive power on "all but three subjects in the State List and all subjects in the Concurrent List".

(b) In Para 212, it is held that "sub-clause (a) of clause (3) of Article 239AA establishes the power of Delhi Legislative Assembly to enact laws for the NCT of Delhi with respect to matters enumerated in the State List and/or Concurrent List except insofar as matters with respect to and which relate to entries 1, 2 and 18 of the State List."

(c) Again, in Para 217, the Court held that on a conjoint reading of clause 3(a) and clause 4 of Article 239AA, it becomes clear that the Delhi Government has executive power which extends over "all but three subjects in the State List and all subjects in the Concurrent List".

(d) To the similar effect are the observation in Para 219 where the Court observed that "Executive Power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the Legislative Power of the Delhi Legislative Assembly has been excluded under Article 239AA(3)(a)".

(e) This is again reiterated in the conclusions contained in Para 277

(xiv), (xv) and (xvi) as under:

"(xiv) The Legislative Assembly of Delhi also has the power to make laws over all those subjects which figure in the concurrent list and all but three excluded subjects, in the State List"

(xv) The executive power of the Council of Ministers of Delhi spans over all subjects in the Concurrent List and all, but three excluded subjects, in the State list".

(xvi) The Union of India has exclusive executive power with respect to the NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded."

48) This submission was sought to be supported from the concurring judgment of Justice Chandrachud (by referring to paras 127 to 130) which holds that the term "insofar as any such matter is applicable to a Union Territory" in not a terms of exclusion. Similarly, in paras 71 and 72 of the judgment of Justice Bhushan, it has been held that the said phrase "is not exclusionary phrase but has been used to facilitate conferment of power on the Delhi Assembly even in respect of entry that begin with the term State".

49) It was further submitted that reliance placed by the learned counsel appearing for the Union of India on Balakrishnan Committee report for interpreting the provisions of Article 239AA was totally misconceived inasmuch as that aspect has already been considered in the judgment of the Constitution Bench. It was argued that the Constitution Bench has interpreted the provisions of Articles 239, 239AA and 239AB as they apply to NCT of Delhi based on first principles of constitutionally mandated representative democracy, which is based on popular will. The Constitution Bench has not been constrained by textual limitations in giving the interpretation. This is best stated in Para 11 of the Constitution Bench judgment, the relevant portion of which reads as under:

"11. ...In the context of the case at hand, the democratic nature of our Constitution and the paradigm of representative participation are undoubtedly comprised in the "spirit of the Constitution". While interpreting the provisions of the Constitution, the safe and most sound approach is to read the words of the Constitution in light of the avowed purpose and spirit of the Constitution so that it does not result in an illogical outcome which would have never been the intention of the Constituent Assembly or the Parliament while exercising its constituent power. Therefore, a Constitutional Court, while adhering to the language employed in the provision, should not abandon the concept of the intention, spirit, the holistic approach and the constitutional legitimate expectation which combinedly project a magnificent facet of purposive interpretation. The Court should pose a question to itself whether a straight, literal and textual approach would annihilate the sense of the great living document which is required to be the laser beam to illumine. If the answer is in the affirmative, then the constitutional courts should protect the sense and spirit of the Constitution taking aid of purposive interpretation as that is the solemn duty of the constitutional courts as final arbiters of the Constitution..." (Emphasis Supplied)

50) Thereafter, in para 15, some portions of the Balakrishnan Committee are extracted. Then, in para 36, the Court notes the argument of the Union of India seeking literal/textual interpretation and reliance on Balakrishnan Report. Similar reliance on Balakrishnan Report by the Union of India is noted in para 47.

Thereafter, the Constitution Bench from Page 45 to Page 135 has discussed the principles of constitutional interpretation that will be used to interpret Article 239AA.

51) In the light of those principles, the Court thereafter has interpreted Article 239AA and its various provisions. Insofar as Balakrishnan Committee Report is concerned, it is not accepted as interpretative tool, as is clear from the following discussion:

"270. There can be no quarrel about the proposition that the reports of the Committee enacting a legislation can serve as an external aid for construing or understanding the statute.

However, in the instant case, as we have elaborately dealt with the meaning to be conferred on the constitutional provision that calls for interpretation, there is no necessity to be guided by the report of the Committee." (Emphasis Supplied)

52) In this context, another submission of the learned counsel for the appellants was that, in fact, respondents were trying to re-argue the entire matter and attempt was to impress this Bench to depart from the view taken by the Constitution Bench, which was impermissible having regard to the provisions contained in Article 145(3) of the Constitution and in particular the proviso thereof, which reads as under:

"Article 145(3): The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion"

53) The argument advanced is that after settling the legal position with respect to Article 239AA of the Constitution, the Constitution Bench has referred the matter back to this Bench for deciding individual cases.

This Bench was, therefore, to decide these individual issues in 'conformity' with the opinion of the Constitution Bench and, therefore, it was not open to the Union of India to re-argue the case.

54) We have considered the aforesaid submissions with deep sense of sincerity, objectivity and also keeping in mind various specific issues that arise for determination in these appeals.

55) Indubitably, NCTD was, and still remains, a Union Territory. This was held by a nine Judge Bench judgment in the NDMC case, which legal position is reiterated by the Constitution Bench in the instant case as well. However, in spite of NCTD being a Union Territory, it has been given special constitution status under Article 239AA. Clause (1) of the said Article creates and recognises such a status. This status is to accord Legislative Assembly in NCTD with certain powers that are also rcognised in the same provision. The nature of Legislative Assembly is enumerated in clause (2)(a) of Article 239AA as per which seats in the Assembly are to be filled by the Members chosen by direction election. In this manner, even when NCTD remains a Union Territory, it is given a different status than other Union Territories in respect of which provisions of Article 239 apply. It is also different from the status given to Puducherry, another Union Territory which is governed by Article 239A of the Constitution. Even for the Union Territory of Puducherry, provision is made for creation of Legislative Assembly. Such a power is given to the Parliament to enact this kind of law. In exercise of that power, the Parliament has enacted an Act which creates a Legislative Assembly which is partly elected and partly nominated. In contrast, conferment of status upon NCTD is by the Constitution itself and is not left to the Parliament. At the same time, NCTD remains a Union Territory and is not elevated to the status of a 'State' governed by Part VI of the Constitution (Articles 152 to 237). Thus, with the creation of Legislative Assembly as well as elected Government and conferment of all legislative and executive powers, concept of federalism has been incorporated in Article 239AA. Article 239AA has been interpreted by the Constitution Bench keeping in view this principle of federalism. All these aspects have been kept in view by the Constitution Bench while deciding the status of the NCTD as well as conferment of legislative and executive powers to the Legislative Assembly and GNCTD respectively. The CB judgment, therefore, has to be read keeping in view all these parameters as well as the constitutional principles adopted in interpreting Article 239AA.

56) Insofar as legislative power of the NCTD is concerned, there is no dispute that it extends to all the subject matters contained in various Entries of List II with the specific exclusion of Entries 1, 2 and 18. Likewise, it extends to all the Entries in the Concurrent List, i.e. List III. At the same time, it is also an undisputed fact that power of the Parliament to legislate on any subject matter contained in List II is not excluded. In fact, in respect of Union Territories, it is the Union, i.e. the Parliament, which has the power to legislate on all subjects contained in List II and List III. However, there is a conferment of such legislative power upon the Legislative Assembly of NCTD as well. This power is specifically conferred upon the Legislative Assembly under sub-clause

(a) of Article 239AA(3). Sub-clause (b) thereof, in no uncertain terms, provides that conferment of powers upon Delhi Legislative Assembly under sub-clause (a) shall not derogate the powers of Parliament under the Constitution to make laws in with respect to any matter for a Union Territory or any part thereof. This sub-clause, therefore, retains the supremacy of Parliament to make laws. What follows is that Parliament has not only concurrent power in respect of List III, but in respect of List II as well. Insofar as Entries 1, 2 and 18 of List II are concerned, the Parliament retains its exclusive domain on those subject matters. To this extent, there is a departure from the principle of

fedaralism inasmuch as Parliament has no power to make any laws in respect of the States for the matters enumerated in List II. Sub-clause (c) of clause (3) of Article 239AA takes care of the situation of repugnancy if it arises between the law made by the Parliament and the Legislative Assembly of NCTD. In that event, the law made by Parliament shall prevail and the law made by Delhi Legislative Assembly, shall, to the extent of repugnancy, be void. First proviso to sub-clause (c), however, saves law made by the Legislative Assembly of Delhi if law made by it has been reserved for the consideration of President and has received his assent. In that event, such law made by the Legislative Assembly of Delhi shall prevail in NCTD. Notwithstanding, second proviso thereto recognises the supremacy of the Parliament by giving it power to enact law with respect to same subject matter as the law made by the Delhi Legislative Assembly and it includes power to make law adding to, amending, varying or even repealing the law made by the Legislative Assembly.

57) As mentioned earlier, insofar as this power of Parliament to make laws in respect of NCTD is concerned, there is no quarrel. In this conspectus, we have to find as to whether the CB Judgment held that insofar as the executive power of GNCTD is concerned, it is to the exclusion of the Centre, or, as contended by the learned senior counsel appearing for the Union of India, such executive power given to Delhi Government is co-extensive with that of Central Government.

58) It is in the aforesaid backdrop that the observations of the Constitution Bench, particularly the majority view, have to be discerned and given an appropriate meaning. Undoubtedly, the majority judgment in the Constitution Bench decides that the executive power of GNCTD is co-extensive with legislative power and it extends over all the subjects of the lis to accept subjects mentioned in Entries 1, 2 and 18 and it also extends to all subjects in List III. This is the clear mandate of the Constitution Bench. The controversy, however, is on the issue as to whether such executive power of GNCTD is to the exclusion of the power of the Union Government. In this behalf, it may be noted that the majority judgment has held that such executive power of the Delhi Government is to the exclusion of the executive power of the Union. On the other hand, in a separate judgment rendered by one of us (Ashok Bhushan, J.), it has been clearly held that the executive power of the Union Government is co-extensive with that of the Delhi Government. Discussion on this aspect, in the opinion of Ashok Bhushan, J., goes as under:

> "84. The appellant relying on Article 73 of the Constitution had submitted that Article 73 lays down the principle that while there may exist under the Constitution concurrent legislative powers on two different federal units, there can never be any concurrent executive powers. It was further submitted that the above principle equally applies to matters listed in List II and List III of the Constitution of India for NCTD. Referring to Article 239-AA(3)(b), it is contended that the said provision confers power on Parliament to enact legislations in matters in both State List and Concurrent Lists Such power is also available under Article 246. However, it does not follow from the above that the said provision also confers executive powers in relation to matters in the State List and Concurrent List. It is further submitted that Parliament may by law confer executive powers in relation to matters in the Concurrent List on the Union Government for States, it may also do so in relation to NCTD. But, if such thing is not done, the Union Government will, as a general rule,

have no executive powers in respect of matters under List II (except the excluded entries) and it is the GNCTD, which shall enjoy exclusive executive powers. We are of the view that the above interpretation as put up by the appellant on constitutional provisions cannot be accepted. The principle is well established that executive powers coexist with the legislative powers. Reference to Article 73 has been made in this context, which need to be noted.Article 73 provides as follows:

"73. Extent of executive power of the Union.—(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause

(a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this Article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."

85. The proviso to Article 73(1) provides that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the legislature of the State has also power to make laws. Obviously, the proviso refers to the Concurrent List where both Parliament and State have power to make laws. Executive power in reference to Concurrent List has been deliberately excluded to avoid any duplicacy in exercise of power by two authorities. Article 73 as it stood prior to the Constitution (Seventh Amendment) Act, 1956 contained the expression after the word State "specified in Part A or Part B of the First Schedule". Thus, the executive power was excluded of the Union only with regard to Part A and Part B States alone.

Thus, when the Constitution was enforced, executive power of Union in reference to Part C States was not excluded with regard to Concurrent List also. Part C States having been substituted as now by the Union Territories by the Constitution (Seventh Amendment) Act. The word "State" in proviso to Article 73 cannot be read to include Union Territory. Reading the words "Union Territory" within the word "State" in proviso to Article 73(1) shall not be in accordance with Scheme of Part VIII

(Union Territories) of the Constitution. Union Territories are administered by the President. Exercise of executive power of the Union through President is an accepted principle with regard to Union Territories. The above interpretation is also reinforced due to another reason. Under Article 239-AA(4) proviso, the Lieutenant Governor, in case of difference of opinion, can make a reference to the President for decision and has to act according to the decision given thereon. The President, thus, with regard to a particular executive action, which has been referred, has exclusive jurisdiction to take a decision, which both Council of Ministers as well as Lieutenant Governor has to follow. The provision does not indicate that power of the President is confined only to executive actions which are mentioned in List II. When the President, as provided by the constitutional scheme, is entitled to take executive decision on any matter irrespective of the fact whether such executive decision taken by the Council of Ministers or Ministers related to matters covered by List II and List III, the executive power to Union through President cannot be confined to List II. Overriding power to the Union even on the executive matters has to be conceded to be there as per constitutional scheme. It is another matter that for exercise of executive powers by the Union through the President and by the Council of Ministers, headed by the Chief Minister of NCTD, the Constitution itself indicates a scheme which advances the constitutional objectives and provide a mechanism for exercise of executive powers, which aspect shall be, however, further elaborated while considering clause (4) of Article 239-AA. Legislative power of the Union is coextensive with its executive power in relation to NCT is further indicated by the provisions of the Government of National Capital Territory of Delhi Act, 1991. The insertion of Article 239-AA by the Constitution Sixty-ninth Amendment has been followed by enactment of the Government of National Capital Territory of Delhi Act, 1991 which Act was enacted by Parliament in exercise of power under Article 239-AA(7)(a) of the Constitution. Section 49 of the Act, 1991 provides as follows:

> "49. Relation of Lieutenant Governor and his Ministers to President.—Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by the President."

> 86. Legislative power of the Union is exercised by the President as per the constitutional scheme and Section 49 itself indicates that Parliament clearly envisaged the Council of Ministers and the Lieutenant Governor shall be under the general control of, and comply with such particular directions issued by the President from time to time. The power of the President to issue direction is not limited in any manner so as to put any restriction on the executive power of the Union.

> 87. The President further is empowered under Section 44 of the 1991 Act to make rules for the allocation of business to the Ministers insofar as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers. As per Article 239-AA sub-clause (4) read with business rules, the manner and procedure of conduct of business including executive functions of GNCTD has to be administered. Although the Union ordinarily does not interfere with or meddle with the day-to-day functions of the GNCTD which is in tune with the constitutional scheme as delineated by Article 239-AA and to give meaning and

purpose to the Cabinet form of Government brought in place in the National Capital of Territory.

But as the overriding legislative power of Parliament is conceded in the constitutional scheme, overriding executive power has also to be conceded even though such power is not exercised by the Union in the day-to-day functioning of the GNCTD. We thus conclude that executive power of the Union is coextensive on all subjects referable to List I and List II on which Council of Ministers and NCTD has also executive powers."

59) Insofar as opinion of Chandrachud, J. is concerned, there is no categorical discussion on this aspect, though insofar as legislative power of the Legislative Assembly of Delhi is concerned, that has been recognised, which is in conformity with the other two opinions, the aspect of executive power of the Delhi Government has not been elaborated. Instead, there is a detailed discussion on the construction of the proviso to Article 239AA(4). As we have seen, clause (4) deals with the executive power of the Council of Ministers of GNCTD. Proviso thereto deals with the situation where there would be a difference of opinion between the Lieutenant Governor and his Ministers on any matter. It provides that in such an eventuality the Lieutenant Governor is supposed to refer the matter to the President for decision and act according to the decision given thereon by the President. It gives supremacy to the President in the matter of executive decisions. Chandrachud, J. has noted that NCTD continues to be a Union Territory and the Union Government has a special interest in the administration of its affairs, which stands exemplified by the provisions of Article 239 and Section 49 of the GNCTD Act. Therefore, the provision to Article 239AA(4) must be given an interpretation which is marked with a sense of fine constitutional balance. The balance which is drawn must preserve the vital interest of the Union Government in the governance of the National Capital while supporting the legitimacy and constitutional status of the Council of Minister, which owes collective responsibility to the Legislative Assembly and which, in its capacity of the executive arm of the Government, tenders aid and advise to the Lieutenant Governor under a cabinet form of governance. According to the learned Judge, three lines of reasoning emerge in this behalf which are mentioned in the opinion. The first line of interpretation would have the Court interpret the expression 'difference of opinion between the Lieutenant Governor and his Council of Ministers on any of the matter' without reservation or qualification, which would be a purely literal or textual construction. In this sense 'any matter' would mean any matter without restriction. Second interpretation would be to read the aforesaid expression to be read and confined to specific categories. Third interpretation has two facets. As per the first facet, a reference can be made to the President only after the Lieutenant Governor has made an effort to resolve a difference with a Minister or with Council of Ministers by seeking a resolution through dialogue and discussion. This is to be done after following the procedure contained in the Transaction of Business Rules. Second facet relates to the substantive meaning of the expression 'any matter', which would not mean 'every matter' or 'every trifling matter' but only those rare and exceptional matters where the difference is so fundamental to the governance of the Union Territory that it deserves to be escalated to the President.

60) After suggesting the aforesaid three lines of interpretations, the judgment suggests that there is a kernel of substance in each of them, but pitfalls have to be avoided. It emphasises that the

functioning of the institutions must establish a constitutional balance which facilitates cooperative governance. Read in this way, the proviso has to be operated and applied in a manner which facilitates and does not obstruct the governance of NCTD. This judgment, thereafter, again emphasises that though Delhi has a special status, it continues to be a Union Territory. In that context, the nine Judge Bench decision in NDMC as well as the scheme contained in Article 239 and 239AA as well as the principle of repugnancy mentioned in Article 254 of the Constitution are discussed. Discussion thereafter would be of some relevance and is, therefore, reproduced below, verbatim:

> "138...The principle of repugnancy which Article 254 recognises between the Union and State legislation on matters in the Concurrent List is extended by Article 239-AA [(3)(b) and (3)(c)], both with reference to State and Concurrent List subjects for NCT. Moreover, certain subjects have been expressly carved out from the ambit of the legislative authority of the Legislative Assembly and vested exclusively in Parliament. Executive powers of the Government of NCT being coextensive with legislative powers, the aid and advice which is tendered to the Lieutenant Governor by the Council of Ministers is confined to those areas which do not lie outside the purview of legislative powers. These provisions demonstrate that while adopting the institutions of a Cabinet form of Government, the Constitution has, for NCT, curtailed the ambit of the legislative and executive powers, consistent with its status as a Union Territory.
>
> 139. The exercise of the constituent power to introduce Article 239-AA was cognizant of the necessity to protect national interests inherent in the governance of a National Capital. A sense of permanence and stability was sought to be attributed to the arrangements made for governing Delhi by bringing in a constitutional amendment. Both in terms of the reach of the legislative power, as well as in relation to the exercise of executive power, the special constitutional arrangements for Delhi recognise that the governance of Delhi implicates a sense of national interest. When matters of national interest arise, they would predicate a predominant role for institutions of national governance.
>
> 140. Consistent with the need to preserve national interest, it would not be appropriate to restrict the ambit of the proviso to Article 239-AA(4) to situations where the action of the Government is ultra vires the limits of its executive powers. This becomes evident on a construction of the provisions of Section 41(1)(i) and Section 44(1)(a) of the GNCTD Act. Clause (i) of Section 41(1) enables the Lieutenant Governor to act in his discretion on a matter which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President. Under Section 44(1)(a), Rules of Business are made on matters on which the Lieutenant Governor is required to act on the aid and advice of the Council of Ministers. Section 44(1)(a) covers business which is not a part of Section 41(1)(i).

This is because matters which fall within Section 44(1)(i) are not governed by the principle of aid and advice.

141. There is much to be said for not laying down an exhaustive catalogue of situations to which the proviso applies. Governance involves complexities. In the very nature of things, it would not be possible for a court delivering judgment in the context of the problems of the day to anticipate situations which may arise in future. It would be unsafe to confine a constitutional provision to stated categories which may affect the resilience of the Constitution to deal with unforeseen situations. Some of the illustrations which may warrant the exercise of the power under the proviso may shed light on the purpose of the proviso and the object which it seeks to achieve.

142. There are two constitutional perspectives: first, the operation of the proviso should preserve the national concerns underlying the conferment of such a power, and second, the exercise of the power under the proviso must not destroy the essential democratic values recognised in Article 239-AA. Thus, it is necessary to lay down the steps which need to be adopted before recourse is taken to the proviso. The Transaction of Business Rules indicate in sufficiently elaborate terms that when there is a difference of opinion between the Lieutenant Governor and a Minister, primarily, an effort should be made to resolve it by mutual discussion. If this process does not yield a satisfactory result, the matter can be referred to the Council of Ministers with whom an attempt is made to seek a satisfactory solution. It is when these two stages are crossed and a difference still persists that the proviso can be taken recourse to by referring the matter to the President. These stages which are enunciated in the Transaction of Business Rules must be read in conjunction with the authority conferred by Section 44 of the GNCTD Act which was enacted in pursuance of Article 239-AA(7). Hence the proviso must be read in conjunction with the law enacted by Parliament and the Transaction of Business Rules made by the President, to give clarity to the operating procedure for invoking the proviso. Moreover, once a reference is made to the President, the Lieutenant Governor is bound by the decision of the President. The Lieutenant Governor has the authority to take action which is warranted by emergent circumstances until the President has taken a decision. But before recourse is taken to the proviso, the Lieutenant Governor must make every effort with the Minister or, as the case may be, the Council of Ministers to resolve a matter of difference. The nature of the differences which may warrant a reference to the President cannot be exhaustively catalogued. But it would be appropriate to construe the proviso as a protector of national concerns in regard to governance of the NCT. The Lieutenant Governor is a watchdog to protect them. The Lieutenant Governor may, for instance, be justified in seeking recourse to the proviso where the executive act of the Government of the NCT is likely to impede or prejudice the exercise of the executive power of the Union Government. The Lieutenant Governor may similarly consider it necessary to invoke the proviso to ensure compliance with the provisions of the Constitution or a law enacted by Parliament. There may well be significant issues of policy which have a bearing on the position of the National

> Capital Territory as a national Capital. Financial concerns of the Union Government may be implicated in such a manner that it becomes necessary for the Lieutenant Governor to invoke the proviso where a difference of opinion remains unresolved. A situation of the nature indicated in Rule 23 of the Transaction of Business Rules may well justify recourse to the proviso. The touchstone for recourse to the proviso is that the difference of opinion is not a contrived difference. The matter on which a difference has arisen must be substantial and not trifling. In deciding whether to make a reference, the Lieutenant Governor must always bear in mind the latitude which a representative Government possesses to take decisions in areas falling within its executive authority. The Lieutenant Governor must bear in mind that it is not he, but the Council of Ministers which takes substantive decisions and even when he invokes the proviso, the Lieutenant Governor has to abide by the decision of the President. The Lieutenant Governor must also be conscious of the fact that unrestrained recourse to the proviso would virtually transfer the administration of the affairs of the NCT from its Government to the Centre. If the expression "any matter" were to be read so broadly as to comprehend "every matter", the operation of the proviso would transfer decision-making away from the Government of the NCT to the Centre. If the proviso were to be so read, it would result in a situation where the President would deal with a reference on every matter, leaving nothing but the husk to the administration of the Union Territory. Article 239-AB makes a provision where there is a failure of the constitutional machinery in the Union Territory. The proviso to Article 239-AA(4) does not deal with that situation. Hence, in the application of the proviso it would be necessary to bear in mind that the Council of Ministers for the NCT has a constitutionally recognised function, as does the Legislative Assembly to whom the Council is collectively responsible. The role of the Lieutenant Governor is not to supplant this constitutional structure but to make it workable in order to ensure that concerns of a national character which have an innate bearing on the status of Delhi as a national Capital are not bypassed. If these fundamental precepts are borne in mind, the operation of the proviso should pose no difficulty and the intervention of the President could be invoked in appropriate cases where a matter fundamental to the governance to the Union Territory is involved."
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> 61) Insofar as executive power of the GNCTD is concerned, we find that the majority judgment authored by Dipak Misra, CJI (as he then was) clearly holds that it is to the exclusion of the executive power of the Central Government. That is the effect of the combined reading of paragraphs 214 to 218 of the Constitution judgment. The argument of the respondents to the contrary is an attempt to reargue the case.

However, judicial discipline prevents us from embarking upon such a journey. In fact, it is for this reason the learned counsel appearing for the Union of India have also argued that the majority opinion is not correct and matter needs to be referred to the larger Bench for reconsideration. This course of action would also not be advisable having regard to the provisions of Article 145(3) of the Constitution. We, thus, have to proceed on the premise that the executive power of the Delhi Government extends to all Entries of List II (except Entries 1, 2 and 18) and Entries 64, 65 and 66 of

that List insofar as they relate to said Entries 1, 2 and 18 as well as all the Entries in List III. This power of GNCTD is also to be exclusive, i.e. to the exclusion of the executive power of the Central Government. At the same time, we may also clarify that while dealing with the specific issues which arise in these appeals, this Court would keep in mind the provisions of GNCTD Act as well as the Transaction of Business Rules inasmuch as for deciding these issues this Court cannot be oblivious of the specific provisions contained in the Act and the Rules.

62) Of course, while construing those provisions and applying these and other provisions in the context of specific issues, the letter and spirit behind the Constitution Bench judgment on various aspects, to which all the three opinions concur, would be kept in mind. It is for this reason we have discussed other two opinions as well, in detail. The Appeals

63) To recapitulate, there are a total of nine appeals which have to be decided by this Court in the present batch of appeals. Seven out of these nine appeals have been filed by the GNCTD and remaining two have been filed by the Union of India. Eight out of these nine appeals are Civil Appeals and one appeal filed by the Union of India is a Criminal Appeal. All the appeals are against the impugned order of the High Court of Delhi dated August 04, 2016. The issues which are raised in different appeals are summed up below:

> 64) The first issue is whether the exclusion of "Services" relatable to Entry 41 of List II of the Seventh Schedule from the legislative and executive domain of the NCT of Delhi, vide Notification of the Government of India dated May 21, 2015, is unconstitutional and illegal?
>
> 65) The second issue is whether the exclusion of the jurisdiction of the Anti-Corruption Branch (ACB) of the NCT of Delhi to investigate offences committed under the Prevention of Corruption Act, 1987 by the officials of Central Government and limiting the jurisdiction of the ACB to the employees of GNCTD alone is legal? (These two issues arise in Civil Appeal No. 2357 of 2017).
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> 66) The third issue is raised in Civil Appeal Nos. 2358, 2359 and 2360 of 2017. In all these three appeals, the common issue is whether the GNCTD is an "Appropriate Government" under the Commission of Enquiry Act, 1952?
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> 67) The fourth issue, which is raised in Civil Appeal 2363 of 2017, is:
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> whether under Section 108 of the Electricity Act, 2003 and under Section 12 of the Delhi Electricity Reforms Act, 2000, the power to issue directions with the State Commission is with the Government of NCT of Delhi?

Similar issue is the subject matter of Civil Appeal 2361 of 2017, viz. whether the orders of the GNCTD nominating Directors to Distribution Companies in Delhi under the Delhi Electricity Reforms Act, 2000 read with Delhi Electricity Reforms (Transfer Scheme) Rules, 2001, without obtaining the concurrence of the Lieutenant Governor are valid?

68) The fifth issue is common to Civil Appeal No. 2362 of 2017 filed by the GNCTD and Civil Appeal No. 2364 of 2017 filed by Union of India, wherein the issue is whether the Revenue Department of the GNCTD has the power to revise the minimum rates of Agricultural Land (Circle Rates) under the provisions of Indian Stamp Act, 1899?

69) The sixth issue, which is the subject matter of Criminal Appeal No. 277 of 2018, pertains to the appointment of Special Public Prosecutors, viz., whether it is the Lieutenant Governor or the GNCTD which has the power to appoint the Special Public Prosecutor under Section 24 of the Cr.PC.?

Discussion and Conclusions on the Issues Raised

70) We now proceed to decide these issues.

Issue No.1: Whether the exclusion of 'Services' relatable to Entry 41 of List II of the Seventh Schedule from the legislative and executive domain of the NCTD, vide Notification dated May 21, 2015, is unconstitutional and illegal?

71) Entry 41 of List II of the Seventh Schedule reads as under:

> "41. State public services; State Public Service Commission."

> 72) Mr. Chidambaram, learned senior counsel who argued the case on behalf of the GNCTD on this issue, submitted that the majority judgment of the Constitution Bench specifically holds that exclusion of legislative/executive power in List II for Assembly/ GNCTD is limited to only three subjects, i.e. Entry 1 (Public order), Entry 2 (Police) and Entry 18 (Land). Therefore, the issue of exclusion of any other additional Entry either in List II or in List III would not arise. As a consequence, not only legislative power of the Assembly, even the co-extensive executive power in respect of Entry 41 rests with GNCTD. Mr. Chidambaram argued that Entry 41 has two components, namely, State public service and State Public Service Commission. Since there is no State Public Service Commission in Delhi, insofar as service personnel in Delhi are concerned, that would come within the expression 'State public services' and it is the GNCTD which would exercise its administrative power over such employees.

> 73) Learned counsel drew attention of this Court to the earlier Notification dated September 24, 1998 and submitted that the said Notification was perfectly in order. We reproduce the same hereunder:

> "

MINISTRY OF HOME AFFAIRS NOTIFICATION New Delhi, the 24th September, 1998 S.O. 853 (E). – In pursuance of the powers conferred under clause (1) of article 239 of the Constitution, the

President hereby directs that subject to his control and until further orders, the Lieutenant Governor of the National Capital Territory of Delhi, shall in respect of matters connected with 'Public Order', 'Police' and 'Services' exercise the powers and discharge the functions of the Central Government, to the extent delegated from time to time to him by the President, in consultation with the Chief Minister of the National Capital Territory of Delhi except in those cases where, for reasons be recorded in writing, he does not consider it expedient to do so.

[F.No. U-11030/2/98-UTL(288)] P.K. JALALI, Jt. Secy." However, this was superseded vide impugned Notification dated May 21, 2015 which gives power to the Lieutenant Governor in respect of 'Services' as well, in addition to 'Public Order', 'Police' and 'Land', which is contrary to the scheme contained in Article 239AA of the Constitution, as interpreted by this Court. This Notification reads as under:

"

MINISTRY OF HOME AFFAIRS NOTIFICATION New Delhi, the 21st May, 2015 S.O. 1368(E).—Whereas article 239 of the Constitution provides that every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify;

And whereas article 239AA inserted by 'the Constitution (Sixty-ninth Amendment) Act, 1991' provides that the Union Territory of Delhi shall be called the National Capital Territory of Delhi and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor; And whereas sub-clause (a) of clause (3) of article 239AA states that the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18; and whereas Entry 1 relates to 'Public Order', Entry 2 relates to 'Police' and Entry 18 relates to 'Land'.

And whereas sub-clause (a) of clause (3) of article 239AA also qualifies the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories. Under this provision, a reference may be made to Entry 41 of the State List which deals with the State Public Services, State Public Service Commission which do not exist in the National Capital Territory of Delhi.

Further, the Union Territories Cadre consisting of Indian Administrative Service and Indian Police Service personnel is common to Union Territories of Delhi, Chandigarh, Andaman and Nicobar Islands, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli, Puducherry and States of Arunachal Pradesh, Goa and Mizoram which is administered by the Central Government through the Ministry of Home Affairs; and similarly DANICS and DANIPS are common services catering to the requirement of the Union Territories of Daman & Diu, Dadra Nagar Haveli, Andaman and Nicobar Islands, Lakshadweep including the National Capital Territory of Delhi which is also

administered by the Central Government through the Ministry of Home Affairs. As such, it is clear that the National Capital Territory of Delhi does not have its own State Public Services. Thus, 'Services' will fall within this category.

And whereas it is well established that where there is no legislative power, there is no executive power since executive power is co-extensive with legislative power. And whereas matters relating to Entries 1, 2 & 18 of the State List being 'Public Order', 'Police' and 'Land' respectively and Entries 64, 65 & 66 of that list in so far as they relate to Entries 1, 2 & 18 as also 'Services' fall outside the purview of Legislative Assembly of the National Capital Territory of Delhi and consequently the Government of NCT of Delhi will have no executive power in relation to the above and further that power in relation to the aforesaid subjects vests exclusively in the President or his delegate i.e. the Lieutenant Governor of Delhi. Now, therefore, in accordance with the provisions contained in article 239 and sub-clause (a) of clause (3) of 239AA, the President hereby directs that -

"(i) subject to his control and further orders, the Lieutenant Governor of the National Capital Territory of Delhi, shall in respect of matters connected with 'Public Order', 'Police', 'Land' and 'Services' as stated hereinabove, exercise the powers and discharge the functions of the Central Government, to the extent delegated to him from time to time by the President.

Provided that the Lieutenant Governor of the National Capital Territory of Delhi may, in his discretion, obtain the views of the Chief Minister of the National Capital Territory of Delhi in regard to the matter of 'Services' wherever he deems it appropriate.

2. In the Notification number F. 1/21/92-Home (P) Estt. 1750 dated 8th November, 1993, as amended vide notification dated 23rd July, 2014 bearing No. 14036/4/2014-Delhi-I (Pt. File), for paragraph 2 the following paragraph shall be substituted, namely:

> — "2. This notification shall only apply to officials and employees of the National Capital Territory of Delhi subject to the provisions contained in the article 239AA of the Constitution." after paragraph 2 the following paragraph shall be inserted, namely:— "3. The Anti-Corruption Branch Police Station shall not take any cognizance of offences against Officers, employees and functionaries of the Central Government".

3. This Notification supersedes earlier Notification number S.O. 853(E) [F. No. U-11030/2/98-UTL] dated 24th September, 1998 except as respects things done or omitted to be done before such supersession.

[F. No. 14036/04/2014-Delhi-I (Part File)] RAKESH SINGH, Jt. Secy."

74) Pertinently, this Notification in respect of 'Services', mentions about Union Territories cadre consisting of Indian Administrative Service and Indian Police Service personnel. There is no dispute that this cadre is common to all the Union Territories and Delhi is only one of them. It is also not in dispute that this cadre is administered by the Central Government through the Ministry of Home

Affairs. The Notification also refers to DANICS and DANIPS, which are again common services catering to the requirement of various Union Territories, including NCTD. These services are also administered by the Central Government through the Ministry of Home Affairs. As is clear from the aforesaid Notification, the aforesaid reasons are given therein thereby making these services subject to the control and further orders of the Lieutenant Governor of NCTD.

75) Submission of Mr. Chidambaram, however, is that being common cadres, which apply to all Union Territories, undoubtedly, the Central Government has the power to allocate the personnel to NCTD as well. Likewise, it is also within the powers of the Central Government to transfer such personnel from one Union Territory to other, which would mean even from NCTD to any other Union Territory. According to him, that was the only function of the Joint Cadre Authority under the All India Services (Joint Cadre) Rules, 1972 inasmuch as Rule 5(1) therein stipulates to: "determine the names of the members of All India Services who may be required to serve from time to time in connection with affairs of each of the constituent States and the period or purpose for which their services shall be available to that Government". However, submits the counsel, once particular officers are allocated to NCTD, during their tenure in NCTD, it is within the powers of the GNCTD to assign them to particular departments. In support of this submission, he referred to the following Rules:

> "The All-India Services (Joint Cadre) Rules, 1972
>
> 2. Definitions – In these rules, unless the context other requires, –
>
> (a). "Joint Cadre Authority" means the Committee of Representatives referred to in rule 4.
>
> xx xx xx
>
> 4. Committee of representatives -
>
> (1) There shall be a Committee consisting of a
>
> representative of each of the Governments of the Constituent States, to be called the Joint Cadre Authority.
>
> (2) The representatives of the Governments of the Constituent States may either be members of an All-India Service or Ministers in the Council of Ministers of the Constituent States, as may be specified by the Governments of the Constituent States." The Indian Administrative Service (Cadre) Rules, 1954
>
> 2. Definitions:- In these rules, unless the context otherwise requires -
>
> xx xx xx

(c) 'State' means a State specified in the First Schedule to the constitution and includes a Union Territory.

(d) 'State Government concerned', in relation to a Joint cadre, means the Joint Cadre Authority.

xx xx xx

7. Postings – All appointments to cadre posts shall be made:-

(a) in the case of a State cadre, by the State Govt.; and

(b) in the case of a Joint Cadre, by the State Government concerned.

(c)(i) The Central Government, in consultation with the State Government or State Governments concerned, may determine the tenure of all or any of the cadre posts specified for the State concerned in item 1 of the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulation, 1955.

(c)(ii) A cadre officer, appointed to any post for which the tenure has been so determined, shall hold the minimum tenure as prescribed except in the event of promotion, retirement, deputation outside the State or training exceeding two months.

(c)(iii) An officer may be transferred before the minimum prescribed tenure only on the recommendation of a Committee on Minimum Tenure as specified in the Schedule annexed to these rules." xx xx xx 11A. Authority to exercise certain powers in respect of members of the Service serving in connection with the affairs of the States constituting a Joint Cadre:- the powers of the State Government under the second proviso to sub-rule (2) of rule 4, under clause (I) of sub-rule (2) of rule 6 and under Rules 7, 10 and 11, in relation to the members of the Service serving in connection with the affairs of any of the Constituent States shall be exercised by the Government of that State." Submission was that as per the aforesaid Rules, posting is done by the State Government once the Central Government allocates particular employees to a particular State and since this principle of federalism is accepted and given imprimatur by the Constitution Bench in case of NCTD as well, the aforesaid principle shall equally apply.

76) As per him, the complete scheme which becomes clear from the above is that while it is the Joint Cadre Authority where Delhi has its own separate representative which allocates officers of the AGMUT Cadre to NCT of Delhi, the post to which such officer is posted/deputed is determined by the GNCTD. Consequently, if within the GNCTD, the said officer has to be posted from one post to the another, it is the GNCTD alone which has the powers under the Service Rules. This is in consonance

with the position that prevails in the states of Arunachal Pradesh, Mizoram and Goa which are also members of the Joint Cadre in the AGMUT Cadre and who like the NCTD and unlike other Union Territories have a representative in the Joint Cadre Authority.

77) Likewise, insofar as DANICS is concerned, the submission is that under the Delhi, Andaman & Nicobar Islands, Lakshasweep, Daman & Diu and Dadra & Nagar Haveli Civil Services Rules, 2003, same consequence follows. Following Rules were referred to:

"11. Appointment to the Service -

All appointment to the Service shall be made by the Appointing Authority to the Junior Administrative Grade-I or Junior Administrative Grade-II or Selection Grade or Entry Grade of the Service and not against any specific post included in the Service.

12. Posting -

Every member of the Service allocated to an Administration shall, unless he is appointed to an ex-cadre post, or is otherwise not available for holding a duty post owing to the exigencies of the public service, be posted against a duty post under the Administration by the Administrator concerned.

13. Allocation of members of the Service -

The Government shall, from time to time, allocate a member of the Service to any Administration for posting in terms of rule 12."

78) It is argued that under the DANICS Rules, as per Rule 2(a) 'Administration' means the GNCTD, as per Rule 2(b) 'Administrator' means the Administrator of NCTD and as per Rule 2(k) 'Government' means the Government of India. Thus, while it is the Government of India that makes an officer available to GNCTD under Rule 13, the posting of that DANICS officer within the NCTD is to be made by the Administrator on the aid and advice of the Council of Ministers.

79) Mr. C.A. Sundaram, learned senior counsel who argued on behalf of the Union of India on this particular issue, submitted that Entry 41 in List II cannot be applied to the NCTD as the said Entry is confined to 'State public services' and 'State Public Service Commission'. Indubitably, there was no Public Service Commission in NCTD. The other part refers to State Public Services whereas the services in respect of which the impugned Notification dated May 21, 2015 is issued, pertains to other All India Services or combined/joint cadre of Union Territories which are not State public services. He also argued that certain matters fall within the discretionary powers of the Lieutenant Governor where he does not have to act on the aid and advise of the Council of Ministers of GNCTD. This was such a discretionary matter and, therefore, fell outside NCTD. In the alternative, he

submitted that even if the Lieutenant Governor has no discretion, since the subject matter is not covered by Entry 41 of List II, the Lieutenant Governor is not supposed to act on the aid and advise of the Central Government and not that of GNCTD. Focusing on the aspect of discretionary power of the Lieutenant Governor, Mr. Sundaram referred to Section 41 of the GNCTD Act which stipulates the matters wherein the Lieutenant Governor can act in his own discretion. This provision reads as under:

> "41. Matters in which Lieutenant Governor to act in his discretion:
>
> (1) The Lieutenant Governor shall act in his discretion in a matter:-
>
> (i) which falls outside the purview of the powers conferred on the legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President;

or

(ii) in which he is required by or under any law to act in his discretion or to exercise any judicial functions. (2) If any question arises as to whether any matter is or is not a matter as respects with the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.

(3) If any questions arises as to whether any matter is or is not a matter as respects with the Lieutenant Governor is by or under any law required by any law to exercise any judicial or quasi-judicial functions, the decision of the Lieutenant Governor thereon shall be final."

80) According to Mr. Sundaram, discretion was conferred upon the Lieutenant Governor in respect of this subject matter by virtue of clause

(i) of sub-section (1) of Section 41 as the matter falls outside the purview of the powers conferred on the Legislative Assembly. Therefore, the President was competent to issue Notification dated May 21, 2015 thereby entrusting the powers and functions in respect of 'Services' to the Lieutenant Governor. According to him, this was supported by Rule 46 of the Transaction of Business Rules which reads as under:

> "46. (1) With respect to persons serving in connection with the administration of the National Capital Territory, the Lieutenant Governor shall, exercise such powers and perform such functions as may be entrusted to him under the provisions of the rules and orders regulating the conditions of service of such persons or by any other order of the President in consultation with the Chief Minister, if it is so provided under any order issued by the President under article 239 of the Constitution.
>
> (2) Notwithstanding anything contained in sub-rule (1) the Lieutenant Governor shall consult the Union Public Service Commission on all matters on which the

> Commission is required to be consulted under clause (3) of article 320 of the Constitution;

and in every such case he shall not make any order otherwise than in accordance with the advice of the Union Public Service Commission unless authorised to do so by the Central Government.

(3) All correspondence with Union Public Service Commission and the Central Government regarding recruitment and conditions of service of persons serving in connection with the administration of National Capital Territory shall be conducted by the Chief Secretary or Secretary of the Department concerned under the direction of the Lieutenant Governor."

81) Insofar as Notification dated September 24, 1998 is concerned, Mr. Sundaram pointed out that this Notification was issued under Article 239 of the Constitution. In any case, this was also issued by the President and was almost to the same effect as Notification dated May 21, 2015, inasmuch as here also the President had delegated the powers to the Lieutenant Governor in respect of 'Public order', 'Police' as well as 'Services'. Therefore, all these subjects were put at par. The only other requirement specified in the said Notification was that the Lieutenant Governor was to exercise the powers and discharge the functions of the Central Government 'in consultation with the Chief Minister of the NCTD'. It was only a 'consultation' which would not mean 'concurrence'. The Notification dated May 21, 2015 brought about change only in respect of such consultative process, i.e. 'consultation' with the Chief Minister, as being done away with. This became necessitated, according to him, because of the problems which the Lieutenant Governor was facing even in undertaking consultations with the Chief Minister. Therefore, now it is entirely within the discretion of the Lieutenant Governor to have the views of the Chief Minister or not. To that extent this Notification is only clarification of the earlier Notification dated September 24, 1998 and in substance the legal implications of this Notification were exactly the same as Notification dated September 24, 1998. Learned counsel also argued that the Constitution provides for services of the States and services of the Union. All Union Territories services are services of the Union, as held in a recent judgment of this Court in Bir Singh v. Delhi Jal Board and Others 4. For example, in Delhi, IAS, DANICS & DASS cadre, as also teachers and doctors, are services of the Union and the recruitment rules have been framed with the approval of the President or of Lieutenant Governor as a nominee of the President. The learned counsel also pointed out that Rule 46 of the Transaction of Business Rules, along with the delegation made by the President under Article 239AA of the Constitution from time to time, has always been governing the process of transfer/posting of officers 4 (2018) 10 SCC 312 working with the GNCTD.

82) Fervent plea of Mr. Sundaram was that a just and fair mechanism could be similar to the one which prevailed in earlier years prior to 2015, viz. that the transfers and postings of Secretaries, HoDs and other officers in the scale of Joint Secretary to the Government of India and above can be done by the Lieutenant Governor and the file submitted to him directly. For other levels, including DANICS officers, the files can be routed through the Chief Minister to Lieutenant Governor. In case of difference of opinion between the Lieutenant Governor and the Chief Minister, the view of the Lieutenant Governor should prevail and the Ministry of Home Affairs can issue a suitable notification in this regard. However, for Grade IV, III, II and I DASS officials, there is an existing

delegation of powers where for Grades IV and III, all transfers and postings are done by the Secretary (Services); for Grades II and I, the transfers and postings are done by the Chief Secretary. For greater transparency, a Civil Services Board can be formed which can be headed by the Secretary (Services) for Grades IV and III officials; by the Chief Secretary for Grades II and I level officers. The Board can decide on the transfer and postings of these DASS cadre officers. He also pointed out that for IAS officers, a Civil Services Board headed by the Chief Secretary already exists and the recommendations of the same are being sent to the Lieutenant Governor. Similar Board can also be formed for DANICS officers. His suggestion was that similar mechanism of Services Boards can be made for other departments such as Education and Health. Likewise, the services of the Union Territories being under the Ministry of Home Affairs, an advisory can be given to that Ministry to make these guidelines under the Transaction of Business Rules and to provide consultation by the Lieutenant Governor with the Chief Minister up to certain level of officers.

83) In rejoinder, Mr. Chidambaram submitted that the aforesaid argument of the Union ignores the judgment of this Court in Union of India v. Prem Kumar Jain and Others 5 wherein a four Judge Bench of this Court held that the 'State' includes a Union Territory for the purposes of Article 312 of the Constitution in the following manner:

> "8. It follows therefore that, as and from November 1, 1956, when the Constitution (Seventh Amendment) Act, 1956, came into force, the President had the power to adapt the laws for the purpose of bringing the provisions of any law in force in India into accord with the provisions of the Constitution. It was under that power that the President issued the Adaptation of Laws (No. 1) Order, 1956, which, as has been shown, substituted a new clause (58) in Section 3 of the General clauses Act providing, inter alia, that the expression "State" shall, as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, mean "a State specified in the First Schedule to the Constitution and shall include a Union Territory". It cannot be said with any justification that there was anything repugnant in the subject or context to make that definition inapplicable. By virtue of Article 372A(1) of the Constitution, it was that definition of the expression "State" which had effect from the first day of November, 1956, and the Constitution expressly provided that it could "not be questioned in any court of law". The High Court therefore went wrong in taking a contrary view and in holding

5 (1976) 3 SCC 743 that "Union territories are not 'States' for purposes of Article 312(1) of the Constitution and the preamble to the Act of 1951". That was why the High Court erred in holding that the definition of "State" in the Cadre Rules was ultra vires the All India Services Act, 1951 and the Constitution, and that the Union territories cadre of the service was "not common to the Union and the States" within the meaning of Article 312(1) of the Constitution, and that the Central Government could not make the Indian Administrative Service (Cadre) Rules, 1954 in consultation with the State Governments as there were no such governments in the Union territories.

(emphasis supplied)" The above decision has also been noted, with approval, in paragraph 125 in the opinion of Chandrachud J. in the Constitution Bench judgment.

84) From the respective arguments of the parties reproduced above, it becomes clear that following aspects are undisputed:

(a) The matter pertains to the 'Services' which consists of Indian Administrative Service, Indian Police Service. Likewise, DANICS and DANIPS are common services catering to the requirement of various Union Territories including NCTD.

(b) These are All India Services and the cadre in question is Union Territory Cadre which is common of all Union Territory and Delhi is one of them. Therefore the Cadre does not pertain to GNCTD itself. This cadre is administered by the Central Government through Ministry of Home Affairs.

(c) There is no dispute that insofar as allocation of personnel belonging to the aforesaid services is concerned, it is the Central Government thorough Ministry of Home Affairs which has to pass the necessary orders. Similarly, Central Government is empowered to transfer such personnel from one Union Territory to other.

85) The fulcrum of dispute pertains to the control of GNCTD over these personnel after they are allocated to the NCTD. As per GNCTD, it has the power to post such work force at different places and the LG is to act on the aid and advice of the Council of Ministers. For this purpose, the executive power is sought to be drawn by virtue of Entry 41 of List II in the Seventh Schedule of the Constitution. The submission on behalf of the Union of India is that it comes within the discretionary powers of the LG as the subject matter is not covered by Entry 41 of List II and, therefore, by virtue of Section 41 of GNCTD Act, the LG is empowered to act in his discretion in such a matter.

86) In the aforesaid backdrop, the first and foremost question is whether 'services' fall outside the purview of legislative assembly of NCTD? To put it otherwise, whether Entry 41 of List II does not cover the subject matter? Entry 41 of List II deals with 'State Public Services' and 'State Public Service Commission'. It is undisputed that State Public Service Commission does not exist in NCTD. When we are dealing with All India Services and DHANICS Services etc., it is also doubtful to mention it as State Public Service.

87) The further issue, however, is to see as to whether it is within the powers of GNCTD to assign such officers to particular departments, once they are allocated to the NCTD by the joint cadre authority. As per Rule 2(c) of Indian Administrative Services (Cardre) Rules, 1954, State includes a Union Territory. Rule 7 deals with posting and, inter alia, stipulates that in the case of joint cadre, posting shall be by the State Government concerned. In the context of Article 312 of the Constitution, this Court has held in Prem Kumar Jain that Union Territories are States for the purpose of the said Article.

> 88) Similar is the position in respect of DANICS. Rule 11 of DANICS Rules, 2003 empowers Administrator of the administration concerned i.e. Union Territory, to make these postings. On the other hand, in the context of NCTD, the Administrator, namely, LG is supposed to function in this behalf on the aid and advice of the Council of Ministers. That is the dicta of Constitution Bench judgment. Therefore, it becomes equally doubtful as to whether it falls within the discretionary powers of the L.G.
>
> 89) The aforesaid discussion leads to a very peculiar situation. The appellant has endeavoured to assume the executive power in respect of 'services' by relying upon Entry 41 of List II, which may be doubtful.

That situation may give discretionary powers to the L.G. On the other hand, it also cannot be said that once the manpower is allocated to Union Territory of Delhi, the GNCTD should not have any power to deal with such employees, in view of C.B. Judgment. In such a scenario, and to avoid any conflict of exercise of powers between the LG on the one hand (as representative of the Central Government) and the Council of Ministers with Chief Minister as Head on the other hand, we are of the opinion that for the smooth functioning of the system, it is necessary to carve out a just and fair mechanism. Therefore, we are inclined to accept the suggestion of Mr. Sundaram in this behalf as recorded above. In this behalf, we reiterate the position as under:

> 90) The transfers and postings of Secretaries, HODs and other officers in the scale of Joint Secretary to the Government of India and above can be done by the Lieutenant Governor and the file submitted to him directly. For other levels, including DANICS officers, the files can be routed through the Chief Minister to Lieutenant Governor. In case of difference of opinion between the Lieutenant Governor and the Chief Minister, the view of the Lieutenant Governor should prevail and the Ministry of Home Affairs can issue a suitable notification in this regard.

However, for Grade IV, III, II and I DASS officials, there is an existing delegation of powers where for Grades IV and III, all transfers and postings are done by the Secretary (Services); for Grades II and I, the transfers and postings are done by the Chief Secretary. For greater transparency, a Civil Services Board can be formed which can be headed by the Secretary (Services) for Grades IV and III officials; by the Chief Secretary for Grades II and I level officers. The Board can decide on the transfer and postings of these DASS cadre officers. He also pointed out that for IAS officers, a Civil Services Board headed by the Chief Secretary already exists and the recommendations of the same are being sent to the Lieutenant Governor. Similar Board can also be formed for DANICS officers. His suggestion was that similar mechanism of Services Boards can be made for other departments such as Education and Health. Likewise, the services of the Union Territories being under the Ministry of Home Affairs, an advisory can be given to that Ministry to make these guidelines under the Transaction of Business Rules and to provide consultation by the Lieutenant Governor with the Chief Minister up to certain level of officers.

91) We may add that insofar as disciplinary authorities are concerned, the same are already prescribed as per the CCA (CCS) Rules and the Rules applicable for different services including IAS

& DANICS. The appointing and disciplinary authority is the President of India, as per the powers delegated by the President from time to time. Vigilance matters would get covered by the applicable disciplinary rules in terms of officers competent to initiate and take vigilance action.

92) In the interest of good governance and smooth Governmental function, we expect that efforts will be made by both the Chief Minister as well as the LG for a harmonious working relation. Issue No.2: Whether the exclusion of the jurisdiction of the Anti-Corruption Branch (ACB) of the NCTD to investigate offences committed under the Prevention of Corruption Act, 1987 by the officials of the Central Government and limiting the jurisdiction of the ACB to the employees of the GNCTD alone is legal?

93) On this issue, validity of few notifications is in question. It may be mentioned that vide Notification dated August 01, 1986, the Administrator declared ACB of Delhi Administration as a Police Station under Section 2(s) of Cr.P.C. for the purpose of certain corruption related offences under the IPC and the Prevention of Corruption Act, 1947. As per this notification, the ACB had "jurisdiction all over the whole of Union Territory of Delhi". In supersession of this notification vide Notification dated November 08, 1993, the GNCTD through the Lieutenant Governor declared the ACB of NCTD at Old Secretariat as a police station under Section 2(s) of the Cr.P.C. for offences under the Prevention of Corruption Act, 1988. Thereafter, two Notifications dated July 23, 2014 and May 21, 2015 came to be issued by the Central Government as per which the jurisdiction of ACB is limited to the employees of GNCTD only. These Notifications read as under:

> "Notification dated July 23, 2014 THE GAZETTE OF INDIA EXTRAORDINARY PART II – SECTION 3 – SUB SECTION (II) PUBLISHED BY AUTHORITY NEW DELHI, FRIDAY, JULY 25, 2014/SHRAVANA 3, 1936 MINISTRY OF HOME AFFAIRS NOTIFICATION New Delhi, the 23rd July, 2014 S.O. 1896(E) – In pursuance of Section 21 of the General Clauses Act, 1897 (10 of 1897) read with the Government of India, Ministry of Home Affairs Notification Number S.O. 183(E), dated the 20th March, 1974 and having regard to the guidelines issued by the Central Vigilance Commission over the jurisdiction of the Central Bureau of Investigation and the Anti-Corruption Branch, Government of National Capital Territory of Delhi, the Central Government hereby declares that the notification number F.1/21/92-Home (P) Estt.1750, dated the 8th November, 1993 issued by the Lieutenant Governor of the National Capital Territory of Delhi shall be applicable to the officers and employees of that Government only and for that purpose amends the said notification, namely:-
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> In the said notification, after the existing Paragraph, the following Paragraph shall be inserted, namely:-
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> "2. This notification shall apply to the officers and employees of the Government of National Capital Territory of Delhi." [F.no. 14036/4/2014-Delhi-I (Pt.File)] I.S. Chahal, Jt. Secretary xx xx xx Notification dated May 21, 2015 THE GAZETTE OF INDIA EXTRAORDINARY PART II – SECTION 3 – SUB SECTION (II) PUBLISHED

BY AUTHORITY NEW DELHI, THURSDAY, MAY 21, 2015/ VAISAKHA 31, 1937 MINISTRY OF HOME AFFAIRS NOTIFICATION New Delhi, the 21st May, 2015 S.O. 1368(E) – Whereas Article 239 of the Constitution provides that every Union Territory shall be administered by the President acting, to such extent as he things fit, through an administrator to be appointed by him with such designation as he may specify;

And whereas Article 239AA inserted by the Constitution (Sixty-ninth Amendment) Act, 1991 provides that the Union Territory of Delhi shall be called the National Capital Territory of Delhi and the administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor.

And whereas sub-clause (a) of clause (3) of Article 239AA states that the Legislative Assembly shall have power to make laws for the whole or any pat of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List insofar as any such matter is applicable to Union Territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List insofar as they relate to the said Entries 1, 2 and 18; and whereas Entry 1 relates to 'Public Order', Entry 2 relates to 'Police' and Entry 18 relates to 'Land'.

And whereas sub-clause (a) of clause (3) of Article 239AA also qualifies the matters enumerated in the State List or in the Concurrent List insofar as any such matter is applicable to Union Territories. Under this provision, a reference may be made to Entry 41 of the State List which deals with the State Public services, State Public Service Commission which do not exist in the National Capital Territory of Delhi.

Further, the Union Territories Cadre consisting of Indian Administrative Service and Indian Police Service personnel is common to Union Territories of Delhi, Chandigarh, Andaman and Nicobar Islands, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli, Puducherry and States of Arunachal Pradesh, Goa and Mizoram which is administered by the Central Government through the Ministry of Home Affairs; and similarly DANICS and DANIPS are common services catering to the requirement of the Union Territories of Daman and Diu, Dadra Nagar Haveli, Andaman and Nicobar Islands, Lakshadweep including the National Capital Territory of Delhi which is also administered by the Central Government through the Minister of Home Affairs. As such, it is clear that the National Capital Territory of Delhi does not have its own State Public Services. Thus, 'Services' will fall within this category.

And whereas it is well established that where there is no legislative power, there is no executive power since executive power is co-extensive with legislative power.

And whereas matters relating to Entries 1, 2 & 18 of the State List being 'Public Order', 'Police' and 'Land' respectively and Entries 64, 65 & 66 of that list insofar as

> they relate to Entries 1, 2 & 18 as also 'Services' fall outside the purview of Legislative Assembly of the National Capital Territory of Delhi and consequently the Govt. of Nct of Delhi will have no executive power in relation to the above and further that power in relation to the aforesaid subjects vests exclusively in the President or his delegate, i.e. the Lieutenant Governor of Delhi.
>
> Now, therefore, in accordance with the provisions contained in Article 239 and sub-clause (a) of clause (3) of Article 239AA, the President hereby directs that –
>
> (i) Subject to his control and further orders, the Lieutenant Governor of the National Capital Territory of Delhi, shall, in respect of matters connected with 'Public Order', 'Police', 'Land' and 'services' as stated hereinabove, exercise the powers and discharge the functions of the Central Government to the extent delegated to him from time to time by the President.

Provided that the Lieutenant Governor of the National Capital Territory of Delhi may, in his discretion, obtain the views of the Chief Minister of the National Capital Territory of Delhi in regard to the matter of 'services' wherever he deems it appropriate.

2. In the Notification number F.1/21/92-Home (P) Estt. 1750, dated 8th November, 1993, as amended vide Notification dated 23rd July, 2014 bearing No. 14036/4/2014-Delhi-I (Pt. File), for Paragraph 2 the following Paragraph shall be substituted, namely:-

> "2. This notification shall only apply to officials and employees of the National Capital Territory of Delhi subject to the provisions contained in the Article 239AA of the Constitution." after paragraph 2 the following paragraph shall be inserted, namely:-
>
> "3. The Anti-Corruption Branch Police Station shall not take any cognizance of offences against Officers, employees and functionaries of the Central Government."

3. This Notification supersedes earlier Notification number S.O. 853 (E) (F.No. U-11030/2/98-UTL) dated 24th September, 1998 except as respects things done or omitted to be done before such supersession.

[F.No. 14036/4/2014-Delhi-I (PartFile)] RAKESH SINGH, Jt. Secy."

94) The validity of these Notifications is challenged on three grounds:

> First, post the 69th Amendment, the Central Government is not the "State Government" within the meaning of Section 2(s) of Cr.P.C. Second, the impugned notifications create a class of offenders immune from the jurisdiction of ACB, even though they are accused of committing the same offence as other public servants and in the same territory. Such classification is not permissible under the Constitution

and has been held to violate Article 14. Third, the notifications have the effect of amending various provisions of the Prevention of Corruption Act, 1988 including the definition of "Public Servant", which is not permissible.

95) It is argued that power under Section 2(s) of Cr.P.C. relates to 'Criminal Procedure' and not 'Police'. Section 2(s) of the Cr.P.C.

empowers the State Government to notify a Police Station. However, the impugned notifications are issued by the Central Government. It is argued that post the 69th Amendment, the Central Government is not the State Government for the purpose of exercising the powers u/s. 2(s) of the Cr.P.C. It is submitted that though a cursory reading of the definition of the 'State Government' contained in Section 3(6) of the General Clauses Act, 1897 (GC Act) includes the Central Government and makes it a State Government in respect of Delhi for the purpose of exercising power under Section 2(s) of the Cr.P.C., but that is not the correct legal position. The contention is that Section 3(60) of the GC Act containing the definition of the 'State Government' was enacted prior to the 69th Amendment to the Constitution. Article 239AA and the cognate Articles were inserted/amended by the said Constitutional amendment. Pursuant to the aforesaid amendment, the Parliament enacted the GNCTD Act. The said amendment and the said Act came in force on February 01, 1992. In view of the aforesaid change in the Constitution and enactment of the GNCTD Act, the Central Government is not the State Government in respect of territory of Delhi for the purpose of Section 2(s) of Cr.P.C. The power to issue notification under Section 2(s) is now vested with the Delhi Government. Reference is made to Entry 2 of List III of the Seventh Schedule, which reads as under:

"2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."

96) It is, therefore, submitted that the Legislative Assembly for Delhi has legislative competence in respect of Cr. P.C, which is directly relatable to Entry 2 of List III. Further the Delhi Government has exclusive executive power in respect of criminal procedure, in terms of Para 218 and 219 of the Constitution Bench Judgment. Section 3(58) of the GC Act defines the expression "State". The definition inter alia lays down that the Union Territory is a State. From this, it is sought to be buttressed that it logically follows that any Government which administers affairs of the Union Territory of Delhi is a State Government.

97) To support the aforesaid plea, certain judgments are relied upon.

In Ukha Kolhe v. State of Maharashtra6, a Constitution Bench of this Court has held as under:

"18...It is true that power to legislate on matters relating to Criminal Procedure and evidence falls within the Third List of the Seventh Schedule to the Constitution and the Union Parliament and the State Legislature have concurrent authority in respect of these matters. The expression "criminal procedure" in the legislative entry includes

> investigation of offences, and ss. 129A and 129B must be regarded as enacted in exercise of the power conferred by Entries 2 and 12 in the Third List....
>
> (emphasis supplied)" Judgments of some High Courts are also cited.
>
> 98) Arguments on this issue, on behalf of the Union, were addressed by Mr. Rakesh Dwivedi, learned senior counsel. His submission was that the entire matter has to be looked into from a historical perspective.

He, thus, traced the development of establishment of ACB of Delhi Police. Historically, ACB of Delhi Police appears to have been constituted in the year 1957. On December 6, 1963, the Chief Commissioner Delhi placed it under the control of Chief Secretary, Delhi Administration. On May 24, 1965, the Superintendent of Police, ACB was declared to be the head and Drawing and Disbursing Officer (DDO). Thereafter, exercising power under Section 5(1), first proviso of PC Act, the administrator of UT, Delhi authorised the inspectors of police serving in ACB to investigate offences under the said Act in the whole of the 6 (1964) 1 SCR 926 : AIR 1963 SC 1531 territory. This was reiterated by the order of the Administrator issued on May 19, 1970. Additionally, with respect to Section 161, 165 and 165A of IPC power of arrest without warrant was given. During the aforementioned period, the police force was governed by the Police Act, 1861, Section 40 of the Punjab Laws Act, 1872 as in force in Delhi and the Bombay Police Act, 1951 as in force in Delhi. The criminal procedure was governed by the Criminal Procedure Code, 1898. The Criminal Procedure Code, 1973 came into force w.e.f. April 1, 1974 though it was gazetted on January 25, 1974. In this context, the President of India issued the notification dated March 20, 1974. A series of notifications, beginning from the year 1974, in respect of establishment and functioning of the ACB have been issued by the President and Administrator/LG in exercise of powers under Article 239(1) of the Constitution and Section 2(s) Cr.P.C., 1973 read with Delhi Police Act. Significantly, notifications issued prior to July 23, 2014 have not been challenged. Some of these notifications were issued even before the insertion of Article 239AA (February 01, 1992). The first notification was issued by the President on March 20, 1974 in exercise of powers under Article 239(1) of the Constitution. The notification directs the Administrators of all UTs other than Arunachal Pradesh and Mizoram to exercise, subject to control of the President and until further orders, the powers and functions under Cr.P.C., 1973 as mentioned in the annexed schedule. The notification has a condition that the Central Government may itself exercise all or any of those powers and functions if it deems necessary. This notification confers powers on the Administrator of UT Delhi to exercise powers under Section 2(s) Cr.P.C., 1973. In pursuance of the delegation of powers by the President of India vide notification dated March 20, 1974 and in exercise of powers under Section 2(s) of Cr.P.C., 1973 the Lieutenant Governor declared ACB of Delhi Administration at Tis Hazari, Delhi to be a police station for offences under Section 161 and 165A IPC, and PC Act, 1947 with jurisdiction over whole of UT, Delhi vide notification dated May 20, 1975. Thus, ACB was established as a police station by Administrator UT Delhi. Thereafter, the Rules of Procedure for inquiries and investigation by ACB were revised on February 17, 1977. Rule 2 declared that all the Rules and Regulations applicable to the Delhi Police are also applicable to the ACB. Rule 3 prescribed the functions of ACB. Rule 5 mentioned that ACB would be under the direct charge of a Superintendent of Police. Rule 15(v) provides that ordinarily no inquiries should be made by ACB in case of Central

Government employees. The Rules also provided for prosecution sections. At this stage, Parliament enacted the Delhi Police Act, 1978 to amend and consolidate the law relating to the Regulation of Police in Delhi. Section 4 vests superintendence of the Delhi Police in the Administrator appointed under Article 239 of the Constitution. It is he who appoints the Commissioner of Police, Additional Commissioner of Police and Deputy Commissioner of Police. Vide Sections 10 and 11, the Commissioner of Police constitutes police districts, police sub-divisions and specifies the police stations and their limits and extents. Each police station is to be under the charge of an Inspector of Police who is appointed by the Additional Commissioner. All this is to be done subject to the control of the Administrator and his orders. Vide Section 15, the Commissioner of Police distributes duties and the mode of fulfillment of their duties. The disciplinary powers vest with the Commissioner of Police who also makes regulations subject to the orders of the Administrator. It also covers preservation of public order and peace through provisions under Chapter IV and V. The Administrator can make rules under Section 147. Section 149 contemplates cessation of old laws regulating police mentioned in Schedule II but it preserves the Rules and Standing Orders, appointments made etc. insofar as they are consistent with the Act. It also preserves the pending investigation and legal proceedings. Vide Section 150 the police force functioning in Delhi was deemed to be the police force constituted under the Delhi Police Act, 1978 with designations mentioned in Schedule III. It is submitted by Mr. Dwivedi that this Act has to be read along with Cr.P.C., 1973 .

99) Vide notification dated August 1, 1986 issued by the Administrator of UT Delhi it was provided, in supersession of his previous notification dated May 20, 1975, and August 23, 1975 and issued in exercise of powers under Section 2(s) Cr.P.C. 1973 read with notification dated March 20, 1974, that ACB Delhi Administration at Tis Hazari, Delhi would be police station in relation to offences under Section 161 to 165A IPC and the Prevention of Corruption Act, 1947 and also attempts, abetment and conspiracies in relation to said offences. It was to have jurisdiction over the whole of UT Delhi. After the enforcement of the Prevention of Corruption Act, 1988 which also omitted Section 161-165A of IPC, the LG of NCTD issued notification dated November 08, 1993 in exercise of power under Section 2(s) CRPC read with notification dated March 20, 1974 of GOI. This notification provided that ACB of NCT Delhi at Old Secretariat would be police station for offences under the PC Act 1988 and attempts, abetment and conspiracies in relation to or in connection with the said offences and any other offence committed in the course of the same transaction rising out of the same set of facts. Its jurisdiction was to be over the whole of NCT Delhi. This notification was issued after the insertion of Article 239AA in the Constitution.

100) On September 24, 1998, the President issued a notification under Article 239(1) of the Constitution directing that subject to his control and until further orders the LG OF NCT Delhi shall exercise powers and discharge functions of the Central Government, to the extent delegated in respect of matters connected with ‘public order’, ‘police’ and ‘services’ in consultation with Chief Minister except in those cases where, for reasons to be recorded in writing, he does not consider it expedient to do so.

101) After tracing the aforesaid history, Mr. Dwivedi submitted that Notification dated July 23, 2014, which is now impugned, came to be issued by the Central Government to amend the earlier

Notification dated November 08, 1993 which was also issued by the Central Government and that too post Article 239AA era. According to him, the object behind issuing this Notification is to implement the guidelines issued by the CVC in respect of the jurisdiction of CBI and ACB. It is this position which is restated in another Notification dated May 21, 2015 which has also been challenged by the Delhi Government. According to Mr. Dwivedi, an analysis of all the notifications shows that from May 20, 1975 itself the ACB Delhi administration was intended to be a police station for investigating offences in relation to the personnel exercising powers and functions in connection with UT Delhi. The notification dated August 1, 1986 had also invoked powers under Government of India notification dated March 20, 1974. Though the notifications territorially covered the whole of UT Delhi but the context was evidently to deal with corruption in the Administration of UT Delhi. The nomenclature 'Anti-corruption branch, Delhi administration' also indicates the same. The subsequent notification dated November 8, 1993 merely made consequential changes on account of P.C. Act 1988 and change in status of administration of Delhi as NCTD. What was necessarily implicit in the said notifications was made clear by the subsequent notification dated July 23, 2014 and May 21, 2015 with a view to avoid parallel exercise of powers by CBI and ACB over officers, employees and functionaries of the Central Government. This was also recommended by CVC. Here it may be noted that while CBI is a police force created under DSPE Act 1946 and ACB is established under Delhi Police Act 1978. The establishment of ACB is with respect to Entry 1 and 2 List II of Schedule VII of the Constitution of India. The establishment of CBI and its power of investigation falls under Entry 8/ 80 list I of Schedule VII whereas the establishment of ACB would be under the Delhi Police Act, 1978.

102) He also submitted that Section 5 of PC Act, 1947 and Section of PC Act, 1988 envisage investigations of offences done by CBI/Delhi Police. Hence, Union or Administrator acting under DSPE Act and Delhi Police Act, 1978 can decide which of the two would investigate officers, employees and functionaries of the Central Government. In short five parliamentary Acts-Cr.P.C., 1973, PC Act, 1988, DSPE Act, Delhi Police Act, 1978 and CVC Act have to be read together.

103) In this hue, Mr. Dwivedi's submission was that it now stands established, even by the judgment of the Constitution Bench, that NCTD is still a Union Territory to which Article 239 is applicable, notwithstanding the insertion of Article 239AA. He further submitted that admittedly Entry 2 in List II is outside the legislative competence of the Legislative Assembly of Delhi and, therefore, the Delhi Government could not exercise executive authority in respect of this entry. Moreover, Entries 8 and 80 of List I are also outside the domain of NCTD over which the Parliament and central executive has the exclusive jurisdiction. It is, therefore, open to the Parliament and the Central Government to act in pursuance of Entries 8 and 80 of List I and provide certain exclusive jurisdiction to CBI as regards investigation to be done by it.

104) Mr. Dwivedi accepted that Cr.P.C. involves a field which is covered by Entry 2 List III of Seventh Schedule. His submission, however, is that List III is the concurrent field both for the Parliament and the States. Therefore, though the Legislative Assembly of Delhi has legislative competence in respect of matters covered by Entry 2, but it is not exclusive inasmuch as Parliament also has the legislative competence. In fact, competence of the Delhi Assembly is subservient to legislative competence of the Parliament. Moreover, Parliament had already exercised its legislative

power by enacting Cr.P.C. comprehensively and exhaustively. Therefore, the field becomes occupied. In such circumstances, the legislative competence of NCTD/Legislative Assembly would stand eroded, if not denuded, which happens on account of Article 239AA(b)(c) of the Constitution. In this scenario, argued the learned counsel, GNCTD can exercise only such executive power as Cr.P.C. confers on it and this conferment should be specific and express.

105) Dr. A.M. Singhvi, learned senior counsel who appeared for the intervenor/Reliance Industries, supported and added to the aforesaid submissions, which would be taken note of in our discussion.

106) After considering the respective submissions, we find force in the arguments advanced by Mr. Rakesh Dwivedi predicated on the historical developments narrated by him, and extracted above. We may also emphasise that the issue is limited, viz., whether ACB is empowered to register cases in respect of Central Government employees as well?

107) We find that the challenge laid by the appellant to these Notifications is predicated on Entry 2 of List II. Even after conferment of the status of quasi-State upon Delhi (which though in constitutional term remains Union Territory), Article 239AA (which gives such a status) itself excludes Entry 2 from the domain of NCTD. Thus, in respect of 'Police', NCTD does not have either legislative or executive power. This Court is required to look into the substance of such an exclusion and cannot be guided by hyper technicalities. Even in the Constitution Bench judgment it has been emphasised time and again, and in fact in all the three opinions of the Hon'ble Judges, that the text of Article 239AA is to be read contextually. Therefore, what has been specifically denied to GNCTD, it cannot venture to gain that power on such a plea.

108) Dr. Singhvi rightly submitted that it is a settled principle that legislative entries are to be interpreted in a broad and liberal manner consistent with imputing to them the widest amplitude and as including all ancillary and subsidiary matters. A narrow or pedantic reading of the entries has been repeatedly frowned upon. We are of the opinion that the scope of the term 'Police' as occurring in Entry 2 of List II cannot, therefore, be artificially restricted or limited to only constitution of the Police force, but would take within its fold the legislative (and, therefore, executive) power to exercise supervision and control over the functioning of the Police so constituted, including by way of issuance of executive directions delineating the powers, functions and jurisdiction of different wings/sections of the Police. In essence, the impugned notifications, to the extent they are in the nature of administrative directions to the Police, are directly relatable to Entry 2 of List II and as such squarely within the competent of the Government of India. Even to the extent the executive power being exercised qua the Police may correspond to the functions of the Police as set out in the Cr.P.C., the nature of the power would not for this reason stand altered or relatable to Entry 2 of List III. It is not metaphorsis from List II to List III. In substance, issuance of an administrative/executive direction to the Police is an exercise of executive power relatable to the legislative entry pertain to Police.

109) Additionally, as already noted above, various provisions of the Delhi Police Act, 1978 also demonstrate that power of control and supervision is invested with the Administrator. This includes defining the limits and extent of the police station and administrative control over police stations.

Moreover, Entry 2 List II would also include the determination as to the nature and scope of investigations to be done by the Police. Therefore, while establishing the ACB as a Police Station, it would be permissible to circumscribe and limit the investigation sphere of the ACB.

110) No doubt, Section 2(s) of the Cr.P.C. contemplates establishment of the police station by the State Government. However, the Cr.P.C. also lays down the procedure for making arrest, conducting investigation and submitting final reports. It does not contain any provision which prescribes what offences would be investigated by which police force. Section 156 of the Cr.P.C. merely provides that officers in the police station will investigate those cognizable cases which can be tried by the court having jurisdiction over the local area concerned would have power to inquire into or try. These provisions do not provide how parallel jurisdiction of two police stations is to be demarcated. In fact, parallel jurisdiction to investigate is not contemplated by Cr.P.C. as that would result in chaos and anarchy and would frustrate the very purpose of investigation. This leads us to hold that the Government which has competence over Entry 2 List II would have power to segregate and demarcate the jurisdiction to investigate as between two police forces. Hence the impugned notifications are valid. This conclusion becomes inevitable when Cr.P.C. is read with the Delhi Police Act, 1978 and other cognate enactments.

111) Here we have to keep mind the fact that Entry 1 of List II, subject matter whereof is 'public order', also stands excluded from the purview of GNCTD and is the exclusive domain of the Parliament/ Central Executive. The term 'public order' has been assigned widest amplitude and connotation (See – Stainislaus v. State of Madhya Pradesh and Others7 and Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and Others8). It is also held that 'public order' includes cognizance of offences, search, seizure and arrest, followed by registration of reports of offences (FIRs), investigation, prosecution, trial 7 (1977) 1 SCC 677 8 (2010) 5 SCC 246 and in the event of conviction, execution of sentences as well. All these aspects have to be construed conjointly.

112) In fact, there was a specific rational in excluding Entries 1, 2 and 18 of List II from the jurisdiction of the Government of NCTD. The Balakrishnan Committee report which recommended exclusion of these Entries (and which part of the Report stands accepted by providing so specifically in Article 239AA of the Constitution) was of the view that duties and responsibilities pertaining to the Police and maintenance of public order be vested solely in the Central Government so that 'there is no confusion or overlap of the jurisdiction in regard to the focal point of control and coordination'. This rationale behind the aforesaid exclusion directly flows from the unique position occupied by the NCTD as the nation's capital and seat of the Central Government.

113) Also, the opinion of Chandrachud, J. at paragraph 29 notes that exclusion of inter alia 'police' and 'public order' was a "constitutional indication of the fact that the NCT has been considered to be of specific importance from the perspective of the nation to exclude three important areas which have a vital bearing on its status as a national capital". Following observations from the said opinion are also apt:

> "The NCT embodies, in its character as a capital city the political symbolism underlying national governance. The circumstances pertaining to the governance of

the NCT may have a direct and immediate impact upon the collective welfare of the nation. This is the rationale for exclusion of the subjects of police, public order and land from the legislative power and necessarily from the executive power of the NCT... (paragraph 55)" xx xx xx "...national imperatives have led to the carving out of the areas of police, public order and land from the sphere of legislative authority of the legislative assembly and their entrustment to Parliament... (paragraph 74)"

114) Pertinently, the appellant wants exclusive executive power in respect of the entries in List II, except Entries 1, 2 and 18, as well as all the subjects over List III. In this behalf, as noted above, contention of the appellant is that the Constitution Bench has so decided. However, when it comes to excepted matter in Entry 2 List II, though powers of NCTD are totally excluded, by indirect method the appellant wants concurrent jurisdiction over the same. It would be difficult to accept such a position. It is also pertinent to mention that insofar as Notification dated November 08, 1993 is concerned, whereby ACB of NCTD at Old Secretariat as police station was created by the Lieutenant Governor, the same has not been challenged. No doubt, there was no elected Government at that time. Fact remains that this Notification has held the field even thereafter throughout. The impugned Notifications are only a modification to the aforesaid Notification dated November 08, 1993 to a limited extent whereby it is clarified that this earlier Notification shall be applicable to 'the officers and employees of that Government only (GNCTD)'. Thus, the only effect is that the ACB is not empowered to investigate into the offences of Central Government employees under the Prevention of Corruption Act. Admittedly, this investigation is carried out by the CBI. Therefore, it obviates the duality and conflict of jurisdiction as well.

115) We, thus, uphold the validity of Notifications dated July 23, 2014 and May 21, 2015.

Issue No.3: Whether the GNCTD is an 'appropriate Government' under the COI Act?

116) The relevant entries in the Seventh Schedule are Entry 94 of List I and Entry 45 of List III. These are as under:

"Entry 94 List I Inquiries, surveys and statistics for the purpose of any of the matters in this List.

Entry 45 List III Inquiries and statistics for the purposes of any of the matters specified in List II or List III."

117) The COI Act is the Central enactment. For understanding the issue involved, we may refer to the definition of 'appropriate Government' contained in Section 2(a) of this Act, which reads as under:

""appropriate Government" means –

(i) the Central Government, in relation to a Commission appointed by it to make an inquiry into any matter relatable to any of the entries enumerated in List I or List II or List III in the Seventh Schedule to the Constitution; and

(ii) the State Government, in relation to a Commission appointed by it to make an inquiry into any matter relatable to any of the entries enumerated in List II or List III in the Seventh Schedule to the Constitution..... (emphasis supplied)"

118) As per Mr. Naphade, clause (I) of sub-section (a) of Section 2 relates to both the Entries, namely, Entry 91 of List I and Entry 45 of List III, whereas clause (ii) is relatable to Entry 45 of List III. Argument is that since Entry 45 of List III steps in and in respect of this Entry NCTD has both legislative and executive competence, it would be an "appropriate Government" for the purposes of the COI Act. Mr. Naphade also referred to proviso (a) to Section 3 which, according to him, is the provision made to avoid any conflict. It is as under:

"(a) by the Central Government, no State Government shall, except with the approval of the Central Government, appoint another Commission to inquire into the same matter for so long as the Commission appointed by the Central Government is functioning;"

119) Mr. Naphade submitted that while holding that the "State Government" in the above definition of "appropriate Government" does not include the Government of NCT of Delhi, the High Court has applied the definition of State Government under Section 3(60) of the GC Act and this is another issue where the said definition has been mechanically applied, without understanding the context or text of the enactment.

120) In respect of this issue, the High Court has held that "In the light of the clear and unambiguous definitions of the Central Government and State Government under Section 3(8) and Section 3(60) respectively of the GC Act, we are of the view that the expression 'appropriate Government' in respect of Union Territories shall be the Central Government only" and further held that even if GNCTD is appropriate government, that the impugned notification appointing the Commission of Enquiry could not be sustained as the same was passed without seeking views/concurrence of the Lieutenant Governor. It was argued that as far as the concurrence of the Lieutenant Governor is concerned, it has already been held by the Constitution Bench that no concurrence is required.9

121) Attention was also drawn to the Statement of Objects and Reasons appended to the original Bill No. 39 of 1952 introduced in Parliament to bring about the enactment the Commissions of Inquiry Act, 1952. It reads as follows:

"Commissions and Committees of Inquiry are at present appointed by Government under executive order; there is no central law to regulate the power of such bodies. Some of them have felt handicapped because of the absence of any statutory power to enforce the attendance of witnesses and the production of documents. In order to remove this difficulty, ad hoc legislation has been passed from time to time, such as for example, the Sugar Crisis Inquiring 9 However, we may add here that even if no concurrence is required, the matter has to be sent to the LG for his views, in terms of proviso to Article 239AA(4), which, of course, has to be within the parameters specified in the opinion authored by Justice Chandrachud and contained in paras 140-142 already extracted above.

Authority Act, 1950. It is felt that there should be a general law authorizing Government to appoint an inquiring authority on any matter of public importance, whenever considered necessary, or when a demand to that effect is made by the Legislature and that such law should enable the inquiring authority to exercise certain specific powers including the powers to summon witnesses, to take evidence on oath, and to compel persons to furnish information. The Bill is designed to achieve this object."

122) Another submission is that the power to appoint a commission of enquiry generally and even under the COI Act, 1952 is a power incidental to governance as it is a means of a government informing itself of matters of public importance. By its very nature and in the interest of good governance and in principle, such a power cannot be denied to any government. Furthermore, the power to appoint a commission of inquiry, whether dehors the COI Act, 1952 or in terms of the Act is traceable to Entry 45 of List III. Thus, the power simpliciter to appoint a Commission of Enquiry exists with the Council of Ministers of GNCTD by virtue of Entry 45. The COI Act, 1952 only facilitates and provides the procedure for conducting such an enquiry. It does not make any sense to deny the Government of NCT of Delhi this procedural benefit, when it otherwise has the power to appoint an enquiry under Entry 45 of List III. More so, when the Delhi Assembly can pass a law setting up a commission of inquiry for instance on transport, water resources or primary health centres in order to better inform itself for the formulation of policy.

123) On the above basis, it is argued that reliance on Section 3(60) of the GC Act is unsustainable. The High Court has applied Section 3(60) of the GC Act without understanding the context of appointment of Commission of Inquiries and without appreciating that the COI Act is only a procedural mechanism for exercise of power which exists independent of this Act in the NCT of Delhi.

124) On this subject matter, Mr. Maninder Singh responded to the aforesaid arguments of Mr. Naphade. His first submission is that COI Act is a Parliamentary enactment and, therefore, implementation thereof has to be as per the provisions of the said Act. He referred to para 12 of the judgment in Rai Sahib Ram Jawaya Kapur's

case which reads as under:

"12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws." Adverting to the provisions of COI Act, he submitted that Section 2(a) defines "appropriate government". According to him, clause 2(i) which defines "State Government" does not include GNCTD.

125) Mr. Gautam Khazanchi, advocate who appeared on behalf of respondent No. 1 in Civil Appeal No. 2360 of 2017 also supported the stand taken by Mr. Maninder Singh. He added to the aforesaid contention by arguing that notification dated August 20, 1996, which gives power to the LG, remains unchanged. According to him, this notification dated August 20, 1966 is a specific statutory delegation which accorded the status of the competent authority on the LG under the COI Act. Therefore, it is the administrative of any Union Territory (LG in the case of NCTD) who is competent to exercise the discharge the function of the 'State Government' under this Act. This position, he argued, has not changed even after the Constitutional amendment and enacting of GNCTD Act, 1991. The learned counsel submitted that in State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru 10, one of the arguments raised by the defence was that valid sanction had not been obtained as per Section 196 of the Cr.P.C. in order to prosecute the accused persons. However, the Court noted:

10 (2005) 11 SCC 600 "11. As regards the sanction under Section 196 CrPC it is recited in the sanction order (Ext. P-11/2) that the Lieutenant Governor acted in exercise of powers conferred by sub-section (1) of Section 196 CrPC read with the Government of India, Ministry of Home Affairs notification dated 20-3-1974. Under that notification, there was delegation of powers to the Lieutenant Governor to grant

> sanction. The said notification which finds place in the annexures to the written submissions made on behalf of Gilani shows that it was issued under Article 239(1) of the Constitution enabling the Administrator of the Union Territory to discharge powers and functions of the State Government under CrPC. We accept the submission of the learned Senior Counsel for the State that the delegation of power contained in the said notification will continue to operate unless Parliament by law provides otherwise.

The Government of NCT of Delhi Act, 1991 does not in any way affect the validity of delegation contained in the presidential notification issued under Article 239."

126) He pointed out that this judgment was also placed before the Constitution Bench while considering the proposition that the executive power of the State Government is limited under the Constitutional scheme, even after the enactment of the GNCTD Act. Chandrachud, J. opined that:

> "450. The issue as to whether the Lieutenant Governor of the NCT is competent to accord sanction for prosecution under the Prevention of Terrorism Act and the Code of Criminal Procedure was considered by a two-Judge Bench of this Court in State (NCT of Delhi) v. Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] (Navjot Sandhu). In that case, sanctions under both the statutes were accorded "by order and in the name of the Lieutenant Governor". The sanction under Section 50 of POTA was urged to be a nullity on the ground that in relation to the Union Territory only the Central Government was competent to accord it. Section 2(1)(h) of POTA defined the expression "State" in relation to a Union Territory, to mean the Administrator thereof. Rejecting the challenge, this Court held that under Article 239-AA, the Administrator appointed under Article 239 does not lose his status as such and it is only his designation which is merged into the new designation of Lieutenant Governor "in keeping with the upgraded status of this particular Union Territory". The Lieutenant Governor, who continues to be an Administrator, was held to derive authority to grant sanction under Section 50 by reason of the legislative fiction under Section 2(1)
>
> (h), the Administrator being deemed to be the State Government for the purpose of Section 50. Hence: (SCC p. 654, para 10) "10. ... by virtue of specific statutory delegation in favour of the Administrator who is constitutionally designated as the Lieutenant Governor as well, the sanction accorded by the said authority is a valid sanction under Section 50 of POTA." The decision in Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] turned upon a specific statutory delegation in favour of the Administrator to grant sanction. It is hence of no assistance to the present constitutional context."
>
> 127) The learned counsel also sought to draw sustenance from Section 41(1)(ii) of the GNCTD Act which states that the LG shall act in his discretion in matters where he is required to, under any law. Since the LG is the 'Appropriate Government' under the

COI Act, he is bound to exercise his discretion as envisaged under Section 41 of the GNCTD Act. The power of the LG to act in his own discretion where he is required to under any law has been affirmed by the Constitution Bench decision.

128) In the alternative, and without prejudice to the aforesaid arguments, the learned counsel argued that in any event, the notification dated August 11, 2015 constituting Commission of Inquiry is violative of GNCTD Act and ToBR. To buttress this submission, he referred to Section 45 of the GNCTD Act as well as Rule 23 of ToBR as per which every decision taken by the Council of Ministers has to be communicated to the LG to keep him apprised and to enable him to exercise the power conferred upon him under Article 239AA(4) and the proviso thereof. Unless the LG is kept informed of all decisions, he cannot exercise the Constitutional power to disagree vested upon him, if need be, and thus, cannot make a reference to the President. Another submission of Mr. Gautam Khazanchi was that the notification dated August 11, 2015 was the result of malafide power of the GNCTD.

According to him, the matter had been investigated by the ACB, dealt with by the LG and was also the subject matter of an Inquiry headed by a retired Chief Justice of a High Court. Initiation of a second round by constitution of Commission of Inquiry to look into the very same allegations investigated by the ACB was not only an abuse of the process but an excess of authority exercised by it to do indirectly what it could not do directly.

129) From the arguments noted above, it becomes apparent that the outcome of this issue hinges upon the meaning that is to be assigned to the expression 'State Government' occurring in Section 2(a) of the COI Act which defines 'Appropriate Government'. To put it otherwise, whether the term State Government would include 'Union Territory'? For this purpose, one will have to fall back on the GC Act. Section 3(8) of the GC Act defines Central Government and relevant portion thereof is as under:

"(8) "Central Government" shall-

(a) ...

(b) in relation to anything done or to be done after the commencement of the Constitution, means the President; and shall include-

(i) ...

(ii) ...

(iii) in relation to the administration of a Union Territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution;"

130) Section 3(60) of the GC Act, on the other hand, defines State Government, relevant provision whereof is extracted below:

"3(60) “State Government”-

(a) ...

(b) ...

(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government; and shall, in relation to functions entrusted under article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article;

131) The GC Act also defines ‘Government’, ‘State’ and ‘Union Territory’. We would like to reproduce these definitions as well:

"3(23) “Government” or “the Government” shall include both the Central Government and any State Government;

3(58) “State”-

(a) ...

(b) as respects any period after such commencement, shall mean a State specified in Schedule I to the Constitution and shall include a Union Territory;

3(62A) “Union Territory” shall mean any Union Territory specified in Schedule I to the Constitution and shall include any other territory comprised within the territory of India but not specified in that Schedule;”

132) No doubt, definition of State as contained in Section 3(58) includes Union Territory. However, we are concerned with the meaning of ‘State Government’ which is defined in Section 2(60) of the GC Act. Here, it is specifically provided that in respect of Union Territory, the State Government would mean the Central Government.

133) It would be appropriate to remark that this aspect had come up for consideration in the case of Goa Sampling Employees’ Association v. General Superintendence Co. of India11, though in the context of definition of “Appropriate Government” contained in Section 2(a) of the Industrial Disputes Act. Goa was Union Territory at that point of time. The workman had raised dispute and reference in this respect was made by the Central Government to the industrial tribunal. This power of Central Government to make the reference was challenged by the management taking a specific

plea that the Central Government was not the Appropriate Government in relation to the Union Territory. This contention was repelled by the industrial tribunal but upheld by the High Court. High Court had held that the administrator of the Union Territory 11 (1985) 1 SCC 206 of Goa, Daman & Diu shall be the administrator who could make the reference. This Court set aside the order of the High Court and upheld that of the industrial tribunal holding that Central Government was the Appropriate Government in respect of Union Territory. After referring to the definition of 'Appropriate Government' in Section 2(a) of the Industrial Disputes Act, the Court relied upon the provisions of GC Act contained in Section 3(8) and Section 3(60) thereof. The Court observed that there is a distinction between "States" and "Union Territories" and also between "State Government" and "Administration of a Union Territory". It held that the "Administration of a Union Territory" would not be comprehended in the expression "State Government". It was held that the "State Government" in a Union Territory would mean the "Central Government", in terms of Section 3(60) of the GC Act. It would not be constitutionally correct to describe the Administration of a Union Territory as a "State Government". This conclusion is arrived at in the following manner:

"12. Parliament enacted the Government of Union Territories Act, 1963 ("1963 Act" for short). Its long title reveals the object underlying the enactment, namely, to provide for Legislative Assemblies and Council of Ministers for certain Union Territories and for certain other matters. Union Territory of Goa, Daman and Diu is governed by the 1963 Act [See Section 2(h)]. The expression "Administrator" has been defined in Section 2(a) of the 1963 Act to mean "the Administrator of a Union Territory appointed by the President under Article 239". Section 18 specifies the extent of legislative power of the Legislative Assembly of a Union Territory to encompass any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule. Section 44 provides that there shall be a Council of Ministers in each Union Territory with the Chief Minister at the head to aid and advise the Administrator in exercise of his functions in relation to matters with respect to which the Legislative Assembly of the Union Territory has power to make laws except insofar as he is required by or under the Act to act in his discretion or by or under any law to exercise any judicial or quasi-judicial functions. There is a proviso to Section 44(1) which sheds light on the position of the Administrator and powers of the Council of Ministers. According to the proviso in the event of a difference of opinion between the Administrator and the Ministers on any matter, the Administrator shall refer it to the President for decision given therein by the President etc. Thus the executive power of the Administrator extends to all subjects covered by the legislative power. But in the event of a difference of opinion the President decides the point. When President decides the point, it is the Central Government that decides the point. And that is binding on the Administrator and also the Ministers. Section 45 provides that "the Chief Minister of a Union Territory shall be appointed by the President". Section 46 confers power on the President to make rules for the conduct of business. Section 55 provides that "all contracts in connection with the administration of a Union Territory are contracts made in the exercise of the executive power of the Union and all suits and proceedings in connection with the administration of a Union Territory shall be instituted by or against the Government of India". In exercise of the power conferred by Article 240, the President has inter alia enacted the Goa, Daman and Diu (Laws) Regulation, 1962. By clause (3) of the regulation, the Acts enumerated in the Schedule appended to the Act were extended to the Goa, Daman and Diu subject to the notifications, if any, specified in the Schedule. The Schedule includes Industrial Disputes Act, 1947 as a whole without any modification.

xx xx xx

14. Would it be constitutionally correct to describe Administration of a Union Territory as State Government? Article 1 provides that "India, that is Bharat, shall be a Union of States". Sub-article (2) provides that "the States and the territories thereof shall be as specified in the First Schedule". Sub-article (3) introduced a dichotomy between the State as understood in the Constitution and the Union Territory when it provides that "the territory of India shall comprise— (a) the territories of the States; and (b) the Union Territories specified in the First Schedule". The provisions of Part VI of the Constitution do not apply to the Union Territories. Part VI of the Constitution which deals with States clearly indicates that the Union Territory is not a State. Therefore, the Union Territory constitutionally speaking is something other than a State. As far as the States are concerned, there has to be a Governor for each State though it would be permissible to appoint the same person as Governor of two or more States. Part VIII provides for administration of Union Territories. Article 239 conferred power on the President for the administration of Union Territories unless otherwise provided by an Act of Parliament. Therefore, apart from the definitions of the expressions "Central Government", "State Government" and "Union Territory" as enacted in the General Clauses Act, 1897, the Constitution itself makes a distinction between State and its Government called the State Government and Union Territory and the Administration of the Union Territory. Unless otherwise clearly enacted, the expression "State will not comprehend Union Territory" and the "State Government" would not comprehend Administration of Union Territory. Now if we recall the definition of three expressions "Central Government" [Section 3(8),] "State Government" [Section 3(60)] and "Union Territory" [Section 3(62-A)] in the General Clauses Act, it would unmistakably show that the framers of the Constitution as also the Parliament in enacting these definitions have clearly retained the distinction between State Government and Administration of Union Territory as provided by the Constitution. It is especially made clear in the definition of expression "Central Government" that in relation to the Administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution, would be comprehended in the expression "Central Government". When this inclusionary part is put in juxtaposition with exclusionary part in the definition of the expression "State Government" which provides that as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, it shall mean, in a State, the Governor, and in a Union Territory, the Central Government, the difference conceptually speaking between the expression "State Government" and the "Administration of a Union Territory" clearly emerges. Therefore, there is no room for doubt that the expression "Administration of a Union Territory", Administrator howsoever having been described, would not be comprehended in the expression "State Government" as used in any enactment. These definitions have been modified to bring them to their present format by Adaptation of Laws (No. 1) Order, 1956. Section 3 of the General Clauses Act, 1897 provides that in all Central Acts and Regulations made after the commencement of the Act unless there is anythingrepugnant in the subject or context, the words defined therein will have the meaning assigned therein. Indisputably the Industrial Disputes Act, 1947 is a Central Act enacted after the commencement of the General Clauses Act and the relevant definitions having been recast to meet the constitutional and statutory requirements, the expressions "Central Government", "State Government" and "Union Territory" must receive the meaning assigned to each in the General Clauses Act unless there is anything repugnant in the subject or context in which it is used. No such

repugnancy was brought to our notice. Therefore, these expressions must receive the meaning assigned to them.

15. The High Court after referring to the definitions of the aforementioned three expressions as set out and discussed herein first observed that on a careful reading of the definition, it appears "that in relation to the administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution is the Central Government". So far there is no dispute. The High Court then observed that "it must follow that the Administrator is the State Government insofar as the Union Territory is concerned, and it is so provided in the definition of the State Government in Section 3(60) of the General Clauses Act". The High Court fell into an error in interpreting clause (c) of Section 3(60) which upon its true construction would show that in the Union Territory, there is no concept of State Government but wherever the expression "State Government" is used in relation to the Union Territory, the Central Government would be the State Government. The very concept of State Government in relation to Union Territory is obliterated by the definition. Our attention was, however, drawn to the two decisions of this Court in Satya Dev Bushahri v. Padam Dev [AIR 1954 SC 587 : 1955 SCR 549 : 1954 SCJ 764 : 10 ELR 103] and the decision of this Court in State of Madhya Pradesh v. Shri Moula Bux [AIR 1962 SC 145 : (1962) 2 SCR 794 : (1961) 2 SCJ 549] in which with reference to Part C States, some observations have been made that "the authority conferred under Article 239, as it then stood, to administer Part C States has not the effect of converting those States into the Central Government, and that under Article 239 the President occupies in regard to Part C States, a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States". It was also observed that "though the Part C States are centrally administered under the provisions of Article 239, they do not cease to be States and become merged with the Central Government". It was then urged that by the amendment to Articles 239 and 240 by the Constitution (Seventh Amendment) Act, 1956 and introduction of Articles 239-A and 239-B by the Constitution (Fourteenth Amendment) Act, 1962, only the nomenclature of the Part C States has undergone a change, now being described as Union Territory, but the position of the Union Territory is the same as it was as Part C States and therefore, the view taken in the aforementioned decisions that the administration of Part C States could appropriately be described as State Government would mutatis mutandis apply to the administration of Union Territories. In other words, it was said that they can be appropriately described as State Governments for various purposes. Both the decisions were rendered prior to the amendment of Part VIII of the Constitution in 1956 and the insertion of the Articles 239-A and 239-B in 1962 and more specifically after the enactment of the 1963 Act. The concept of Union Territory with or without a Legislative Assembly and with or without a Council of Ministers with specified legislative and executive powers have been set out in the 1963 Act. Coupled with this, modifications were made in the definitions of aforementioned three expressions. Therefore, the two decisions are of no assistance in resolution of the present controversy."

134) We may also usefully refer to the opinion of Chandrachud, J. in the Constitution Bench judgment, where the learned Judge has specifically dealt with the aforesaid case of Goa Sampling Employees Association and held that there is no 'State Government' in the Union Territory and the State Government shall mean the Central Government. It is so stated in Para 448 of the opinion which reads as under:

"448. Dealing with the provisions of Section 44(1) of the 1963 Act, this Court observed thus: (Goa Sampling case [Goa Sampling Employees' Assn. v. General Superintendence Co. of India (P) Ltd., (1985) 1 SCC 206 : 1985 SCC (L&S) 201] , SCC p. 213, para 12) "12. ... According to the proviso in the event of a difference of opinion between the Administrator and the Ministers on any matter, the Administrator shall refer it to the President for decision given therein by the President, etc. Thus the executive power of the Administrator extends to all subjects covered by the legislative power. But in the event of a difference of opinion the President decides the point. When President decides the point, it is the Central Government that decides the point." The Court noticed that the provisions of Part VI of the Constitution which deal with the States clearly indicate that a Union Territory administration is not a State Government. The Court observed that the Constitution makes a distinction between a State and its Government (called the State Government) on one hand and the Union Territory and its administration on the other hand. This distinction, the Court observed, was carried in the definition contained in the General Clauses Act: (SCC p. 214, para 14) "14. ... Now if we recall the definition of three expressions "Central Government" [Section 3(8)], "State Government" [Section 3(60)] and "Union Territory" [Section 3(62-A)] in the General Clauses Act, it would unmistakably show that the Framers of the Constitution as also Parliament in enacting these definitions have clearly retained the distinction between State Government and Administration of Union Territory as provided by the Constitution. It is especially made clear in the definition of expression "Central Government" that in relation to the Administration of a Union Territory, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution, would be comprehended in the expression "Central Government". When this inclusionary part is put in juxtaposition with exclusionary part in the definition of the expression "State Government" which provides that as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, it shall mean, in a State, the Governor, and in a Union Territory, the Central Government, the difference conceptually speaking between the expression "State Government" and the "Administration of a Union Territory" clearly emerges. Therefore, there is no room for doubt that the expression "Administration of a Union Territory", Administrator howsoever having been described, would not be comprehended in the expression "State Government" as used in any enactment." The view of the High Court that the Administrator is the State Government insofar as the Union Territory is concerned under Section 3(60) was held to be in error. The decisions in Satya Dev Bushahri [Satya Dev Bushahri v. Padam Dev, AIR 1954 SC 587 :

(1955) 1 SCR 549] and in State of Vindhya Pradesh v. Moula Bux [State of Vindhya Pradesh v. Moula Bux, (1962) 2 SCR 794 : AIR 1962 SC 145] were distinguished since they were rendered prior to the amendment of Part VIII of the Constitution in 1956 and before the insertion of Articles 239-A and 239-B. The position in law was set out as follows: (Goa Sampling case [Goa Sampling Employees' Assn. v. General

> Superintendence Co. of India (P) Ltd., (1985) 1 SCC 206 : 1985 SCC (L&S) 201] , SCC p. 217, para 17) "17. ... On a conspectus of the relevant provisions of the Constitution and the 1963 Act, it clearly transpires that the concept of State Government is foreign to the administration of Union Territory and Article 239 provides that every Union Territory is to be administered by the President. The President may act through an Administrator appointed by him. Administrator is thus the delegate of the President. His position is wholly different from that of a Governor of a State.

Administrator can differ with his Minister and he must then obtain the orders of the President meaning thereby of the Central Government. Therefore, at any rate the Administrator of Union Territory does not qualify for the description of a State Government. Therefore, the Central Government is the "appropriate Government"."

135) We, therefore, are unable to accept the submission of Mr. Naphade that the expression 'State Government' occurring in Section 2(a) of the COI Act would mean GNCTD, a Union Territory.

136) It is not for us to deal with the argument of Mr. Naphade that Entry 45 of List III confers legislative and executive competence on GNCTD and, therefore, GNCTD can pass an appropriate order appointing a Commission of Inquiry in exercise of its executive power. In the instant case, we are concerned with notification dated August 11, 2015 which is passed under the COI Act. We, therefore, uphold the judgment of the High Court on this aspect.

Issue No.4: Whether, under Section 108 of the Electricity Act, 2003 and under Section 12 of the Delhi Electricity Reforms Act, 2000, the power to issue directions with the State Commission is with the Government of NCT of Delhi?

137) On this issue, submissions were made by Mr. Kapil Sibal, learned senior counsel, on behalf of GNCTD. In the first instance, he referred to Section 108 of the Electricity Act which gives State Government the power to give directions to the State Electricity Regulatory Commission (SCRC). It reads as under:

> "Section 108. (Directions by State Government):
>
> (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.
>
> (2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."

138) He pointed out that similar powers are conferred upon the Central Government under Section 107 of the Electricity Act, namely, to give directions to the Central Electricity Regulatory Commission (CERC).

According to him, Delhi Electricity Reforms Act, 2000 (DERC Act), with which we are concerned, contains Section 12 which is exactly on the same terms as Section 108 of the Electricity Act. This provision reads as under:

> "12. Powers of the Government.
>
> (1) In the discharge of its functions, the Commission shall be guided by such directions in matters of policy involving public interest as the Government may issue from time to time.
>
> (2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Government thereon shall be final.
>
> (3) The Government shall be entitled to issue policy directions concerning any subsidy to be allowed for supply of electricity or any other infrastructure services to any class or classes of persons.

Provided that the Government shall contribute an amount to compensate the Board or any company affected to the extent of the subsidy granted.

The Commission shall determine such amounts, the terms and conditions on which and the time within which such amounts are to be paid by the Government.

(4) The Government shall consult the Commission in relation to any proposed legislation or rules concerning any policy direction and may take into account the recommendations made by the Commission." (Emphasis Supplied)

139) Certain definitions which were referred to by Mr. Sibal from DER Act may also be noted. Under Section 2(d) of the DER Act, 2000 "Government" means the Lieutenant Governor referred to in Article 239AA of the Constitution" and under Section 2(g) "Lieutenant Governor" means the Lieutenant Governor of the National Capital Territory of Delhi appointed by the president under Article 239 read with Article 239AA of the Constitution". Under Section 2(c), "Commission" means the Delhi Electricity Regulatory Commission referred in Section 3".

140) His submission on the conjoint reading of the aforesaid definitions was that Government is defined as LG referred to in Article 239AA of the Constitution. He argued that Constitution Bench while interpreting Article 239AA has categorically held that LG is to act on the aid and advice of the Council of Ministers, and only those matters are excepted where LG has to function in his own discretion, which was not the case here. Moreover, DER Act was passed by Delhi Legislative Assembly. Therefore, even the executive power of the Union will not be there.

141) Mr. Sibal referred to the judgment of Constitution Bench in Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly & Ors.12 which discusses in detail discretionary power of the Governor under Article 163 of the Constitution. This judgment also

provides instances of situations wherein Governor may exercise power "in his discretion" independent of, or, contrary to aid and advice of Council of Ministers. Based on that, Mr. Sibal submitted that exercise of powers under the DER Act does not fall within the domain of discretionary power of the LG and, therefore, he is supposed to act on the aid and advice of Council of Ministers.

142) Reply of Mr. Maninder Singh to the aforesaid arguments was that the Electricity Act, 2003 is a Parliamentary enactment which was passed after the insertion of Article 239AA. Under Section 108 of the Electricity Act, 2003, it is the jurisdiction of the 'State Government' to issue any direction to DERC and such State Government, in relation to Union Territory like Delhi, would mean Central Government as per Section 3(60) of the GC Act. He also referred to Section 83(1)(b) of the Electricity Act, 2003 which makes it clear that for any Union Territory, it would be Central Government which is the Appropriate Government.

143) While answering question No. 3 in the context of COI Act, we have 12 (2016) 8 SCC 1 held that the expression 'State Government' occurring in Section 2(a) of the said Act which defines 'Appropriate Government' would not include GNCTD. That conclusion is arrived at while interpreting the provisions of Section 2(a) of the COI Act. However, here we are concerned with the Electricity Act, 2003 which also defines 'Appropriate Government'. Section 2(5) thereof reads as under:

> "5. "Appropriate Government" means,-
>
> (a) the Central Government,-
>
> (i) in respect of a generating company wholly or partly owned by it;
>
> (ii) in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations;
>
> (iii) in respect of the National Load Despatch Centre and Regional Load Despatch Centre;
>
> (iv) in relation to any works or electric installation belonging to it or under its control;
>
> (b) in any other case, the State Government having jurisdiction under this Act;
>
> 144) As can be seen from clause (b) above, Appropriate Government is the State Government having jurisdiction under this Act in all those cases which do not come within the domain of 'Central Government'.

This definition contained in Section 2(5) of the Electricity Act is materially different from definition of Appropriate Government in Section 2(a) of the COI Act. Another important and distinguishing aspect is that in respect of Delhi, the DER Act has also been enacted by the State Legislative Assembly of NCT of Delhi to which President has accorded his consent. Under this Act, Delhi Electricity Regulatory Commission (DERC) has been established to exercise the powers conferred on, and to perform the functions assigned to it under the said Act. It acts as a quasi-judicial body which is clear from Section 10 of the DER Act. Section 11 stipulates various functions which DERC is supposed to perform which include determination of tariff for electricity, wholesale, bulk, grid or retail, as the case may be; and to determine the tariff payable for the use of transmission facility etc. In essence, such powers are almost the same powers which are given to Central Electricity Regulatory Commission (CERC). Thus, insofar as NCTD is concerned, it has its own Commission, namely, DERC. DER Act also stipulates powers of Government in Part IV thereof. General powers of the Government, inter alia, include giving directions to the DERC in matters of policy involving public interest, as the Government may issue from time to time. These powers are akin to the powers given under Section 108 of the Electricity Act, 2003. Government is defined in Section 2(d) of DER Act as under:

> "2(d) “Government” means the Lieutenant Governor referred to in article 239AA of the Constitution;
>
> 145) Reading the aforesaid definition in the context of the Constitution Bench judgment would clearly mean that LG here has to act on the aid and advice of Council of Ministers, as such functions do not come within his discretionary powers.
>
> 146) What follows from the aforesaid is that insofar as DER Act is concerned, it is an enactment enacted by Legislative Assembly of NCTD. It operates within the NCTD. Government here means GNCTD i.e. LG who is supposed to act on the aid and advice of the Council of Ministers. Under this Act, Delhi Government has power to issue directions to the DERC in matters of policies involving public interest.

When such powers are conferred specifically to Delhi Government under DER Act, it cannot be said that insofar as Section 108 of the Electricity Act, 2003 is concerned, the expression ‘State Government’ therein would mean the Central Government. If such an interpretation is given, there would clearly be a conflict of jurisdiction in the NCTD insofar as working of Electricity Act/DER Act are concerned. As a result, and going by the dicta laid down by the Constitution Bench, we set aside the decision of the Delhi High Court on this aspect and hold that it was within the jurisdiction of GNCTD to issue notification No. F.11(58/2010/Power/1856) dated June 12, 2015. We may make it clear that we have not touched upon the merits of the said notification as that is not the issue before us.

Issue No.5: Whether the Revenue Department of the GNCTD had the power to revise the minimum rates of Agricultural Land (Circle Rates) under the provisions of Indian Stamp Act, 1899?

147) The GNCTD had issued the notification dated August 4, 2015 revising the rates of Agricultural Land (Circle Rates) under the provisions of Indian Stamp Act, 1899 and Delhi Stamp (Prevention of Under-Valuation of Instruments) Rules, 2007. Before issuing this notification, matter was not placed before the LG for his views or concurrence. This notification reads as under:

> "GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI, REVENUE DEPARTMENT, S.SHAM NATH MARG, DELHI.
>
> No.F.1(1953)/Regn.Br./Div.Com/HQ/2014/191 Dated 4th August, 2015 No.F.1(1953)/Regn.Br./Div.Com/HQ/2014- In exercise of the powers conferred by sub-section(3) of Section 27 the Indian Stamp Act, 1899 (2 of 1899) and rule 4 of the Delhi Stamp (Prevention of Under - Valuation of Instruments) Rules, 2007 read with the Ministry of Home Affairs, Govt. of India Notification No.S.O.1726 (No.F.215/61-Judl.-II) dated the 22nd July, 1961 and in supersession of this Department's notification No.F.1(177)/Regn.Br./Div.Com./07/254-279 dated 14.03.2008; the Lt. Governor of the National Capital Territory of Delhi, hereby revises and notifies the minimum rates for the purposes of chargeability of stamp duty on the instruments related to sale/transfer of agriculture land under the provisions of the said Act, as per details given below:-

Srl No.	District	Rates for agricultural land (Rs. Per acre)	Rates for the agricultural land falling in villages where land pooling policy is applicable (Rs. per acre)
1.	East	1.00 Crore	2.25 crore
2.	North – East	1.00 Crore	2.25 Crore
3.	Shahdra	1.00 Crore	2.25 Crore
4.	North	1.25 Crore	3.00 Crore
5.	North West	1.25 Crore	3.00 Crore
6.	West	1.25 Crore	3.00 Crore
7.	South West	1.50 Crore	3.50 Crore
8.	South	1.50 Crore	3.50 Crore
9.	South East	1.50 Crore	3.50 Crore
10.	New Delhi	1.50 Crore	3.50 Crore
11.	Central	1.25 Crore	3.00 Crore

> These revised rates shall come into force with immediate effect.
>
> By order and in the name of the Lt.Governor of the National Capital Territory of Delhi, Sd/- (Sanjay Kumar) IAS Spl. Inspector General (Registration) "

148) Validity of this notification was challenged on two counts, namely:

(a) As the notification is issued in the name of LG, prior concurrence of LG was a pre-requisite for issuance of such a notification.

(b) Subject matter of the notification i.e. fixation of circle rates would fall under Entry 18 of List II over which the Parliament has the exclusive power inasmuch as it stands specifically excluded from the purview of GNCTD.

149) Argument of the appellant/GNCTD is that fixation of circle rate is not relatable to Entry 18 of List II i.e. 'land'. It is the submission that stamp duty is imposed on an instrument with regard to the title of the land and not the land itself. Therefore, a stamp duty would be levied on an instrument and would affect the document evidencing the said transfer of the agricultural land, but not on the land itself. The occasion for levy of stamp duty is the execution of the document/conveyance, as distinguished from the immovable property which is the underlying subject matter of the transaction dealt with in the document/conveyance.

Thus, the order of 4th August, 2015 traceable to Entry 63 of List II, rather than Entry 18 of List II. Entry 63 of List II reads as under:

'Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.'

150) The appellant has submitted that the phrase 'other than those specified in the provisions of List I ' in Entry 63 List II is of no assistance to the Union of India. An analysis of Entry 63 of List II and Entry 91 of List I (which is the concerned provision of List I) shows that a distinction can be observed between the powers of the central and state legislatures to impose/levy stamp duty. Entry 91 of List I reads as under:

'91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.'

151) The Union is empowered to levy stamp duty ONLY on the specific types of instruments specified under Entry 91 of List I. But the State has been given the power to impose stamp duty on every other type of document/instrument not mentioned under Entry 91 of List I.

152) It is also argued that it is general practice all over the country for State Governments to set the circle rates for conveyance of immovable properties within the State. Examples of the same are Karnataka Stamp [Prevention of Undervaluation of Instrument Rules], 1977; Tamil Nadu Stamp [Prevention of Undervaluation of Instruments] Rules, 1968;

Andhra Pradesh Stamp [Prevention of Undervaluation of Instruments] Rules, 1975; West Bengal Stamp [Prevention of Undervaluation of Instruments] Rules, 2001; Bihar Stamp [Prevention of Undervaluation of Instruments] Rules, 1995; Haryana Stamp [Prevention of Undervaluation of Instruments] Rules, 1978; Madhya Pradesh Stamp [Prevention of Undervaluation of Instruments] Rules, 1975; Chhattisgarh Stamp [Prevention of Undervaluation of Instruments] Rules, 2001; Kerala Stamp [Prevention of Undervaluation of Instruments] Rules, 1968; Maharashtra Stamp [Determination of true market value of property] Rules, 1995.

153) It was also pointed out that it was the Indian Stamp (Delhi Amendment) Act, 2001 which was passed by the Legislative Assembly of Delhi on 28th March, 2001 and received Presidential- assent on 18 th July, 2001 and the Indian Stamp (Delhi Amendment) Act, 2007 which was passed by the Legislative Assembly of Delhi on 18th September, 2007 and received the Presidential assent on 5th November, 2007 which in fact first dealt with the stamp duty payable on conveyance deeds in Delhi. Given that neither of these Acts have been challenged and in fact the Union has given its assent to these Acts, it is submitted that there can be no question of the Union now questioning the power of the GNCTD to collect such stamp duty and fix circle rates in respect of such collections.

154) The appellant also stated that Section 27(3) of the Indian Stamp Act, as amended in Delhi, that too with the express consent of the Union/President gives power to the Delhi Government to notify minimum rates for land for the purpose of calculation of stamp duty i.e. circle rate. Section 27(3) as amended for Delhi, reads as under:

> "27. Facts affecting duty to be set forth in instrument (3) In the case of instruments relating to land, chargeable with valorem duty, the Government may notify minimum rates for valuation of land."

[Emphasis Supplied] It is submitted that 'Government' under Section 27(3) must be read to mean "Government of NCT of Delhi".

155) In reply, the respondents submit that Section 27(3) of the Indian Stamp Act is concerned with notifying minimum rates for valuation of land and it has nothing to do with ‘rates of stamp duty’. As per the respondents, power to notify minimum rates for valuation of land (circle rates) is relatable to Entry 18 of List II which falls within the exclusive domain of the Union. It is also argued that as per the law laid down in State of Gujarat & Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal & Ors.13, entry in the Seventh Schedule is to be given its widest possisble interpretation. According to respondents, Entry 63 of List II only deals with ‘rates of stamp duty’ and, therefore, would not apply to ‘minimum 13 (2004) 5 SCC 155 rates for valuation of land’ which is relatable to Entry 18 of List II. It was also argued that by virtue of the Presidential Orders dated July 22, 1961 and September 07, 1966 under Article 239, the power of the Union under the Indian Stamp Act, 1899 for NCT Delhi had been delegated on the LG. All the previous notifications for notifying the circle rates in Delhi (July 18, 2007, March 14, 2008, November 15, 2011 etc.) had been issued by the LG in exercise of his delegated power under Article 239.

156) From the respective submissions, it becomes apparent that the entire controversy centers around the question as to whether the impugned notification is relatable to Entry 18 of List II i.e. 'land' or the subject matter falls within the scope of Entry 63 of List II. Entry 18 of List II reads as under:

> "18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agriculture loans; colonization."

We may also note the language of Entry 63 List II:

> "63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty."

157) Insofar as Entry 91 of List I is concerned, subject matter thereof is within the exclusive domain of the Centre/Parliament. It deals with 'rates of stamp duty in respect of wills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts'. It follows that insofar as instruments mentioned in Entry 91 of List I are concerned, rates of stamp duty of such documents are within the exclusive domain of the Union. In respect of other instruments, it is the State which has the necessary jurisdiction to fix the rates of stamp duty.

158) It would be pertinent to note that the High Court in the impugned judgment has arrived at a conclusion that notification dated August 4, 2015 revising the rates of agricultural land (circle rates) is traceable to Entry 63 of List II and not to Entry 18 of List II. We are in agreement with this conclusion. Said notification is issued under the provisions of Indian Stamp Act and Delhi Stamp (Prevention of Under-Valuation of Instruments) Rules, 2007. Circle rates are fixed for the purpose of payment of stamp duty. Therefore, they do not pertain to 'land' namely rights in or over land, land tenures etc. or transfer of alienation of agricultural land etc. Stamp duty is not a duty on instrument but it is in reality a duty on transfer of property. In that sense, as rightly held by the High Court, the occasion for levy of stamp duty is the document which is executed as distinguished from the transaction which is embodied in the document.

159) Even after accepting the aforesaid plea of the GNCTD, the High Court has set aside the said notification on the ground that this decision of the Council of Ministers was without seeking views/concurrence of the LG. As per the High Court, such an order could not be issued unless the decision of the Council of Ministers is communicated to the LG.

160) From the judgment of the Constitution Bench, it is clear that the Council of Ministers have a right to take such a decision. Discussion to this extent of the High Court is expressed in Paras 107, 108, 116 and 117 of its judgment may not be entirely correct. These paras read as under:

> "107. In the light of the above-noticed provisions, we have no manner of doubt to conclude that every decision taken by the Council of Ministers shall be communicated

> to the Lt. Governor for his views. The orders in terms of the decision of the Council of Ministers can be issued only where no reference to the Central Government is required as provided in Chapter V of the Transaction of Business Rules.
>
> 108. Making a reference by the Lt. Governor to the Central Government as provided under Chapter V of the Transaction of Business Rules is possible only when the decision is communicated to the Lt. Governor. Therefore, there is no substance in the contention that an order can be passed pursuant to the decision of the Council of Ministers without communicating such decision to the Lt.Governor for his views/concurrence with respect to any of the matters enumerated in List-II or List-III except the three reserved matters in Entries 1, 2 and 18 of List-II. The emphasis sought to be laid by the learned Senior Counsels who appeared for GNCTD on Rule 23 of the Transaction of Business Rules to substantiate the contention that those proposals which are mentioned in Rule 23 alone are required to be submitted to Lt. Governor is misplaced. The word "essentially"

employed in Rule 23 makes clear the legislative intent that the proposals specified (i) to (viii) therein are not exhaustive. Any interpretation contra would render the Transaction of Business Rules ultra vires Clause (4) of Article 239AA of the Constitution.

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116. For the aforesaid reasons, we are of the considered view that it is mandatory under the Constitutional scheme to communicate the decision of the Council of Ministers to the Lt. Governor even in relation to the matters in respect of which power to make laws has been conferred on the Legislative Assembly of NCTD and an order thereon can be issued only where the Lt. Governor does not take a different view.

117. Hence, the contention on behalf of the Government of NCT of Delhi that the Lt. Governor is bound to act only on the aid and advice of the Council of Ministers is untenable and cannot be accepted.

161) The Constitution Bench judgment of this Court clarifies that in all those matters which do not fall within the discretionary jurisdiction of the LG, the LG is bound to act on the aid and advice of Council of Ministers. Further, majority opinion also holds that executive power of the GNCTD extends to all the subject matters contained in List II (except Entry 1, 2 and 18) as well as List III (wherein it has concurrent jurisdiction along with the Central Government). That is the interpretation accorded to clause (4) of Article 239AA. At the same time, this clause contains a proviso as well which reads as under:

> "Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his

opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary."

162) Interpreting this proviso, it is held as under:

"215. Now, it is essential to analyse clause (4) of Article 239-AA, the most important provision for determination of the controversy at hand. Clause (4) stipulates a Westminster style Cabinet system of Government for NCT of Delhi where there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to matters with respect to which the Delhi Legislative Assembly has power to enact laws except in matters in respect of which the Lieutenant Governor is required to act in his discretion.

216. The proviso to clause (4) of Article 239-AA stipulates that in case of a difference of opinion on any matter between the Lieutenant Governor and his Ministers, the Lieutenant Governor shall refer it to the President for a binding decision. Further, pending such decision by the President, in any case where the matter, in the opinion of the Lieutenant Governor, is so urgent that it is necessary for him to take immediate action, the proviso makes him competent to take such action and issue such directions as he deems necessary.

217. A conjoint reading of Article 239-AA(3)(a) and Article 239-AA(4) reveals that the executive power of the Government of NCT of Delhi is coextensive with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239-AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239-AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

218. Article 239-AA(3)(a) reserves Parliament's legislative power on all matters in the State List and Concurrent List, but clause (4) nowhere reserves the executive powers of the Union with respect to such matters. On the contrary, clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has power to legislate. The legislative power is conferred upon the Assembly to enact whereas the policy of the legislation has to be given effect to by the executive for which the Government of Delhi has to have coextensive executive powers. Such a view is in consonance with the observation in Ram Jawaya Kapur [Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549] which has been discussed elaborately in the earlier part of the judgment.

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232. From the foregoing discussion, it is clear that the words "any matter" occurring in the proviso to Article 239-AA(4) do not necessarily need to be construed to mean "every matter". As highlighted in the authorities referred to hereinabove, the word "any" occurring in a statute or constitutional provision is not to be mechanically read to mean "every" and the context in which the word has been used must be given due weightage so as to deduce the real intention and purpose in which the word has been used.

233. It has to be clearly understood that though "any" may not mean "every", yet how it should be understood is extremely significant. Let us elaborate. The power given to the Lieutenant Governor under the proviso to Article 239-AA(4) contains the rule of exception and should not be treated as a general norm. The Lieutenant Governor is to act with constitutional objectivity keeping in view the high degree of constitutional trust reposed in him while exercising the special power ordained upon him unlike the Governor and the President who are bound by the aid and advice of their Ministers. The Lieutenant Governor need not, in a mechanical manner, refer every decision of his Ministers to the President. He has to be guided by the concept of constitutional morality. There have to be some valid grounds for the Lieutenant Governor to refer the decision of the Council of Ministers to the President in order to protect the interest of NCT of Delhi and the principle of constitutionalism. As per the 1991 Act and the Rules of Business, he has to be apprised of every decision taken by the Council of Ministers. He cannot change the decision. That apart, there is no provision for concurrence. He has the authority to differ. But it cannot be difference for the sake of difference. It cannot be mechanical or in a routine matter. The power has been conferred to guide, discuss and see that the administration runs for the welfare of the people and also NCT of Delhi that has been given a special status. Therefore, the word "any" has to be understood treating as a guidance meant for the constitutional authority. He must bear in mind the constitutional objectivity, the needed advice and the realities.

234. The proviso to Article 239-AA(4), we say without any fear of contradiction, cannot be interpreted in a strict sense of the mere words employed treating them as only letters without paying heed to the thought and the spirit which they intend to convey. They are not to be treated as bones and flesh without nerves and neurons that make the nerves functional. We feel, it is necessary in the context to read the words of the provision in the spirit of citizenry participation in the governance of a democratic polity that is republican in character. We may hasten to add that when we say so, it should not be construed that there is allowance of enormous entry of judicial creativity, for the construction one intends to place has its plinth and platform on the Preamble and precedents pertaining to constitutional interpretation and purposive interpretation keeping in view the conception of sense and spirit of the Constitution. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution. And we call it constitutional pragmatism.

235. The authorities in power should constantly remind themselves that they are constitutional functionaries and they have the responsibility to ensure that the fundamental purpose of administration is the welfare of the people in an ethical manner. There is requirement of discussion and deliberation. The fine nuances are to be dwelled upon with mutual respect. Neither of the authorities should feel that they have been lionised. They should feel that they are serving the constitutional norms, values and concepts.

236. Interpretation cannot ignore the conscience of the Constitution. That apart, when we take a broader view, we are also alive to the consequence of such an interpretation. If the expressions "in case of difference" and "on any matter" are construed to mean that the Lieutenant Governor can differ on any proposal, the expectation of the people which has its legitimacy in a democratic set-up, although different from States as understood under the Constitution, will lose its purpose in simple semantics. The essence and purpose should not be lost in grammar like the philosophy of geometry cannot be allowed to lose its universal metaphysics in the methods of drawing. And that is why, we deliberated upon many a concept. Thus, the Administrator, as per the Rules of Business, has to be apprised of each decision taken by a Minister or Council of Ministers, but that does not mean that the Lieutenant Governor should raise an issue in every matter. The difference of opinion must meet the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and cultivated idea of respect for a representative Government. The difference of opinion should never be based on the perception of "right to differ" and similarly the term "on any matter" should not be put on such a platform as to conceive that as one can differ, it should be a norm on each occasion. The difference must meet the concept of constitutional trust reposed in the authority and there has to be objective assessment of the decision that is sent for communication and further the rationale of difference of opinion should be demonstrable and it should contain sound reason. There should not be exposition of the phenomenon of an obstructionist but reflection of the philosophy of affirmative constructionism and a visionary. The constitutional amendment does not perceive a situation of constant friction and difference which gradually builds a structure of conflict. At the same time, the Council of Ministers being headed by the Chief Minister should be guided by values and prudence accepting the constitutional position that NCT of Delhi is not a State." In a concurring opinion on this aspect, Chandrachud, J. has also given lucid commentary.

163) It becomes clear from the above that even when the executive wing of Delhi Government takes a decision, the LG is also empowered to form its opinion 'on any matter' which may be different from the decision taken by his Ministers. Any matter does not mean each and 'every matter' or 'every trifling matter' but only those rare and exceptional matters where the difference is so fundamental to the governance of the Union Territory that it deserved to be escalated to the President. Therefore, the

> LG is not expected to differ routinely with the decision of Council of Minister. Difference should be on cogent and strong reasons. However, this limitation pertains to LG's exercise of power. At the same time, the proviso recognises that there may be contingencies where LG and his Ministers may differ. In such circumstances, LG is supposed to refer the matter to the President for decision and act according to the decision given thereon by the President. It means that final say, in case of different between LG and Council of Ministers, is that of the President. Such a scheme of things clearly contemplates that the Council of Ministers is supposed to convey its decisions to the LG to enable the LG to form his view thereupon. The decision cannot be implemented without referring the same to the LG in the first instance. More pertinently, the decision here touches upon the governance of the UT. Therefore, we agree with the conclusion of the High Court that views of LG should have been taken before issuing circular dated August 4, 2015.

However, we would like to add that normally, and generally, the LG is expected to honour the wisdom of the council of ministers. He is also expected to clear the files expeditiously and is not supposed to sit over it unduly. He's under duty to bear in mind expediency and urgency of the subject matter of the decisions taken by the GNCTD, where ever situation so demands. That in fact is the facet of good governance. Likewise , the executive is also expected to give due deference to the unique nature of the role assigned to the LG in the Constitutional scheme. By and large, it demands a mutual respect between the two organs. Both should realise that they are here to serve the people of NCTD. Mutual cooperation, thus, becomes essential for the effective working of the system.

Issue No.6: Whether it is the Lieutenant Governor or the GNCTD which has the power to appoint the Special Public Prosecutor under Section 24 of the Cr.PC.?

164) Special Public Prosecutor is appointed as per the provisions of Section 24(8) of Cr.P.C. which is to the following effect:

> "24. Public Prosecutors. ... (8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor."

> 165) As is clear from the above, power to appoint Special Public Prosecutor is conferred both upon the Central Government and the State Government. The question, therefore, arises is as to whether the expression 'State Government' would include GNCTD. As per the appellant, once the Government of NCT of Delhi is found to be the "State Government" under the Cr.P.C., necessarily the power to appoint the Special Public Prosecutor will also lie with the Government of NCT of Delhi. If the contention of the Union of India is to be accepted then under the Cr.P.C. both the Central Government and State Government will be the Central Government alone, which will be a completely absurd legal position, particularly in light of the fact that subsequent to the 69 th Amendment, various powers of the State Government under the Cr.P.C., including appointment of public prosecutors, have been exercised by the

elected government of NCT of Delhi. Referring to the impugned judgment, on this issue, it is pointed out that the High Court has held that the definition of Section 3(60) of the General Clauses Act, 1897 will apply to interpret the term "State Government" and it would thus be the Central Government, which would be the State Government. It is argued that this approach is wrong as the issue of appointment of public prosecutor relates to Criminal Procedure, i.e. Entry 2 of List II over which the Delhi Assembly and Executive exercise power, the Lt. Governor must act on the aid and advice of the Council of Ministers of the NCT of Delhi. It is contended that this convoluted method of reasoning was not necessary and the entire issue could be resolved if the Government of NCT of Delhi was held to be a State Government of NCT of Delhi by application of definition of State in Section 3(58) of General Clauses Act, 1897 to interpret State Government in the Cr.P.C., instead of definition of Section 3(60) of the GC Act which is obviously repugnant to the subject and context of Cr.P.C.

166) We may mention at this stage that writ petition was filed in the High Court by the GNCTD challenging the order of the Special Judge dated September 7, 2015 and order of LG dated September 4, 2015 appointing Shri S.K. Gupta, Advocate as Special Public Prosecutor to conduct the prosecution in FIR No. 21 of 2012 dated December 17, 2012. The GNCTD had appointed another lawyer as Special Public Prosecutor. The High Court has held that under Section 24(8) of Cr.P.C., State Government is empowered to appoint Special Public Prosecutor. However, as NCTD is a Union Territory, by virtue of Section 3(60) of the GC Act, it is the Central Government which should be the State Government. Further, since by notification dated March 20, 1974, administrator is empowered to exercise powers and the expression 'State Government' would mean the LG. At the same time, the High Court has also observed that power to appoint Public Prosecutor is relatable to Entries 1 and 2 of List III in respect of which GNCTD has legislative competence. Therefore, the LG must appoint Special Public Prosecutor on the aid and advice of Council of Ministers.

167) As is clear from the arguments of GNCTD noted above, it is aggrieved by that part of the impugned order of the High Court whereby State Government in respect of NCTD is held to be the Central Government by virtue of Section 3(60) of the GC Act. On the other hand, the Union Government is aggrieved by that portion of the order of the High Court where it is held that LG must appoint Special Public Prosecutor on the aid and advice of Council of Ministers.

168) Arguments on behalf of the Union of India is that by virtue of Notification dated March 20, 1974, President under Article 239 had empowered the Administrator to exercise all the powers conferred upon State Government by the Cr.P.C. except that conferred by Section 8 and

477. Therefore, the power under Section 24 to appoint Prosecutor or Special Public Prosecutor vests with the LG and not the Government of NCT. So far as Entries 1 and

2, List III are concerned, it is argued that undoubtedly Legislative Assembly of NCT has legislative competence qua said entries but it is subservient to the legislative power of the Union. It is contended that legislative competence of NCT Delhi cannot derogate from or be repugnant to law of Parliament. And once Cr.P.C., 1973 has been made by the Parliament dealing exhaustively and comprehensively with criminal procedure the executive power of GNCTD as well as the legislative power would stand eroded and become subservient to the central executive. Therefore, GNCTD can exercise executive power only upon an express conferment of power by Cr.P.C. There is no such conferment. It is the Central Government alone which would have independent power to appoint Special Public Prosecutor. It is also argued that assuming without admitting that under Section 24 both Central Government are empowered to appoint Public Prosecutor/Special Public Prosecutor under Section 24(1) and 24(8), the Central Government cannot be prevented or restrained from making appointment, and wherever the Central Government has already made an appointment of a Public Prosecutor with respect to a case or a class of clases, the UT Government would not be competent to make a parallel appointment.

169) We find that in answering this question, the High Court has entered into the following discussion:

> "300. As could be seen, Section 24(8) of Cr.P.C. empowers the State Government for appointing a Special Public Prosecutor for the purposes of any case or class of cases. Admittedly, NCT of Delhi is a Union Territory and not a State. As per Sections 3(8), 3(58) and 3(60) of the General Clauses Act, 1897, the expression 'State Government' for the purpose of a Union Territory means the President and includes the Administrator in terms of Article 239 of the Constitution read with the Notification dated 20.03.1974 {See Para 167 (supra)} under which the Administrators of all the Union Territories were empowered to exercise the powers of the State Government under Cr.P.C. So far as NCT of Delhi is concerned, the 'State Government' thus means the Lt. Governor for the purpose of Section 24(8) of Cr.P.C. However, the power to appoint a Public Prosecutor is relatable to Entries 1 and 2 of List III in respect of which the Government of NCT of Delhi has legislative competence under Article 239AA of the Constitution. As a corollary, the exercise of the functions relating to the said subject by the Lt. Governor under Article 239AA(4) of the Constitution shall be on the aid and advice of the Council of Ministers with the Chief Minister at the head.
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> 301. Hence, we are unable to accept the contention of the Union of India that the Council of Ministers have no role to play in exercise of the powers under Section 24(8) of Cr.P.C. In our considered opinion, the Lt. Governor under Section 24(8) of Cr.P.C. does not act eo-nominee but exercises the executive functions of the State. Hence, the said power has to be exercised on the aid and advice of the Council of Ministers in terms of Clause (4) of Article 239AA of the Constitution.

302. For the above reasons, we are of the view that it is not open to the Lt. Governor to appoint the Special Public Prosecutor on his own without seeking aid and advice of the Council of Ministers.

303. In the circumstances, the impugned order dated 07.09.2015 passed by the Special Judge-07 in FIR No.21/2012 is hereby set aside and there shall be a direction to the Special Judge to pass an appropriate order afresh in accordance with law."

170) In the earlier part of the discussion, it has held:

(a) As per Sections 3(8), 3(58) and 3(60) of the GC Act, the expression 'State Government' for the purposes of a Union Territory means the President and includes the Administrator in terms of Article 239A of the Constitution.

(b) Insofar as NCT of Delhi is concerned, the 'State Government', thus, means the Lieutenant Governor for the purposes of Section 24(8) of Cr.P.C.

171) Though, we have accepted the interpretation, as given by the High Court in respect of the provisions of the GC Act mentioned above while discussing the expression 'State Government' in the context of COI Act, this position is clarified while dealing with the same expression occuring in Section 2(5) of the Electricity Act, 2003. We have made it clear that it would depend upon language used in defining State Government in a particular enactment. We have also pointed out the difference in the definitions of Appropriate Government, under the COI Act and Electricity Act. This becomes important in the light of decision contained in the Constitution Bench judgment which clearly holds that under various circumstances, the expression State Government would be relatable to GNCTD, notwithstanding the fact that it continues to be the Union Territory. The Constitution Bench judgment has also not accepted the opinion of the High Court insofar as it treats State Government as the Lieutenant Governor.

172) In any case, it may not be necessary to dwell much upon this aspect. The High Court has also categorically held that the power to appoint a Public Prosecutor is relatable to Entries 1 and 2 of List III. In our opinion, the High Court has rightly held that in respect of these entries, the Government of NCT of Delhi has legislative competence under Article 239AA of the Constitution and that the LG under Article 239AA(4) of the Constitution shall act on the aid and advice of the Council of Ministers. This conclusion of the High Court is in tune with the judgment of the Constitution Bench. We, therefore, hold that Lieutenant Governor, while appointing the Special Public Prosecutor, is to act on the aid and advice of the Council of Ministers. This issue is answered accordingly.

173) All the appeals stand disposed of by answering the issues in the manner aforesaid. Contempt Petition also stands disposed of.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN)
NEW DELHI;

FEBRUARY 14, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2357 OF 2017

GOVT. OF NCT OF DELHI … APPELLANT

VERSUS

UNION OF INDIA … RESPONDENT

WITH

CONT. PETITION (CIVIL) NO. 175 OF 2016 IN
WRIT PETITION (CRIMINAL) NO. 539 OF 1986,

CIVIL APPEAL NO. 2360 OF 2017,CIVIL APPEAL NO. 2359 OF 2017, CIVIL APPEAL NO. 2363 OF 2017, CIVIL APPEAL NO. 2362 OF 2017, CIVIL APPEAL NO. 2358 OF 2017, CIVIL APPEAL NO. 2361 OF 2017,CRIMINAL APPEAL NO. 277 OF 2017 AND CIVIL APPEAL NO. 2364 OF 2017.

J U D G M E N T ASHOK BHUSHAN, J.

I have gone through the erudite and elaborate judgment of my esteemed brother, Justice A.K. Sikri.

Justice A.K. Sikri, in his opinion has noted the details of facts giving rise to these appeals, order passed in these appeals referring it to the Constitution Bench and the judgment of Constitution Bench delivered on 04.07.2018. My Brother has noted the elaborate submissions made before us, after the Constitution Bench has answered the reference and sent back the matter to the regular Bench for deciding these appeals. The submissions made before us by learned counsel for the parties having been elaborately noted in the opinion of my esteemed Brother, I feel no necessity of burdening this judgment by reproducing the submissions again. Justice Sikri has framed six issues in paragraph Nos. 63 to 68 for consideration in these appeals, which are as follows:-

63) The first issue is whether the exclusion of "Services" relatable to Entry 41 of List II of the Seventh Schedule from the legislative and executive domain of the NCT of Delhi, vide notification of the Government of India dated May 21, 2015, is unconstitutional and illegal?

64) The second issue is whether the exclusion of the jurisdiction of the Anti-Corruption Branch (ACB) of the NCT of Delhi to investigate offences committed under the Prevention of Corruption Act, 1987 by the officials of Central Government and limiting the jurisdiction of the ACB to the employees of GNCTD alone is legal? (These two issues arise in Civil Appeal No. 2357 of 2017).

65) The third issue is raised in Civil Appeal Nos. 2358, 2359 and 2360 of 2017. In all these three appeals, the common issue is whether the GNCTD is an "Appropriate Government" under the Commission of Enquiry Act, 1952?

66) The fourth issue, which is raised in Civil Appeal No. 2363 of 2017, is: Whether under Section 108 of the Electricity Act, 2003 and under Section 12 of the Delhi Electricity Reforms Act, 2000, the power to issue directions with the State Commission is with the Government of NCT of Delhi?

Similar issue is the subject matter of Civil Appeal No. 2361 of 2017, viz. whether the orders of the GNCTD nominating Directors to Distribution Companies in Delhi under the Delhi Electricity Reforms Act, 2000 read with Delhi Electricity Reforms (Transfer Scheme) Rules, 2001, without obtaining the concurrence of the Lieutenant Governor are valid?

67) The fifth issue is common to Civil Appeal No. 2362 of 2017 filed by the GNCTD and Civil Appeal No. 2364 of 2017 filed by Union of India, wherein the issue is whether the Revenue Department of the GNCTD has the power to revise the minimum rates of Agricultural Land (Circle Rates) under the provisions of Indian Stamp Act, 1899?

68) The sixth issue, which is the subject matter of Criminal Appeal No. 277 of 2018, pertains to the appointment of Special Public Prosecutors, viz., whether it is the Lieutenant Governor or the GNCTD which has the power to appoint the Special Public Prosecutor under Section 24 of the Cr.P.C.?

2. I am in full agreement with the conclusions arrived and 6. I do not intend to add anything on the above issues. On Issue No.1, I do not entirely agree with the opinion of my esteemed brother, however, I am in agreement with his opinion that Entry 41 of List II of the Seventh Schedule of the Constitution is not available to the Delhi Legislative Assembly. I proceed to consider the Issue No.1.

3. As noted above with regard to decisions on all other issues as given in the opinion of my esteemed brother I entirely agree.

4. It is C.A.No.2357 of 2017(Govt. of NCT of Delhi vs. Union of India) filed against the judgment of the Delhi High Court dated 04.08.2016 in Writ Petition (C)No.5888 of 2015 in which the above issue has arisen. The Writ Petition (C)No.5888 of 2015 (Govt.

of NCT of Delhi vs. Union of India) was filed challenging the notifications dated 21.05.2015 and 23.07.2014 issued by the Govt. of India, Ministry of Home Affairs empowering the Lt. Governor to exercise the powers in respect of matters connected with "Services". The notification dated 21.05.2015 which was challenged in Writ Petition (C)No.5888 of 2015 was to the following effect:

> "MINISTRY OF HOME AFFAIRS NOTIFICATION New Delhi, the 21st May, 2015 S.O. 1368(E).—Whereas article 239 of the Constitution provides that every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify;
>
> And whereas article 239AA inserted by 'the Constitution (Sixty-ninth Amendment) Act, 1991' provides that the Union Territory of Delhi shall be called the National Capital Territory of Delhi and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor;
>
> And whereas sub-clause (a) of clause (3) of article 239AA states that the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18; and whereas Entry 1 relates to 'Public Order', Entry 2 relates to 'Police' and Entry 18 relates to 'Land'.
>
> And whereas sub-clause (a) of clause (3) of article 239AA also qualifies the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories. Under this provision, a reference may be made to Entry 41 of the State List which deals with the State Public Services, State Public Service Commission which do not exist in the National Capital Territory of Delhi.
>
> Further, the Union Territories Cadre consisting of Indian Administrative Service and Indian Police Service personnel is common to Union Territories of Delhi, Chandigarh, Andaman and Nicobar Islands, Lakshadweep, Daman and Diu, Dadra and Nagar Haveli, Puducherry and States of Arunachal Pradesh, Goa and Mizoram which is administered by the Central Government through the Ministry of Home Affairs; and similarly DANICS and DANIPS are common services catering to the

requirement of the Union Territories of Daman & Diu, Dadra Nagar Haveli, Andaman and Nicobar Islands, Lakshadweep including the National Capital Territory of Delhi which is also administered by the Central Government through the Ministry of Home Affairs. As such, it is clear that the National Capital Territory of Delhi does not have its own State Public Services. Thus, 'Services' will fall within this category.

And whereas it is well established that where there is no legislative power, there is no executive power since executive power is co-extensive with legislative power.

And whereas matters relating to Entries 1, 2 & 18 of the State List being 'Public Order', 'Police' and 'Land' respectively and Entries 64, 65 & 66 of that list in so far as they relate to Entries 1, 2 & 18 as also 'Services' fall outside the purview of Legislative Assembly of the National Capital Territory of Delhi and consequently the Government of NCT of Delhi will have no executive power in relation to the above and further that power in relation to the aforesaid subjects vests exclusively in the President or his delegate i.e. the Lieutenant Governor of Delhi.

Now, therefore, in accordance with the provisions contained in article 239 and sub-clause (a) of clause (3) of 239AA, the President hereby directs that -

"(i) subject to his control and further orders, the Lieutenant Governor of the National Capital Territory of Delhi, shall in respect of matters connected with 'Public Order', 'Police', 'Land' and 'Services' as stated hereinabove, exercise the powers and discharge the functions of the Central Government, to the extent delegated to him from time to time by the President.

Provided that the Lieutenant Governor of the National Capital Territory of Delhi may, in his discretion, obtain the views of the Chief Minister of the National Capital Territory of Delhi in regard to the matter of 'Services' wherever he deems it appropriate.

2. In the Notification number F. 1/21/92-Home (P) Estt. 1750 dated 8th November, 1993, as amended vide notification dated 23rd July, 2014 bearing No. 14036/4/2014-Delhi-I (Pt. File), for paragraph 2 the following paragraph shall be substituted, namely:— "2. This notification shall only apply to officials and employees of the National Capital Territory of Delhi subject to the provisions contained in the article 239AA of the Constitution." after paragraph 2 the following paragraph shall be inserted, namely:— "3. The Anti-Corruption Branch Police Station shall not take any cognizance of offences against Officers, employees and functionaries of the Central Government".

3. This Notification supersedes earlier Notification number S.O. 853(E) [F. No. U-11030/2/98- UTL] dated 24th September, 1998 except as respects things done or omitted to be done before such supersession.

[F. No. 14036/04/2014-Delhi-I (Part File)] RAKESH SINGH, Jt. Secy."

5. The Government of India, Ministry of Home Affairs issued above notification on the premise that Entry 41 of List II which deals with "State public services; State Public Service Commission" is not available to the Legislative Assembly of the National Capital Territory of Delhi which has been expressly stated so in the notification. The Government of NCT of Delhi (hereinafter referred to as "GNCTD") aggrieved by the notification has filed Writ Petition (C)No.5888 of 2015 in Delhi High Court. The Delhi High Court vide its judgment dated 04.08.2016 has decided Writ Petition (C)No.5888 of 2015 along with other writ petitions. The conclusion of the judgment dated 04.08.2016 of the Delhi High Court are summarised in paragraph No.302. The Delhi High Court in paragraph No.302(v) laid down following:

> "302(v) The matters connected with "Services" fall outside the purview of the Legislative Assembly of NCT of Delhi. Therefore, the direction in the impugned Notification S.O. No. 1368(E) dated 21-5-2015 that the Lieutenant Governor of the NCT of Delhi shall in respect of matters connected with "Services" exercise the powers and discharge the functions of the Central Government to the extent delegated to him from time to time by the President is neither illegal nor unconstitutional." The Delhi High Court, in result, dismissed Writ Petition (C)No.5888 of 2015.
>
> 6. While hearing this batch of appeals issues arose regarding the interpretation that needed to be given to Article 239AA of the Constitution of India.

Two-Judge Bench directed for placing the matter before Chief Justice for constituting a Constitution Bench. On the above reference order, a five-Judge Constitution Bench was constituted and matter was heard by five-Judge Constitution Bench which delivered its judgment on 04.07.2018. The main judgment of the Constitution Bench had been authored by Justice Dipak Misra, C.J. (as he then was) for himself and for Dr. Justice A.K. Sikri and Justice A.M. Khanwilkar. Two other separate opinions were also delivered, one by Dr. Justice D.Y. Chandrachud and one by myself, (Justice Ashok Bhushan). After the judgment of the Constitution Bench, the matter has been placed before this Bench for deciding all these appeals.

7. Before this Bench elaborate submissions have been made by several eminent counsel. The submissions made before us have been elaborately noticed by Justice A.K. Sikri which need no repetition in this order. The Constitution Bench having answered the reference vide its judgment dated 04.07.2018, we are required to decide these appeals as per the opinion of the Constitution Bench. Article 145 clause (3) of the Constitution of India provides as follows:

> "Article 145(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

> Provided that, where the Court hearing an appeal under any of the provisions of this chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion."

8. The expression "shall on receipt of the opinion dispose of the appeal in conformity with such opinion" occurring in proviso to Article 145 clause (3) obliges this Bench to dispose of the appeal in conformity with such opinion. We, thus, need to find as to what is the opinion of the Constitution Bench in accordance with which the appeal is to be disposed of. On first question as noted above, what is opinion of the Constitution Bench has to be ascertained to apply the same in deciding the appeal.

9. Shri Rakesh Dwivedi, learned senior counsel and Shri Maninder Singh, learned Additional Solicitor General(as he then was) submitted that the majority judgment of the Constitution Bench authored by Justice Dipak Misra, C.J. (as he then was) has neither considered the submission that Entry 41 of List II of the VIIth Schedule of the Constitution is not available to Legislative Assembly of Delhi nor answered the said question. It is submitted that although before the Constitution Bench it was emphatically submitted that as per Article 239AA sub-clause (3)(a) the Legislative Assembly shall have power to make laws with respect to any of the matters enumerated in the State List or in the Concurrent List "in so far as any such matter is applicable to Union Territories". It is submitted before us that emphasis before the Constitution Bench was that all matters enumerated in State List and Concurrent List shall not be ipso facto available to Legislative Assembly of Delhi and Legislative power is given only of those matters which matters are applicable to Union Territory of Delhi. It is submitted that the Constitution Bench has specifically noted the above argument but has neither considered nor decided the issue, hence, the issue has to be considered and decided by this Bench.

10.Entry 41 of List II which is the subject matter of consideration is as follows:

> "41.State public services; State Public Service Commission."

11.We may first notice that the Constitution Bench speaking through Justice Dipak Misra, C.J. (as he then was) as well as two other opinions have noted that the controversy in individual appeals need not to be dwelled upon by the Constitution Bench as the Constitution Bench is to answer only the constitutional issues. In the opinion of Justice Dipak Misra, C.J. (as he then was) following was stated in paragraph 13:

> "13. Having prefaced thus, we shall now proceed to state the controversy in brief since in this batch of appeals which has been referred to the Constitution Bench, we are required to advert to the issue that essentially pertains to the powers conferred on the Legislative Assembly of the National Capital Territory of Delhi and the executive

> power exercised by the elected Government of NCT of Delhi. The facts involved and the controversy raised in each individual appeal need not be dwelled upon, for we only intend to answer the constitutional issue."

12.In paragraph 486 of the judgment (in my opinion) following was stated:

> "486. These appeals, thus, have been placed before this Constitution Bench. At the outset, it was agreed between the learned counsel for the parties that this Constitution Bench may only answer the constitutional questions and the individual appeals thereafter will be decided by appropriate regular Benches."

13.The submissions which are being pressed before us by Shri Rakesh Dwivedi as well as Shri Maninder Singh were also pressed before the Constitution Bench, the specific submission was that the power of Legislative Assembly of Delhi on subject matter provided in List II and III of Seventh Schedule is limited by very same Article when it implies "in so far as any such matter is applicable to Union Territories". It is useful to notice that in paragraph 39 of the judgment of Justice Dipak Misra, C.J. (as he then was) following has been noticed:

> "39. The respondents also contend that although Article 239-AA confers on the Legislative Assembly of Delhi the power to legislate with respect to subject-matters provided in List II and List III of the Seventh Schedule, yet the said power is limited by the very same Article when it employs the phrase "insofar as any such matter is applicable to Union Territories..." and also by specifically excluding from the legislative power of the Assembly certain entries as delineated in Article 239-AA(3)(a). This restriction, as per the respondents, limits the power of the Legislative Assembly to legislate and this restriction has to be understood in the context of conferment of special status."

14.The Constitution Bench speaking through Justice Dipak Misra, C.J. (as he then was) has in its judgment clearly accepted the position that NCT of Delhi is not a State and it remains a Union Territory. In this reference, in paragraph Nos. 196 and 201 of the judgment following has been laid down:

> "196. Thus, NDMC makes it clear as crystal that all Union Territories under our constitutional scheme are not on the same pedestal and as far as NCT of Delhi is concerned, it is not a State within the meaning of Article 246 or Part VI of the Constitution. Though NCT of Delhi partakes a unique position after the Sixty-ninth Amendment, yet in sum and substance, it remains a Union Territory which is governed by Article 246(4) of the Constitution and to which Parliament, in the exercise of its constituent power, has given the appellation of the "National Capital Territory of Delhi".
>
> 201. In the light of the aforesaid analysis and the ruling of the nine-Judge Bench in NDMC, it is clear as noonday that by no stretch of imagination, NCT of Delhi can be

> accorded the status of a State under our present constitutional scheme and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor."

15.Discussion being confined only to Legislative power conferred on the Delhi Legislative Assembly it is useful to notice the opinion expressed by the Constitution Bench in the above regard. In paragraph Nos. 217 and 219 following has been laid down:

> "217. Sub-clause (a) of clause (3) of Article 239-AA establishes the power of the Delhi Legislative Assembly to enact laws for NCT of Delhi with respect to matters enumerated in the State List and/or Concurrent List except insofar as matters with respect to and which relate to Entries 1, 2 and 18 of the State List.
>
> 219. Thus, it is evident from clause (3) of Article 239-AA that Parliament has the power to make laws for NCT of Delhi on any of the matters enumerated in the State List and the Concurrent List and at the same time, the Legislative Assembly of Delhi also has the legislative power with respect to matters enumerated in the State List and the Concurrent List except matters with respect to entries which have been explicitly excluded from Article 239-AA(3)(a)."

16.In the above paragraphs Constitution Bench held that the power of the Legislative Assembly to make laws of NCT of Delhi is with respect to matters enumerated in State List and the Concurrent List except in so far as matters with respect to and which relate to entries 1,2 and 18 of the State List. What is noticed in paragraph No. 217 is what is stated in general terms in Article 239AA(3)(a) of the Constitution. The Constitution Bench has not bestowed its consideration on the purpose and intent of expression "with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territory of Delhi". The reason is not far to seek. Individual issues which had arisen in different appeals were not touched by the Constitution Bench leaving it open to be decided by the regular Bench after constitutional questions are answered. Whether the "services" are within legislative competence of Delhi Legislative Assembly is one of the issues which has directly arisen in C.A.No.2357 of 2017. Thus, there is no opinion of Constitution Bench as to whether Entry 41 of List II is available to Legislative Assembly of Delhi or not except a general statement that Legislative Assembly of Delhi shall have power to make laws with respect to any of the matters enumerated in List I and List II except Entries 1, 2 and 18 of State List.

17.We may also notice the conclusion recorded by the Constitution Bench speaking through Justice Dipak Misra, C.J. (as he then was) in paragraph No.284. The conclusion in paragraph No.284.13 is as follows:

> "284.13. With the insertion of Article 239-AA by virtue of the Sixty-ninth Amendment, Parliament envisaged a representative form of Government for NCT of Delhi. The said provision intends to provide for the Capital a directly elected

> Legislative Assembly which shall have legislative powers over matters falling within the State List and the Concurrent List, barring those excepted, and a mandate upon the Lieutenant Governor to act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision."

18.As noticed above the Constitution Bench in paragraph No.39 extracted above has noticed the submissions of the counsel for the respondents that words "insofar as any such matter is applicable to Union Territories ..." in Article 239AA(3)(a) restrict the Legislative power of the Legislative Assembly of Delhi to only those entries which are only applicable to Union Territories and not all. The elaborate discussion on its answer is not found in the majority opinion expressed by Justice Dipak Misra, C.J. (as he then was). The submission having been made before the Constitution Bench which submission was considered in other two opinions expressed by Dr. Justice D.Y. Chandrachud and myself, it is useful to notice as to what has been said in other two opinions in the Constitution Bench.

19.Dr. Justice D.Y. Chandrachud in his opinion has dealt with the submission under the separate heading as indicated at Serial No.K(v) in the Index in the beginning of the judgment which is to the following effect:

> "K(v) "Insofar as any such matter is applicable to Union Territories"

20.In pages 736 and 737 of the judgment of Dr.Justice D.Y. Chandrachud, the said submission has been considered in paragraph Nos. 461, 462 and 463 and following has been laid down:

"461. Article 239-AA(3)(a) permits the Legislative Assembly of the NCT to legislate on matters in the State List, except for Entries 1, 2 and 18 (and Entries 64, 65 and 66 insofar as they relate to the earlier entries) and on the Concurrent List, "insofar as any such matter is applicable to Union Territories". In forming an understanding of these words of Article 239-AA(3)(a), it has to be noticed that since the decision in Kanniyan right through to the nine-Judge Bench decision in NDMC, it has been held that the expression "State" in Article 246 does not include a Union Territory. The expression "insofar as any such matter is applicable to Union Territories" cannot be construed to mean that the Legislative Assembly of NCT would have no power to legislate on any subject in the State or Concurrent Lists, merely by the use of the expression "State" in that particular entry. This is not a correct reading of the above words of Article 239-AA(3)

(a). As we see below, that is not how Parliament has construed them as well.

462. Section 7(5) of the GNCTD Act provides that salaries of the Speaker and Deputy Speaker of the Legislative Assembly may be fixed by the Legislative Assembly by law. Section 19 provides that the Members of the Legislative Assembly shall receive salaries and allowances as determined by the Legislative Assembly by law. Section 43(3) similarly provides that the salaries and allowances of Ministers shall be determined by the Legislative Assembly.

However, Section 24 provides that a Bill for the purpose has to be reserved for the consideration of the President. Parliament would not have enacted the above provisions unless legislative competence resided in the States on the above subject. The subjects pertaining to the salaries and allowances of Members of the Legislature of the State (including the Speaker and Deputy Speaker) and of the Ministers for the State are governed by Entry 38 and Entry 40 of the State List. The GNCTD Act recognises the legislative competence of the Legislative Assembly of NCT to enact legislation on these subjects. The use of the expression "State" in these entries does not divest the jurisdiction of the Legislative Assembly. Nor are the words of Article 239-AA(3)(a) exclusionary or disabling in nature.

463. The purpose of the above narration is to indicate that the expression "State" is by itself not conclusive of whether a particular provision of the Constitution would apply to Union Territories. Similarly, it can also be stated that the definition of the expression State in Section 3(58) of the General Clauses Act (which includes a Union Territory) will not necessarily govern all references to "State" in the Constitution. If there is something which is repugnant in the subject or context, the inclusive definition in Section 3(58) will not apply. This is made clear in the precedent emanating from this Court. In certain contexts, it has been held that the expression "State" will not include Union Territories while in other contexts the definition in Section 3(58) has been applied. Hence, the expression "insofar as any such matter is applicable to Union Territories" is not one of exclusion nor can it be considered to be so irrespective of subject or context."

21.Dr. Justice D.Y. Chandrachud while considering the expression "in so far as any such matter is applicable to Union Territories" as occurring in Article 239AA(3) has held that the ability of the Legislative Assembly is circumscribed by the above expression. In Paragraph No. 316 of the Constitution Bench judgment, he has observed following:-

> "316. Clause (3) of Article 239-AA defines the legislative powers of the Legislative Assembly for the NCT. Sub-clause (a) empowers the Legislative Assembly for the NCT to enact law with respect to any of the matters contained in the State or Concurrent Lists of the Seventh Schedule to the Constitution. The ability of the Legislative Assembly is circumscribed "insofar as any such matter is applicable to Union Territories". The Legislative Assembly can hence enact legislation in regard to the entries in the State and Concurrent Lists to the extent to which they apply to a Union Territory. Of equal significance is the exception which has been carved out: Entries 1, 2 and 18 of the State List (and Entries 64, 65 and 66 insofar as they relate to Entries 1, 2 and 18) lie outside the legislative powers of the Legislative Assembly of NCT....."

22.Dr. Justice D.Y. Chandrachud, thus, held that expression "State" is by itself not conclusive of whether a particular provision of the Constitution would apply to Union Territories. His Lordship opined that the expression "insofar as any such matter is applicable to Union Territories" is not one of exclusion nor can it be considered to be so irrespective of subject or context.

23.I had also dealt with the above submission in paragraph Nos. 500, 551 and 552 in following words:

> "500. It is submitted that even when Article 239-AA(3)(a) stipulates that Legislative Assembly of Delhi shall have the power to legislate in respect of subject-matters provided in List II and List III of the VIIth Schedule of the Constitution of India, it specifically restricts the legislative powers of the Legislative Assembly of Delhi to those subject-matters which are "applicable to Union Territories". The Constitution envisages that List II and List III of the VIIth Schedule of the Constitution of India contain certain subject-matters which are not applicable to Union Territories. The intention of the Constitution-makers is that even when the subject-matters contained in List II and List III of the VIIth Schedule become available to the Legislative Assembly of NCT of Delhi, the subject-matters in the said Lists which are not applicable to Union Territories would not become available to the Legislative Assembly of NCT of Delhi and would be beyond its legislative powers.
>
> 551. The provision is very clear which empowers the Legislative Assembly to make laws with respect to any of the matters enumerated in the State List or in the Concurrent List except the excluded entries. One of the issues is that power to make laws in State List or in Concurrent List is hedged by phrase "insofar as any such matter is applicable to Union Territories".
>
> 552. A look at the entries in List II and List III indicates that there is no mention of Union Territory. A perusal of Lists II and III indicates that although in various entries there is specific mention of word "State" but there is no express reference of "Union Territory" in any of the entries. For example, in List II Entries 12, 26, 37, 38, 39, 40, 41, 42 and 43, there is specific mention of word "State". Similarly, in List III Entries 3, 4 and 43 there is mention of word "State". The above phrase "insofar as any such matter is applicable to Union Territory" is inconsequential. The reasons are twofold. On the commencement of the Constitution, there was no concept of Union Territories and there were only Part A, B, C and D States. After Seventh Constitutional Amendment, where First Schedule as well as Article 2 of the Constitution were amended which included mention of Union Territory both in Article 1 as well as in First Schedule. Thus, the above phrase was used to facilitate the automatic conferment of powers to make laws for Delhi on all matters including those relatable to the State List and Concurrent List except where an entry indicates that its applicability to the Union Territory is excluded by implication or any express constitutional provision."

24.In the above paragraphs the opinion is expressed that all matters including those relatable to the State List and Concurrent List are available to Legislative Assembly of Delhi except where an entry indicates that its applicability to the Union Territory is excluded by implication or by any express constitutional provision. The conclusion is, thus, that all entries of List II and List III are available to Legislative Assembly for exercising Legislative power except when an entry is excluded by

implication or by any express provision.

25.The majority opinion delivered by Justice Dipak Misra, C.J. (as he then was) having not dealt with the expression "insofar as any such matter is applicable to Union Territories", it is, thus, clear that no opinion has been expressed in the majority opinion of the Constitution Bench, hence the said issue is required to be elaborately answered for deciding C.A.No.2357 of 2017.

26.As noted above, Article 239AA has been inserted by Constitution 69th Amendment, 1991 with effect from 1st February, 1992. Legislative powers to Legislative Assembly for Union Territory was an accepted principle even before 69th Constitution (Amendment) Act. The Government of Union Territories Act, 1963 was enacted by Parliament in reference to Article 239A brought by Constitution 14th Amendment, 1962. Article 239A provided as follows:

> "239A. Creation of local Legislatures or Council of Ministers or both for certain Union territories.-
>
> (1) Parliament may by law create for the Union territory of Pondicherry-
>
> (a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or
>
> (b) a Council of Ministers, or both with such Constitution, powers and functions, in each case, as may be specified in the law.
>
> (2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

27.Article 239A empowered the Parliament by law to create a body to function as a Legislature for the Union Territory. Such Union Territory constituted under Act, 1963 had Legislative power as provided by the Parliament itself under Section 18 of the Act, 1963. Section 18 of the Act, 1963 is as follows:

> "18. Extent of legislative power.(1) Subject to the provisions of this Act, the Legislative Assembly of the Union territory may make laws for the whole or any part of the Union territory with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable in relation to Union territories.
>
> (2) Nothing in sub-section (1) shall derogate from the powers conferred on Parliament by the Constitution to make laws with respect to any matter for the Union territory or any part thereof."

28.Thus, the expression "insofar as any such matter is applicable in relation to Union Territories" is a known concept which was occurring in Section 18 of the Government of Union Territories Act, 1963 also.

29.For understanding the reasons and objects for circumscribing the Legislative powers of the Delhi Legislative Assembly by qualifying with the expression "insofar as any such matter is applicable in relation to Union Territories", we need to look into the Statement of Objects and Reasons of the Constitution 69th (Amendment) Act and other relevant materials throwing light on the object and purpose of 69th Constitutional amendment.

30.It is to be noted that for Reorganisation of the administrative set up of Union Territory of Delhi, the Government of India has appointed a Committee, namely, Balakrishnan Committee, which had submitted its report on 14.12.1989 to the Home Ministry. The Report of the Balakrishnan Committee was the basis for enacting 69th Constitution Amendment. In the Statement of Objects and Reasons of the 69th Constitution Amendment, the Report of Balakrishnan Committee has been specifically referred to and relied on. It is useful to notice the Statement of Objects and Reasons of Constitution 69th Amendment, which are as follows:-

"Statement of Objects and Reasons The question of reorganisation of the administrative set-up in the Union Territory of Delhi has been under the consideration of the Government for some time. The Government of India appointed on 24-12-1987 a Committee to go into the various issues connected with the administration of Delhi and to recommend measures inter alia for the streamlining of the administrative set-up. The Committee went into the matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the National Capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union Territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence the arrangements should be incorporated in the Constitution to give the National Capital a special status among the Union Territories.

2. The Bill seeks to give effect to the above proposals."

31.The Constitution Bench judgment of this Court in Govt. of NCT of Delhi vs. Union of India (supra) speaking through Justice Dipak Misra, C.J. (as he then was) has also referred to and relied on the Balakrishnan's Committee Report. In Paragraph No. 16 of the judgment, several paragraphs of the Balakrishnan Committee Report have

been extracted by the Constitution Bench. The Constitution Bench has further held that Balakrishnan Committee's Report serve as an enacting history and corpus of public knowledge relative to the introduction of Articles 239-AA and 239-AB and would be handy external aids for construing Article 239-AA and unearthing the real intention of Parliament while exercising its constituent power. In Paragraph No. 206 of the judgment, following has been observed:-

"206. It is perceptible that the constitutional amendment conceives of conferring special status on Delhi. This has to be kept in view while interpreting Article 239-AA. Both the Statement of Objects and Reasons and the Balakrishnan Committee Report, the relevant extracts of which we have already reproduced in the earlier part of this judgment, serve as an enacting history and corpus of public knowledge relative to the introduction of Articles 239-AA and 239-AB and would be handy external aids for construing Article 239-AA and unearthing the real intention of Parliament while exercising its constituent power."

32.Balakrishnan's Committee Report in Para No. 6.7.4 has noted the limitation on the Legislative power of the Delhi Legislative Assembly because of the difference between the Constitutional Status of Union Territory and that of the State. Para No. 6.7.4 is to the following effect:-

"6.7.4 As regards the Legislative Assembly to be created for Delhi. It should have full legislative power in relation to matters assigned to it. Subject to the specific exclusion of certain subjects set out in paragraphs 6.7.8 and 6.7.12 below, such powers should cover matters in the State List and the Concurrent List of the Constitution in so far as such matters are applicable in relation to Union territories. This last limitation is necessary because of the difference between the constitutional status of a Union territory and that of a State. The exercise of such legislative powers should, of course, be subject to the provisions of the Constitution and the relevant laws of Parliament."

33.Balakrishnan Committee Report while elaborating the expression "insofar as any such matters are applicable in relation to Union Territories" has noticed that apart from entries specifically excluded, there are other entries, which ipso facto fall outside the purview of the Delhi Legislative Assembly. Following has been stated in Paragraph No. 6.7.12:-

"6.7.12 .....Another connected Entry in the State List is Entry No.35 which is "Works, lands and buildings vested in or in the possession of the "State". Considering that the powers of the Assembly proposed for Delhi will extend to matters in the State List and the Concurrent List of the Constitution "in so far as such matters are applicable in relation to Union territories" Entry 35 will ipso facto fall outside the purview of the Assembly proposed for Delhi because that Entry is applicable to States and not to Union territories....."

34.Entry 41 of List II of VIIth Schedule of the Constitution was specifically considered in the Balakrishnan Committee Report and the Balakrishnan Committee Report opined that the said entry is not applicable to the Union Territory. On the above subject, following was stated in the Report in Paragraph Nos. 8.1.2 and 8.1.3:-

"8.1.2 Entry 41 of the State List mentions "State public services: State 'Public Services Commission". Obviously, this Entry is not applicable to Union territories because it mentions only "State" and not "Union territories". This view is reinforced by the fact that this Constitution divides public services in India into two categories, namely, services in connection with the affairs of the Union and services in connection with the affairs of the State as is clear from the various provisions in Part XIV of the Constitution. There is no third category of services covering the services of the Union territories. The obvious reason is that the administration of the Union territory is the constitutional responsibility of the Union under article 239 and as such comes under "affairs of the Union". Consequently, the public services for the administration of any Union territory should form part of the public services in connection with the affairs of the Union.

8.1.3 It is not, therefore, constitutionally possible to bring the subject matter of the services in the Union territory within the scope of the Legislative Assembly or the Council of Ministers of the proposed Delhi Administration. On the same reasoning it is not possible to provide for a separate Public Service Commission for a Union territory like Delhi because State Public Service Commission in Entry 41 aforesaid means only the body set up for the States."

35.Balakrishnan Committee Report further opined that services in connection with the administration of the Union Territory of Delhi will be part of the services of the Union even after the setting up of a Legislative Assembly with a Council of Ministers.

Following was stated in Paragraph No. 9.3.4 on the heading "SERVICES":-

"SERVICES 9.3.4 By virtue of the provisions in the Constitution, services in connection with the administration of the Union territory of Delhi will be part of the services of the Union even after the setting up of a Legislative Assembly with a Council of Ministers. This constitutional position is unexceptionable and should not be disturbed. There should, however, be adequate delegation of powers to the Lt.

Governor in respect of specified categories of services or posts. In performing his functions under such delegated powers the Lt. Governor will have to act in his discretion but there should be a convention of consultation, whenever possible, with the Chief Minister."

36.The Balakrishnan Committee Report which led into passing of the 69th Constitution (Amendment) Act categorically has accepted the position that Entry 41 of List II shall not be within the Legislative competence of Delhi Legislature, which conclusion was plausible, since the

Legislative power of the Delhi Legislative Assembly was circumscribed by the expression "insofar as any such matter is applicable in relation to Union Territories" as occurring in Article 239AA(3). In Balakrishnan Committee Report, the Committee noticed the existence of services, which were in existence in the Union Territory of Delhi. There were common services for several Union Territories constituted by Union. On 13.07.1959, the President has issued an order in exercise of power conferred by Proviso to Article 309 of the Constitution and framed Rules namely, Conditions of Services of Union Territories Employees Rules, 1959.

37.The Delhi Administration Subordinate Ministerial/Executive Service Rules., 1967 were also framed by the President in exercise of power conferred by Article 309 of the Constitution of India. Rule 2(d) provided that "commission" means the Union Public Services Commission. There has been subsequent Rules framed for services under the Union Territories. There being also Rules for Services combined to different Union Territories. The Parliament was well aware at the time when Constitution 69th (Amendment) Act was enacted that the term "services" in the Union Territories are Union Services and there are no State services and the Commission for Services means the Union Public Services Commission. A Constitution Bench of this Court had occasion to consider various aspects of the services in Union Territory of Delhi in Bir Singh Vs. Delhi Jal Board and Others, (2018) 10 SCC 312. The above Constitution Bench judgment was delivered on 30.08.2018, i.e. subsequent to Constitution Bench judgment in Govt. of NCT of Delhi vs. Union of India (supra). The Constitution Bench of this Court speaking through Justice Ranjan Gogoi (as he then was) has noticed details of all Central Civil Services, Union Territories Services in reference to NCT of Delhi, although with reference to question of applicability of reservation in services. Services in reference to NCT of Delhi has been noticed in paragraph Nos. 64 to 66 under the heading "National Capital Territory of Delhi", which is to the following effect:-

> "National Capital Territory of Delhi
>
> 64. In case of National Capital Territory of Delhi, especially, to make the picture even clearer, a reference may be made to "Delhi Administration Subordinate Service Rules, 1967". Rule 3 of the aforesaid Rules is to the following effect:
>
> "3. Constitution of service and its classification.—(1) On and from the date of commencement of these Rules, there shall be constituted one Central Civil Service, known as the Subordinate Service of the Delhi Administration.
>
> (2) The Service shall have four Grades, namely— Grade I Grade II Grade III Grade IV
> (3) The posts in Grade I shall be Central Civil posts, Class II Group "B" (Gazetted) and those in Grades II, III and IV shall be Central Civil posts Group "C" (Non-Gazetted).
>
> (4) Members of the service shall, in the normal course be eligible for appointment to various Grades of the service to which they belong and not to the other service." (emphasis supplied)

65. Subordinate services in the National Capital Territory of Delhi are, therefore, clearly Central Civil Services. The affidavit of the Union of India also points out this feature by stating that, "The posts in CCS Group C are in the subordinate services. The equivalent in the Union Territory of Delhi is the Delhi Administrative Subordinate Services (DASS) and the recruiting agency in the place of Staff Selection Commission is the Delhi Subordinate Service Selection Board (DSSSB).

Members of the Delhi Administrative Subordinate Services are the feeder cadre for Central Civil Services Group B (DANICS). It is for these reasons that the policy (of pan India eligibility) is consistently adopted."

66. A combined reading of these provisions of the DASS Rules, 1967 and CCS Rules, 1965, therefore, more than adequately explains the nature of Subordinate Services in the NCT of Delhi. These clearly are General Central Services and perhaps, it is owing to this state of affairs that the Union of India in its affidavit has stated that, "Members of the Delhi Administrative Subordinate Services are the feeder cadre for Central Civil Services Group B (DANICS). It is for these reasons that the policy (of pan India eligibility) is consistently adopted."

38.The Constitution Bench in Bir Singh (supra), thus, has opined that services in the National Capital Territory are clearly Central Civil Services. What has been held by the Constitution Bench also reinforces that there are no State Public Services in the NCT, Delhi. Learned counsel appearing for the appellant has placed much reliance on the Delhi Fire Services Act, 2007 to buttress his submission that by the aforesaid Act, State Services namely Delhi Fire Services has been created, which clearly means that Entry 41 of List II is applicable to Delhi Legislative Assembly. The Delhi Fire Services Act, 2007 has been passed to provide for the maintenance of a fire service and to make more effective provisions for the fire prevention and fire safety measures in certain buildings and premises in the National Capital Territory of Delhi and the matter connected therewith.

39.We may first notice that the word "services" used in the Act has been used in a manner of providing services for fire prevention and fire safety measures. The word "services" has not been used in a sense of constitution of a service. It is to be noted that fire service is a municipal function performed by local authority. Delhi Municipal Council Act, 1957 contains various provisions dealing with prevention of fire etc. Further fire services is a municipal function falling within the domain of municipalities, which has been recognised in the Constitution of India. Article 243(W) of the Constitution deals with functions of the municipalities in relation to matters listed in the 12th Schedule. Entry 7 of the 12th Schedule provides for "Fire Services" as one of the functions of the municipalities. The nature of the enactment and the provisions clearly indicate that Delhi Fire Services Act falls under Entry 5 of List II and not under Entry 41 of List II.

40.The distribution of Legislative powers of State and the Parliament is provided under Articles 245 and 246 of the Constitution. Article 246 which provides for subject-matter of laws made by Parliament and by the Legislatures of States provides as follows:

"Article 246. Subject matter of laws made by Parliament and by the Legislatures of States.-(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

41.It is relevant to notice that Article 246 clause (3) which provides for exclusive power to make laws for such State or any part thereof, uses the expression "with respect to any of the matters enumerated in List II in the Seventh Schedule". The expression used in Article 239AA(3)(a) i.e. "in so far as any such matter is applicable to Union Territories" connotes different expression. There is a difference between the Legislative powers of the State and the Union Territories, which is apparent by use of different expressions in the Constitution. While inserting Article 239AA in the Constitution, the Parliament was well aware about the functioning of the Union Territories and extent and controls of powers to be given to the Union Territories by constitutional amendment.

42.I having held that Entry 41 of List II of the Seventh Schedule of the Constitution is not available to the Legislative Assembly of GNCTD, there is no occasion to exercise any Executive power with regard to "Services" by the GNCTD, since the Executive power of the GNCTD as per Article 239AA(4) extend in relation to matters with respect to which Legislative Assembly has power to make laws. With regard to "Services" GNCTD can exercise only those Executive powers, which can be exercised by it under any law framed by the Parliament or it may exercise those Executive powers, which have been delegated to it. Issue No. 1 is answered accordingly.

43.In view of my above answer to Issue No.1, Civil Appeal No. 2357 of 2017 – Govt. Of NCT of Delhi Vs. Union of India stands disposed of upholding the judgment of the Delhi High Court dismissing the Writ Petition (C) No. 5888 of 2015. The other appeals are disposed of as per order proposed by

my esteemed Brother Justice A.K. Sikri. Contempt Petition (C) No. 175 of 2016 is closed. The parties shall bear their own costs.

.....J. (ASHOK BHUSHAN) NEW DELHI, FEBRUARY 14, 2019.