HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

(1) D.B. Civil Writ Petition No. 20267/2017

Milap Chand Dandia

----Petitioner

Versus

State Of Raj And Anr

----Respondents

Connected With

(2) D.B. Civil Writ Petition No. 18713/2017

Vijay Bhandari

----Petitioner

Versus

State Of Raj

----Respondent

For Petitioner(s)	:	Mr. Vimal Chand Choudhary with Mr. Yogesh Tailor Mr. S.S. Hora
For Respondent(s)	:	Mr. M.S. Singhvi, Advocate General assisted by Mr. Raunak Singhvi

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PRAKASH GUPTA

Judgment

Reserved on 09/05/2019

Pronounced on 04/09/2019

Reportable

Per Hon'ble Chief Justice

"A republic, if you can keep it." – Benjamin Franklin, after the Constitutional Convention resolved to adopt a republican form of government in the USA.

1. In this petition filed in public interest, a challenge has been laid to the constitutionality of Section 7BB and Section 11 of the Rajasthan Ministers Salaries Act, 2017, which provide that former

Chief Ministers shall get for the remainder of their lives, a government residence, a car for their family members, telephone and a staff of 10 persons including a driver.

2. The public interest litigant submits that Articles 164(5), 195 and Entries 38 and 40 of List II of the Constitution of India provide only for payment of salary and allowances to the members of legislatures or to the ministers. There is no specific provision for residence and conveyance allowance for them in these provisions. Therefore, former Chief Ministers are not entitled to a government residence, or a residence at public expense, or a car for their family members, telephone and staff of ten including a driver.

3. It is submitted that being financially backward, the State of Rajasthan cannot afford to provide the facilities assured by the Act to former Chief Ministers. It is argued that if such facilities are allowed, they would be an extra burden on the state exchequer. There is no rationale for providing of staffers to the ex-Chief Ministers. The petitioners allege that after demitting office, a Chief Minister becomes a common man and thus it would be violative of the provisions of Article 14 to provide the said facilities to a former Chief Minister.

4. It is submitted that the proposed increase in salary would involve a revenue expenditure of about Rs. 1.5 crores per annum and thus, if the additional facilities are allowed to stand, there will be similar demands from other MLAs and ministers as well. Counsel for the petitioners argue that it is not within the domain of the State Legislature to make provisions for residential accommodation, staff, car and telephone for former Chief Ministers.

5. Mr. Vimal Chand Chaudhary and Mr. S.S. Hora, counsel for the petitioner also argued that having regard to the egalitarian principle underlined by Article 14 of the Constitution of India, assuring rent free accommodation and other perks, in the form of "freebies" would be distribution of largesse, not based on any rationale. It is submitted that by no stretch of logic or reason can a former Chief Minister be classified as different from any other public servant. Granting such benefits would fly in the face of settled jurisprudence that state largesse cannot be given out for no reason. Arguing that

a Chief Minister in office is an elected official accountable to the state's assembly, it is urged that once the mandate of the people ends either during elections, or after the incumbent demits office and is replaced by another, the perks of office cannot be continued just because someone had occupied it at some point of time. Doing so would cast impossible burdens on the state.

6. It was argued that the issue is no longer *res integra*, as it has been held by the Supreme Court in *Lok Prahari v. State of Uttar Pradesh and Others,* (2018) 6 SCC 1, that retention of official accommodation by the Chief Ministers after they had demitted office violates the equality clause guaranteed by Article 14 of the Constitution. Counsel submitted that in *Lok Prahari (supra),* it was further held that the public office held by the former Chief Minister becomes a matter of history and therefore, cannot form the basis of a reasonable classification to categorize previous holders of public office as a special category of persons entitled to the benefit of special privileges.

7. In *Akhil Bhartiya Upbhokta Congress v. State Of Madhya Pradesh and Others* (2011) 5 SCC 29, the Supreme Court examined the legality of the action of the Madhya Pradesh Government's action of allotting 20 acres of land to an institution on the basis of applications by a trust. The Supreme Court held that the distribution of State largesse through allocation of land, grant of permit, licence etc. should always be in a fair and equitable manner. It was held that the elements of favoritism or nepotism shall not influence the exercise of discretion by the decision maker. Observing that every action of the public authority should be guided by public interest free from arbitrariness, it was held as under:

> *"65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy*

must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

Counsel submitted that in *E.P. Royappa v. State of Tamil Nadu and Another,* AIR 1974 SC 555, the Supreme Court formulated a doctrine that the sole motive of Article 14 is to strike out the arbitrariness of the state. No action of the State should be arbitrary, and should ensure fairness and equality. Reasonableness is an essential element of the principles of equality and non-arbitrariness. This doctrine was followed by the Supreme Court in *Maneka Gandhi v. Union of India and Another,* AIR 1978 SC 597.

8. It is therefore, submitted that the allotment of government bungalows and providing other privileges to the former Chief Ministers after such functionaries demit public office(s) would be clearly subject to judicial review on the touchstone of Article 14 of the Constitution of India. This is particularly so, as such bungalows constitute public property which are scarce and meant for the use of current holders of public offices. The questions relating to allocation of such property, therefore, undoubtedly, are questions of public character and would be amenable to adjudication on the touchstone of reasonable classification as well as arbitrariness.

9. It is further argued that Rajasthan is financially backward and thus, it would not be fair to spend public money on former Chief Ministers simply to provide them luxurious lifestyles. There is no reasonable cause for providing residential accommodation for their lifetime, a car for family use, telephone, and a staff of 10 including a driver. After vacating the office of Chief Minister, she/he becomes an ordinary person and ordinary citizens are neither allowed to stay in the official bungalow nor are any such other facilities provided to

them at the expense of the State Government, as all persons circumstanced similarly should be treated alike.

10. Counsel urged that Section 7BB confers more facilities to privileged sections of society. There is no intelligible differentia and rational nexus to justify separate and exclusive treatment to former Chief Ministers after they vacate their post as Chief Ministers. Section 7BB is arbitrary and discriminatory in nature and it does not pass the dynamic and activist doctrine formulated in the case of *E.P. Royappa (supra)*. It also fails the test of reasonable classification because giving public property on the basis of previous public office held by the Chief Ministers is irrational and against principles of natural justice. It is not within the domain of the State legislature to make provisions for residential accommodation, as the State legislature can only decide the salary of the Chief Minister as well as other ministers under Article 164 of the Constitution. Section 7BB of the Rajasthan Ministers Salaries Act, 2017 is contrary to Article 14, so the provision too transgresses the Constitution whereas the increased salaries of ministers under Section 11 of Rajasthan Ministers Salaries Act, 2017 is valid and it is justified by the changing needs of society. This is fair and cannot be revoked and also is not invalid because of the doctrine of natural justice. It is further submitted that Section 7BB and 11 as inserted by the Rajasthan Ministers Salaries Act, 2017 too violate the Constitution, which guarantees equality of before law and equal opportunity. Under this Article no one is above law.

11. The State, represented by the Advocate General, Mr. M.S. Singhvi, argued that it is within the competence of the State Legislature to make provisions for residential accommodation and other allowances to former Chief Ministers. It was urged that none of the provisions of the Act violate Article 14 of the Constitution, as there is an intelligible differentia to justify separate and exclusive treatment to former Chief Ministers who form a class of their own.

12. The learned Advocate General submitted that in *Shiv Sagar Tiwari v. Union of India and Others,* (1997) 1 SCC 444, the Supreme Court held that certain holders of public office such as President, Vice President, Prime Minister, etc. stood on a different

footing when it came to allotment of public property after completion of tenure. It was argued that states are well within their rights under the Constitution to make similar provisions in favour of Chief Ministers, who represent the people when they have the confidence of the State Assembly. After they cease to be Chief Ministers, they may still be given commensurate privileges. These are distinct from holders of other kind of public office, who serve in administrative capacities and superannuate according to a previously prescribed norm.

13. The Rajasthan Ministers Salaries Act was originally enacted in 1956. Section 5 enables each Minister to salary and rent-free residential furnished accommodation for the tenure of her or his office and a state car. Further, payment of electricity and water dues too are exempted (Section 5A). After demitting office too, such ex-ministers can occupy the residences and enjoy the same facilities for two months. By virtue of the proviso to Section 5(1), in the event of such individual not vacating the residence, she or he would have to pay damages of up to Rs. 5000/- per month and is under threat of eviction, notwithstanding provisions of the Rajasthan Public Premises (Unauthorized Occupants) Act, 1964. Sections 7BB and 11 (which are impugned by the present petition) read as follows:

> ***"7BB Facilities to former Chief Ministers:-*** *(1) Subject to any rules that may be made in this behalf, a person who has served as the Chief Minister of Rajasthan for an uninterrupted term of five year shall, for remainder of his life, be entitled-*
>
> *(a) to a Government residence of the same type, and with same facilities and concessions, to which a Minister is entitled to under this Act, which may be provided at option of such person either at Jaipur or at any other District Headquarters in Rajasthan:*
>
> *Provided that if such Government residence is not available for allotment or if such person does not avail of the use of Government residence, he may be reimbursed a fixed monthly amount to be specified in the rules;*
>
> *(b) to a State car for his own use or for the use of members of his family for transport in respect of journey within or out side of the State, as may be specified in the rules;*
>
> *(c) to the use of telephone with all facilities of communication at his Government residence subject to such limit as may be specified in the rules;*

(d) to the following numbers and categories of secretarial and other staff at his Government residence to be provided by the State Government in consultation with such person on such terms and conditions as may be specified in the rules, namely:-

(i) one Private Secretary;

(ii) one Personal Assistant or Stenographer, and if this facility is not availed of, to a fixed monthly amount to be specified in the rules;

(iii) one Clerk Grade I:

(iv) two Informatics Assistant, and if this facility is not availed of, to a fixed monthly amount to be specified in the rules;

(v) one driver, and if this facility is not availed of, to a fixed monthly amount to be specified in the rules;

(vi) three Class IV employees, and if this facility is not availed of, to a fixed monthly amount to be specified in the rules:

Provided that in special circumstances to be mentioned in the order, the State Government may, on the request of such person, provide additional staff of any of the above categories temporarily to meet the circumstances.

(2) Where such person is also entitled to any of the facilities specified in clauses (a) to (d) of sub-section (1), for the time being as the President. Vice-President. Governor or Lieutenant Governor of any State or the Administrator of any Union Territory or as Member of Parliament or any State Legislature, or from the Central Government or any State Government or any Corporation owned or controlled by the Central Government or any State Government or any local authority under any law or otherwise, he or she shall not be entitled to that facility to that extent under this section.

***7C. Power to make rules with retrospective effect** -The rules under this Act may be made so as to have retrospective effect from such date, not earlier than the date of the commencement of this Act, as the Governor may, by notification in the Official Gazette, appoint.*

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***11. Regulation of certain payments on account of facilities to former Chief Ministers--** (1) Notwithstanding anything contained in this Act or any other law for the time being in force, all sums of money paid or payable, until the commencement of the Rajasthan Ministers' Salaries (Amendment) Act. 2017 on account of any facilities provided to a former Chief Minister under any rule or order of the State Government shall be deemed to have been properly and lawfully paid or payable and no demand shall be made on such Chief Minister for the refund of the whole or any portion of such payment.*

(2) Notwithstanding anything contained in section 7-BB, a former Chief Minister who was receiving any facility under any rule or order of the State Government immediately before the commencement of the Rajasthan Ministers' Salaries (Amendment) Act, 2017 shall continue to avail such facilities for the remainder of his life even if he has not served as the Chief Minister of Rajasthan for an uninterrupted term of five years."

14. Equality before the law is one of the bedrock principles which the Indian Constitution recognizes. It is the basis for a democratic constitution, whereby "we the people" have given onto ourselves a written constitution, pledged to be governed by justice and are sworn to the supremacy of the constitution and the rule of law. There is no parallel to the kind of privileges which former chief ministers of Rajasthan are entitled to through the impugned provisions. Article 18 abolishes titles and enjoins Indian citizens not to accept any foreign title or honour.

15. The impugned provision entitles an individual who anytime earlier had served as the Chief Minister of Rajasthan, the "*same facilities and concessions"* in regard to official residence, as a serving minister is entitled, "*for the remainder of his life"*. Other amenities similarly granted for life are (a) the State car for personal use and use by family members; (b) use of telephone "*with all facilities of communication*" subject to prescribed (monetary) limits; (c) a Private Secretary (d) a Stenographer/P.A.; (e) one Clerk Grade-I; (f) two informatics assistants; (g) a driver; and (h) three Class IV employees. In case such staff is unavailable, fixed amounts specified by the rules (towards salary of such staff members) have to be provided by the State. Interestingly, under Section 11(2), even if an individual had not completed a term of five years as Chief Minister, but was receiving the benefit of free official residence, car, other facilities, staff (or in lieu of it, monetary amounts), would be entitled to such perquisites for the remainder of his or her life.

16. In *Lok Prahari* (*supra*), identical questions were involved. The Court had to deal with the validity of the provisions of the U.P. Ministers (Salaries, Allowances and Miscellaneous Provisions) Act, 1981, especially the Rules framed for Ex Chief Ministers' Residence

Allotment in 1997. The Court notices its previous judgment in *Lok Prahari v. State of Uttar Pradesh and Others*, (2016) 8 SCC 389, and noted the provisions impugned which are reproduced as below:-

"4. Section 4 of the 1981 Act was amended in the year 2016. Under Section 4(3) brought in by the 2016 Amendment (U.P. Act No. 22 of 2016), former Chief Ministers of the State became entitled to allotment of government accommodation for their life time. The validity of the aforesaid Section 4(3), as amended, has been questioned by the writ Petitioner, a registered body, which claims to be "committed to upholding of the Constitution and enforcement of the Rule of law".

5. Section 4 of the 1981 Act as originally enacted and as amended in the year 2016 by 2016 Amendment is in the following terms:

Section 4 of the Act, as originally enacted	*Section 4 of the Act, as amended in the year 2016 by 2016 Amendment (U.P Act No. 22 of 2016)*
4. Residence.-(1) Each Minister shall be entitled without payment of any rent to the use throughout the term of his office and for period of fifteen days thereafter, of a residence at Lucknow which shall be furnished and maintained at public expenses at the prescribed scale. *(2) Where a Minister has not been provided with a residence in accordance with Sub-section (1), or does not avail of the benefit of the said Sub-section, he shall be entitled to a compensatory allowance at the rate of-* *(a) three hundred rupees per month in the case of Deputy Minister, and* *(b) five hundred rupees per month in any other case.*	*4. For Section 4 of the principal Act, the following sections shall be substituted, namely:* *4(1) The Chief Minister and each Minister shall be entitled, without payment of any rent to the use, throughout the term of his office and for a period of fifteen days thereafter, of a residence at Lucknow which shall be furnished and maintained at public expense at the prescribed scale.* *(2) Where the Chief Minister or a Minister has not been provided with a residence in accordance with Sub-section (1) or does not avail of the benefit of the said subsection, he shall be entitled to a compensatory allowance at the rate of-*

	(a) ten thousand rupees per month in the case of the Chief Minister, a Minister, a Minister of State (Independent Charge) and a Minister of State; *(b) eight thousand rupees per month in the case of a Deputy Minister.* *(3) A government residence shall be allotted to a former Chief Minister of Uttar Pradesh, at his/her request, for his/her life time, on payment of such rent as may be determined from time to time by the Estate Department of the State Government.*

17. Thereafter, the Court took note of the previous rulings in *Shiv Sagar Tiwari (supra)*; the preamble of the Constitution of India; the judgment in *Vineet Narain and Others v. Union of India and Another,* (1998) 1 SCC 226. The Court also recollected the judgment in *Raghunathrao Ganpatrao v. Union of India* (1994) Supp 1 SCC 191, to the effect that permanent retention of the privy purse and the privileges and rights of erstwhile rulers would be incompatible with the sovereign and republican form of Government. Furthermore, the Court took note of *Akhil Bhartiya Upbhokta Congress* (*supra*), *Sachidanand Pandey and Another v. State of West Bengal and Others,* (1987) 2 SCC 295, as well as *E.P.Royappa* (*supra*) and held as follows:-

> *"36. In the light of the above views the allocation of government bungalows to constitutional functionaries enumerated in Section 4(3) of the 1981 Act after such functionaries demit public office(s) would be clearly subject to judicial review on the touchstone of Article 14 of the Constitution of India. This is particularly so as such bungalows constitute public property which by itself is scarce and meant for use of current holders of public offices. The above is manifested by the institution of Section 4-A in the 1981 Act by the Amendment Act of 1997 (Act 8 of 1997). The questions*

relating to allocation of such property, therefore, undoubtedly, are questions of public character and, therefore, the same would be amenable for being adjudicated on the touchstone of reasonable classification as well as arbitrariness.

37. The present Petitioner, as already noticed in the opening paragraphs of this judgment, had earlier approached this Court Under Article 32 of the Constitution challenging the validity of the 1997 Rules. Not only the said writ petition was entertained but the 1997 Rules were, in fact, struck down. In doing so, this Court had, inter alia, considered the validity of the 1997 Rules in the light of Article 14 of the Constitution of India. The insertion of Section 4(3) by the 2016 Amendment as a substantive provision of the statute when the 1997 Rules to the same effect were declared invalid by the Court would require the curing of the invalidity found by this Court in the matter of allotment of government accommodation to former Chief Ministers. The defect found earlier persists. The impugned legislation, therefore, can very well be construed to be an attempt to overreach the judgment of this Court in Lok Prahari.

38. Natural resources, public lands and the public goods like government bungalows/official residence are public property that belongs to the people of the country. The 'Doctrine of Equality' which emerges from the concepts of justice, fairness must guide the State in the distribution/allocation of the same. The Chief Minister, once he/she demits the office, is at par with the common citizen, though by virtue of the office held, he/she may be entitled to security and other protocols. But allotment of government bungalow, to be occupied during his/her lifetime, would not be guided by the constitutional principle of equality.

39. Undoubtedly, Section 4(3) of the 1981 Act would have the effect of creating a separate class of citizens for conferment of benefits by way of distribution of public property on the basis of the previous public office held by them. Once such persons demit the public office earlier held by them there is nothing to distinguish them from the common man. The public office held by them becomes a matter of history and, therefore, cannot form the basis of a reasonable classification to categorize previous holders of public office as a special category of persons entitled to the benefit of special privileges. The test of reasonable classification, therefore, has to fail. Not only that the legislation i.e. Section 4(3) of the 1981 Act recognizing former holders of public office as a special class of citizens, viewed in the aforesaid context, would appear to be arbitrary and discriminatory thereby violating the equality clause. It is a legislative exercise based on irrelevant and legally unacceptable considerations, unsupported by any constitutional sanctity."

18. In the opinion of this Court, the observations and judgment in *Lok Prahari (supra)* are decisive and binding. There can be no question of life time allotment of residential accommodation to former Chief Ministers (irrespective of their tenure of office, i.e. whether it was for one term or less than a term of five year). To permit the allotment of such residential accommodation, would mean that the court has to accept the state's theory that a reasonable classification exists between those elected to hold office as Chief Ministers and those who were not so elected.

19. The Supreme Court had cited *Raghunathrao Ganpatrao* (*supra*) and the abolition of privy purses. At the time of the nation's independence, most princely states acceded to the Indian Union through compacts and other instruments. A few states (notably Hyderabad, Travancore, Bhopal, Jodhpur, Junagarh and Kashmir), resisted. Sardar Patel's skills and the untiring efforts of late V.P. Menon led to the complete integration of most of these states, before 1947, and the remaining, after 1947. As part of the bargain (of acceding to the Union), the Central Government granted to the rulers 'privy purses', i.e. specified sums of money payable annually to the (erstwhile) rulers of such States. The quantum of the 'privy purse' payment was determined by the erstwhile states' revenue, the gun salutes it was entitled to, etc. These payments were free from tax and were guaranteed by a provision in the Constitution of India - Article 29. The amounts could be anything between Rs. 5,000 per annum and Rs. 26 lakhs per annum. Privy purse payments to the former rulers were questioned as anachronistic and the first attempt to abolish the system, which also included the attempt to abolish titles was not a success; a Constitutional amendment did not pass muster in 1969. Ultimately, by the 26th Amendment to the Constitution of India in 1971, the then Prime Minister, Indira Gandhi, argued the case for abolition based on equal rights for all citizens and the need to reduce the Government's revenue deficit. The Constitutional Amendment recorded the following as its objectives and reasons:

"The concept of rulership, with privy purses and special privileges unrelated to any current functions and social purposes was incompatible with an egalitarian social order. The Government, therefore, decided to terminate the privy purses and privileges of the rulers of former Indian States. It was necessary for this purpose, apart from amending the relevant provisions of the Constitution, to insert a new article therein so as to terminate expressly the recognition already granted to such rulers and to abolish privy purses and extinguish all rights, liabilities and obligations in respect of privy purses. Hence this Act."

20. In the seminal judgment of *Indira Nehru Gandhi v. Raj Narain and Another,* AIR 1975 SC 2299, the Supreme Court held as follows:

"332. Democracy proceeds on two basic assumptions : (1) popular sovereignty in the sense that the country should be governed by the representatives of the people; that all power came from them; at their pleasure and under their watchful supervision it must be held; and (2) that there should be equality among the citizens in arriving at the decisions affecting them.

333. Today, it is impossible to conceive of a democratic republican form of government without equality of citizens. It is true that in the republics of Athens and Rome there were slaves who were regarded as chattels. And, even in the United States of America, there was a republic even before the Negroes were enfranchised. Our Constitution envisages the establishment of a democratic republican form of government based on adult suffrage.

334. Equality is a multicoloured concept incapable of a single definition. It is a notion of many shades and connotations. The preamble of the Constitution guarantees equality of status and of opportunity. They are nebulous concepts. And I am not sure whether they can provide a solid foundation to rear a basic structure. I think the types of equality which our democratic republic guarantees are all subsumed under specific articles of the Constitution like Articles 14, 15, 16, 17, 25 etc., and there is no other principle of equality which is an essential feature of our democratic polity.

335. In the opinion of some of the judges constituting the majority in Bharati's case (supra), rule of law is a basic structure of the Constitution apart from democracy.

336. The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere. 'Rule of law' is an expression to give reality to something which is not

readily expressible. That is why Sir Ivor Jennings said that it is an unruly horse. Rule of law is based upon the liberty of the individual and has as its object, the harmonizing of the opposing notions of individual liberty and public order. The notion of justice maintains the balance between the two; and justice has a variable content. Dicey's formulation of the rule of law, namely,

> *"the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, excluding the existence of arbitrariness, of prerogative, even of wide discretionary authority on the part of the government "has been discarded in the later editions of his book. That is because it was realized that it is not necessary that where law ends, tyranny should begin. As Culp Davis said, where the law ends, discretion begins and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness. There has been no government or legal system in world history which did not involve both rules and discretion. It is impossible to find a government of laws alone and not of men in the sense of eliminating all discretionary powers. All governments are governments of laws and of men.*
>
> *Jerome Frank has said:*
>
> > *"This much we can surely say: For Aristotle, from whom Harrington derived the notion of a government of laws and not of men, that notion was not expressive of hostility to what today we call administrative discretion. Nor did it have such a meaning for Harrington ".*

733. Another definition of rule of law has been given by Friedrich A. Hayek in his books: "Road of Serfdom" and "Constitution of Liberty". It is much the same as that propounded by the Franks Committee in England:

> *"The rule of law stands for the view that decisions should be made by the application of known principles or laws. In general, such decisions will be predictable, and the citizen will know where he is. On the other hand, there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law "."*

338. This Court said in Jaisinghani v. Union of India that the rule of law from one point of view means that decisions should be made by the application of known principles and rules, and, in general, such decisions should be predictable and the citizen should know where he is.

339. This exposition of the rule of law is only the aspiration for an ideal and it is not based on any down-to-earth analysis of practical problems with which a modern Government is confronted. In the world of action, this ideal cannot be worked out and that is the reason why this exposition has been rejected by all practical men.

340. If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then there is no rule of law in any modern State. A judge who passes a sentence has no other guidance except a statute which says that the person may be sentenced to imprisonment for a term which may extend to, say, a period of ten years. He must exercise considerable discretion. The High Courts and the Supreme court overrule their precedents. What previously announced rules guide them in laying down the new precedents? A court of law decides a case of first impression; no statute governs, no precedent is applicable. It is precisely because a judge cannot find a previously announced rule that he becomes a legislator to a limited extent. All these would show that it is impossible to enunciate the rule of law which has as its basis that no decision can be made unless there is a certain rule to govern the decision.

341. Leaving aside these extravagant versions of rule of law, there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a basic structure, it must be a terrestrial concept having its habitat within the four corners of the constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. May be, the other articles referred to do the same duty.

342. Das, C.J. said that Article 14 combines the English doctrine of the rule of law and the equal protection clause of the Fourteenth Amendment to the American Federal Constitution. In State of Bengal v. Anwar Ali Sarkar, Patanjali Sastri, C.J. observed that the first part of the article which has been adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India and thus enshrines what American judges regard as the "basic principle of republicanism" and that the second part which is a corollary of the first is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution. So, the concept of equality which is basic to

rule of law and that which is regarded as the most fundamental postulate of republicanism are both embodied in Article 14."

21. Much earlier, in *State of West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75, expressing reservations about the efficacy of the theory of classification, Vivian Bose, J., poignantly stated as follows:

"Take first the words "equality before the law". It is to be observed that equality in the abstract is not guaran- teed but only equality before the law. That at once leads to the question, what is the law, and whether "the law" does not draw distinctions between man and man and make for inequalities in the sense of differentiation? One has only to look to the differing personal laws which are applied daily to see that it does, to trusts and foundations from which only one particular race or community may benefit, to places of worship from which all but members of particular faith are excluded, to cemeteries and towers of silence which none but the faithful may use, to the laws of property, marriage and divorce. All that is part and parcel of the law of the land and equality before it in any literal sense is impossible unless these laws are swept away, but that is not what the Constitution says, for these very laws are preserved and along with equality before the law is also guaranteed the right to the practice of one's faith.

Then, again, what does "equality" mean? All men are not alike. Some are rich and some are poor. Some by the mere accident of birth inherit riches, others are born to pover- ty. There are differences in social standing and economic status. High sounding phrases cannot alter such fundamental facts. It is therefore impossible to apply rules of abstract equality to conditions which predicate in equality from the start; and yet the words have meaning though in my judgment their true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formula which have their essence in mere form. They constitute a frame-work of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready- made generalisations like classification. I have no doubt those tests serve as a rough and ready guide in some cases but they are not the only tests, nor are they the true tests on a final analysis.

What, after all, is classification? It is merely a systematic arrangement of things into groups or classes, usually in accordance with some definite scheme. But the scheme can be

anything and the laws which are laid down to govern the grouping must necessarily be arbitrarily select- ed; also granted the right to select, the classification can be as broad-based as one pleases, or it can be broken down and down until finally just one solitary unit is divided off from the rest. Even those who propound this theory are driven to making qualifica- tions. Thus, it is not enough merely to classify but the classification must not be 'discriminatory', it must not amount to 'hostile action', there must be 'reasonable grounds for distinction', it must be 'rational' and there must be no 'substantial discrimination'. But what then becomes of the classification? and who are to be the judges of the reasonableness and the substantiality or otherwise of the discrimination? And, much more important, whose stand- ards of reasonableness are to be applied? -the judges'?--the government's?--or that of the mythical ordinary reasonable man of law which is no single man but a composite of many men whose reasonableness can be measured and gauged even though he can neither be seen nor heard nor felt? With the utmost respect I cannot see how these vague generalisations serve to clarify the position. To my mind they do not carry us one whit beyond the original words and are no more satisfactory than saying that all men are equal before the law and that all shall be equally treated and be given equal protection. The problem is not solved by substituting one generalisation for another. To say that the law shall not be discriminatory carries us nowhere for unless the law is discriminatory the question cannot arise. The whole problem is to pick out from among the laws which make for differentiation the ones which do not offend Article 14 and separate them from those which do. It is true the word can also be used in the sense of showing favouritism, but in so far as it means that, it suffers from the same defect as the 'hostile action' test. We are then compelled to import into the question the element of motive and delve into the minds of those who make the differentia- tion or pass the discriminatory law and thus at once substi- tute a subjective test for an objective analysis. I would always be slow to impute want of good faith in these cases. I have no doubt that the motive, except in rare cases, is beyond reproach and were it not for the fact that the Constitution demands equality of treatment these laws would, in my opinion, be valid. But that apart. What material have we for delving into the mind of a legislature? It is useless to say that a man shall be judged by his acts, for acts of this kind can spring from good motives as well as bad, and in the absence of other material the presumption must be overwhelmingly in favour of the former.

I can conceive of cases where there is the utmost good faith and where the classification is scientific and ration- al and yet which would offend this law. Let us take an imaginary case in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or

who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub-standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are sub- stituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a judge is called upon to crystallise a vague generality like Article 14 into a concrete concept. Even in England, where Parliament is supreme, that is inevitable, for, as Dicey tells us in his Law of the Constitution, "Parliament is the supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enact- ments."

This, however, does not mean that judges are to deter- mine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a a narrow margin within which judges, who are human, will always be influenced by subjective factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it fails to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it. I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The common law of England grew up in that way. It was gradually added to as each concrete case arose and a decision was given ad hoc on the facts of that

particular case. It is true the judges who thus contributed to its growth were not importing personal predilections into the result and merely stated what was the law applicable to that particular ease. But though they did not purport to make the law and merely applied what according to them, had always been the law handed down by custom and tradition, they nevertheless had to draw for their material on a nebulous mass of undefined rules which, though they existed in fact and left a vague awareness in man's minds, nevertheless were neither clearly definable, nor even necessarily identifiable, until crystallised into concrete existence by a judicial decision; nor indeed is it necessary to travel as far afield. Much of the existing Hindu law has grown up in that way from instance to instance, the threads being gathered now from the rishis, now from custom, now from tradition. In the same way, the laws of liberty, of freedom and of protection under the Constitution will also slowly assume recognisable shape as decision is added to decision. They cannot, in my judgment, be enunciated in static form by hidebound rules and arbitrarily applied standards or tests.

I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these "laws" which have been called in question offend a still greater law before which even they must bow?

Doing that, what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in Ordinances promulgated in haste because of what was then felt to be the urgent neces- sities of the moment. Without casting the slightest reflec- tion on the Judges and the Courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary Courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the

judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, Article 14 is but a reflex of this mood.

What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiassed views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it."

22. In the opinion of this Court, if the terms of the Constitution are to be regarded as *"living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present..."* the impugned legislation cannot be in consonance with *"the collective conscience of a sovereign democratic republic"* as it does not accord with *"the sort of substantially equal treatment which men of resolute minds and unbiassed views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be."*

23. In terms of the Former Presidents Act, 1958 (U.S.C. § 102) as against the salary of nearly half a million dollars that a President of the United States is entitled to receive annually, former Presidents for the rest of their lives, receive pensions at the rate of about USD 211,000 per annum (as on 2018). Such former Presidents also receive USD 150,000 per annum for a few years, towards salaries of staff, to be employed by them; this amount later reduces to USD 96,000 per annum. Former Presidents are entitled to medical insurance cover too. No other perks such as rent-free accommodation, provision of electricity, free phones (or at state expense) are provided; the amounts received by the former head of the state of US is also taxable. Till 2012, permanent secret security cover was not

provided; by the Former Presidents Protection Act of 2012, such security protection has been provided to former presidents of USA.

24. Similarly, in New Zealand, a former Prime Minister is paid annuity fixed under Section 43(1)(a) of the Members of Parliament (Remuneration and Services) Act, 2013. A person who has held the office of Prime Minister for not less than two years (whether for a continuous period or for periods totaling 2 years) is paid at the yearly rate of "the lesser of the following" i.e: (a) $10,700 for each complete year of the total period for which the person held the office, or (b) $53,500 (annual maximum annuity payable). In the UK, the maximum pension paid to a former Prime Minister as on date is £70,000 a year; inclusive of this, the cost of security etc., is to the tune of £250,000 a year.

25. The provision by Section 7BB, of a residential house to a former Chief Minister, comparable to what a serving minister is entitled to for her or his lifetime, and equally, facilities such as State Car for personal use and use by family members, use of telephones, and provision of staff members numbering 10 (or the monetary equivalent of each of these perks) after the Chief Minister demits office and, by reason of Section 11(2), extension of these facilities to former Chief Ministers regardless of whether they had a tenure of five years or less, is abhorrent to the principle of equality. Equating a serving minister who is a public servant, bound by the oath of office and another who was a Chief Minister, and may not even be a public servant, for the purpose of grant of residential accommodation is nothing but appropriation of state wealth for no reason other than having held a high elective office. As held in *Lok Prahari (supra),* there is no intelligible differentia discernable between a citizen or other class of public servant, (i.e. those who work in a service under the state or hold a post in the state, in an administrative capacity) and another (i.e. the political executive, especially the former chief ministers and former ministers) to entitle the latter to favourable treatment, with regard to grant of post retirement perks and free benefits at state expense. No other class of public servant is entitled to such benefits after superannuation. For these reasons, it is held that Section 7BB is arbitrary and unconstitutional. However, it is

open to the State, by law, to grant the facility of one secretarial staff, or to sanction an amount to facilitate the hiring of such personnel, for the same grade of employees. As Section 11(2) was enacted to grant protection to allotments made to former chief ministers, who had less than a full tenure (i.e. 5 years), here again, the court is of opinion that the provision is arbitrary and unprincipled; it offends Article 14 of the Constitution of India.

26. The petitioner has challenged Section 11(1) of the Act; it is submitted that the sole rationale for the provision is to protect the allotments made to former Chief Ministers, *before coming into force of the amendment Act.* Much can be said about the suspect nature of this provision, as it protects what was an obvious illegality: grant of largesse without any legal authorization. Yet, the court is of the opinion that since the main provision is being held unconstitutional, it would not be appropriate at this point of time, to hold the provision which validates a previously existing state of affairs as arbitrary or unconstitutional.

27. All power is public trust, to be held for and on behalf of the people and for their benefit. Once the holders of such power stray from the path of rectitude and help themselves to public largesse, the essence of the democratic principle and equality is violated. One is reminded of George Orwell's apocryphal portrayal of a distorted meaning of equality in his much-celebrated *Animal Farm* – that all animals are born equal but some are more equal than others- a satirical portrayal of equality practiced in the erstwhile Soviet Union where the members of the Communist Party became the ruling elite. What stands in the way of a slide towards such a direction, mercifully in India, is the Constitution of India and substantive equality and not a formal promise of equality it assures to the people, always. Therefore, Sections 7BB and 11 of the Act, in arrogating a section of the political executive, i.e. former chief ministers to the status of a ruling elite by assuring them significant largesse for life, amounts to saying that such individuals are more equal than the other public servants and citizens of India- placing those provisions beyond the pale of valid legislation.

28. In view of the foregoing discussion, the Court hereby declares Section 7BB and 11(2) as arbitrary, contrary to Article 14 of the Constitution of India, and void. The writ petitions are allowed in the above terms.

(PRAKASH GUPTA),J (S. RAVINDRA BHAT),CJ

Parmar/-