

NAMIT SHARMA

v.

UNION OF INDIA

(Writ Petition (Civil) No. 210 of 2012)

SEPTEMBER 13, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]*Right to Information Act, 2005:*

ss. 12(5), (6) and 15(5), (6) - Appointment to the post of Chief Information Commissioners and Information Commissioners at Central as well as State Level - Eligibility criteria - Constitutional validity of - Held: The provisions of ss. 12(5) and 15(5) are constitutionally valid with a rider that the court will have to read into the provisions that the expression 'knowledge and experience' would mean and include a basic degree in the field and the experience gained thereafter - The provisions u/ss.12(6) and 15(6) are vague, have no nexus with the object of the Act and there is no intelligible differentia to support such classification - The court would, rather than declaring ss.12(6) and 15(6) unconstitutional, would read down these provisions as having effect post-appointment rather than pre-appointment - Direction to legislature to suitably amend the provisions and direction to competent authority to frame rules - Constitution of India, 1950 - Art. 14.

Central/State Information Commissions - Character and structure of - The Information Commissions are quasi-judicial authorities or tribunals performing judicial functions - The Commission is vested with civil as well as penal powers - It is required to determine the disputes by striking a balance between right to privacy and right to information - The nature of functions of the Commission involves an adjudicatory process - It possesses the essential attributes and trappings of a court - Once Information Commission is held to be

essentially a quasi-judicial forum, the Chief Information Commissioner and members of the Commission should be the persons possessing requisite qualification and experience in the field of Law and/or other specified fields - The Commission to work in a bench of two i.e. a 'judicial member' and an expert member' - Appointment to the post of judicial member should be made in consultation' with the Chief Justice of India in case of Central Information Commission and with the Chief Justices of the High Courts of the respective States in case of State Information Commissions - The term experience in law and other specified field as enumerated u/ ss. 12(5) and 15(5) of the Act would take within its ambit both-requisite qualification as well as experience in that field -A Law Officer or a lawyer having twenty years of law practice and having experience of social work is also eligible for appointment as judicial member - For appointment as Information Commissioners, the authority should prefer a person who is or has been a judge of High Court - Chief Information Commissioner shall only be a person who is or has been Chief Justice of High Court or a Judge of Supreme Court - A panel of prospective members should be created by the Department of Personnel and Training or the concerned State level ministry and be placed before the High Powered Committee to make selections in accordance with s. 12(3) of the Act.

First Appellate Authority - Qualification - Recommendation of Court that the qualification for the post should be degree in law and adequate knowledge and experience in the field of law.

Judicial Review:

Determination of constitutionality of a statute - Principles to be followed - While determining the constitutional validity of a statute, court has to see the legislative competence and the provisions of the statute to be examined in the light of the

provisions of the Constitution - No prejudice needs to be proved in cases of breach of fundamental rights - Even if two views are possible, one making the statute constitutional, the court to make efforts to uphold its constitutional validity - There is presumption of constitutionality in favour of legislation - The burden to prove that the enacted law offends fundamental rights is on the one who questions the constitutionality and shows that despite the presumption of constitutionality, the statute is unfair, unjust and unreasonable - Declaring the Law unconstitutional is one of the last resorts taken by courts - The courts should prefer to put into service principles of 'reading down' or 'reading into'.

Judicial review of the orders of Information Commission - Nothing in the Right to Information Act can take away powers vested in u/Arts.226 and 32 of the Constitution - The finality indicated u/ss. 19(6) and (7) cannot be construed to oust the jurisdiction of higher courts despite the bar created u/s. 23 - Right to Information Act, 2005.

Constitution of India, 1950 - Right to Information - Nature of - Held: Right to freedom of Speech and Expression under Article 19(1)(a) encompasses the right to import and receive information - This right is not an unlimited or unrestricted right - It is subject to statutory and constitutional limitations.

Words and Phrases - 'Quasi-judicial - Meaning of.

The petitioner filed the present writ petition under Article 32 of the Constitution as a PIL questioning the constitutional validity of sub-sections (5) and (6) of s. 12 and sub-sections (5) and (6) of s. 15 of the Right to Information Act, 2005, which primarily deal with the eligibility criteria for appointment to the posts of Chief Information Commissioners and Information Commissioners at the Central level as well as State level.

Partly allowing the writ petition, the Court

A HELD: 1.1. The Constitution of India expressly confers upon the courts the power of judicial review. The courts, as regards the fundamental rights, have been assigned the role of sentinel on the qui vive under Article 13 of the Constitution. The courts have exercised the power of judicial review, beyond legislative competence, but within the specified limitations. While the court gives immense weightage to the legislative judgment, still it cannot deviate from its own duties to determine the constitutionality of an impugned statute. Every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. [Para 7] [34-F-H]

Supreme Court Advocates on Record Association and Ors. v. Union of India (1993) 4 SCC 441: 1993 (2) Suppl. SCR 659 - followed.

E 1.2. In determining the constitutionality or validity of a constitutional provision, the court must weigh the real impact and effect thereof, on the fundamental rights. The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. [Para 9] [35-C-D]

Minerva Mills Ltd. and Ors. v. Union of India and Ors. (1980) 3 SCC 625: 1981 (1) SCR 206 - followed.

F 1.3. A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. First and the foremost, is the competence of the legislature to make the law. The wisdom or motive of the legislature in making it is not a relative consideration. The Court should examine the provisions of the statute in the light of the provisions of the Constitution (e.g. Part III),

regardless of how it is actually administered or is capable of being administered. [Para 13] [37-D-E] A

1.4. No prejudice needs to be proved in cases where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void. [Para 12] [37-C] B

A.R. Antulay v. R.S. Nayak and Anr. (1988) 2 SCC 602:1988 (1) Suppl. SCR 1 - referred to.

1.5. The Court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional. [Para 19] [41-E] C

Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi (2008) 4 SCC 720: 2008 (3) SCR 330 - relied on. D

1.6. Even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must prevail and the Court must make efforts to uphold the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of malafide, unreasonableness and arbitrariness alone. [Para 19] [41-F-G] E

1.7. In order to examine the constitutionality or otherwise of a statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as the legislative history of the statute. It would help the court in arriving at a more objective and justful approach. It would be necessary for the Court to examine the reasons of enactment of a particular provision so as F

H

A to find out its ultimate impact vis-a-vis the constitutional provisions. [Para 20] [41-G-H; 42-A]

1.8. When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the 'direct and inevitable effect' of such law. A matter within the legislative competence of the legislature has to be left to the discretion and wisdom of the framers, so long as it does not infringe any constitutional provision or violate any fundamental right. The law has to be just, fair and reasonable. Article 14 of the Constitution does not prohibit the prescription of reasonable rules for selection or of qualifications for appointment, except, where the classification is on the face of it, unjust. [Para 40] [55-B-D] B

Maneka Gandhi v. Union of India and Anr. (1978) 1 SCC 248: 1978 (2) SCR 621 - relied on. C

1.9. There is presumption of constitutionality in favour of legislation. The legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the constitutionality and shows that despite such presumption in favour of the legislation, it is unfair, unjust and unreasonable. [Para 46] [57-C-D] D

1.10. Another most significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The courts would accept an interpretation which would be in favour of the constitutionality, than an approach which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably E

H

principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. [Para 47] [57-D-F]

1.11. When the law making power of a State is restricted by a written fundamental law, then any law enacted, which is opposed to such fundamental law, being in excess of fundamental authority, is a nullity. Inequality is one such example. Still, reasonable classification is permissible under the Indian Constitution. Surrounding circumstances can be taken into consideration in support of the constitutionality of the law which is otherwise hostile or discriminatory in nature, but the circumstances must be such as to justify the discriminatory treatment or the classification, subserving the object sought to be achieved. Mere apprehension of the order being used against some persons is no ground to hold it illegal or unconstitutional particularly when its legality or constitutionality has not been challenged. [Para 37] [52-H; 53-A-C]

K. Karunakaran v. State of Kerala and Anr. (2000) 3 SCC 761: 2000 (2) SCR 735 - relied on.

1.12. It is a settled canon of constitutional jurisprudence that the doctrine of classification is a subsidiary rule evolved by courts to give practical content to the doctrine of equality. Over-emphasis of the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. It is not necessary that classification in order to be valid, must be fully carried out by the statute itself. The statute itself may indicate the persons or things to whom its provisions are intended to apply. Instead of making the classification itself, the State may lay down the principle or policy for selecting or classifying the

A

B

C

D

E

F

G

H

persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature. [Para 14] [38-D-H]

B

LIC of India v. Consumer Education and Research Centre (1995) 5 SCC 482: 1995 (1) Suppl. SCR 349 - referred to.

C

1.13. Article 14 forbids class legislation but does not forbid reasonable classification which means : It must be based on reasonable and intelligible differentia; and such differentia must be on a rational basis. It must have nexus to the object of the Act. The basis of judging whether the institutional reservation, fulfils the above-mentioned criteria, should be a) there is a presumption of constitutionality; b) the burden of proof is upon the writ petitioners, the person questioning the constitutionality of the provisions; c) there is a presumption as regard the States' power on the extent of its legislative competence; d) hardship of few cannot be the basis of determining the validity of any statute. [Paras 15 and 16] [39-A-D]

E

F

Ram Krishna Dalmia v. Justice S.R. Tendolkar AIR 1958 SC 538:1959 SCR 279; *Budhan Chodhry v. State of Bihar* AIR 1955 SC 191:1955 SCR 1045; *Atam Prakash v. State of Haryana and Ors.* (1986) 2 SCC 249: 1986 (1) SCR 399; *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamata and Ors.* (2008) 5 SCC 33: 2008 (4) SCR 1020 - referred to.

G

H

1.14. Classification, means segregation in classes which have a systematic relation usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. The differentia which is the basis of the classification and the object of the Act are distinct things and what

there must be a nexus between them. The basis of testing constitutionality, particularly on the ground of discrimination, should not be made by raising a presumption that the authorities are acting in an arbitrary manner. No classification can be arbitrary. One of the known concepts of constitutional interpretation is that the legislature cannot be expected to carve out classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned. The Courts would respect the classification dictated by the wisdom of the Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness tested on the touchstone of Article 14 of the Constitution. [Para 37] [53-E-H; 54-A-B]

Welfare Association of Allottees of Residential Premises, Maharashtra v. Ranjit P. Gohil (2003) 9 SCC 358: 2003 (2) SCR 139 - relied on.

1.15. The rule of equality or equal protection does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programme. So long as the line drawn, by the State is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point. A statute is not invalid because it might have gone further than it did, since the legislature need not strike at all evils at the same time and may address itself to the phase of the problem which seemed most acute to the legislative mind. A classification based on experience was a reasonable classification, and that it had a rational nexus to the object thereof and to hold otherwise would be detrimental to the interest of the service itself. [Para 38] [54-C-E]

State of UP and Ors. v. J.P. Chaurasia and Ors. (1989)

A 1 SCC121: 1988 (3) Suppl. SCR 288 - relied on.

1.16. Classification on the basis of educational qualifications made with a view to achieve administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. Intelligible differentia and rational nexus are the twin tests of reasonable classification. [Para 38] [54-F-G]

C *State of Jammu Kashmir v. Sh. Triloki Nath Khosa and Ors. (1974) 1SCC 19: 1974 (1) SCR 771 - relied on.*

1.17. If the law deals equally with members of a well defined class, it is not open to the charge of denial of equal protection. There may be cases where even a single individual may be in a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others. Still such law can be constitutional. [Para 39] [54-H; 55-A]

E *Constitutional Law of India by H.M. Seervai (Fourth Edition) Vol.1 - referred to.*

2.1. The citizens have the right to know about the affairs of the Government which, having been elected by them, seeks to formulate some policies of governance aimed at their welfare. The Right to Information was harnessed as a tool for promoting development; strengthening the democratic governance and effective delivery of socio-economic services. The Right to Information has been stated to be one of the important facets of proper governance. With the passage of time, this concept has not only developed in the field of law, but also has attained new dimensions in its application. Public interest is better served by effective application of the right to information. [Paras 1 and

Secretary, Ministry of Information and Broadcasting, Government of India and Ors. v. Cricket Association of Bengal and Anr. (1995) 2 SCC 161: 1995 (1) SCR 1036 - relied on.

“Freedom of Information” By Justice V.R. Krishna Iyer - referred to.

2.2. Greater transparency, promotion of citizen-government partnership, greater accountability and reduction in corruption are stated to be the salient features of the Act of 2005. Development and proper implementation of essential and constitutionally protected laws such as Mahatma Gandhi Rural Guarantee Act, 2005, Right to Education Act, 2009, etc. are some of the basic objectives of this Act. Revelation in actual practice is likely to conflict with other public interests, including efficiency, operation of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information. It is necessary to harness these conflicting interests while preserving the parameters of the democratic ideal or the aim with which this law was enacted. It is certainly expedient to provide for furnishing certain information to the citizens who desire to have it and there may even be an obligation of the state authorities to declare such information suo moto. However, balancing of interests still remains the most fundamental requirement of the objective enforcement of the provisions of the Act of 2005 and for attainment of the real purpose of the Act. [Para 33] [51-B-F]

2.3. The Right to Freedom of Speech and Expression enshrined under Article 19(1)(a) of the Constitution of India encompasses the right to impart and receive information. Despite the absence of any express mention of the word ‘information’ in the Constitution under Article

A
B
C
D
E
F
G
H

A 19(1)(a), this right has stood incorporated therein by the interpretative process by this Court. Before the Supreme Court spelt out with clarity the right to information as a right inbuilt in the constitutional framework, there existed no provision giving this right in absolute terms or otherwise. One finds glimpses of the right to information of the citizens and obligations of the State to disclose such information in various other laws, for example, Sections 74 to 78 of the Evidence Act, 1872 and Section 25(6) of the Water (Prevention and Control of Pollution) Act, 1974. [Para 1 and 24] [29-E; 44-D-G]

‘Commentary on the Right to Information Act’ (2006) by Dr. J.N. Barowalia - referred to.

D 2.4. The Right to Information, like any other right, is not an unlimited or unrestricted right. It is subject to statutory and constitutional limitations. Section 3 of the Act of 2005 clearly spells out that the right to information is subject to the provisions of the Act. Other provisions require that information must be held by or under the control of public authority besides providing for specific exemptions and the fields to which the provisions of the Act do not apply. The doctrine of severability finds place in the statute in the shape of Section 10 of the Act of 2005. [Para 34] [51-G-H]

G 2.5. Nothing in the Act of 2005 can take away the powers vested in the High Court under Article 226 of the Constitution and of this Court under Article 32. The finality indicated in ss. 19(6) and 19(7) cannot be construed to oust the jurisdiction of higher courts, despite the bar created u/s. 23 of the Act. It always has to be read and construed subject to the powers of the High Court under Article 226 of the Constitution. [Para 29] [49-E]

H

L. Chandra Kumar vs. Union of India and Ors. (1997) 3 SCC 261: 1997 (2) SCR 1186 - relied on.

3.1. The provisions of Section 12(5) of 2005 Act do not discuss the basic qualification needed, but refer to two components: (a) persons of eminence in public life; and (b) with wide knowledge and experience in the fields stated in the provision. The provision, thus, does not suffer from the infirmity of providing no criteria resulting in the introduction of the element of arbitrariness or discrimination. The legislature in its wisdom has chosen not to provide any specific qualification, but has primarily prescribed 'wide knowledge and experience' in the cited subjects as the criteria for selection. It is not for the courts to spell out what ought to be the qualifications or experience for appointment to a particular post. If the legislature itself provides 'knowledge and experience' as the basic criteria of eligibility for appointment, this per se, would not attract the rigors of Article 14 of the Constitution. [Paras 48 and 57] [57-G-H; 62-E-F]

3.2. The principles like 'reading into' and/or 'reading down' have to be applied while interpreting Section 12(5). It is the application of these principles that would render the provision constitutional and not opposed to the doctrine of equality. In order to satisfy the test of constitutionality, the Court will have to read into Section 12(5) of the Act that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law. Such appreciation and application of legal principles is a sine qua non to the determinative functioning of the Information Commission as it can tilt the balance of

A
B
C
D
E
F
G
H

A justice either way. [Paras 58 and 103] [63-D-E; 89-A-C]

3.3. Section 12(5) has inbuilt guidelines to the effect that knowledge and experience, being two distinct concepts, should be construed in their correct perspective. This would include the basic qualification as well as an experience in the respective field, both being the pre-requisites for this Section. Ambiguity, if any, resulting from the language of the provision is insignificant, being merely linguistic in nature and the same is capable of being clarified by framing appropriate rules in exercise of powers of the Central Government u/s. 27 of the Act of 2005. Certainty to vague expressions, like 'social service' and 'mass media', can be provided under the provisions which are capable of being explained by framing of proper rules or even by way of judicial pronouncements. [Paras 57 and 59] [62-G-H; 63-A-B, F]

3.4. The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus, it is held and declared that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working

H



This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof. [Para 106] [92-A-E]

4.1. Sub-Section (6) of Section 12 creates in a way a disqualification in terms thereof. This provision does have an element of uncertainty and indefiniteness. Upon its proper construction, an issue as to what class of persons are eligible to be appointed to these posts, would unexceptionally arise. According to this provision, a person to be appointed to these posts ought not to have been carrying on any business or pursuing any profession. By necessary implication, it excludes practically all classes while not specifying as to which class of persons is eligible to be appointed to that post. The exclusion is too vague, while inclusion is uncertain. It creates a situation of confusion which could not have been the intent of law. It is also not clear as to what classification the framers of the Act intended to lay down. The classification does not appear to have any nexus with the object of the Act. There is no intelligible differentia to support such classification. [Para 49] [58-E-H; 59-A-B]

4.2. No Rules have been brought to the notice of the Court which even intend to explain the vagueness and inequality explicit in the language of Section 12(6). If the language of Sections 12(5) and 12(6) are read together, the provisions under sub-Section (6) appear to be in conflict with those under sub-Section (5) and would result in defeating the provisions of sub-Section (5) of Section 12 to some extent. [Para 49] [59-C-F]

4.3. The legislature is required to exercise its power in conformity with the constitutional mandate, particularly contained in Part III of the Constitution. If the impugned provision denies equality and the right of equal consideration, without reasonable classification, the courts would be bound to declare it invalid. Section 12(6)

A
B
C
D
E
F
G
H

A does not speak of the class of eligible persons, but practically debars all persons from being appointed to the post of Chief Information Commissioner or Information Commissioners at the Centre and State levels, respectively. [Para 50] [59-G-H; 60-A]

B 4.4. The Court will normally adopt an approach which is tilted in favour of constitutionality and would prefer reading down the provision, if necessary, by adding some words rather than declaring it unconstitutional. Thus, the Court would prefer to interpret the provisions of Section 12(6) as applicable post-appointment rather than pre-appointment of the Chief Information Commissioner and Information Commissioners. In other words, these disqualifications will only come into play once a person is appointed as Chief Information Commissioner/ Information Commissioner at any level and he will cease to hold any office of profit or carry any business or pursue any profession that he did prior to such appointment. As opposed to declaring the provisions of Section 12(6) and 15(6) unconstitutional, the Court would prefer to read these provisions as having effect ‘post-appointment’. Cessation/termination of holding of office of profit, pursuing any profession or carrying any business is a condition precedent to the appointment of a person as Chief Information Commissioner or Information Commissioner at the Centre or State levels. [Paras 53 and 106] [60-G-H; 61-A; 92-F-G]

G 5.1. The Chief Information Commissioner and members of the Commission are required to possess wide knowledge and experience in the respective fields. They are expected to be well versed with the procedure that they are to adopt while performing the adjudicatory and quasi-judicial functions in accordance with the statutory provisions and the scheme of the Act of 2005. In terms of Section 8(1)(e), (f), (g), (h)

H

is required to record a definite satisfaction whether disclosure of information would be in the larger public interest or whether it would impede the process of investigation or apprehension or prosecution of the offenders and whether it would cause unwarranted invasion of the privacy of an individual. All these functions may be performed by a legally trained mind more efficaciously. The most significant function which may often be required to be performed by these authorities is to strike a balance between the application of the freedom guaranteed under Article 19(1)(a) and the rights protected under Article 21 of the Constitution. Thus, the deciding authority ought to be conscious of the constitutional concepts which hold significance while determining the rights of the parties in accordance with the provisions of the statute and the Constitution. [Para 98] [86-B-H]

5.2. Besides separation of powers, the independence of judiciary is of fundamental constitutional value in the structure of Indian Constitution. Impartiality, independence, fairness and reasonableness in judicial decision making are the hallmarks of the Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. [Para 101] [88-B-C]

Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 17 - relied on.

5.3. The independence of judiciary stricto sensu applies to the Court system. Thus, by necessary implication, it would also apply to the tribunals whose functioning is quasi-judicial and akin to the court system. The entire administration of justice system has to be so independent and managed by persons of legal acumen, expertise and experience that the persons demanding justice must not only receive justice, but should also

A
B
C
D
E
F
G
H

A have the faith that justice would be done. [Para 102] [88-D-E]

B 5.4. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. [Para 97] [85-F-H; 86-A]

E *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. (1976) 2 SCC 981: 1976 Suppl. SCR 489; Assistant Commissioner, Commercial Tax Department Works Contract and Leasing, Kota v. Shukla and Brothers (2010) 4 SCC 785: 2010 (4) SCR 627 - relied on.*

F 5.5. Under the provisions of the Act, particularly, Sections 4, 12, 18, 19, 20, 22, 23 and 25, the Central or State Information Commission, as the case may be, not only exercises adjudicatory powers of a nature no different than a judicial tribunal but is vested with the powers of a civil court as well. Therefore, it is required to decide a lis, where information is required by a person and its furnishing is contested by the other. The Commission exercises two kinds of penal powers: firstly, in terms of Section 20(1), it can impose penalty upon the defaulters or violators of the provisions of the Act and,

H

secondly, Section 20(2) empowers the Central and the State Information Commission to conduct an enquiry and direct the concerned disciplinary authority to take appropriate action against the erring officer in accordance with law. Hence, the Commission has powers to pass orders having civil as well as penal consequences. Besides this, the Commission has been given monitoring and recommendatory powers. In terms of Section 23, the jurisdiction of civil courts has been expressly barred. [Para 59] [63-G-H; 64-A-C]

“The Judicialisation of ‘Administrative’ Tribunals in the UK : from Hewart to Leggatt” by Gavin Drewry - referred to.

5.6. The nature of functions of the Information Commission involves an adjudicatory process where parties are required to be heard, appropriate directions are to be issued, the orders are required to be passed upon due application of mind and for valid reasons. The exercise of powers and passing of the orders by the authorities concerned under the provisions of the Act of 2005 cannot be arbitrary. It has to be in consonance with the principles of natural justice and the procedure evolved by such authority. Natural justice has three indispensable facets, i.e., grant of notice, grant of hearing and passing of reasoned orders. Thus, the authorities under the Act of 2005 and the Tribunals are discharging quasi-judicial functions. [Para 70] [68-G-H; 69-A-B]

Indian National Congress (I) v. Institute of Social Welfare and Ors. (2002) 5 SCC 685; 2002 (3) SCR 1040 - relied on.

5.7. The Legislature, in its wisdom, has provided for two appeals under the 2003 Act. Higher the adjudicatory forum, greater is the requirement of adherence to the rule of judiciousness, fairness and to act in accordance with the procedure prescribed and in absence of any such prescribed procedure, to act in consonance with the

A

B

C

D

E

F

G

H

A principles of natural justice. Higher also is the public expectation from such tribunal. The adjudicatory functions performed by these bodies are of a serious nature. An order passed by the Commission is final and binding and can only be questioned before the High Court or the Supreme Court in exercise of the Court’s jurisdiction under Article 226 and/or Article 32 of the Constitution, respectively. [Para 75] [72-H; 73-A-B]

5.8. An authority is described as quasi-judicial when it has some attributes or trappings of judicial provisions but not all. The concerned authorities particularly the Information Commission, possess the essential attributes and trappings of a court. Its powers and functions, as defined under the Act of 2005 also sufficiently indicate that it has adjudicatory powers quite akin to the court system. They adjudicate matters of serious consequences. The Commission may be called upon to decide how far the right to information is affected where information sought for is denied or whether the information asked for is ‘exempted’ or impinges upon the ‘right to privacy’ or where it falls in the ‘no go area’ of applicability of the Act. It is not mandatory for the authorities to allow all requests for information in a routine manner. The Act of 2005 imposes an obligation upon the authorities to examine each matter seriously being fully cautious of its consequences and effects on the rights of others. The decision making process by these authorities is not merely of an administrative nature. The functions of these authorities are more aligned towards the judicial functions of the courts rather than mere administrative acts of the State authority. [Para 72] [69-F-H; 70-A-F]

Gobind v. State of Madhya Pradesh and Anr. (1975) 2 SCC 148; 1975 (3) SCR 946; *Ram Jethmalani and Ors. v.*

H

Union of India (2011) 8 SCC 1: 2011 (8) SCR 725 - relied on. A

5.9. 'Quasi judicial' is a term which may not always be used with utmost clarity and precision. An authority which exercises judicial functions or functions analogous to the judicial authorities would normally be termed as 'quasi-judicial'. The expression 'quasi judicial' has been termed to be one which stands midway a judicial and an administrative function. If the authority has any express statutory duty to act judicially in arriving at the decision in question, it would be deemed to be quasi-judicial. Where the function to determine a dispute is exercised by virtue of an executive discretion rather than the application of law, it is a quasi-judicial function. A quasi-judicial act requires that a decision is to be given not arbitrarily or in mere discretion of the authority but according to the facts and circumstances of the case as determined upon an enquiry held by the authority after giving an opportunity to the affected parties of being heard or wherever necessary of leading evidence in support of their contention. The authority and the Tribunal constituted under the provisions of the Act of 2005 are certainly quasi-judicial authority/tribunal performing judicial functions. [Paras 73 and 74] [70-G; 72-B-D]

State of Himachal Pradesh and Ors. v. Raja Mahendra Pal and Anr. 1995 Supp (2) SCC 731 - relied on. F

'Advanced Law Lexicon' (3rd Edn., 2005) by P. Ramanathan Aiyar - relied on. G

5.10. Once it is held that the Information Commission is essentially quasi-judicial in nature, the Chief information Commissioner and members of the Commission should be the persons possessing requisite H

A qualification and experience in the field of law and/or other specified fields. [Para 80] [76-C]

L. Chandra Kumar v. Union of India (1997) 3 SCC 261: 1997 (2) SCR 1186 - followed.

B *Bharat Bank Ltd., Delhi v. Employees of Bharat Bank and Ors.* 1950SCR 459 : AIR 1950 SC 188; *S.P. Sampath Kumar v. Union of India* (1987) 1 SCC 124: 1987 (1) SCR 435; *Union of India v. Madras Bar Association* [(2010) 11 SCC 1: 2010 (6) SCR 857 - relied on.

C 5.11. In terms of sub-Section (5) of ss. 12 and 15 of the Act, besides being a person of eminence in public life, the necessary qualification required for appointment as Chief Information Commissioner or Information Commissioner is that the person should have wide knowledge and experience in law and other specified fields. The term 'experience in law' is an expression of composite content and would take within its ambit both the requisite qualification in law as well as experience in the field of law. Experience in absence of basic qualification would certainly be insufficient in its content and would not satisfy the requirements of the said provision. Wide knowledge in a particular field would, by necessary implication, refer to the knowledge relatable to education in such field whereas experience would necessarily relate to the experience attained by doing work in such field. Both must be read together in order to satisfy the requirements of Sections 12(5) of and 15(5) the Act of 2005. Similarly, wide knowledge and experience in other fields would have to be construed as experience coupled with basic educational qualification in that field. [Para 93] [83-A-C, E-F]

State of Madhya Pradesh v. Dharam Bir (1998) 6 SCC 165: 1998 (3) SCR 511 - referred to. H

5.12. The requirement of a judicial mind for manning the judicial tribunal is a well accepted discipline in all the major international jurisdictions with hardly with any exceptions. Even if the intention is to not only appoint people with judicial background and expertise, then the most suitable and practical resolution would be that a ‘judicial member’ and an ‘expert member’ from other specified fields should constitute a Bench and perform the functions in accordance with the provisions of the Act of 2005. Such an approach would further the mandate of the statute by resolving the legal issues as well as other serious issues like an inbuilt conflict between the Right to Privacy and Right to Information while applying the balancing principle and other incidental controversies. Participation by qualified persons from other specified fields would be a positive contribution in attainment of the proper administration of justice as well as the object of the Act of 2005. Such an approach would help to withstand the challenge to the constitutionality of Section 12(5). [Para 103] [89-D-G]

6.1. Once it is held that it is a judicial tribunal having the essential trappings of a court, then it must, as an irresistible corollary, follow that the appointments to this august body are made in consultation with the judiciary. Section 12(3) of the Act states about the High-powered Committee, which has to recommend the names for appointment to the post of Chief Information Commissioner and Information Commissioners to the President. However, this Section, and any other provision for that matter, is entirely silent as to what procedure for appointment should be followed by this High Powered Committee. [Para 104] [89-H; 90-A-B]

6.2. In the event, the Government is of the opinion and desires to appoint not only judicial members but also experts from other fields to the Commission in terms of

A
B
C
D
E
F
G
H

A Section 12(5) of the Act of 2005, then it may do so, however, subject to the riders stated in this judgment. To ensure judicial independence, effective adjudicatory process and public confidence in the administration of justice by the Commission, it would be necessary that the Commission is required to work in Benches. The Bench should consist of one judicial member and the other member from the specified fields in terms of Section 12(5) of the Act of 2005. [Para 104] [90-C-D]

C 6.3. It will be incumbent and in conformity with the scheme of the Act that the appointments to the post of judicial member are made ‘in consultation’ with the Chief Justice of India in case of Chief Information Commissioner and members of the Central Information Commission and the Chief Justices of the High Courts of the respective States, in case of the State Chief Information Commissioner and State Information Commissioners of that State Commission. In the case of appointment of members to the respective Commissions from other specified fields, the DoPT in the Centre and the concerned Ministry in the States should prepare a panel, after due publicity, empanelling the names proposed at least three times the number of vacancies existing in the Commission. Such panel should be prepared on a rational basis, and should inevitably form part of the records. The names so empanelled, with the relevant record should be placed before the said High Powered Committee. In furtherance to the recommendations of the High Powered Committee, appointments to the Central and State Information Commissions should be made by the competent authority. Empanelment by the DoPT and other competent authority has to be carried on the basis of a rational criteria, which should be duly reflected by recording of appropriate reasons. The advertisement issued by such agency should not

particular class of persons stated u/s. 12(5), but must cover persons from all fields. Complete information, material and comparative data of the empanelled persons should be made available to the High Powered Committee. The High Powered Committee itself has to adopt a fair and transparent process for consideration of the empanelled persons for its final recommendation. The selection process should be commenced at least three months prior to the occurrence of vacancy. [Paras 104 and 106] [90-E-H; 91-A-C; 95-A]

6.4. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a 'judicial member', while the other an 'expert member'. The judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A law officer or a lawyer may also be eligible provided he is a person who has practiced law at least for a period of twenty years as on the date of the advertisement. Such lawyer should also have experience in social work. The competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India. [Para 106] [93-G-H; 94-A-C]

6.5. The Court directed that the provisions of Section 12(5), 12(6) and 15(5), 15(6) of the Act would be amended at the earliest by the legislature to avoid any ambiguity or impracticability and to make it in consonance with the constitutional mandates. The Central Government and/or the competent authority is directed to frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance

A

B

C

D

E

F

G

H

A with the basic rule of law. Such rules should be framed with particular reference to Section 27 and 28 of the Act within a period of six months from the date of the judgment. [Para 106] [92-H; 93-A-C]

B *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261: 1997 (2) SCR 1186 - followed.

Centre for PIL and Anr. v. Union of India and Anr. (2011) 4 SCC 1: 2011 (4) SCR 445 - relied on.

C 7.1. Section 5 of the Act of 2005 makes it obligatory upon every public authority to designate as many officers, as Central Public Information Officers and State Information Public Officers in all administrative units or offices, as may be necessary to provide information to the persons requesting information under the Act of 2005. Further, the authority is required to designate Central Assistant Public Information Officer and State Assistant Public Information Officer at the sub-divisional or sub-district level. The Assistant Public Information Officers are to perform dual functions - (1) to receive the applications for information; and (2) to receive appeals under the Act. The applications for information are to be forwarded to the concerned Information Officer and the appeals are to be forwarded to the Central Information Commission or the State Information Commission, as the case may be. It was contemplated that these officers would be designated at all the said levels within hundred days of the enactment of the Act. There is no provision under the Act of 2005 which prescribes the qualification or experience that the Information Officers are required to possess. In fact, the language of the Section itself makes it clear that any officer can be designated as Central Public Information Officer or State Public Information Officer. Thus, no specific requirement is mandated for designating an officer at the sub-divisional or sub-district level. There is also no qualifi

required of these designated officers to whom the first appeal would lie u/s. 19(1) of the Act. [Para 87] [79-H; 80-A-E, F-G]

7.2. The functions of the Chief Information Commissioner and Information Commissioners may be better performed by a legally qualified and trained mind possessing the requisite experience. The same should also be applied to the designation of the first appellate authority, i.e., the senior officers to be designated at the Centre and State levels. However, in view of language of Section 5, it may not be necessary to apply this principle to the designation of Public Information Officer. [Para 99] [87-D-E]

8. The Information Commission is bound by the law of precedence, i.e., judgments of the High Court and the Supreme Court of India. In order to maintain judicial discipline and consistency in the functioning of the Commission, the Commission is directed to give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case. It is not only the higher court's judgments that are binding precedents for the Information Commission, but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission. The rule of precedence is equally applicable to intra appeals or references in the hierarchy of the Commission. [Para 106] [95-D-F]

Case Law Reference:

1995 (1) SCR 1036	relied on	Para 1
1993 (2) Suppl. SCR 659	followed	Para 8
1981 (1) SCR 206	followed	Para 9

A
B
C
D
E
F
G
H

A	1988 (1) Suppl. SCR 1	referred to	Para 12
	1995 (1) Suppl. SCR 349	referred to	Para 14
	1959 SCR 279	referred to	Para 17
	1955 SCR 1045	referred to	Para 17
B	1986 (1) SCR 399	referred to	Para 18
	2008 (4) SCR 1020	referred to	Para 19
	2008 (3) SCR 330	relied on	Para 19
C	1997 (2) SCR 1186	relied on	Para 29
	2000 (2) SCR 735	relied on	Para 37
	2003 (2) SCR 139	relied on	Para 37
	1988 (3) Suppl. SCR 288	relied on	Para 38
D	1974 (1) SCR 771	relied on	Para 38
	1978 (2) SCR 621	relied on	Para 40
	2002 (3) SCR 1040	relied on	Para 71
E	1975 (3) SCR 946	relied on	Para 72
	2011 (8) SCR 725	relied on	Para 72
	1995 Supp (2) SCC 731	relied on	Para 74
	1950 SCR 459	relied on	Para 80
F	1987 (1) SCR 435	relied on	Para 80
	2010 (6) SCR 857	relied on	Para 80
	1997 (2) SCR 1186	followed	Para 81
	1998 (3) SCR 511	referred to	Para 94
G	1976 (0) Suppl. SCR 489	relied on	Para 97
	2010 (4) SCR 627	relied on	Para 97
	(2010) 11 SCC 17	relied on	Para 101
H	1997 (2) SCR 1186	follo	



2011 (4) SCR 445 **relied on** **Para 104** A

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 210 of 2012.

Under Article 32 of the Constitution of India.

Amit Sharma, Rahul Jain for the Petitioner.

A.S. Chandiok, ASG, R.K. Rathore, Rekha Pandey, B.V. Balram Das for the Respondent.

The Judgment of the Court was delivered by C

SWATANTER KUMAR, J. 1. The value of any freedom is determined by the extent to which the citizens are able to enjoy such freedom. Ours is a constitutional democracy and it is axiomatic that citizens have the right to know about the affairs of the Government which, having been elected by them, seeks to formulate some policies of governance aimed at their welfare. However, like any other freedom, this freedom also has limitations. It is a settled proposition that the Right to Freedom of Speech and Expression enshrined under Article 19(1)(a) of the Constitution of India (for short 'the Constitution') encompasses the right to impart and receive information. The Right to Information has been stated to be one of the important facets of proper governance. With the passage of time, this concept has not only developed in the field of law, but also has attained new dimensions in its application. This court while highlighting the need for the society and its entitlement to know has observed that public interest is better served by effective application of the right to information. This freedom has been accepted in one form or the other in various parts of the world. This Court, in absence of any statutory law, in the case of *Secretary, Ministry of Information and Broadcasting, Government of India & Ors. v. Cricket Association of Bengal & Anr.* [(1995) 2 SCC 161] held as under :

"The democracy cannot exist unless all citizens have a right H

A to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 ½ per cent of the population has an access to the print media which is not subject to pre-censorship."

D 2. The legal principle of 'A man's house is his castle. The midnight knock by the police bully breaking into the peace of the citizen's home is outrageous in law', stated by Edward Coke has been explained by Justice Douglas as follows:

E "The free State offers what a police state denies – the privacy of the home, the dignity and peace of mind of the individual. That precious right to be left alone is violated once the police enter our conversations."

F 3. The States which are governed by Policing and have a policy of greater restriction and control obviously restrict the enjoyment of such freedoms. That, however, does not necessarily imply that this freedom is restriction-free in the States where democratic governance prevails. Article 19(1)(a) of the Constitution itself is controlled by the reasonable restrictions imposed by the State by enacting various laws from time to time.

H 4. The petitioner, a public spirited citizen, has approached this Court under Article 32 of the Constitution stating that though the Right to Information Act, 2005 (for short 'Act of 2005') is an important tool in the hands of any citizen

A balances on the working of the public servants, yet the criterion
for appointment of the persons who are to adjudicate the
disputes under this Act are too vague, general, *ultra vires* the
Constitution and contrary to the established principles of law
laid down by a plethora of judgments of this Court. It is the stand
of the petitioner that the persons who are appointed to
discharge judicial or quasi-judicial functions or powers under
the Act of 2005 ought to have a judicial approach, experience,
knowledge and expertise. Limitation has to be read into the
competence of the legislature to prescribe the eligibility for
appointment of judicial or quasi-judicial bodies like the Chief
Information Commissioner, Information Commissioners and the
corresponding posts in the States, respectively. The legislative
power should be exercised in a manner which is in consonance
with the constitutional principles and guarantees. Complete lack
of judicial expertise in the Commission may render the decision
making process impracticable, inflexible and in given cases,
contrary to law. The availability of expertise of judicial members
in the Commission would facilitate the decision-making to be
more practical, effective and meaningful, besides giving
semblance of justice being done. The provision of eligibility
criteria which does not even lay down any qualifications for
appointment to the respective posts under the Act of 2005
would be unconstitutional, in terms of the judgments of this Court
in the cases of *Union of India v. Madras Bar Association*,
[(2010) 11 SCC 1]; *Pareena Swarup v. Union of India* [(2008)
14 SCC 107]; *L. Chandra Kumar v. Union of India* [(1997) 3
SCC 261]; *R.K. Jain v. Union of India* [(1993) 4 SCC 119];
S.P. Sampath Kumar v. Union of India [(1987) 1 SCC 124].

5. It is contended that keeping in view the powers, functions
and jurisdiction that the Chief/State Information Commissioner
and/or the Information Commissioners exercise undisputedly,
including the penal jurisdiction, there is a certain requirement
of legal acumen and expertise for attaining the ends of justice,
particularly, under the provisions of the Act of 2005. On this
premise, the petitioner has questioned the constitutional validity

A
B
C
D
E
F
G
H

A of sub-Sections (5) and (6) of Section 12 and sub-Sections (5)
and (6) of Section 15 of the Act of 2005. These provisions
primarily deal with the eligibility criteria for appointment to the
posts of Chief Information Commissioners and Information
Commissioners, both at the Central and the State levels. It will
be useful to refer to these provisions at this very stage.

B
C “Section 12 — (5) The Chief Information Commissioner
and Information Commissioners shall be persons of
eminence in public life with wide knowledge and experience
in law, science and technology, social service,
management, journalism, mass media or administration
and governance.

D (6) The Chief Information Commissioner or an Information
Commissioner shall not be a Member of Parliament or
Member of the Legislature of any State or Union territory,
as the case may be, or hold any other office of profit or
connected with any political party or carrying on any
business or pursuing any profession.

E XXX XXX XXX

F Section 15 (5) The State Chief Information Commissioner
and the State Information Commissioners shall be persons
of eminence in public life with wide knowledge and
experience in law, science and technology, social service,
management, journalism, mass media or administration
and governance.

G (6) The State Chief Information Commissioner or a State
Information Commissioner shall not be a Member of
Parliament or Member of the Legislature of any State or
Union territory, as the case may be, or hold any other office
of profit or connected with any political party or carrying
on any business or pursuing any profession.

H 6. The challenge to the constitu
provisions *inter alia* is on the following

- (i) Enactment of the provisions of eligibility criteria for appointment to such high offices, without providing qualifications, definite criterion or even consultation with judiciary, are in complete violation of the fundamental rights guaranteed under Article 14, 16 and 19(1)(g) of the Constitution. A B
- (ii) Absence of any specific qualification and merely providing for experience in the various specified fields, without there being any nexus of either of these fields to the object of the Act of 2005, is violative of the fundamental constitutional values. C
- (iii) Usage of extremely vague and general terminology like social service, mass media and alike terms, being indefinite and undefined, would lead to arbitrariness and are open to abuse. D
- (iv) This vagueness and uncertainty is bound to prejudicially affect the administration of justice by such Commissions or Tribunals which are vested with wide adjudicatory and penal powers. It may not be feasible for a person of ordinary experience to deal with such subjects with legal accuracy. E
- (v) The Chief Information Commissioner and Information Commissioners at the State and Centre level perform judicial and/or quasi-judicial functions under the Act of 2005 and therefore, it is mandatory that persons with judicial experience or majority of them should hold these posts. F
- (vi) The fundamental right to equality before law and equal protection of law guaranteed by Article 14 of the Constitution enshrines in itself the person's right to be adjudged by a forum which exercises judicial power in an impartial and independent manner G

H

- A consistent with the recognised principles of adjudication.
- (vii) Apart from specifying a high powered committee for appointment to these posts, the Act of 2005 does not prescribe any mechanism for proper scrutiny and consultation with the judiciary in order to render effective performance of functions by the office holders, which is against the basic scheme of our Constitution. B
- (viii) Even if the Court repels the attack to the constitutionality of the provisions, still, keeping in view the basic structure of the Constitution and the independence of judiciary, it is a mandatory requirement that judicial or quasi-judicial powers ought to be exercised by persons having judicial knowledge and expertise. To that extent, in any case, these provisions would have to be read down. Resultantly, limitation has to be read into the competence of the legislature to prescribe requisite qualifications for appointment of judicial or quasi-judicial bodies or tribunals. C D E

Discussion

7. The Constitution of India expressly confers upon the courts the power of judicial review. The courts, as regards the fundamental rights, have been assigned the role of *sentinel on the qui vive* under Article 13 of the Constitution. Our courts have exercised the power of judicial review, beyond legislative competence, but within the specified limitations. While the court gives immense weightage to the legislative judgment, still it cannot deviate from its own duties to determine the constitutionality of an impugned statute. Every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality.

H

8. The foundation of this power of judicial review, as explained by a nine-Judge's Bench in the case of *Supreme Court Advocates on Record Association & Ors. v. Union of India* [(1993) 4 SCC 441], is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the 'will' of the legislature as declared in the statute, stands in opposition to that of the people as declared in the Constitution - the 'will' of the people must prevail.

9. In determining the constitutionality or validity of a constitutional provision, the court must weigh the real impact and effect thereof, on the fundamental rights. The Court would not allow the legislature to overlook a constitutional provision by employing indirect methods. In *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* [(1980) 3 SCC 625], this Court mandated without ambiguity, that it is the Constitution which is supreme in India and not the Parliament. The Parliament cannot damage the Constitution, to which it owes its existence, with unlimited amending power.

10. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in the '*Shorter Constitution of India*' (Fourteenth Edition, 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:-

"Grounds of unconstitutionality . – A law may be unconstitutional on a number of grounds:

A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

- i. Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Art. 143, (Ref. AIR 1965 SC 745 (145): 1965 (1) SCR 413)
 - ii. Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the 7th Sch., read with the connected Articles. (Ref. Under Art. 143, AIR 1965 SC 745)
 - iii. Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Art. 301. (Ref. *Atiabari Tea Co. v. State of Assam*, AIR 1961 SC 232)
 - iv. In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State. (*State of Bombay v. Chamaraughwala R.M.D.*, AIR 1957 SC 699)
 - v. That the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. *Hamdard Dawakhana Wakf v. Union of India*, AIR 1960 SC 554 (568)
11. On the other hand, a law cannot be invalidated on the following grounds:
- (a) That in making the law (including an Ordinance), the law-making body did not apply its mind (even though it may be a valid ground for challenging an executive act), (Ref. *Nagaraj K. V. State of A.P.*, AIR 1985 SC 551 (paras 31, 36), or was prompted by some improper motive. (Ref. *Rehman Shagoo v. State of J & K*, AIR 1960 SC 1(6); 1960 (1) SCR 681)

(b) That the law contravenes some constitutional limitation which did not exist at the time of enactment of the law in question. (Ref. *Joshi R.S. v. Ajit Mills Ltd.*, AIR 1977 SC 2279 (para 16) A

(c) That the law contravened any of the Directive contained in Part IV of the Constitution. (Ref. *Deep Chand v. State of U.P.*, AIR 1959 SC 648 (664) B

12. Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void {Ref. *A.R. Antulay v. R.S. Nayak & Anr.* [(1988) 2 SCC 602]}. C

13. A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute. First and the foremost, as already noticed, is the competence of the legislature to make the law. The wisdom or motive of the legislature in making it is not a relative consideration. The Court should examine the provisions of the statute in light of the provisions of the Constitution (e.g. Part III), regardless of how it is actually administered or is capable of being administered. In this regard, the Court may consider the following factors as noticed in *D.D. Basu* (supra). D

“(a) The possibility of abuse of a statute does not impart to it any element of invalidity. E

(b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements. F

In the case of *Charan Lal Sahu v. UOI* [(1990) 1 SCC 614 (667) (para 13), MUKHERJEE, C.J. made an unguarded statement, viz., that H

A “In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into.”

It can be supported only on the test of ‘direct and inevitable effect’ and, therefore, needs to be explained in some subsequent decision. B

(c) When the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the ‘direct and inevitable effect’ of such law. C

(d) There is presumption in favour of constitutionality of statutes. The law courts can declare the legislative enactment to be an invalid piece of legislation only in the even of gross violation of constitutional sanctions.” D

14. It is a settled canon of constitutional jurisprudence that the doctrine of classification is a subsidiary rule evolved by courts to give practical content to the doctrine of equality. Over-emphasis of the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. (Ref. *LIC of India v. Consumer Education & Research Centre* [(1995) 5 SCC 482]. It is not necessary that classification in order to be valid, must be fully carried out by the statute itself. The statute itself may indicate the persons or things to whom its provisions are intended to apply. Instead of making the classification itself, the State may lay down the principle or policy for selecting or classifying the persons or objects to whom its provisions are to apply and leave it to the discretion of the Government or administrative authority to select such persons or things, having regard to the principle or policy laid down by the Legislature. E

15. Article 14 forbids class legislation but does not forbid reasonable classification which means :

- (i) It must be based on reasonable and intelligible differentia; and
- (ii) Such differentia must be on a rational basis.
- (iii) It must have nexus to the object of the Act.

16. The basis of judging whether the institutional reservation, fulfils the above-mentioned criteria, should be a) there is a presumption of constitutionality; b) the burden of proof is upon the writ petitioners, the person questioning the constitutionality of the provisions; c) there is a presumption as regard the States' power on the extent of its legislative competence; d) hardship of few cannot be the basis of determining the validity of any statute.

17. The principles for adjudicating the constitutionality of a provision have been stated by this Court in its various judgments. Referring to these judgments and more particularly to the cases of *Ram Krishna Dalmia v. Justice S.R. Tendolkar* AIR 1958 SC 538 and *Budhan Chodhry v. State of Bihar* AIR 1955 SC 191, the author Jagdish Swarup in his book 'Constitution of India (2nd Edition, 2006) stated the principles to be borne in mind by the Courts and detailed them as follows:

“(a) that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

A
B
C
D
E
F
G
H

A (c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

B (d) that the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

C (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

D (f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.”

F
G
H 18. These principles have, often been reiterated by this Court while dealing with the constitutionality of a provision or a statute. Even in the case of *Atam Prakash v. State of Haryana & Ors.* [(1986) 2 SCC 249], the Court stated that whether it is the Constitution that is expounded or the constitutional validity of a statute that is considered, a cardinal rule is to look to the Preamble of the Constitution as the guiding light and to the Directive Principles of State Policy as the Book of Interpretation. The Constitution being *sui generis*, these are the factors of distant vision that help in the determinat

issues. Referring to the object of such adjudicatory process, the Court said :

“...we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. For example, when we consider the question whether a statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV of the Constitution.”

19. Dealing with the matter of closure of slaughter houses in the case of *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat & Ors.* [(2008) 5 SCC 33], the Court while noticing its earlier judgment in the case of *Government of Andhra Pradesh & Ors. v. Smt. P. Laxmi Devi* [(2008) 4 SCC 720], introduced a rule for exercise of such jurisdiction by the courts stating that the Court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional. Further, in the case of *P. Lakshmi Devi* (supra), the Court has observed that even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must prevail and the Court must make efforts to uphold the constitutional validity of a statute, unlike a policy decision, where the executive decision could be rendered invalid on the ground of malafide, unreasonableness and arbitrariness alone.

20. In order to examine the constitutionality or otherwise of a statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as the legislative history of the statute. It would help the court in arriving at a more objective and justful approach. It would be necessary for the Court to examine the reasons of enactment of a

A particular provision so as to find out its ultimate impact *vis-a-vis* the constitutional provisions. Therefore, we must examine the contemplations leading to the enactment of the Act of 2005.

(A) **SCHEME, OBJECTS AND REASONS**

B 21. In light of the law guaranteeing the right to information, the citizens have the fundamental right to know what the Government is doing in its name. The freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political growth. It is a safety valve. People are more ready to accept the decisions that go against them if they can in principle seem to influence them. In a way, it checks abuse of power by the public officials. In the modern times, where there has been globalization of trade and industry, the scientific growth in the communication system and faster commuting has turned the world into a very well-knit community. The view projected, with some emphasis, is that the imparting of information qua the working of the government on the one hand and its decision affecting the domestic and international trade and other activities on the other, impose an obligation upon the authorities to disclose information.

OBJECTS AND REASONS

F 22. The Right to Information was harnessed as a tool for promoting development; strengthening the democratic governance and effective delivery of socio-economic services. Acquisition of information and knowledge and its application have intense and pervasive impact on the process of taking informed decision, resulting in overall productivity gains. It is also said that information and knowledge are critical for realising all human aspirations such as improvement in the quality of life. Sharing of information, for instance, about the new techniques of farming, health care facilities, hazards of environmental degradation, opportunities for learning and earning, legal remedies for combating gender bias etc., have overtime, made significant contribution

poor people. It is also felt that this right and the laws relating thereto empower every citizen to take charge of his life and make proper choices on the basis of freely available information for effective participation in economic and political activities.

A

23. Justice V.R. Krishna Iyer in his book “Freedom of Information” expressed the view:

B

“The right to information is a right incidental to the constitutionally guaranteed right to freedom of speech and expression. The international movement to include it in the legal system gained prominence in 1946 with the General Assembly of the United Nations declaring freedom of information to be a fundamental human right and a touchstone for all other liberties. It culminated in the United Nations Conference on Freedom of Information held in Geneva in 1948.

C

D

Article 19 of the Universal Declaration of Human Rights says:

“Everyone has the right to freedom of information and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

E

F

It may be a coincidence that Article 19 of the Indian Constitution also provides every citizen the right to freedom of speech and expression. However, the word ‘information’ is conspicuously absent. But, as the highest Court has explicated, the right of information is integral to freedom of expression.

G

“India was a member of the Commission on Human Rights appointed by the Economic

H

A

B

C

D

E

F

G

H

and Social Council of the United Nations which drafted the 1948 Declaration. As such it would have been eminently fit and proper if the right to information was included in the rights enumerated under Article 19 of our Constitution. Article 55 of the U.N. Charter stipulates that the United Nations ‘shall promote respect for, and observance of, human rights and fundamental freedoms’ and according to Article 56 ‘all members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.’”

24. Despite the absence of any express mention of the word ‘information’ in our Constitution under Article 19(1)(a), this right has stood incorporated therein by the interpretative process by this Court laying the unequivocal statement of law by this Court that there was a definite right to information of the citizens of this country. Before the Supreme Court spelt out with clarity the right to information as a right inbuilt in the constitutional framework, there existed no provision giving this right in absolute terms or otherwise. Of course, one finds glimpses of the right to information of the citizens and obligations of the State to disclose such information in various other laws, for example, Sections 74 to 78 of the Indian Evidence Act, 1872 give right to a person to know about the contents of the public documents and the public officer is required to provide copies of such public documents to any person, who has the right to inspect them. Under Section 25(6) of the Water (Prevention and Control of Pollution) Act, 1974, every State is required to maintain a register of information on water pollution and it is further provided that so much of the register as relates to any outlet or effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected

A premises, as the case may be. Dr. J.N. Barowalia in
'Commentary on the Right to Information Act' (2006) has noted
that the Report of the *National Commission for Review of*
Working of Constitution under the Chairmanship of Justice
M.N.Venkatachaliah, as he then was, recognised the right to
B information wherein it is provided that major assumption behind
a new style of governance is the citizen's access to information.
Much of the common man's distress and helplessness could
be traced to his lack of access to information and lack of
knowledge of decision-making processes. He remains ignorant
and unaware of the process which virtually affects his interest.
C Government procedures and regulations shrouded in the veil
of secrecy do not allow the litigants to know how their cases
are being handled. They shy away from questioning the officers
handling their cases because of the latter's snobbish attitude.
D Right to information should be guaranteed and needs to be
given real substance. In this regard, the Government must
assume a major responsibility and mobilize skills to ensure flow
of information to citizens. The traditional insistence on secrecy
should be discarded.

E 25. The Government of India had appointed a Working
Group on Right to Information and Promotion of Open and
Transparent Government under the Chairmanship of Shri H.D.
Shourie which was asked to examine the feasibility and need
for either full- fledged Right to Information Act or its introduction
in a phased manner to meet the needs of an open and
F responsive Government. This group was also required to
examine the framework of rules with reference to the Civil
Services (Conduct) Rules and Manual of Office Procedure. This
Working Group submitted its report in May 1997.

G 26. In the Chief Ministers Conference on 'Effective and
Responsive Government' held on 24th May, 1997, the need to
enact a law on the Right to Information was recognized
unanimously. This conference was primarily to discuss the
measures to be taken to ensure a more effective and
H

A responsive government. The recommendations of various
Committees constituted for this purpose and awareness in the
Government machinery of the significance and benefits of this
freedom ultimately led to the enactment of the 'Freedom of
Information Act, 2002' (for short, the 'Act of 2002'). The
B proposed Bill was to enable the citizens to have information on
a statutory basis. The proposed Bill was stated to be in accord
with both Article 19 of the Constitution of India as well as Article
19 of the Universal Declaration of Human Rights, 1948. This
is how the Act of 2002 was enacted.

C 27. In terms of the Statement of Objects and Reasons of
the Act of 2002, it was stated that this law was enacted in order
to make the government more transparent and accountable to
the public. It was felt that in the present democratic framework,
free flow of information for citizens and non-Government
D institutions suffers from several bottlenecks including the
existing legal framework, lack of infrastructure at the grass root
level and an attitude of secrecy within the Civil Services as a
result of the old framework of rules. The Act was to deal with
all such aspects. The purpose and object was to make the
E government more transparent and accountable to the public
and to provide freedom to every citizen to secure access to
information under the control of public authorities, consistent
with public interest, in order to promote openness, transparency
and accountability in administration and in relation to matters
F connected therewith or incidental thereto.

G 28. After the Act of 2002 came into force, there was a
definite attempt to exercise such freedom but it did not operate
fully and satisfactorily. The Civil Services (Conduct) Rules and
the Manual of the Office Procedure as well as the Official
Secrets Act, 1923 and also the mindset of the authorities were
implied impediments to the full, complete and purposeful
achievement of the object of enacting the Act of 2002. Since,
with the passage of time, it was felt that the Act of 2002 was
neither sufficient in fulfilling the aspiration
H

A nor in making the right to freedom of information more
progressive, participatory and meaningful, significant changes
to the existing law were proposed. The National Advisory
Council suggested certain important changes to be
incorporated in the said Act of 2002 to ensure smoother and
greater access to information. After examining the suggestions
of the Council and the public, the Government decided that the
Act of 2002 should be replaced and, in fact, an attempt was
made to enact another law for providing an effective framework
for effectuating the right to information recognized under the
Article 19 of the Constitution. The Right to Information Bill was
introduced in terms of its statements of objects and reasons
to ensure greater and more effective access to information. The
Act of 2002 needed to be made even more progressive,
participatory and meaningful. The important changes proposed
to be incorporated therein included establishment of an
appellate machinery with investigative powers to review the
decision of the Public Information Officer, providing penal
provisions in the event of failure to provide information as per
law, etc. This Bill was passed by both the Houses of the
Parliament and upon receiving the assent of the President on
15th June, 2005, it came on the statute book as the Right to
Information Act, 2005.

**SCHEME OF ACT of 2005 (COMPARATIVE ANALYSIS OF
ACT OF 2002 AND ACT OF 2005)**

29. Now, we may deal with the comparative analysis of
these two Acts. The first and the foremost significant change
was the change in the very nomenclature of the Act of 2005 by
replacing the word 'freedom' with the word 'right' in the title of
the statute. The obvious legislative intent was to make seeking
of prescribed information by the citizens, a right, rather than a
mere freedom. There exists a subtle difference when people
perceive it as a right to get information in contra-distinction to
it being a freedom. Upon such comparison, the connotations
of the two have distinct and different application. The Act of

A
B
C
D
E
F
G
H

A 2005 was enacted to radically alter the administrative ethos and
culture of secrecy and control, the legacy of colonial era and
bring in a new era of transparency and accountability in
governance. In substance, the Act of 2005 does not alter the
spirit of the Act of 2002 and on the contrary, the substantive
provisions like Sections 3 to 11 of both the Acts are similar
except with some variations in some of the provisions. The Act
of 2005 makes the definition clause more elaborate and
comprehensive. It broadens the definition of public authority
under Section 2(h) by including therein even an authority or body
or institution of self-government established or constituted by
a notification issued or order made by the appropriate
Government and includes any body owned, controlled or
substantially financed by the Government and also non-
governmental organization substantially financed by the
appropriate Government, directly or indirectly. Similarly, the
expression 'Right to Information' has been defined in Section
2(j) to include the right to inspection of work, documents,
records, taking certified samples of material, taking notes and
extracts and even obtaining information in the form of floppies,
tapes, video cassettes, etc. This is an addition to the important
step of introduction of the Central and State Information
Commissions and the respective Public Information Officers.
Further, Section 4(2) is a new provision which places a
mandatory obligation upon every public authority to take steps
in accordance with the requirements of clause (b) of sub-
Section (1) of that Section to provide as much information *suo*
moto to the public at regular intervals through various means
of communication including internet so that the public have
minimum resort to use of this Act to obtain information. In other
words, the aim and object as highlighted in specific language
of the statute is that besides it being a right of the citizenry to
seek information, it was obligatory upon the State to provide
information relatable to its functions for the information of the
public at large and this would avoid unnecessary invocation of
such right by the citizenry under the provisions of the Act of
2005. Every authority/department is rec

A Public Information Officers and to appoint the Central
Information Commission and State Information Commissions
in accordance with the provisions of Sections 12 and 15 of the
Act of 2005. It may be noticed that under the scheme of this
Act, the Public Information Officer at the Centre and the State
Levels are expected to receive the requests/applications for
providing the information. Appeal against decision of such
Public Information Officer would lie to his senior in rank in terms
of Section 19(1) within a period of 30 days. Such First
Appellate Authority may admit the appeal after the expiry of this
statutory period subject to satisfactory reasons for the delay
being established. A second appeal lies to the Central or the
State Information Commission, as the case may be, in terms
of Section 19(3) within a period of 90 days The decision of
the Commission shall be final and binding as per Section 19(7).
Section 19 is an exhaustive provision and the Act of 2005 on
its cumulative reading is a complete code in itself. However,
nothing in the Act of 2005 can take away the powers vested in
the High Court under Article 226 of the Constitution and of this
Court under Article 32. The finality indicated in Sections 19(6)
and 19(7) cannot be construed to oust the jurisdiction of higher
courts, despite the bar created under Section 23 of the Act. It
always has to be read and construed subject to the powers of
the High Court under Article 226 of the Constitution. Reference
in this regard can be made to the decision of a Constitution
Bench of this Court in the case of *L. Chandra Kumar vs. Union
of India and Ors.* [(1997) 3 SCC 261].

G 30. Exemption from disclosure of information is a common
provision that appears in both the Acts. Section 8 of both the
Acts open with a non-obstante language. It states that
notwithstanding anything contained in the respective Act, there
shall be no obligation to give any citizen the information
specified in the exempted clauses. It may, however, be noted
that Section 8 of the Act of 2005 has a more elaborate
exemption clause than that of the Act of 2002. In addition, the
Act of 2005 also provides the Second Schedule which

A enumerates the intelligence and security organizations
established by the Central Government to which the Act of 2005
shall not apply in terms of Section 24.

B 31. Further, under the Act of 2002, the appointment of the
Public Information Officers is provided in terms of Section 5 and
there exists no provision for constituting the Central and the
State Information Commission. Also, the Act does not provide
any qualifications or requirements to be satisfied before a
person can be so appointed. On the other hand, in terms of
Section 12 and Section 15 of the Act of 2005, specific
provisions have been made to provide for the constitution of
and eligibility for appointment to the Central Information
Commission or the State Information Commission, as the case
may be.

D 32. Section 12(5) is a very significant provision under the
scheme of the Act of 2005 and we shall deal with it in some
elaboration at a subsequent stage. Similarly, the powers and
functions of the Authorities constituted under the Act of 2005
are conspicuous by their absence under the Act of 2002, which
under the Act of 2005 are contemplated under Section 18. This
section deals in great detail with the powers and functions of
the Information Commissions. An elaborate mechanism has
been provided and definite powers have been conferred upon
the authorities to ensure that the authorities are able to
implement and enforce the provisions of the Act of 2005
adequately. Another very significant provision which was non-
existent in the Act of 2002, is in relation to penalties. No
provision was made for imposition of any penalty in the earlier
Act, while in the Act of 2005 severe punishment like imposition
of fine upto Rs.250/- per day during which the provisions of the
Act are violated, has been provided in terms of Section 20(1).
The Central/State Information Commission can, under Section
20(2), even direct disciplinary action against the erring Public
Information Officers. Further, the appropriate Government and
the competent authority have been emp
under Sections 27 and 28 of the Act of

carrying out the provisions of the Act. Every rule made by the Central Government under the Act has to be laid before each House of the Parliament while it is in session for a total period of 30 days, if no specific modifications are made, the rules shall thereafter have effect either in the modified form or if not annulled, it shall come into force as laid.

A
B

33. Greater transparency, promotion of citizen-government partnership, greater accountability and reduction in corruption are stated to be the salient features of the Act of 2005. Development and proper implementation of essential and constitutionally protected laws such as Mahatma Gandhi Rural Guarantee Act, 2005, Right to Education Act, 2009, etc. are some of the basic objectives of this Act. Revelation in actual practice is likely to conflict with other public interests, including efficiency, operation of the government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information. It is necessary to harness these conflicting interests while preserving the parameters of the democratic ideal or the aim with which this law was enacted. It is certainly expedient to provide for furnishing certain information to the citizens who desire to have it and there may even be an obligation of the state authorities to declare such information *suo moto*. However, balancing of interests still remains the most fundamental requirement of the objective enforcement of the provisions of the Act of 2005 and for attainment of the real purpose of the Act.

C
D
E
F

34. The Right to Information, like any other right, is not an unlimited or unrestricted right. It is subject to statutory and constitutional limitations. Section 3 of the Act of 2005 clearly spells out that the right to information is subject to the provisions of the Act. Other provisions require that information must be held by or under the control of public authority besides providing for specific exemptions and the fields to which the provisions of the Act do not apply. The doctrine of severability finds place in the statute in the shape of Section 10 of the Act of 2005.

G
H

35. Neither the Act of 2002 nor the Act of 2005, under its repeal provision, repeals the Official Secrets Act, 1923. The Act of 2005 only repeals the Freedom of Information Act, 2002 in terms of Section 31. It was felt that under the Official Secrets Act, 1923, the entire development process had been shrouded in secrecy and practically the public had no legal right to know as to what process had been followed in designing the policies affecting them and how the programmes and schemes were being implemented. Lack of openness in the functioning of the Government provided a fertile ground for growth of inefficiency and corruption in the working of the public authorities. The Act of 2005 was intended to remedy this widespread evil and provide appropriate links to the government. It was also expected to bring reforms in the environmental, economic and health sectors, which were primarily being controlled by the Government.

A
B
C
D

36. The Central and State Information Commissions have played a critical role in enforcing the provisions of the Act of 2005, as well as in educating the information seekers and providers about their statutory rights and obligations. Some section of experts opined that the Act of 2005 has been a useful statutory instrument in achieving the goal of providing free and effective information to the citizens as enshrined under Article 19(1)(a) of the Constitution. It is true that democratisation of information and knowledge resources is critical for people's empowerment especially to realise the entitlements as well as to augment opportunities for enhancing the options for improving the quality of life. Still of greater significance is the inclusion of privacy or certain protection in the process of disclosure, under the right to information under the Act. Sometimes, information ought not to be disclosed in the larger public interest.

E
F
G

37. The courts have observed that when the law making power of a State is restricted by a written fundamental law, then any law enacted, which is opposed to

H

A being in excess of fundamental authority, is a nullity. Inequality is one such example. Still, reasonable classification is permissible under the Indian Constitution. Surrounding circumstances can be taken into consideration in support of the constitutionality of the law which is otherwise hostile or discriminatory in nature, but the circumstances must be such as to justify the discriminatory treatment or the classification, subserving the object sought to be achieved. Mere apprehension of the order being used against some persons is no ground to hold it illegal or unconstitutional particularly when its legality or constitutionality has not been challenged. {Ref. *K. Karunakaran v. State of Kerala & Anr.* [(2000) 3 SCC 761]}. To raise the plea of Article 14 of the Constitution, the element of discrimination and arbitrariness has to be brought out in clear terms. The Courts have to keep in mind that by the process of classification, the State has the power of determining who should be regarded as a class for the purposes of legislation and in relation to law enacted on a particular subject. The power, no doubt, to some degree is likely to produce some inequality but if a law deals with liberties of a number of individuals or well defined classes, it is not open of the charge of denial of equal protection on the ground that has no application to other persons. Classification, thus, means segregation in classes which have a systematic relation usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily, as already noticed. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a *nexus* between them. The basis of testing constitutionality, particularly on the ground of discrimination, should not be made by raising a presumption that the authorities are acting in an arbitrary manner. No classification can be arbitrary. One of the known concepts of constitutional interpretation is that the legislature cannot be expected to carve out classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned.

A
B
C
D
E
F
G
H

A The Courts would respect the classification dictated by the wisdom of the Legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness tested on the touchstone of Article 14 of the Constitution. {Ref. *Welfare Association of Allottees of Residential Premises, Maharashtra v. Ranjit P. Gohil* [(2003) 9 SCC 358]}.

C 38. The rule of equality or equal protection does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all, and particularly with respect to social welfare programme. So long as the line drawn, by the State is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point. A statute is not invalid because it might have gone further than it did, since the legislature need not strike at all evils at the same time and may address itself to the phase of the problem which seemed most acute to the legislative mind. A classification based on experience was a reasonable classification, and that it had a rational nexus to the object thereof and to hold otherwise would be detrimental to the interest of the service itself. This opinion was taken by this Court in the case of *State of UP & Ors. v. J.P. Chaurasia & Ors.* [(1989) 1 SCC 121]. Classification on the basis of educational qualifications made with a view to achieve administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances of the case in order to judge the validity of a classification. In the case of *State of Jammu & Kashmir v. Sh. Triloki Nath Khosa & Ors.* [(1974) 1 SCC 19], it was noted that intelligible differentia and rational nexus are the twin tests of reasonable classification.

H 39. If the law deals equally with members of a well defined class, it is not open to the charge of denial of equal protection. There may be cases where even a single individual may be in a class by himself on account of some

H

or reasons applicable to him and not applicable to others. Still such law can be constitutional. [Ref. *Constitutional Law of India* by H.M. Seervai (Fourth Edition) Vol.1]

40. In *Maneka Gandhi v. Union of India & Anr.* [(1978) 1 SCC 248] and *Charanlal Sahu v. Union of India* (supra), the Court has taken the view that when the constitutionality of a law is challenged on the ground that it infringes a fundamental right, what the Court has to consider is the 'direct and inevitable effect' of such law. A matter within the legislative competence of the legislature has to be left to the discretion and wisdom of the framers, so long as it does not infringe any constitutional provision or violate any fundamental right. The law has to be just, fair and reasonable. Article 14 of the Constitution does not prohibit the prescription of reasonable rules for selection or of qualifications for appointment, except, where the classification is on the face of it, unjust.

41. We have noticed the challenge of the petitioner to the constitutionality of Section 12(5) and (6) and Section 15(5) and (6) of the Act of 2005. The challenge is made to these provisions stating that the eligibility criteria given therein is vague, does not specify any qualification, and the stated 'experience' has no nexus to the object of the Act. It is also contended that the classification contemplated under the Act is violative of Article 14 of the Constitution. The petitioner contends that the legislative power has been exercised in a manner which is not in consonance with the constitutional principles and guarantees and provides for no proper consultative process for appointment. It may be noted that the only distinction between the provisions of Sections 12(5) and 12(6) on the one hand and Sections 15(5) and 15(6) on the other, is that under Section 12, it is the Central Government who has to make the appointments in consonance with the provisions of the Act, while under Section 15, it is the State Government which has to discharge similar functions as per the specified parameters. Thus, discussion on one provision would sufficiently cover the other as well.

42. Sub-Section (5) of Section 12 concerns itself with the eligibility criteria for appointment to the post of the Chief Information Commissioner and Information Commissioners to the Central Information Commission. It states that these authorities shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

43. Correspondingly, Sub-Section (6) of Section 12 states certain disqualifications for appointment to these posts. If such person is a Member of Parliament or Member of the legislature of any State or Union Territory or holds any other office of profit or connected with any political party or carrying on any business or pursuing any profession, he would not be eligible for appointment to these posts.

44. In order to examine the constitutionality of these provisions, let us state the parameters which would finally help the Court in determining such questions.

- (a) Whether the law under challenge lacks legislative competence?
- (b) Whether it violates any Article of Part III of the Constitution, particularly, Article 14?
- (c) Whether the prescribed criteria and classification resulting therefrom is discriminatory, arbitrary and has no nexus to the object of the Act?
- (d) Lastly, whether it a legislative exercise of power which is not in consonance with the constitutional guarantees and does not provide adequate guidance to make the law just, fair and reasonable?

45. As far as the first issue is concerned, it is a commonly conceded case before us that the Act of 2005 does not in any form, lack the legislative competence. In

such a law falls squarely within the domain of the Indian Parliament and has so been enacted under Entry 97 (residuary powers) of the Union List. Thus, this issue does not require any discussion.

46. To examine constitutionality of a statute in its correct perspective, we have to bear in mind certain fundamental principles as afore-recorded. There is presumption of constitutionality in favour of legislation. The Legislature has the power to carve out a classification which is based upon intelligible differentia and has rational nexus to the object of the Act. The burden to prove that the enacted law offends any of the Articles under Part III of the Constitution is on the one who questions the constitutionality and shows that despite such presumption in favour of the legislation, it is unfair, unjust and unreasonable.

47. Another most significant canon of determination of constitutionality is that the courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The courts would accept an interpretation which would be in favour of the constitutionality, than an approach which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this court in its various pronouncements.

48. The provisions of Section 12(5) do not discuss the basic qualification needed, but refer to two components: (a) persons of eminence in public life; and (b) with wide knowledge and experience in the fields stated in the provision. The provision, thus, does not suffer from the infirmity of providing no criteria resulting in the introduction of the element of arbitrariness or discrimination. The provisions require the persons to be of eminence and with knowledge in the stated

A
B
C
D
E
F
G
H

A fields. Knowledge and experience in these fields normally shall be preceded by a minimum requisite qualification prescribed in that field. For example, knowledge and experience in the field of law would pre-suppose a person to be a law graduate. Similarly, a person with wide knowledge and experience in the field of science and technology would invariably be expected to be at least a graduate or possess basic qualification in science & technology. The vagueness in the expression 'social service', 'mass media' or 'administration and governance' does create some doubt. But, certainly, this vagueness or doubt does not introduce the element of discrimination in the provision. The persons from these various walks of life are considered eligible for appointment to the post of Chief Information Commissioner and Information Commissioners in the respective Information Commissions. This gives a wide zone of consideration and this alleged vagueness can always be clarified by the appropriate government in exercise of its powers under Section 27 and 28 of the Act, respectively.

Constitutional Validity of Section 12(6)

E 49. Similarly, as stated above, sub-Section (6) of Section 12 creates in a way a disqualification in terms thereof. This provision does have an element of uncertainty and indefiniteness. Upon its proper construction, an issue as to what class of persons are eligible to be appointed to these posts, would unexceptionally arise. According to this provision, a person to be appointed to these posts ought not to have been carrying on any business or pursuing any profession. It is difficult to say what the person eligible under the provision should be doing and for what period. The section does not specify any such period. Normally, the persons would fall under one or the other unacceptable categories. To put it differently, by necessary implication, it excludes practically all classes while not specifying as to which class of persons is eligible to be appointed to that post. The exclusion is too vague, while inclusion is uncertain. It creates a situat

H

could not have been the intent of law. It is also not clear as to what classification the framers of the Act intended to lay down. The classification does not appear to have any nexus with the object of the Act. There is no intelligible differentia to support such classification. Which class is intended to be protected and is to be made exclusively eligible for appointment in terms of Sections 12(5) and (6) is something that is not understandable. Wherever, the Legislature wishes to exercise its power of classification, there it has to be a reasonable classification, satisfying the tests discussed above. No Rules have been brought to our notice which even intend to explain the vagueness and inequality explicit in the language of Section 12(6). According to the petitioner, it tantamounts to an absolute bar because the legislature cannot be stated to have intended that only the persons who are ideal within the terms of Sub-section (6) of Section 12, would be eligible to be appointed to the post. If we read the language of Sections 12(5) and 12(6) together, the provisions under sub-Section (6) appear to be in conflict with those under sub-Section (5). Sub-Section (5) requires the person to have eminence in public life and wide knowledge and experience in the specified field. On the contrary, sub-Section (6) requires that the person should not hold any office of profit, be connected with any political party or carry on any business or pursue any profession. The object of sub-section (5) stands partly frustrated by the language of sub-Section (6). In other words, sub-section (6) lacks clarity, reasonable classification and has no nexus to the object of the Act of 2005 and if construed on its plain language, it would result in defeating the provisions of sub-Section (5) of Section 12 to some extent.

50. The legislature is required to exercise its power in conformity with the constitutional mandate, particularly contained in Part III of the Constitution. If the impugned provision denies equality and the right of equal consideration, without reasonable classification, the courts would be bound to declare it invalid. Section 12(6) does not speak of the class of eligible persons,

A
B
C
D
E
F
G
H

A but practically debars all persons from being appointed to the post of Chief Information Commissioner or Information Commissioners at the Centre and State levels, respectively.

B 51. It will be difficult for the Court to comprehend as to which class of persons is intended to be covered under this clause. The rule of disqualification has to be construed strictly. If anyone, who is an elected representative, in Government service, or one who is holding an office of profit, carrying on any business or profession, is ineligible in terms of Section 12(6), then the question arises as to what class of persons would be eligible? The Section is silent on that behalf.

C 52. The element of arbitrariness and discrimination is evidenced by the language of Section 12(6) itself, which can be examined from another point of view. No period has been stated for which the person is expected to not have carried on any business or pursued any profession. It could be one day or even years prior to his nomination. It is not clear as to how the persons falling in either of these classes can be stated to be differently placed. This uncertainty is bound to bring in the element of discrimination and arbitrariness.

D 53. Having noticed the presence of the element of discrimination and arbitrariness in the provisions of Section 12(6) of the Act, we now have to examine whether this Court should declare this provision *ultra vires* the Constitution or read it down to give it its possible effect, despite the drawbacks noted above. We have already noticed that the Court will normally adopt an approach which is tilted in favour of constitutionality and would prefer reading down the provision, if necessary, by adding some words rather than declaring it unconstitutional. Thus, we would prefer to interpret the provisions of Section 12(6) as applicable post-appointment rather than pre-appointment of the Chief Information Commissioner and Information Commissioners. In other words, these disqualifications will only come into play once a person is appointed as Chief Information Com

H

Commissioner at any level and he will cease to hold any office of profit or carry any business or pursue any profession that he did prior to such appointment. It is thus implicit in this provision that a person cannot hold any of the posts specified in sub-section (6) of Section 12 simultaneous to his appointment as Chief Information Commissioner or Information Commissioner. In fact, cessation of his previous appointment, business or profession is a condition precedent to the commencement of his appointment as Chief Information Commissioner or Information Commissioner.

Constitutional Validity of Section 12(5)

54. The Act of 2005 was enacted to harmonise the conflicting interests while preserving the paramountcy of the democratic ideal and provide for furnishing of certain information to the citizens who desire to have it. The basic purpose of the Act is to set up a practical regime of right to information for the citizens to secure and access information under the control of the public authorities. The intention is to provide and promote transparency and accountability in the functioning of the authorities. This right of the public to be informed of the various aspects of governance by the State is a pre-requisite of the democratic value. The right to privacy too, is to be protected as both these rival interests find their origin under Article 19(1)(a) of the Constitution. This brings in the need for an effective adjudicatory process. The authority or tribunals are assigned the responsibility of determining the rival contentions and drawing a balance between the two conflicting interests. That is where the scheme, purpose and the object of the Act of 2005 attain greater significance.

55. In order to examine whether Section 12(5) of the Act suffers from the vice of discrimination or inequality, we may discuss the adjudicatory functions of the authorities under the Act in the backdrop of the scheme of the Act of 2005, as discussed above. The authorities who have to perform adjudicatory functions of quasi-judicial content are:-

A
B
C
D
E
F
G
H

- A 1. The Central/State Public Information Officer;
- B 2. Officers senior in rank to the Central/State Public Information Officer to whom an appeal would lie under Section 19(1) of the Act; and
- B 3. The Information Commission (Central/State) consisting of Chief Information Commissioner and Information Commissioners.

56. In terms of Section 12(5), the Chief Information Commissioner and Information Commissioners should be the persons of eminence in public life with wide knowledge in the prescribed fields. We have already indicated that the terminology used by the legislature, such as 'mass-media' or 'administration and governance', are terms of uncertain tenor and amplitude. It is somewhat difficult to state with exactitude as to what class of persons would be eligible under these categories.

57. The legislature in its wisdom has chosen not to provide any specific qualification, but has primarily prescribed 'wide knowledge and experience' in the cited subjects as the criteria for selection. It is not for the courts to spell out what ought to be the qualifications or experience for appointment to a particular post. Suffices it to say, that if the legislature itself provides 'knowledge and experience' as the basic criteria of eligibility for appointment, this *per se*, would not attract the rigors of Article 14 of the Constitution. On a reasonable and purposive interpretation, it will be appropriate to interpret and read into Section 12(5) that the 'knowledge and experience' in a particular subject would be deemed to include the basic qualification in that subject. We would prefer such an approach than to hold it to be violative of Article 14 of the Constitution. Section 12(5) has inbuilt guidelines to the effect that knowledge and experience, being two distinct concepts, should be construed in their correct perspective. This would include the basic qualification as well as an experi

field, both being the pre-requisites for this section. Ambiguity, if any, resulting from the language of the provision is insignificant, being merely linguistic in nature and, as already noticed, the same is capable of being clarified by framing appropriate rules in exercise of powers of the Central Government under Section 27 of the Act of 2005. We are unable to find that the provisions of Section 12(5) suffer from the vice of arbitrariness or discrimination. However, without hesitation, we would hasten to add that certain requirements of law and procedure would have to be read into this provision to sustain its constitutionality.

A
B
C

58. It is a settled principle of law, as stated earlier, that courts would generally adopt an interpretation which is favourable to and tilts towards the constitutionality of a statute, with the aid of the principles like 'reading into' and/or 'reading down' the relevant provisions, as opposed to declaring a provision unconstitutional. The courts can also bridge the gaps that have been left by the legislature inadvertently. We are of the considered view that both these principles have to be applied while interpreting Section 12(5). It is the application of these principles that would render the provision constitutional and not opposed to the doctrine of equality. Rather the application of the provision would become more effective.

D
E

59. Certainty to vague expressions, like 'social service' and 'mass media', can be provided under the provisions which are capable of being explained by framing of proper rules or even by way of judicial pronouncements. In order to examine the scope of this provision and its ramifications on the other parts of the Act of 2005, it is important to refer back to the scheme of the Act. Under the provisions of the Act, particularly, Sections 4, 12, 18, 19, 20, 22, 23 and 25, it is clear that the Central or State Information Commission, as the case may be, not only exercises adjudicatory powers of a nature no different than a judicial tribunal but is vested with the powers of a civil court as well. Therefore, it is required to decide a *lis*, where information is required by a person and its furnishing is contested by the

F
G
H

A other. The Commission exercises two kinds of penal powers: firstly, in terms of Section 20(1), it can impose penalty upon the defaulters or violators of the provisions of the Act and, secondly, Section 20(2) empowers the Central and the State Information Commission to conduct an enquiry and direct the concerned disciplinary authority to take appropriate action against the erring officer in accordance with law. Hence, the Commission has powers to pass orders having civil as well as penal consequences. Besides this, the Commission has been given monitoring and recommendatory powers. In terms of Section 23, the jurisdiction of Civil Courts has been expressly barred.

D Authority and particularly, the Information Commissioners (Members of the Commission) are of a very vital nature. The impact of such adjudication, instead of being tilted towards administrative adjudication is specifically oriented and akin to the judicial determinative process. Application of mind and passing of reasoned orders are inbuilt into the scheme of the Act of 2005. In fact, the provisions of the Act are specific in that regard. While applying its mind, it has to dwell upon the issues of legal essence and effect. Besides resolving and balancing the conflict between the 'right to privacy' and 'right to information', the Commission has to specifically determine and return a finding as to whether the case falls under any of the exceptions under Section 8 or relates to any of the organizations specified in the Second Schedule, to which the Act does not apply in terms of Section 24. Another significant adjudicatory function to be performed by the Commission is where interest of a third party is involved. The legislative intent in this regard is demonstrated by the language of Section 11 of the Act of 2005. A third party is not only entitled to a notice, but is also entitled to hearing with a specific right to raise objections in relation to the disclosure

C
E
F
G
H

functions, by no stretch of imagination, can be termed as 'administrative decision' but are clearly in the domain of 'judicial determination' in accordance with the rule of law and provisions of the Act. Before we proceed to discuss this aspect in any further elaboration, let us examine the status of such Tribunal/ Commissions and their functions.

B) TRIBUNAL/COMMISSIONS AND THEIR FUNCTIONS :

61. Before dwelling upon determination of nature of Tribunals in India, it is worthwhile to take a brief account of the scenario prevalent in some other jurisdictions of the world.

62. In United Kingdom, efforts have been made for improvising the system for administration of justice. The United Kingdom has a growing human rights jurisprudence, following the enactment of the Human Rights Act, 1998, and it has a well-established ombudsman system. The Tribunals have been constituted to provide specialised adjudication, alongside the courts, to the citizens dissatisfied from the directives made by the Information Commissioners under either of these statutes. The Tribunals, important cogs in the machinery of administration of justice, have recently undergone some major reforms. A serious controversy was raised whether the functioning of these Tribunals was more akin to the Government functioning or were they a part of the Court-attached system of administration of justice. The Donoughmore Committee had used the term 'ministerial tribunals', and had regarded them as part of the machinery of administration. The Franks Report saw their role quite differently:

"Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence... appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social services field would be

A regarded as adjuncts to the administration of the services themselves. We do not accept this view. *We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.* The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance.... or on appeal from a decision of a Minister or of an official in a special statutory position....Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of the Parliament to provide for the independence of tribunals is clear and unmistakable."

63. Franks recommended that tribunal chairmen should be legally qualified. This was implemented in respect of some categories of tribunal, but not others. But one of the most interesting issues arising from the Franks exercise is the extent to which the identification of tribunals as part of the machinery of adjudication led the Committee, in making its specific recommendations, down the road of increased legal formality and judicialisation. (Refer : "*The Judicialisation of 'Administrative' Tribunals in the UK : from Hewart to Leggatt*" by Gavin Drewry).

64. In the United Kingdom, the Tribunals, Courts and Enforcement Act, 2007 (for short, the 'TCEA') explicitly confirmed the status of Tribunal Judges (as the legally qualified members of the Tribunals are now called) as part of the independent judicial system, extending to them the same guarantees of independence as apply to the judges in the ordinary courts.

65. From the analysis of the above system of administrative justice prevalent in United Kingdom, a

A distinction from other laws is noticeable in as much as the sensitive personal data and right of privacy of an individual is assured a greater protection and any request for access to such information firstly, is subject to the provisions of the Act and secondly, the members of the Tribunals, who hear the appeals from a rejection of request for information by the Information Commissioners under the provisions of either of these Acts, include persons qualified judicially and having requisite experience as Judges in the regular courts. B

C 66. In United States of America, the statute governing the subject is 'Freedom of Information Act, 1966' (for short, the 'FOIA'). This statute requires each 'agency' to furnish the requisite information to the person demanding such information, subject to the limitations and provisions of the Act. Each agency is required to frame rules. A complainant dissatisfied from non-furnishing of the information can approach the district courts of the United States in the district in which the complainant resides or the place in which the agency records are situated. Such complaints are to be dealt with as per the procedure prescribed and within the time specified under the Act. D

E 67. In New South Wales, under the Privacy and Government Information Legislation Amendment Bill, 2010, amendments were made to both, the Government Information (Public Access) Act, 2009 and the Personal and Privacy Information Act, 1998, to bring the Information Commissioner and the Privacy Commissioner together within a single office. This led to the establishment of the Information and Privacy Commission. F

G 68. On somewhat similar lines is the law prevalent in some other jurisdictions including Australia and Germany, where there exists a unified office of Information and Privacy Commissioner. In Australia, the Privacy Commissioner was integrated into the office of the Australian Information Commissioner in the year 2010. H

A 69. In most of the international jurisdictions, the Commission or the Tribunals have been treated to be part of the court attached system of administration of justice and as said by the Donoughmore Committee, the 'ministerial tribunals' were different and they were regarded as part of machinery of the administration. The persons appointed to these Commissions were persons of legal background having legally trained mind and judicial experience. B

(a) **NATURE OF FUNCTION**

C 70. The Information Commission, as a body, performs functions of wide magnitude, through its members, including adjudicatory, supervisory as well as penal functions. Access to information is a statutory right. This right, as indicated above, is subject to certain constitutional and statutory limitations. The Act of 2005 itself spells out exempted information as well as the areas where the Act would be inoperative. The Central and State Information Commissioners have been vested with the power to decline furnishing of an information under certain circumstances and in the specified situations. For disclosure of Information, which involves the question of prejudice to a third party, the concerned authority is required to issue notice to the third party who can make a representation and such representation is to be dealt with in accordance with the provisions of the Act of 2005. This position of law in India is in clear contrast to the law prevailing in some other countries where information involving a third party cannot be disclosed without consent of that party. However, the authority can direct such disclosure, for reasons to be recorded, stating that the public interest outweighs the private interest. Thus, it involves an adjudicatory process where parties are required to be heard, appropriate directions are to be issued, the orders are required to be passed upon due application of mind and for valid reasons. The exercise of powers and passing of the orders by the authorities concerned under the provisions of the Act of 2005 cannot be arbitrary. It has to be i H

principles of natural justice and the procedure evolved by such authority. Natural justice has three indispensable facets, i.e., grant of notice, grant of hearing and passing of reasoned orders. It cannot be disputed that the authorities under the Act of 2005 and the Tribunals are discharging quasi-judicial functions.

71. In the case of *Indian National Congress (I) v. Institute of Social Welfare & Ors.* [(2002) 5 SCC 685], the Court explained that where there are two or more parties contesting each other's claim and the statutory authority is required to adjudicate the rival claims between the parties, such a statutory authority can be held to be quasi-judicial and the decision rendered by it as a quasi-judicial order. Thus, where there is a *lis* between the two contesting parties and the statutory authority is required to decide such a dispute, in absence of any other attributes of a quasi-judicial authority, such a statutory authority is a quasi-judicial authority. The legal principles which emerge from the various judgments laying down when an act of a statutory authority would be a quasi-judicial act are that where (a) a statutory authority empowered under a statute to do any act (b) which would prejudicially affect the subject (c) although there is no *lis* or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial.

72. In other words, an authority is described as quasi-judicial when it has some attributes or trappings of judicial provisions but not all. In the matter before us, there is a *lis*. The request of a party seeking information is allowed or disallowed by the authorities below and is contested by both parties before the Commission. There may also be cases where a third party is prejudicially affected by disclosure of the information requested for. It is clear that the concerned authorities particularly the Information Commission, possess the essential attributes and trappings of a Court. Its powers and functions,

A
B
C
D
E
F
G
H

A as defined under the Act of 2005 also sufficiently indicate that it has adjudicatory powers quite akin to the Court system. They adjudicate matters of serious consequences. The Commission may be called upon to decide how far the right to information is affected where information sought for is denied or whether the information asked for is 'exempted' or impinges upon the 'right to privacy' or where it falls in the 'no go area' of applicability of the Act. It is not mandatory for the authorities to allow all requests for information in a routine manner. The Act of 2005 imposes an obligation upon the authorities to examine each matter seriously being fully cautious of its consequences and effects on the rights of others. It may be a simple query for information but can have far reaching consequences upon the right of a third party or an individual with regard to whom such information is sought. Undue inroad into the right to privacy of an individual which is protected under Article 21 of the Constitution of India or any other law in force would not be permissible. In *Gobind v. State of Madhya Pradesh & Anr.* [(1975) 2 SCC 148] this Court held that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. In *Ram Jethmalani & Ors. v. Union of India* [(2011) 8 SCC 1] this Court has observed that the right to privacy is an integral part of the right to life. Thus, the decision making process by these authorities is not merely of an administrative nature. The functions of these authorities are more aligned towards the judicial functions of the courts rather than mere administrative acts of the State authority.

73. 'Quasi-judicial' is a term which may not always be used with utmost clarity and precision. An authority which exercises judicial functions or functions analogous to the judicial authorities would normally be termed as 'quasi-judicial'. In the '*Advanced Law Lexicon*' (3rd Edn., 2005) by P. Ramanathan Aiyar, the expression 'quasi-judicial' is explained as under :

H "Of, relating to, or involving an executive function..."



A official’s adjudicative acts. Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by Courts. (Blacm, 7th Edn., 1999)

B ‘Quasi-judicial is a term that is Not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency – the test is the nature of the tribunal rather than what it is doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by the law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion..’ (George Whitecross Paton, *A Textbook of Jurisprudence* 336 (G.W. Paton & Davit P Derham eds., 4th ed. (1972)

E Describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law (*Oxford Law Dictionary 5th Edn. 2003*)

F When the law commits to an officer the duty of looking into certain facts not in a way which it specially directs, but after a discretion in its nature judicial, the function is quasi judicial.

G Of or relating to the adjudicative acts of an executive or administrative officials.

H Sharing the qualities of and approximating to what is judicial; essentially judicial in character but not within the

A judicial power or function nor belonging to the judiciary as constitutionally defined. [S.128(2)(i), C.P.C. (5 of 1908)].”

B 74. This Court in the case of *State of Himachal Pradesh & Ors. v. Raja Mahendra Pal & Anr.* [1995 Supp (2) SCC 731], held that the expression ‘quasi judicial’ has been termed to be one which stands midway a judicial and an administrative function. If the authority has any express statutory duty to act judicially in arriving at the decision in question, it would be deemed to be *quasi*-judicial. Where the function to determine a dispute is exercised by virtue of an executive discretion rather than the application of law, it is a quasi-judicial function. A quasi-judicial act requires that a decision is to be given not arbitrarily or in mere discretion of the authority but according to the facts and circumstances of the case as determined upon an enquiry held by the authority after giving an opportunity to the affected parties of being heard or wherever necessary of leading evidence in support of their contention. The authority and the Tribunal constituted under the provisions of the Act of 2005 are certainly quasi-judicial authority/tribunal performing judicial functions.

E 75. Under the scheme of the Act of 2005, in terms of Section 5, every public authority, both in the State and the Centre, is required to nominate Public Information Officers to effectuate and make the right to information a more effective right by furnishing the information asked for under this Act. The Information Officer can even refuse to provide such information, which order is appealable under Section 19(1) to the nominated senior officer, who is required to hear the parties and decide the matter in accordance with law. This is a first appeal. Against the order of this appellate authority, a second appeal lies with the Central Information Commission or the State Information Commission, as the case may be, in terms of Section 19(3) of the Act of 2005. The Legislature, in its wisdom, has provided for two appeals. Higher the adjudicatory forum, greater is the requirement of adherence to the rule of law and to act in accordance with the procedure.

absence of any such prescribed procedure, to act in consonance with the principles of natural justice. Higher also is the public expectation from such tribunal. The adjudicatory functions performed by these bodies are of a serious nature. An order passed by the Commission is final and binding and can only be questioned before the High Court or the Supreme Court in exercise of the Court's jurisdiction under Article 226 and/or Article 32 of the Constitution, respectively.

76. If one analyses the scheme of the Act of 2005 and the multi-farious functions that the Information Commission is expected to discharge in its functioning, following features become evident :

1. It has a *lis* pending before it which it decides. '*Lis*', as per Black's Law Dictionary (8th Edition) means 'a piece of litigation; a controversy or a dispute'. One party asserting the right to a particular information, the other party denying the same or even contesting that it was invasion into his protected right gives rise to a *lis* which has to be adjudicated by the Commission in accordance with law and, thus, cannot be termed as 'administrative function' *simpliciter*. It, therefore, becomes evident that the appellate authority and the Commission deal with *lis* in the sense it is understood in the legal parlance.
2. It performs adjudicatory functions and is required to grant opportunity of hearing to the affected party and to record reasons for its orders. The orders of the Public Information Officer are appealable to first appellate authority and those of the First Appellate Authority are appealable to the Information Commission, which are then open to challenge before the Supreme Court or the High Court in exercise of its extraordinary power of judicial review.

A
B
C
D
E
F
G
H

3. It is an adjudicatory process not akin to administrative determination of disputes but similar in nature to the judicial process of determination. The concerned authority is expected to decide not only whether the case was covered under any of the exceptions or related to any of the organizations to which the Act of 2005 does not apply, but even to determine, by applying the legal and constitutional provisions, whether the exercise of the right to information amounted to invasion into the right to privacy. This being a very fine distinction of law, application of legal principles in such cases becomes very significant.
4. The concerned authority exercises penal powers and can impose penalty upon the defaulters as contemplated under Section 20 of the Act of 2005. It has to perform investigative and supervisory functions. It is expected to act in consonance with the principles of natural justice as well as those applicable to service law jurisprudence, before it can make a report and recommend disciplinary action against the defaulters, including the persons in service in terms of Section 20(2).
5. The functioning of the Commission is quite in line with the functioning of the civil courts and it has even expressly been vested with limited powers of the civil Court. Exercise of these powers and discharge of the functions discussed above not only gives a colour of judicial and/or quasi-judicial functioning to these authorities but also vests the Commission with the essential trappings of a civil Court.

77. Let us now examine some other pre-requisites of vital significance in the functioning of the Commission. In terms of Section 22 of this Act, the provisions of the Act are to be given

H

effect to, notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. This Act is, therefore, to prevail over the specified Acts and even instruments. The same, however, is only to the extent of any inconsistency between the two. Thus, where the provisions of any other law can be applied harmoniously, without any conflict, the question of repugnancy would not arise.

78. Further, Section 23 is a provision relating to exclusion of jurisdiction of the Courts. In terms of this Section, no Court shall entertain any suit, application or other proceedings in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal provided for under this Act. In other words, the jurisdiction of the Court has been ousted by express language. Nevertheless, it is a settled principle of law that despite such excluding provision, the extraordinary jurisdiction of the High Court and the Supreme Court, in terms of Articles 226 and 32 of the Constitution, respectively, cannot be divested. It is a jurisdiction incapable of being eroded or taken away by exercise of legislative power, being an important facet of the basic structure of the Constitution. In the case of *L. Chandra Kumar* (supra), the Court observed that the constitutional safeguards which ensure independence of the Judges of the superior judiciary not being available for the Members of the Tribunal, such tribunals cannot be considered full and effective substitute to the superior judiciary in discharging the function of constitutional interpretation. They can, however, perform a supplemental role. Thus, all decisions of the Tribunals were held to be subject to scrutiny before the High Court under Article 226/227 of the Constitution. Therefore, the orders passed by the authority, i.e., the Central or the State Information Commissions under the Act of 2005 would undoubtedly be subject to judicial review of the High Court under Article 226/227 of the Constitution.

79. Section 24 of the Act of 2005 empowers the Central

A
B
C
D
E
F
G
H

A Government to make amendments to the Second Schedule specifying such organization established by the Government to which the Act of 2005 would not apply. The 'appropriate Government' [as defined in Section 2(a)] and the 'competent authority' [as defined in Section 2(e)] have the power to frame rules for the purposes stated under Sections 27 and 28 of the Act of 2005. This exercise is primarily to carry out the provisions of the Act of 2005.

80. Once it is held that the Information Commission is essentially quasi-judicial in nature, the Chief information Commissioner and members of the Commission should be the persons possessing requisite qualification and experience in the field of law and/or other specified fields. We have discussed in some detail the requirement of a judicial mind for effectively performing the functions and exercising the powers of the Information Commission. In the case of *Bharat Bank Ltd., Delhi v. Employees of Bharat Bank & Ors.* [1950 SCR 459 : AIR 1950 SC 188], this Court took the view that the functions and duties of the Industrial Tribunal are very much like those of a body discharging judicial functions, although it is not a court in the technical sense of the word. In *S.P. Sampath Kumar v. Union of India* [(1987) 1 SCC 124], again this Court held that in the case of Administrative Tribunals, the presence of a Judicial member was the requirement of fair procedure of law and the Administrative Tribunal must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. It was also observed that we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience. Similar view was also expressed in the case of *Union of India v. Madras Bar Association* [(2010) 11 SCC 1].

H

81. Further, in the case of *L. Chandra Kumar* (supra) where this Court was concerned with the orders and functioning of the Central Administrative Tribunal and scope of its judicial review, while holding that the jurisdiction of the High Court under Article 226 of the Constitution was open and could not be excluded, the Court specifically emphasised on the need for a legally trained mind and experience in law for the proper functioning of the tribunal. The Court held as under :

“88. Functioning of Tribunals

XXX XXX XXX

8.65 A Tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. *Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, equipment and approach.* When such a tribunal is composed of personnel drawn from the judiciary as well as from services or from amongst experts in the field, any weightage in favour of the service members or expert members and value-discounting the judicial members would render the tribunal less effective and efficacious than the High Court. The Act setting up such a tribunal would itself have to be declared as void under such circumstances. The same would not at all be conducive to judicial independence and may even tend, directly or indirectly, to influence their decision-making process, especially when the Government is a litigant in most of the cases coming before such tribunal. (See *S.P. Sampath Kumar v. Union of India.*) The protagonists of specialist tribunals, who simultaneously with their establishment want exclusion of the writ jurisdiction of the High Courts in regard to matters entrusted for adjudication to such tribunals, ought not to

A
B
C
D
E
F
G
H

A overlook these vital and important aspects. *It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself.* Tribunals are not an end in themselves but a means to an end; even if the laudable objectives of speedy justice, uniformity of approach, predictability of decisions and specialist justice are to be achieved, the framework of the tribunal intended to be set up to attain them must still retain its basic judicial character and inspire public confidence. B Any scheme of decentralisation of administration of justice providing for an alternative institutional mechanism in substitution of the High Courts must pass the aforesaid test in order to be constitutionally valid.” C

D 82. In India, the Central or the State Information Commission, as the case may be, is vested with dual jurisdiction. It is the appellate authority against the orders passed by the first appellate authority, the Information Officer, in terms of Section 19(1) of the Act of 2005, while additionally it is also a supervisory and investigative authority in terms of E Section 18 of the Act wherein it is empowered to hear complaints by any person against the inaction, delayed action or other grounds specified under Section 18(1) against any State and Central Public Information Officer. This inquiry is to be conducted in accordance with the prescribed procedure and F by exercising the powers conferred on it under Section 18(3). It has to record its satisfaction that there exist reasonable grounds to enquire into the matter.

G 83. Section 20 is the penal provision. It empowers the Central or the State Information Commission to impose penalty as well as to recommend disciplinary action against such Public Information Officers who, in its opinion, have committed any acts or omissions specified in this section, without any reasonable cause. The above provisions demonstrate that the functioning of the Commission is not ac

H

but is quasi-judicial in nature. It exercises powers and functions which are adjudicatory in character and legal in nature. Thus, the requirement of law, legal procedures, and the protections would apparently be essential. The finest exercise of quasi-judicial discretion by the Commission is to ensure and effectuate the right of information recognized under Article 19 of the Constitution vis-a-vis the protections enshrined under Article 21 of the Constitution.

A
B

84. The Information Commission has the power to deal with the appeals from the First Appellate Authority and, thus, it has to examine whether the order of the appellate authority and even the Public Information Officer is in consonance with the provisions of the Act of 2005 and limitations imposed by the Constitution. In this background, no Court can have any hesitation in holding that the Information Commission is akin to a Tribunal having the trappings of a civil Court and is performing quasi-judicial functions.

C
D

85. The various provisions of this Act are clear indicators to the unquestionable proposition of law that the Commission is a judicial tribunal and not a ministerial tribunal. It is an important cog in and is part of court attached system of administration of justice unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to machinery of administration.

E
F

(b) REQUIREMENT OF LEGAL MIND

86. Now, it will be necessary for us to dwell upon somewhat controversial but an aspect of greater significance as to who and by whom such adjudicatory machinery, at its various stages under the provisions of the Act of 2005 particularly in the Indian context, should be manned.

G

87. Section 5 of the Act of 2005 makes it obligatory upon every public authority to designate as many officers, as Central Public Information Officers and State Information Public Officers

H

A in all administrative units or offices, as may be necessary to provide information to the persons requesting information under the Act of 2005. Further, the authority is required to designate Central Assistant Public Information Officer and State Assistant Public Information Officer at the sub-divisional or sub-district level. The Assistant Public Information Officers are to perform dual functions – (1) to receive the applications for information; and (2) to receive appeals under the Act. The applications for information are to be forwarded to the concerned Information Officer and the appeals are to be forwarded to the Central Information Commission or the State Information Commission, as the case may be. It was contemplated that these officers would be designated at all the said levels within hundred days of the enactment of the Act. There is no provision under the Act of 2005 which prescribes the qualification or experience that the Information Officers are required to possess. In fact, the language of the Section itself makes it clear that any officer can be designated as Central Public Information Officer or State Public Information Officer. Thus, no specific requirement is mandated for designating an officer at the sub-divisional or sub-district level. The appeals, under Section 19(1) of the Act, against the order of the Public Information Officer are to be preferred before an Officer senior in the rank to the Public Information Officer. However, under Section 19(3), a further appeal lies to the Central or the State Information Commission, as the case may be, against the orders of the Central or State Appellate Officer. These officers are required to dispose of such application or appeal within the time schedule specified under the provisions of the Act. There is also no qualification or experience required of these designated officers to whom the first appeal would lie. However, in contradistinction, Section 12(5) and Section 15(5) provide for the experience and knowledge that the Chief Information Commissioner and the Information Commissioners at the Centre and the State levels, respectively, are required to possess. This provision is obviously mandatory in nature.

A
B
C
D
E
F
G
H

88. As already noticed, in terms of Section 12(5), the Chief Information Commissioner and Information Commissioners are required to be persons of eminence in public life with wide knowledge and experience in law, science and technology or any of the other specified fields. Further, Sub-Section (6) of Sections 12 and 15 lays down the disqualifications for being nominated as such. It is provided that the Chief Information Commissioner or Information Commissioners shall not be a Member of Parliament or Member of the Legislative Assembly of any State or Union Territory or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

89. The requirement of legal person in a quasi-judicial body has been internationally recognized. We have already referred, amongst others, to the relevant provisions of the respective Information Acts of the USA, UK and Canada. Even in the Canadian Human Rights Tribunal, under the Canadian Human Rights Act, the Vice-Chairman and Members of the Tribunal are required to have a degree in law from a recognized university and be the member of the bar of a province or a Chamber *des notaires du Quebec* for at least 10 years. Along with this qualification, such person needs to have general knowledge of human rights law as well as public law including Administrative and Constitutional Laws. The Information Commissioner under the Canadian Law has to be appointed by the Governor in Council after consultation with the leader of every recognized party in the Senate and the House of Commons. Approval of such appointment is done by resolution of the Senate and the House of Commons. It is noted that the Vice-Chairperson plays a pre-eminent role within this Administrative Tribunal by ensuring a fair, timely and impartial adjudication process for human rights complaints, for the benefit of all concerned.

90. As already noticed, in the United Kingdom, the Information Rights Tribunal and the Information Commissioners are to deal with the matters arising from both, the FOIA as well

A
B
C
D
E
F
G
H

A as the Data Protection Act, 1998. These tribunals are discharging quasi-judicial functions. Appointments to them are dealt with and controlled by the TCEA. These appointments are treated as judicial appointments and are covered under Part 2 of the TCEA. Section 50 provides for the eligibility conditions for judicial appointment. Section 50(1)(b) refers to a person who satisfies the judicial-appointment eligibility condition on an N-year basis. A person satisfies that condition on N-year basis if (a) the person has a relevant qualification and (b) the total length of the person's qualifying periods is at least N years. Section 52 provides for the meaning of the expression 'gain experience in law' appearing in Section 50(3)(b). It states that a person gains experience in law during a period if the period is one during which the person is engaged in law-related activities. The essence of these statutory provisions is that the concerned person under that law is required to possess both a degree as well as experience in the legal field. Such experience inevitably relates to working in that field. Only then, the twin criteria of requisite qualification and experience can be satisfied.

E 91. It may be of some relevance here to note that in UK, the Director in the office of the Government Information Service, an authority created under the Freedom of Information Act, 2000 possesses a degree of law and has been a member of the Bar of the District of Columbia and North Carolina in UK. The Principal Judge of Information Rights Jurisdiction in the First-tier Tribunal, not only had a law degree but were also retired solicitors or barristers in private practice.

G 92. Thus, there exists a definite requirement for appointing persons to these posts with legal background and acumen so as to ensure complete faith and confidence of the public in the independent functioning of the Information Commission and for fair and expeditious performance of its functions. The Information Commissions are required to discharge their functions and duties strictly in accordar

H

93. In India, in terms of sub-Section (5), besides being a person of eminence in public life, the necessary qualification required for appointment as Chief Information Commissioner or Information Commissioner is that the person should have wide knowledge and experience in law and other specified fields. The term 'experience in law' is an expression of wide connotation. It pre-supposes that a person should have the requisite qualification in law as well as experience in the field of law. However, it is worthwhile to note that having a qualification in law is not equivalent to having experience in law and vice-versa. 'Experience in law', thus, is an expression of composite content and would take within its ambit both the requisite qualification in law as well as experience in the field of law. A person may have some experience in the field of law without possessing the requisite qualification. That certainly would not serve the requirement and purpose of the Act of 2005, keeping in view the nature of the functions and duties required to be performed by the Information Commissioners. Experience in absence of basic qualification would certainly be insufficient in its content and would not satisfy the requirements of the said provision. Wide knowledge in a particular field would, by necessary implication, refer to the knowledge relatable to education in such field whereas experience would necessarily relate to the experience attained by doing work in such field. Both must be read together in order to satisfy the requirements of Sections 12(5) of and 15(5) the Act of 2005. Similarly, wide knowledge and experience in other fields would have to be construed as experience coupled with basic educational qualification in that field.

94. Primarily it may depend upon the language of the rules which govern the service but it can safely be stated as a rule that experience in a given post or field may not necessarily satisfy the condition of prescribed qualification of a diploma or a degree in such field. Experience by working in a post or by practice in the respective field even for long time cannot be equated with the basic or the prescribed qualification. In

A
B
C
D
E
F
G
H

A absence of a specific language of the provision, it is not feasible for a person to have experience in the field of law without possessing a degree in law. In somewhat different circumstances, this Court in the case of *State of Madhya Pradesh v. Dharam Bir* [(1998) 6 SCC 165], while dealing with Rule 8(2) of the Madhya Pradesh Industrial Training (Gazetted) Service Recruitment Rules, 1985, took the view that the stated qualification for the post of Principal Class I or Principal Class II were also applicable to appointment by promotion and that the applicability of such qualification is not restricted to direct appointments. Before a person becomes eligible for being promoted to the post of Principal, Class II or Principal, Class-I, he must possess a Degree or Diploma in Engineering, as specified in the Schedule. The fact that the person had worked as a Principal for a decade would not lead to a situation of accepting that the person was qualified to hold the post. The Court held as under :

E “32. “Experience” gained by the respondent on account of his working on the post in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government.

G 33. The post in question is the post of Principal of the Industrial Training Institute. The Government has prescribed a Degree or Diploma in Engineering as the essential qualification for this post. No one who does not possess this qualification can be appointed on this post. The educational qualification has a direct nexus with the nature of the post. The Principal may also

H

take classes and teach the students. A person who does not hold either a Degree or Diploma in Engineering cannot possibly teach the students of the Industrial Training Institute the technicalities of the subject of Engineering and its various branches.”

95. Thus, in our opinion, it is clear that experience in the respective field referred to in Section 12(5) of the Act of 2005 would be an experience gained by the person upon possessing the basic qualification in that field. Of course, the matter may be somewhat different where the field itself does not prescribe any degree or appropriate course. But it would be applicable for the fields like law, engineering, science and technology, management, social service and journalism, etc.

96. This takes us to discuss the kind of duties and responsibilities that such high post is expected to perform. Their functions are adjudicatory in nature. They are required to give notice to the parties, offer them the opportunity of hearing and pass reasoned orders. The orders of the appellate authority and the Commission have to be supported by adequate reasoning as they grant relief to one party, despite opposition by the other or reject the request for information made in exercise of a statutory right.

97. It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are

A
B
C
D
E
F
G
H

A required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of *Siemens Engineering & Manufacturing Co. of India Ltd. v. Union of India & Anr.* [(1976) 2 SCC 981]; and *Assistant Commissioner, Commrcial Tax Department Works Contract and Leasing, Kota v. Shukla & Brothers* [(2010) 4 SCC 785].

B
C
D
E
F
G
H

98. The Chief Information Commissioner and members of the Commission are required to possess wide knowledge and experience in the respective fields. They are expected to be well versed with the procedure that they are to adopt while performing the adjudicatory and quasi judicial functions in accordance with the statutory provisions and the scheme of the Act of 2005. They are to examine whether the information required by an applicant falls under any of the exemptions stated under Section 8 or the Second Schedule of the Act of 2005. Some of the exemptions under Section 8, particularly, subsections (e), (g) and (j) have been very widely worded by the Legislature keeping in mind the need to afford due protection to privacy, national security and the larger public interest. In terms of Section 8(1)(e), (f), (g), (h) and (i), the authority is required to record a definite satisfaction whether disclosure of information would be in the larger public interest or whether it would impede the process of investigation or apprehension or prosecution of the offenders and whether it would cause unwarranted invasion of the privacy of an individual. All these functions may be performed by a legally trained mind more efficaciously. The most significant function which may often be required to be performed by these authorities is to strike a balance between the application of the freedom guaranteed under Article 19(1)(a) and the rights protected under Article 21 of the Constitution. In other words, the deciding authority ought to be conscious of the constitutional concepts which hold significance while determining the rights of the parties in accordance with the provisions of the statute and the Constitution. The legislative scheme of the Act of 2005 clearly postulates passing of a reasoned order

A A reasoned order would help the parties to question the correctness of the order effectively and within the legal requirements of the writ jurisdiction of the Supreme Court and the High Courts.

B 99. 'Persons of eminence in public life' is also an expression of wide implication and ramifications. It takes in its ambit all requisites of a good citizen with values and having a public image of contribution to the society. Such person should have understanding of concepts of public interest and public good. Most importantly, such person should have contributed to the society through social or allied works. The authorities cannot lose sight of the fact that ingredients of institutional integrity would be applicable by necessary implication to the Commissions and their members. This discussion safely leads us to conclude that the functions of the Chief Information Commissioner and Information Commissioners may be better performed by a legally qualified and trained mind possessing the requisite experience. The same should also be applied to the designation of the first appellate authority, i.e., the senior officers to be designated at the Centre and State levels. However, in view of language of Section 5, it may not be necessary to apply this principle to the designation of Public Information Officer.

F 100. Moreover, as already noticed, the Information Commission, is performing quasi-judicial functions and essence of its adjudicatory powers is akin to the Court system. It also possesses the essential trappings of a Court and discharges the functions which have immense impact on the rights/obligations of the parties. Thus, it must be termed as a judicial Tribunal which requires to be manned by a person of judicial mind, expertise and experience in that field. This Court, while dealing with the cases relating to the powers of the Parliament to amend the Constitution has observed that every provision of the Constitution, can be amended provided in the result, the basic structure of the Constitution remains the same. The dignity of the individual secured by the various freedoms

A and basic rights contained in Part III of the Constitution and their protection itself has been treated as the basic structure of the Constitution.

B 101. Besides separation of powers, the independence of judiciary is of fundamental constitutional value in the structure of our Constitution. Impartiality, independence, fairness and reasonableness in judicial decision making are the hallmarks of the Judiciary. If 'Impartiality' is the soul of Judiciary, 'Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive, as this Court stated in the case of *Union of India v. R. Gandhi, President, Madras Bar Association* [(2010) 11 SCC 17].

D 102. The independence of judiciary *stricto sensu* applies to the Court system. Thus, by necessary implication, it would also apply to the tribunals whose functioning is quasi-judicial and akin to the court system. The entire administration of justice system has to be so independent and managed by persons of legal acumen, expertise and experience that the persons demanding justice must not only receive justice, but should also have the faith that justice would be done.

F 103. The above detailed analysis leads to an *ad libitum* conclusion that under the provisions and scheme of the Act of 2005, the persons eligible for appointment should be of public eminence, with knowledge and experience in the specified fields and should preferably have a judicial background. They should possess judicial acumen and experience to fairly and effectively deal with the intricate questions of law that would come up for determination before the Commission, in its day-to-day working. The Commission satisfies abecedarians of a judicial tribunal which has the trappings of a court. It will serve the ends of justice better, if the Information Commission was manned by persons of legal expertise and with adequate experience in the field of adjudication. We may further clarify that such judicial members could work individually or in Benches of two, one being a judicial member w

A qualified person from the specified fields to be called an expert member. Thus, in order to satisfy the test of constitutionality, we will have to read into Section 12(5) of the Act that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law. Such appreciation and application of legal principles is a *sine qua non* to the determinative functioning of the Commission as it can tilt the balance of justice either way. *Malcolm Gladwell* said, "the key to good decision making is not knowledge. It is understanding. We are swimming in the former. We are lacking in the latter". The requirement of a judicial mind for manning the judicial tribunal is a well accepted discipline in all the major international jurisdictions with hardly with any exceptions. Even if the intention is to not only appoint people with judicial background and expertise, then the most suitable and practical resolution would be that a 'judicial member' and an 'expert member' from other specified fields should constitute a Bench and perform the functions in accordance with the provisions of the Act of 2005. Such an approach would further the mandate of the statute by resolving the legal issues as well as other serious issues like an inbuilt conflict between the Right to Privacy and Right to Information while applying the balancing principle and other incidental controversies. We would clarify that participation by qualified persons from other specified fields would be a positive contribution in attainment of the proper administration of justice as well as the object of the Act of 2005. Such an approach would help to withstand the challenge to the constitutionality of Section 12(5).

104. As a natural sequel to the above, the question that comes up for consideration is as to what procedure should be adopted to make appointments to this august body. Section 12(3) states about the High-powered Committee, which has to

A
B
C
D
E
F
G
H

A recommend the names for appointment to the post of Chief Information Commissioner and Information Commissioners to the President. However, this Section, and any other provision for that matter, is entirely silent as to what procedure for appointment should be followed by this High Powered Committee. Once we have held that it is a judicial tribunal having the essential trappings of a court, then it must, as an irresistible corollary, follow that the appointments to this august body are made in consultation with the judiciary. In the event, the Government is of the opinion and desires to appoint not only judicial members but also experts from other fields to the Commission in terms of Section 12(5) of the Act of 2005, then it may do so, however, subject to the riders stated in this judgment. To ensure judicial independence, effective adjudicatory process and public confidence in the administration of justice by the Commission, it would be necessary that the Commission is required to work in Benches. The Bench should consist of one judicial member and the other member from the specified fields in terms of Section 12(5) of the Act of 2005. It will be incumbent and in conformity with the scheme of the Act that the appointments to the post of judicial member are made 'in consultation' with the Chief Justice of India in case of Chief Information Commissioner and members of the Central Information Commission and the Chief Justices of the High Courts of the respective States, in case of the State Chief Information Commissioner and State Information Commissioners of that State Commission. In the case of appointment of members to the respective Commissions from other specified fields, the DoPT in the Centre and the concerned Ministry in the States should prepare a panel, after due publicity, empanelling the names proposed at least three times the number of vacancies existing in the Commission. Such panel should be prepared on a rational basis, and should inevitably form part of the records. The names so empanelled, with the relevant record should be placed before the said High Powered Committee. In furtherance to the recommendations

Committee, appointments to the Central and State Information Commissions should be made by the competent authority. Empanelment by the DoPT and other competent authority has to be carried on the basis of a rational criteria, which should be duly reflected by recording of appropriate reasons. The advertisement issued by such agency should not be restricted to any particular class of persons stated under Section 12(5), but must cover persons from all fields. Complete information, material and comparative data of the empanelled persons should be made available to the High Powered Committee. Needless to mention that the High Powered Committee itself has to adopt a fair and transparent process for consideration of the empanelled persons for its final recommendation. This approach, is in no way innovative but is merely derivative of the mandate and procedure stated by this Court in the case of *L. Chandra Kumar* (supra) wherein the Court dealt with similar issues with regard to constitution of the Central Administrative Tribunal. All concerned are expected to keep in mind that the Institution is more important than an individual. Thus, all must do what is expected to be done in the interest of the institution and enhancing the public confidence. A three Judge Bench of this Court in the case of *Centre for PIL and Anr. v. Union of India & Anr.* [(2011) 4 SCC 1] had also adopted a similar approach and with respect we reiterate the same.

105. Giving effect to the above scheme would not only further the cause of the Act but would attain greater efficiency, and accuracy in the decision-making process, which in turn would serve the larger public purpose. It shall also ensure greater and more effective access to information, which would result in making the invocation of right to information more objective and meaningful.

106. For the elaborate discussion and reasons afore-recorded, we pass the following order and directions:

1. The writ petition is partly allowed.

A
B
C
D
E
F
G
H

2. The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus, we hold and declare that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof.
3. As opposed to declaring the provisions of Section 12(6) and 15(6) unconstitutional, we would prefer to read these provisions as having effect 'post-appointment'. In other words, cessation/termination of holding of office of profit, pursuing any profession or carrying any business is a condition precedent to the appointment of a person as Chief Information Commissioner or Information Commissioner at the Centre or State levels.
4. There is an absolute necessity for the legislature to reword or amend the provisions of Section 12(5), 12(6) and 15(5), 15(6) of the

A
B
C
D
E
F
G
H

- hope that these provisions would be amended at the earliest by the legislature to avoid any ambiguity or impracticability and to make it in consonance with the constitutional mandates. A A
5. We also direct that the Central Government and/or the competent authority shall frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law. Such rules should be framed with particular reference to Section 27 and 28 of the Act within a period of six months from today. B B C C
6. We are of the considered view that it is an unquestionable proposition of law that the Commission is a 'judicial tribunal' performing functions of 'judicial' as well as 'quasi-judicial' nature and having the trappings of a Court. It is an important cog and is part of the court attached system of administration of justice, unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to the machinery of administration. D D E E
7. It will be just, fair and proper that the first appellate authority (i.e. the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law. F F
8. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a 'judicial member', while the other an 'expert member'. The judicial member should be a person possessing a degree in law, having a judicially trained mind and G G H H
9. The appointment of the judicial members to any of these posts shall be made 'in consultation' with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.
10. The appointment of the Information Commissioners at both levels should be made from amongst the persons empanelled by the DoPT in the case of Centre and the concerned Ministry in the case of a State. The panel has to be prepared upon due advertisement and on a rational basis as afore-recorded.
11. The panel so prepared by the DoPT or the concerned Ministry ought to be placed before the High-powered Committee in terms of Section 12(3), for final recommendation to the President of India. Needless to repeat that the High Powered Committee at the Centre and the State levels is expected to adopt a fair and transparent method of recommending the names for appointment to the competent authority.

12. The selection process should be commenced at least three months prior to the occurrence of vacancy. A
13. This judgment shall have effect only prospectively. A
14. Under the scheme of the Act of 2005, it is clear that the orders of the Commissions are subject to judicial review before the High Court and then before the Supreme Court of India. In terms of Article 141 of the Constitution, the judgments of the Supreme Court are law of the land and are binding on all courts and tribunals. Thus, it is abundantly clear that the Information Commission is bound by the law of precedence, i.e., judgments of the High Court and the Supreme Court of India. In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case. B

It is not only the higher court's judgments that are binding precedents for the Information Commission, but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission. The rule of precedence is equally applicable to intra appeals or references in the hierarchy of the Commission. C

107. The writ petition is partly allowed with the above directions, however, without any order as to costs. D

K.K.T. Writ Petition Partly allowed. E

A UNION OF INDIA
v.
NAMIT SHARMA
REVIEW PETITION [C] No.2309 OF 2012
IN
B WRIT PETITION [C] NO.210 OF 2012
SEPTEMBER 3, 2013

[A.K. PATNAIK AND A.K. SIKRI, JJ.]

C *Constitution of India, 1950 – Article 137 – Review under – Held: Is confined to only errors apparent on the face of the record – On an application for review, the Supreme Court can reverse or modify its decision on the ground of mistake of law or fact – In the instant case, as the judgment under review suffered from mistake of law, directions and declarations in the judgment under review recalled – Supreme Court Rules, 1966 – Order XL.*

D *Right to Information Act, 2005 – ss.12(5) and 15(5) – Appointment of Central Information Commissioner / Information Commissioner – Eligibility criteria – ss.12(5) and 15(5) providing that Chief Information Commissioner and Information Commissioners shall be persons with eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance – Constitutional validity of ss.12(5) and 15(5) – Upheld in the judgment under review, but with the rider that the expression 'knowledge and experience' appearing in the provisions would mean and include a basic degree in the respective field and the experience gained thereafter; and that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice*

by the Information Commission – Held: ss.12(5) and 15(5) are not ultra vires the Constitution – Said provisions, however, do not prescribe any basic qualification in the respective fields of work – In the judgment under review, missing words were “read into” ss.12(5) and 15(5) and it was held that a basic degree in the respective field was required – This “reading into” the provisions of ss.12(5) and 15(5), words which the Parliament has not intended is contrary to the principles of statutory interpretation – The court could not correct or make up for any deficiencies or omissions in the language of the statute – ss.12(5) and 15(5) do not provide that the Chief Information Commissioner and Information Commissioners shall be persons having judicial experience, training and acumen – Yet, in the judgment under review, it was held that for effectively performing the functions and exercising the powers of the Information Commission, there is a requirement of a judicial mind and therefore persons eligible for appointment should preferably have judicial background and possess judicial acumen and experience – Such direction amounted to encroachment in the field of legislation – Since Information Commissions do not exercise judicial powers, the constitutional principles of separation of powers and independence of judiciary cannot be relied upon to direct that they must be manned by persons with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court – Interpretation of Statute.

Right to Information Act, 2005 – ss.12(5) and 15(5) – Matter involving intricate questions of law – Duty of the Chief Information Commissioner – Held: Wherever, the Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.

Right to Information Act, 2005 – ss.12(6) and 15(6) –

A
B
C
D
E
F
G
H

A Appointment of Chief Information Commissioner/Information Commissioner – Disqualification provision u/ss.12(6) and 15(6) – Interpretation and effect of – Held: ss.12(6) and 15(6) do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner/Information Commissioner – But after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner/Information Commissioner.

Right to Information Act, 2005 – ss.12(3) and 15(3) – Committee u/ss. 12(3) and 15(3) for appointment of Chief Information Commissioner/Information Commissioners – Role and duty of – Held: The Committee while making recommendations for such appointment must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.

Right to Information Act, 2005 – ss. 18, 19 and 20 – Functions of the Information Commission – Nature of – Held: The Information Commission discharges administrative functions, not judicial functions – While performing the administrative functions, however, the Information Commissions are required to act in a fair and just manner following the procedure laid down in s

H

this does not mean that the Information Commissioners are like Judges or Justices who must have judicial experience, training and acumen.

Right to Information Act, 2005 – ss. 27 and 28 – Direction given in the judgment under review, to the Central Government and/or the competent authority to frame practice and procedure related rules within a period of six months – Challenge to – Held: The direction is patently erroneous since the use of word “may” in ss.27 and 28 make it clear that the Parliament has left it to the discretion of the rule making authority to make rules to carry out the provisions of the Act – Hence, no mandamus can be issued to the rule making authority to make the rules either within a specific time or in a particular manner – The Court cannot direct the rule making authority to make the rules where the Legislature confers discretion on the rule making authority to make rules.

The respondent had filed a Writ Petition filed under Article 32 of the Constitution, praying for declaring Sections 12(5), 12(6), 15(5) and 15(6) of the Right to Information Act, 2005 as *ultra vires* the Constitution contending that the said provisions, whereby eligibility criteria was laid down for appointment of Central Information Commissioners and State Information Commissioners, were vague and had no nexus with the object of the Act and were violative of Article 14 of the Constitution and while enacting these provisions, the Parliament had not exercised legislative power in consonance with the constitutional principles and guarantees.

The Supreme Court disposed of the writ petition holding the provisions of Sections 12(5) and 15(5) of the Act of 2005 to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, the expression ‘knowledge and experience’ appearing in these provisions would mean and include a basic degree

A

B

C

D

E

F

G

H

A in the field and the experience gained thereafter; and that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Information Commission. Further as opposed to declaring the provisions of Section 12(6) and 15(6) unconstitutional, the Supreme Court read these provisions as having effect ‘post-appointment’ i.e. cessation/termination of holding of office of profit, pursuing any profession or carrying any business is a condition precedent to the appointment of a person as Chief Information Commissioner or Information Commissioner at the Centre or State levels.

The Supreme Court further directed the Central Government and/or the competent authority to frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law and such rules be framed with particular reference to Section 27 and 28 of the Act within a period of six months. The Supreme Court also held that the Commission is a ‘judicial tribunal’ performing functions of ‘judicial’ as well as ‘quasi-judicial’ nature and having the trappings of a Court, unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to the machinery of administration and thus it will be just, fair and proper that the first appellate authority (i.e. the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law.

The said judgment of the Supreme Court was challenged in the instant Review Petitions filed under Article 137 of the Constitution. The question which arose for consideration was whether

H

directions in the judgment under review were at variance with the clear and simple language employed in the different provisions of the Right to Information Act, 2005 and whether the judgment under review suffered from manifest errors of law apparent on the face of the record.

A

Allowing the review petition, the Court

B

HELD:1. Review of a judgment or order of this Court under Article 137 of the Constitution is confined to only errors apparent on the face of the record as provided in Order XL Rule 1 of the Supreme Court Rules, 1966. If a reasoning in the judgment under review is at variance with the clear and simple language in a statute, the judgment under review suffers from a manifest error of law, an error apparent on the face of the record, and is liable to be rectified. Under Order XL of the Supreme Court Rules, 1966, this Court can review its judgment or order on the ground of error apparent on the face of record and on an application for review can reverse or modify its decision on the ground of mistake of law or fact. [Paras 17, 32] [128-A-C; 146-A]

C

D

E

Commissioner of Sales Tax, J & K and Ors. v. Pine Chemicals Ltd. and Ors. (1995) 1 SCC 58: 1994 (5) Suppl. SCR 123 – relied on.

2.1. Sections 12(5) and 15(5) of the Act provide that Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. These provisions of the Act do not provide that the Chief Information Commissioner and Information Commissioners shall be persons having judicial experience, training and acumen and yet this Court has held in the judgment under review that for effectively

F

G

H

A performing the functions and exercising the powers of the Information Commission, there is a requirement of a judicial mind and therefore persons eligible for appointment should preferably have judicial background and possess judicial acumen and experience. [Para 18] [128-E-G]

B

C

D

E

F

G

H

2.2. Sections 18, 19 and 20 of the Act confer powers on the Information Commission. It is clear from the plain and simple language of Sections 18, 19 and 20 of the Act that the functions of the Information Commissions are limited to ensuring that a person who has sought information from a public authority in accordance with his right to information conferred under Section 3 of the Act is not denied such information except in accordance with the provisions of the Act. Section 2(j) defines “Right to Information” conferred on all citizens under Section 3 of the Act to mean the right to information accessible under the Act, “which is held by or under the control of any public authority”. While deciding whether a citizen should or should not get a particular information “which is held by or under the control of any public authority”, the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority. This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions. [Paras 19, 20] [129-A; 134-H; 135-A-F]

2.3. In the judgment under review, this Court has held that there is a *lis* to be decided by the Information Commission inasmuch as the request of a party seeking information is to be allowed or to be disallowed and hence requires a judicial mind. But the *lis* that the Information Commission has to decide was only with regard to the information in possession of the public authority.

authority and the Information Commission was required to decide whether the information could be given to the person asking for it or should be withheld in public interest or any other interest protected by the provisions of the Act. The Information Commission, therefore, while deciding this *lis* does not really perform a judicial function, but performs an administrative function in accordance with the provisions of the Act. [Para 21] [135-F-H; 136-A]

2.4. In the judgment under review, this Court has also held that the Information Commission decides matters which may affect the rights of third parties and hence there is requirement of judicial mind. To protect the rights of third parties, Section 11 of the Act provides that where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record or part thereof, may on a request made under the Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, a written notice will have to be given to such third party inviting such party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party can be kept in view while taking a decision about disclosure of the information. The decision taken by the Central Public Information Officer or the State Public Information Officer, as the case may be, under Section 11 of the Act is appealable under Section 19 of the Act before the Information Commission and when the Information Commission decides such an appeal, it decides only whether or not the information should be furnished to the citizen in view of the objection of the third party. Here also the Information Commission does not decide the rights of a third party but only whether the information which is held by or under the control of a public authority in relation to or supplied by that third party could be furnished to a citizen under the

A
B
C
D
E
F
G
H

A provisions of the Act. Hence, the Information Commission discharges administrative functions, not judicial functions. [Para 22] [136-E-H; 137-A-E]

B 2.5. While performing the administrative functions, however, the Information Commissions are required to act in a fair and just manner following the procedure laid down in Sections 18, 19 and 20 of the Act. But this does not mean that the Information Commissioners are like Judges or Justices who must have judicial experience, training and acumen. [Para 23] [137-F]

C *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjunwala and Others* AIR 1961 SC 1669: 1962 SCR 339 – relied on.

D *Bharat Bank Ltd., Delhi v. Employees of Bharat Bank and Ors.* AIR 1950 SC 188: 1950 SCR 459; *S.P. Sampath Kumar v. Union of India and Ors.* (1987) 1 SCC 124: 1987 (1) SCR 435 and *L. Chandra Kumar v. Union of India and Ors.* (1997) 3 SCC 261: 1997 (2) SCR 1186 – referred to.

E *B. Johnson & Co. (Builders), Ltd. v. Minister of Health* (1947) 2 All England Law Reports 395 – referred to.

F *Mallikarjuna Rao and Ors. v. State of Andhra Pradesh and Ors.* (1990) 2 SCC 707: 1990 (2) SCR 418; *Bushell v. Secretary of State for the Environment* (1980) 2 All ER 608 HL; *Centre for PIL and Anr. v. Union of India and Anr.* (2011) 4 SCC 1 and *Indra Das v. State of Assam* (2011) 3 SCC 380: 2011 (4) SCR 289 – cited.

G 3. Once the Court is clear that Information Commissions do not exercise judicial powers and actually discharge administrative functions, the Court cannot rely on the constitutional principles of separation of powers and independence of judiciary to direct that Information Commissions must be

H

with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court. The principles of separation of powers and independence of judiciary embodied in our Constitution no doubt require that judicial power should be exercised by persons with judicial experience, training and acumen. But, the powers exercised by the Information Commissions under the Act were not earlier vested in the High Court or subordinate court or any other court and are not in any case judicial powers and therefore the Legislature need not provide for appointment of judicial members in the Information Commissions. Perhaps for this reason, Parliament has not provided in Sections 12(5) and 15(5) of the Act for appointment of persons with judicial experience and acumen and retired Judges of the High Court as Information Commissioners and retired Judges of the Supreme Court and Chief Justice of the High Court as Chief Information Commissioner and any direction by this Court for appointment of persons with judicial experience, training and acumen and Judges as Information Commissioners and Chief Information Commissioner would amount to encroachment in the field of legislation. [Paras 24, 25] [138-E-G; 139-G-H; 140-A-C]

Union of India v. R. Gandhi, President Madras Bar Association (2010) 11 SCC 1: 2010 (6) SCR 857; Pareena Swarup v. Union of India (2008) 14 SCC107: 2008 (13) SCR 1217– distinguished.

P. Ramachandra Rao v. State of Karnataka (2002) 4 SCC 578 – followed.

4. Moreover, Sections 12(5) and 15(5) of the Act while providing that Chief Information Commissioner and Information Commissioners shall be persons with eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration

A

B

C

D

E

F

G

H

A and governance, also does not prescribe any basic qualification which such persons must have in the respective fields in which they work. In the judgment under review, however, this Court has “read into” Sections 12(5) and 15(5) of the Act missing words and held that such persons must have a basic degree in the respective field as otherwise Sections 12(5) and 15(5) of the Act are bound to offend the doctrine of equality. This “reading into” the provisions of Sections 12(5) and 15(5) of the Act, words which Parliament has not intended is contrary to the principles of statutory interpretation recognised by this Court. The court could not correct or make up for any deficiencies or omissions in the language of the statute. [Para 26] [140-E-H; 141-A]

Union of India and Anr. v. Deoki Nandan Aggarwal 1992 Supp. (1) SCC 323 – relied on.

5. In the judgment under review, this Court has also held that if Sections 12(5) and 15(5) of the Act are not read in the manner suggested in the judgment, these Sections would offend the doctrine of equality. But Sections 12(5) and 15(5) of the Act do not discriminate against any person in the matter of appointment as Chief Information Commissioner and Information Commissioners and so long as one is a person of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance, he is eligible to be considered for appointment as Chief Information Commissioner or Information Commissioner. However, to ensure that the equality clause in Article 14 is not offended, the persons to be considered for appointment as Chief Information Commissioner or Information Commissioner should be from different fields, namely, law, science and technology, social service, management, journalism, mass media or administration and governance.

H

mass media or administration and governance and not just from one field. [Para 27] [141-E-H; 142-A]

6. Sections 12(6) and 15(6) of the Act, however, provide that the Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carry on any business or pursue any profession. There could be two interpretations of Sections 12(6) and 15(6) of the Act. One interpretation could be that a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession will not be eligible to be considered for appointment as a Chief Information Commissioner and Information Commissioner. If this interpretation is given to Sections 12(6) and 15(6) of the Act, then it will obviously offend the equality clause in Article 14 of the Constitution as it debars such persons from being considered for appointment as Chief Information Commissioner and Information Commissioners. The second interpretation of Sections 12(6) and 15(6) of the Act could be that once a person is appointed as a Chief Information Commissioner or Information Commissioner, he cannot continue to be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession. If this interpretation is given to Sections 12(6) and 15(6) of the Act then the interpretation would effectuate the object of the Act inasmuch as Chief Information Commissioner and Information Commissioners would be able to perform their functions in the Information Commission without being influenced by their political, business, professional

A
B
C
D
E
F
G
H

A or other interests. It is this second interpretation of Sections 12(6) and 15(6) of the Act which has been rightly given in the judgment under review and Sections 12(6) and 15(6) of the Act have been held as not to be violative of Article 14 of the Constitution. [Para 28] [142-A-H; 143-A]

B 7. In the judgment under review, the Central Government and/or the competent authority have been directed to frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law and with particular reference to Sections 27 and 28 of the Act within a period of six months. The use of word "may" in Sections 27 and 28 of the Act make it clear that Parliament has left it to the discretion of the rule making authority to make rules to carry out the provisions of the Act. Hence, no *mandamus* can be issued to the rule making authority to make the rules either within a specific time or in a particular manner. If, however, the rules are made by the rule making authority and the rules are not in accordance with the provisions of the Act, the Court can strike down such rules as *ultra vires* the Act, but the Court cannot direct the rule making authority to make the rules where the Legislature confers discretion on the rule making authority to make rules. In the judgment under review, therefore, this Court made a patent error in directing the rule making authority to make rules within a period of six months. [Para 29] [143-C-D; F-H; 144-A]

G 8. Nonetheless, the selection and appointment of Chief Information Commissioner and Information Commissioners has not been left entirely to the discretion of the Central Government and the State Government under Sections 12 and 15 of the Act. The basic requirement for a person to be appointed as a Chief Information Commissioner or Information Commissioner is that he should be a person of en

H

with wide knowledge and experience in a particular field. Parliament has insisted on this basic requirement having regard to the functions that the Chief Information Commissioner and Information Commissioners are required to perform under the Act. [Para 30] [144-B, E-F]

9. However, the orders passed by Information Commissions have at times gone beyond the provisions of the Act and the Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or Information Commissioners or that the persons appointed answer the criteria laid down in Sections 12(5) and 15(5) of the Act but they do not have the required mind to balance the interests indicated in the Act and to restrain themselves from acting beyond the provisions of the Act. This experience of the functioning of the Information Commissions prompted this Court to issue the directions in the judgment under review to appoint judicial members in the Information Commissions. But it is for Parliament to consider whether appointment of judicial members in the Information Commissions will improve the functioning of the Information Commissions and as Sections 12(5) and 15(5) of the Act do not provide for appointment of judicial members in the Information Commissions, this direction was an apparent error. Sections 12(5) and 15(5) of the Act, however, provide for appointment of persons with wide knowledge and experience in law. This Court hopes that persons with wide knowledge and experience in law will be appointed in the Information Commissions at the Centre and the States. Accordingly, wherever Chief

A

B

C

D

E

F

G

H

A Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming before the Information Commissions, he will ensure that the matter is heard by an Information Commissioner who has such knowledge and experience in law. [Para 31] [145-B-H]

B

10. As the judgment under review suffers from mistake of law, the directions and declarations in the judgment under review are recalled and following declarations and directions are given:

C

(i) Sections 12(5) and 15(5) of the Act are not *ultra vires* the Constitution.

D

(ii) Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner.

E

F

G

H

(iii) Only persons of eminence in public life with

- wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment as Information Commissioner and Chief Information Commissioner.
- (iv) Persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.
- (v) The Committees under Sections 12(3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.
- (vi) Wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide

A
B
C
D
E
F
G
HA
B
C
D
E
F
G
H

knowledge and experience in the field of law.
[Para 32] [146-B-H; 147-A-F]

Case Law Reference:

1994 (5) Suppl. SCR 123	relied on	Para 17
(1947) 2 All ELR 395	referred to	Paras 12, 21
1962 SCR 339	relied on	Paras 9, 23
2010 (6) SCR 857	distinguished	Paras 5, 16, 24
2008 (13) SCR 1217	distinguished	Paras 16, 24
(2002) 4 SCC 578	followed	Para 8
1992 Supp. (1) SCC 323	relied on	Paras 8, 26
1950 SCR 459	referred to	Para 5
1987 (1) SCR 435	referred to	Para 5
1997 (2) SCR 1186	referred to	Para 5
1990 (2) SCR 418	cited	Para 10
(1980) 2 All ER 608 HL	cited	Para 12
(2011) 4 SCC 1	cited	Para 13
2011 (4) SCR 289	cited	Para 15

CIVIL ORIGINAL JURISDICTION : Review Petition (C) No. 2309 of 2012.

IN

Writ Petition (Civil) No. 210 of 2012.

Under Article 32 of the Constitution of India.

WITH

RP(C) No. 2675 of 2012 in WP(C) No. 210 of 2012.

Amarjit Singh Chandhiok, ASG, M.S, Ganesh, Dr. Manish Singhvi, Irshad Ahmad, AAG, Ritesh Kumar, Anoopam Prasad, T.A. Khan, Nizam Pasha, Shweta Gupta, Honey Kumari, Mallika Ahluwalia, Sidharth Tyagi, B.V. Balaram Das, R. Ayyam Perumal, K. Seshachary, Anushree Kapadia, Sukun K.S. Chandele, Amit Lubhaya, Pragati Neekhra, Prashant Bhushan, Pranav Sachdeva, Amit Sharma, Shweta Singh, Upendra Mishra, Satya Narain Shukla for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These are petitions filed under Article 137 of the Constitution of India for review of the judgment dated 13.09.2012 of this Court in Writ Petition (C) No.210 of 2012 (hereinafter referred to as ‘the judgment under review’).

Background Facts:

2. In Writ Petition (C) No.210 of 2012 filed under Article 32 of the Constitution of India, Namit Sharma, the respondent herein, had prayed for declaring the provisions of Sections 12(5), 12(6), 15(5) and 15(6) of the Right to Information Act, 2005 (for short ‘the Act’) as *ultra vires* the Constitution. Sections 12(5), 12(6), 15(5) and 15(6) of the Act are extracted hereinbelow:

“12(5) The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.”

“12(6) The Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or

Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.”

“15(5) The State Chief Information Commissioner and State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.”

“15(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.”

The grounds taken in the writ petition were that the provisions of Sections 12(5), 12(6), 15(5) and 15(6) of the Act laying down the eligibility criteria for appointment of Central Information Commissioners and State Information Commissioners were vague and had no nexus with the object of the Act and were violative of Article 14 of the Constitution of India and while enacting these provisions, Parliament had not exercised legislative power in consonance with the constitutional principles and guarantees.

3. After hearing the learned counsel for the respondent-writ petitioner and the learned Additional Solicitor General for Union of India, this Court held in the judgment under review that the provisions of Sections 12(5) and 15(5) of the Act did not specify the basic qualifications of the persons to be appointed as Information Commissioners and only mentioned that the Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media

governance. This Court held that the knowledge and experience in the different fields mentioned in Section 12(5) and Section 15(5) of the Act would presuppose a graduate who possesses basic qualification in the concerned field. This Court also held that Sections 12(6) and 15(6) of the Act, which provide that the Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory or hold any other office of profit or be connected with any political party or carry on any business or pursue any profession, do not disqualify such persons for consideration for appointment as Chief Information Commissioner or Information Commissioner, but these disqualifications will come into play after a person is appointed as Chief Election Commissioner or Information Commissioner. In other words, after a Chief Election Commissioner or Information Commissioner is appointed, he cannot continue to be a Member of Parliament or Member of the Legislature of any State or hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession.

4. In the judgment under review, this Court also held that the Information Commission, as a body, performs functions of wide magnitude, through its members, including adjudicatory, supervisory as well as penal functions. This Court held that access to information is a statutory right, subject to certain constitutional and statutory limitations and the Information Commissioners have been vested with the power to decline furnishing of information under certain circumstances and in the specified situations. This Court held that disclosure of information under the Act may also involve the question of prejudice to a third party, unlike in some countries where information involving a third party cannot be disclosed without the consent of that party. This Court held that considering all these functions to be performed by the Information Commission, the exercise of powers and passing of the orders by the Information Commission cannot be arbitrary and have to be in

A
B
C
D
E
F
G
H

A consonance with the principles of natural justice, namely, notice to a party, grant of hearing and passing of reasoned orders, and, therefore, the Information Commission is a Tribunal discharging quasi-judicial functions. This Court held that there is a *lis* to be decided by the Information Commission inasmuch as the request of a party seeking information is to be allowed or to be disallowed and the decisions rendered by the Information Commission on such a *lis* may prejudicially affect a third party. For these reasons, this Court further held that the Information Commission possesses the essential attributes and trappings of a Court as the adjudicatory powers performed by the Information Commission are akin to the Court system and the adjudicatory matters that they decide can have serious consequences on various rights including the right to privacy protected under Article 21 of the Constitution.

D 5. In the judgment under review, this Court also expressed the opinion that for effectively performing the functions and exercising the powers of the Information Commission, there is a requirement of a judicial mind. For holding this opinion, the Court relied on the judgments of this Court in *Bharat Bank Ltd., Delhi v. Employees of Bharat Bank & Ors.* [AIR 1950 SC 188], *S.P. Sampath Kumar v. Union of India and Others* [(1987) 1 SCC 124], *Union of India v. R. Gandhi, President Madras Bar Association* [(2010) 11 SCC 1] and *L. Chandra Kumar v. Union of India and Others* [(1997) 3 SCC 261]. This Court also held that separation of powers and the independence of judiciary are fundamental constitutional values in the structure of our Constitution as without these two constitutional values, impartiality cannot thrive as has been held by this Court in *Union of India v. R. Gandhi, President, Madras Bar Association* (supra). This Court, thus, held that though the independence of judiciary *stricto sensu* applied to the Court system, by necessary implication, it would also apply to Tribunals whose functioning is quasi-judicial and akin to the Court system and the entire administration of justice has to be so independent and managed by persons

H

expertise and experience that persons demanding justice must not only receive justice, but should also have the faith that justice would be done. This Court accordingly held that the persons eligible for appointment should be of public eminence, with knowledge and experience in the specified fields and should preferably have some judicial background and they should possess judicial acumen and experience to fairly and effectively deal with the intricate questions of law that would come up for determination before the Information Commission in its day-to-day working. This Court held that the Information Commission is a judicial tribunal having the essential trappings of a Court and, as an irresistible corollary, it will follow that the appointments to the Information Commission are made in consultation with the judiciary. The Court, however, observed that in the event, the Government is of the opinion and desires to appoint not only judicial members but also experts from other fields to the Commission in terms of Section 12(5) of the Act, to ensure judicial independence, effective adjudicatory process and public confidence in the administration of justice by the Commission, it would be necessary that the Commission is required to work in Benches comprising one judicial member and one other member from the specified fields mentioned in Sections 12(5) and 15(5) of the Act.

6. On the appointment procedure, this Court also held in the judgment under review that the appointments to the post of judicial member has to be made in consultation with the Chief Justice of India in case of Chief Information Commissioner and members of the Central Information Commission, and the Chief Justices of the High Courts of the respective States, in the case of State Chief Information Commissioner and State Information Commissioners of that State Commission. This Court further held that in the case of appointment of members to the respective Commissions from other specified fields, the DoPT in the Centre and the concerned Ministry in the States should prepare a panel, after due publicity. Empanelling the names proposed should be at least three times the number of

A
B
C
D
E
F
G
H

A vacancies existing in the Commission and the names so empanelled, with the relevant record should be placed before the High Powered Committee mentioned in Section 12(3) and 15(3) of the Act and in furtherance of the recommendations of the High Powered Committee, appointments to the Central and State Information Commissions should be made by the competent authority.

7. For the reasons recorded in the judgment under review, this Court disposed of the writ petition of the respondent-writ petitioner with the following directions/declarations:

- C “1. The writ petition is partly allowed.
- D 2. The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to ‘read into’ these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus, we hold and declare that the expression ‘knowledge and experience’ appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof.

F
G
H 3. As opposed to declaring the provisions of Section 12(6) and 15(6) unconstitutional, we would

provisions as having effect 'post-appointment'. In other words, cessation/termination of holding of office of profit, pursuing any profession or carrying any business is a condition precedent to the appointment of a person as Chief Information Commissioner or Information Commissioner at the Centre or State levels.

A

B

4. There is an absolute necessity for the legislature to reword or amend the provisions of Section 12(5), 12(6) and 15(5), 15(6) of the Act. We observe and hope that these provisions would be amended at the earliest by the legislature to avoid any ambiguity or impracticability and to make it in consonance with the constitutional mandates.

C

5. We also direct that the Central Government and/or the competent authority shall frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law. Such rules should be framed with particular reference to Section 27 and 28 of the Act within a period of six months from today.

D

6. We are of the considered view that it is an unquestionable proposition of law that the Commission is a 'judicial tribunal' performing functions of 'judicial' as well as 'quasi-judicial' nature and having the trappings of a Court. It is an important cog and is part of the court attached system of administration of justice, unlike a ministerial tribunal which is more influenced and controlled and performs functions akin to the machinery of administration.

E

F

7. It will be just, fair and proper that the first appellate authority (i.e. the senior officers to be nominated in terms of Section 5 of the Act of 2005) preferably should be the persons possessing a degree in law or having adequate knowledge and experience in the field of law.

G

H

A

B

C

D

E

F

G

H

8. The Information Commissions at the respective levels shall henceforth work in Benches of two members each. One of them being a 'judicial member', while the other an 'expert member'. The judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions. A law officer or a lawyer may also be eligible provided he is a person who has practiced law at least for a period of twenty years as on the date of the advertisement. Such lawyer should also have experience in social work. We are of the considered view that the competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners. The Chief Information Commissioner at the Centre or State level shall only be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India.

9. The appointment of the judicial members to any of these posts shall be made 'in consultation' with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be.

10. The appointment of the Information Commissioners at both levels should be made from amongst the persons empanelled by the DoPT in the case of Centre and the concerned Ministry in the case of a State. The panel has to be prepared upon due advertisement and on a rational basis as afore-recorded.

11. The panel so prepared by the DoPT or the concerned Ministry ought to be placed before the High-powered Committee in terms of Section 12(3), for final recommendation to the President of India. Needless to repeat that the High Powered Committee at the Centre and the State levels is expected to adopt a fair and transparent method of recommending the names for appointment to the competent authority.

12. The selection process should be commenced at least three months prior to the occurrence of vacancy. A

13. This judgment shall have effect only prospectively.

14. Under the scheme of the Act of 2005, it is clear that the orders of the Commissions are subject to judicial review before the High Court and then before the Supreme Court of India. In terms of Article 141 of the Constitution, the judgments of the Supreme Court are law of the land and are binding on all courts and tribunals. Thus, it is abundantly clear that the Information Commission is bound by the law of precedent, i.e., judgments of the High Court and the Supreme Court of India. In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedent and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case. B
C
D

It is not only the higher court's judgments that are binding precedents for the Information Commission, but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission. The rule of precedence is equally applicable to intra-court appeals or references in the hierarchy of the Commission." E
F

Contentions of the learned counsel for the parties:

8. Mr. A.S. Chandhiok, learned ASG appearing for the Union of India, submitted that under the Constitution it is only the Legislature which has the power to make law and amend the law and the Court cannot in exercise of its judicial power encroach into the field of legislation. In support of this submission, he relied on the decision of a seven-Judge Bench of this Court in *P. Ramachandra Rao v. State of Karnataka* [(2002) 4 SCC 578] in which this Court has recognised the G
H

A limits of judicial power in a constitutional democracy. He also cited the decision of a three- Judge Bench in *Union of India and Another v. Deoki Nandan Aggarwal* [1992 Supp. (1) SCC 323] for the proposition that courts cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. He submitted that this being the position of law, this Court could not have held in the judgment under review that the knowledge and experience in different fields mentioned in Sections 12(5) and 15(5) of the Act would presuppose a graduate or basic degree in the concerned field when Parliament has not provided in Sections 12(5) and 15(5) of the Act that only persons with basic degree in law, science and technology, social science, management, journalism, mass media, etc. would be eligible for appointment as Chief Information Commissioner and Information Commissioners. He submitted that directions nos. 2 and 7 of the judgment under review that persons possessing basic degree in the respective fields can be Information Commissioners amount to amendment of Sections 12(5) and 15(5) of the Act. B
C
D

9. Mr. Chandhiok next submitted that the view taken by this Court in the judgment under review that the Information Commissioners should possess the essential attributes of a court and that for effectively performing the functions and powers of the Information Commission there is requirement of a judicial mind and hence persons eligible for appointment as Information Commissioners should preferably have some judicial background and possess judicial acumen, is a patent error of law. He submitted that Information Commissioners have a duty to act judicially and perform quasi-judicial functions, but this does not mean that they must have the experience and acumen of judicial officers. In support of this submission, he cited the observations of Hidayatullah, J in *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjunwala and Others* (AIR 1961 SC 1669) that an officer who is required to decide the matters judicially does not make him a Court or even a Tribunal because that only establishes that he is H

of conduct and is free from bias and interest. He submitted that as Information Commissions are not really exercising judicial powers, and are not courts, Parliament has not provided in Sections 12(5) and 15(5) of the Act that Information Commissioners have to have judicial experience and acumen. He argued that direction no. 8 that Information Commissions at the respective levels shall work in Benches of two members each and one of them has to be a judicial member possessing a degree in law and having judicially trained mind and experience in performing judicial functions and the direction that competent authority should prefer a person who is or has been a Judge of the High Court for appointment as Information Commissioners and that the Chief Information Commissioner shall only be a person who is or has been a Chief Justice of a High Court or a Judge of the Supreme Court of India is a palpable error which needs to be corrected in this review. He further submitted that consequently direction no.9 in the judgment under review that the appointment of judicial members as Information Commissioners shall be in consultation with the Chief Justice of India and Chief Justice of High Court of the respective States, as the case may be, should be deleted.

10. Mr. Chandhiok finally submitted that in direction no.5 of the judgment under review, this Court has further directed the Central Government to frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law under Sections 27 and 28 of the Act within a period of 6 months but law is well settled that the Court cannot direct a rule making authority to make rules in a particular fashion. He relied on the decision of this Court in *Mallikarjuna Rao and Others v. State of Andhra Pradesh and Others* [(1990) 2 SCC 707] in support of this submission. He argued that direction no.5 of the judgment under review is, therefore, a patent error which needs to be corrected in this review.

11. Dr. Manish Singhvi, Additional Advocate General for

A
B
C
D
E
F
G
H

A the State of Rajasthan, submitted that the Information Commissioners do not perform functions which prior to the Act were vested in courts and therefore they need not be persons having judicial background/judicial training/judicial experience. He submitted that in *Union of India v. R. Gandhi, Madras Bar Association* (supra), this Court took the view that only if functions which have been dealt with by civil courts are transferred to tribunals, such tribunals should be manned by persons having judicial background/judicial training/judicial experience. He submitted that the view taken by this Court in the judgment under review that persons having judicial background/judicial training/judicial experience should be preferred while appointing Information Commissioners is an apparent error which should be corrected in this review.

12. Mr. M.S. Ganesh, learned senior counsel appearing for the intervener, Commonwealth Human Rights Initiative, submitted that the Information Commission is not vested with sovereign judicial powers and discharges only administrative functions under the provisions of the Act and the view taken by this Court in the judgment under review that Information Commissioners should be persons having judicial background, judicial experience and judicial acumen is not a correct view. He cited the opinion of Lord Greene, M.R. in *B. Johnson & Co. (Builders), Ltd. v. Minister of Health* [(1947) 2 All England Law Reports 395] as well as the opinion of Lord Diplock in *Bushell v. Secretary of State for the Environment* [(1980) 2 All ER 608 HL] that Information Commissioners arrive at administrative decisions and do not decide litigations and therefore they need not have judicial background, judicial experience and judicial acumen. Mr. Ganesh next submitted that persons who have been appointed as Chief Information Commissioners and Information Commissioners under Sections 12(5) and 15(5) of the Act, have been persons without any eminence in public life. He submitted that mostly retired IAS Officers and IPS Officers without any experience in public life but only experience in administration have been appointed

Commissioners. He submitted that in this review, the Court should issue appropriate directions to ensure that appointment of Chief information Commissioners and Information Commissioners are made in accordance with Sections 12(5) and 15(5) of the Act.

13. Mr. Prashant Bhushan, learned senior counsel appearing for the interveners, Mr. Shailesh Gandhi and Mrs. Aruna Roy, submitted that as the Information Commissions do not perform judicial work, they need not be manned by judicial officers and Justices of High Courts and Supreme Court and, therefore, directions No.8 and 9 of the judgment under review need to be deleted. He further submitted that directions No.10 and 11 of the judgment under review regarding the procedure to be followed for appointment of Information Commissioners may not ensure transparency in the matter of appointment of Information Commissioners. He submitted that this Court in *Centre for PIL and Another v. Union of India & Another* [(2011) 4 SCC] has laid down a procedure in para 88 for selecting and appointing the Central Vigilance Commissioner and Vigilance Commissioners under Section 3 (3) of the Central Vigilance Commission Act, 2003 and has laid down therein that the empanelment of persons to be considered for appointment of Central Vigilance Commissioner and Vigilance Commissioner shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority. He submitted that similar procedure should be followed for short listing persons for appointment as Information Commissioners and some reasons should be indicated as to why the person has been empanelled for appointment as Information Commissioner. He further submitted that the direction No.8 in the judgment under review that Information Commissioners at the respective levels shall henceforth work in benches of two members and one of them should be a judicial member would result in very few Division Benches of the Information Commission taking up matters and the working of the Information Commission in dealing with

A
B
C
D
E
F
G
H

A matters will slow down. He submitted that instead legal training can be given to Information Commissioners to decide matters involving intricate questions of law.

14. Learned counsel for the respondent- writ petitioner Mr. Amit Sharma, on the other hand, supported the judgment under review. According to him, this Court has rightly held that the Information Commission functions as an adjudicatory authority and decides issues relating to the fundamental right of a citizen to be informed about the Government policies and information. He submitted that to ensure proper adjudication of the fundamental right to information of every citizen, it is absolutely necessary that an independent person who does not have a political agenda is appointed as Information Commissioner. He further submitted that Information Commissioners also have to adjudicate issues relating to right of privacy of the citizens of India, which is part of their personal liberty under Article 21 of the Constitution and for this reason also a person with judicial experience and training is best suited and therefore this Court has rightly held that persons with judicial experience and training and judicial acumen should be preferred for appointment as Information Commissioners. He finally submitted that it will be evident from Sections 7, 8, 9 and 11 of the Act that a *lis* between the parties will have to be decided by the Central Public Information Officer or State Public Information Officer and this Court has rightly held in judgment under review that Information Commissions which decide appeals under Section 20 of the Act against the decisions of the Central Public Information Officer or State Public Information Officer are akin to courts. He referred to Section 18 of the Act to show that Information Commissions have been vested with the powers of a civil court and, therefore, are in the nature of courts which have to be manned by judicial officers.

15. Mr. Sharma vehemently argued that in the event this Court holds in this review that the persons with judicial experience and training need not be ap

H

A
B
C
Commissioners, then the provisions of Section 12(5) and 15(5) of the Act have to be struck down as *ultra vires* Article 14 of the Constitution. He cited the decision of this Court in *Indra Das v. State of Assam* [(2011) 3 SCC 380] in which it has been held that ordinarily the literal rule of interpretation while construing a statutory provision should be followed, but where such interpretation makes the provision unconstitutional it can be departed from and the statute should be read down to make it constitutional. He submitted that in the judgment under review, this Court has saved the provisions of Section 12(5) and 15(5) of the Act by reading down the said provisions.

D
E
F
G
H
16. Mr. Sharma referred to the chart at page 40 of the writ petition to show qualifications of persons appointed equivalent to Information Commissioners in Australia, Canada, Scotland, England and United States and argued that they are required to obtain a degree in the field of law. He cited the observations of this Court in the case of *Union of India v. R. Gandhi, President, Madras Bar Association* (supra) that the assumption that members of the civil services will have the judicial experience or expertise in company law to be appointed either as judicial member or technical member is an erroneous assumption. He submitted that in that case, this Court therefore issued directions that only High Court Judges or District Judges of 5 years experience or lawyers having practice of 10 years can be considered for appointment as judicial members of the National Company Law Tribunal. He also relied on the decision of this Court in *Pareena Swarup v. Union of India* [(2008) 14 SCC 107] in which this Court observed that while creating new avenue of judicial forums, it is the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of judiciary and held that the provisions of the Prevention of Money-Laundering Act, 2002 as enacted may not ensure an independent judiciary to decide the cases under the Act and accordingly directed the Union of India to incorporate the proposed provisions to ensure independence of judiciary.

A **Findings of the Court:**

B
C
D
17. Review of a judgment or order of this Court under Article 137 of the Constitution is confined to only errors apparent on the face of the record as provided in Order XL Rule 1 of the Supreme Court Rules, 1966. A three Judge Bench of this Court has held in *Commissioner of Sales Tax, J & K and Others v. Pine Chemicals Ltd. and Others* [(1995) 1 SCC 58] that if a reasoning in the judgment under review is at variance with the clear and simple language in a statute, the judgment under review suffers from a manifest error of law, an error apparent on the face of the record, and is liable to be rectified. Hence, in these Review Petitions, we have to decide whether the reasoning and directions in the judgment under review is at variance with the clear and simple language employed in the different provisions of the Act and accordingly whether the judgment under review suffers from manifest errors of law apparent on the face of the record.

E
F
G
H
18. As we have noticed, Sections 12(5) and 15(5) of the Act provide that Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. These provisions of the Act do not provide that the Chief Information Commissioner and Information Commissioners shall be persons having judicial experience, training and acumen and yet this Court has held in the judgment under review that for effectively performing the functions and exercising the powers of the Information Commission, there is a requirement of a judicial mind and therefore persons eligible for appointment should preferably have judicial background and possess judicial acumen and experience. We may now examine the bare provisions of the Act, whether this finding that there is requirement of a judicial mind to discharge the functions of Information Commission is an error apparent on the face of the record.

19. Sections 18, 19 and 20 of the Act, which confer powers on the Information Commission, are extracted hereinbelow:

“18. Powers and ‘Functions of Information Commissions.—(1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,—

(a) who has been unable to submit a request to a Central Public Information Officer or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or senior officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;

(b) who has been refused access to any information requested under this Act;

(c) who has not been given a response to a request for information or access to information within the time limit specified under this Act;

(d) who has been required to pay an amount of fee which he or she considers unreasonable;

(e) who believes that he or she has been given incomplete, misleading or false information under this Act; and

A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

(2) Where the Central Information Commission or State Information Commission, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof.

(3) The Central Information Commission or State Information Commission, as the case may be, shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;

(b) requiring the discovery and inspection of documents;

(c) receiving evidence on affidavit;

(d) requisitioning any public record or copies thereof from any court or office;

(e) issuing summons for examination of witnesses or documents; and

(f) any other matter which may be prescribed.

(4) Notwithstanding anything inconsistent contained in any other Act of Parliament or State Legislature, as the case may be, the Central Information Commission or the State Information Commission, as the case may be, may, during the inquiry of any complaint under

record to which this Act applies which is under the control of the public authority, and no such record may be withheld from it on any grounds.

19. Appeal.—(1) Any person who, does not receive a decision within the time specified in sub-section (1) or clause (a) of sub-section (3) of section 7, or is aggrieved by a decision of the Central Public Information Officer or State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or State Public Information Officer as the case may be, in each public authority:

Provided that such officer may admit the appeal after the expiry of the period of thirty days if he or she is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) Where an appeal is preferred against an order made by a Central Public Information Officer or a State Public Information Officer, as the case may be, under section 11 to disclose third party information, the appeal by the concerned third party shall be made within thirty days from the date of the order.

(3) A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission:

Provided that the Central Information Commission or the State Information Commission, as the case may be, may admit the appeal after the expiry of the period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(4) If the decision of the Central Public Information Officer or State Public Information Officer, as the case may be, against which an appeal is preferred relates to information of a third party, the Central Information Commission or State Information Commission, as the case may be, shall give a reasonable opportunity of being heard to that third party.

(5) In any appeal proceedings, the onus to prove that a denial of a request was justified shall be on the Central Public Information Officer or State Public Information Officer, as the case may be, who denied the request.

(6) An appeal under sub-section (1) or sub-section (2) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing.

(7) The decision of the Central Information Commission or State Information Commission, as the case may be, shall be binding.

(8) In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to—

(a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including—

(i) by providing access to information, if so requested, in a particular form;

(ii) by appointing a Central Public Information Officer or State Public Information Officer, as the case may be;

(iii) by publishing certain information or categories of information; A

(iv) by making necessary changes to its practices in relation to the maintenance, management and destruction of records; B

(v) by enhancing the provision of training on the right to information for its officials; C

(vi) by providing it with an annual report in compliance with clause (b) of sub-section (1) of section 4; C

(b) require the public authority to compensate the complainant for any loss or other detriment suffered;

(c) impose any of the penalties provided under this Act; D

(d) reject the application.

(9) The Central Information Commission or State Information Commission, as the case may be, shall give notice of its decision, including any right of appeal, to the complainant and the public authority. E

(10) The Central Information Commission or State Information Commission, as the case may be, shall decide the appeal in accordance with such procedure as may be prescribed. F

20. Penalties.—(1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) G

H

A of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or, obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

B

C Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

D Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

E (2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

F

G

H 20. It will be clear from the plain a

Sections 18, 19 and 20 of the Act that, under Section 18 the Information Commission has the power and function to receive and inquire into a complaint from any person who is not able to secure information from a public authority, under Section 19 it decides appeals against the decisions of the Central Public Information Officer or the State Public Information Officer relating to information sought by a person, and under Section 20 it can impose a penalty only for the purpose of ensuring that the correct information is furnished to a person seeking information from a public authority. Hence, the functions of the Information Commissions are limited to ensuring that a person who has sought information from a public authority in accordance with his right to information conferred under Section 3 of the Act is not denied such information except in accordance with the provisions of the Act. Section 2(j) defines "Right to Information" conferred on all citizens under Section 3 of the Act to mean the right to information accessible under the Act, "which is held by or under the control of any public authority". While deciding whether a citizen should or should not get a particular information "which is held by or under the control of any public authority", the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority. This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions.

21. In the judgment under review, this Court after examining the provisions of the Act, however, has held that there is a *lis* to be decided by the Information Commission inasmuch as the request of a party seeking information is to be allowed or to be disallowed and hence requires a judicial mind. But we find that the *lis* that the Information Commission has to decide was only with regard to the information in possession of a public authority and the Information Commission was required to decide whether the information could be given to the person asking for it or should be withheld in public interest or any other

A
B
C
D
E
F
G
H

A interest protected by the provisions of the Act. The Information Commission, therefore, while deciding this *lis* does not really perform a judicial function, but performs an administrative function in accordance with the provisions of the Act. As has been held by Lord Greene, M.R. in *B. Johnson & Co. (Builders), Ltd. v. Minister of Health* (supra):

C "Lis, of course, implies the conception of an issue joined between two parties. The decision of a *lis*, in the ordinary use of legal language, is the decision of that issue. The What is described here as a *lis* – the raising of the objections to the order, the consideration of the matters so raised and the representations of the local authority and the objectors – is merely a stage in the process of arriving at an administrative decision. It is a stage which the courts have always said requires a certain method of approach and method of conduct, but it is not a *lis inter partes*, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation."

E 22. In the judgment under review, this Court has also held after examining the provisions of the Act that the Information Commission decides matters which may affect the rights of third parties and hence there is requirement of judicial mind. For example, under Section 8(1)(d) of the Act, there is no obligation to furnish information including commercial confidence, trade secrets, or intellectual property, the disclosure of which would harm the competitive position of the third party, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. Similarly, the right to privacy of a third party, which is part of his personal liberty under Article 21 of the Constitution, may be breached if a particular kind of information, purely of personal nature may be directed to be furnished by the concerned authority. To protect the rights of third parties, Section 11 of the Act provides that w

H

Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record or part thereof, may on a request made under the Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, a written notice will have to be given to such third party inviting such party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party can be kept in view while taking a decision about disclosure of the information. The decision taken by the Central Public Information Officer or the State Public Information Officer, as the case may be, under Section 11 of the Act is appealable under Section 19 of the Act before the Information Commission and when the Information Commission decides such an appeal, it decides only whether or not the information should be furnished to the citizen in view of the objection of the third party. Here also the Information Commission does not decide the rights of a third party but only whether the information which is held by or under the control of a public authority in relation to or supplied by that third party could be furnished to a citizen under the provisions of the Act. Hence, the Information Commission discharges administrative functions, not judicial functions.

23. While performing these administrative functions, however, the Information Commissions are required to act in a fair and just manner following the procedure laid down in Sections 18, 19 and 20 of the Act. But this does not mean that the Information Commissioners are like Judges or Justices who must have judicial experience, training and acumen. In *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjunwala and Others* (supra), Hidayatullah, J, explained:

“33. In my opinion, a Court in ‘the strict sense is a tribunal which is a part of the ordinary hierarchy of Courts of Civil Judicature maintained by the State under its constitution to exercise the judicial power of the State. These Courts

A
B
C
D
E
F
G
H

A perform all the judicial functions of the State except those that are excluded by law from their jurisdiction. The word “judicial”, be it noted, is itself capable of two meanings. They were admirably stated by Lopes, L.J. in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1892) 1 QB 431(452) in these words:

B
C “The word ‘judicial’ has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration.”

D That an officer is required to decide matters before him “judicially” in the second sense does not make him a Court or even a tribunal, because that only establishes that he is following a standard of conduct, and is free from bias or interest.”

E 24. Once the Court is clear that Information Commissions do not exercise judicial powers and actually discharge administrative functions, the Court cannot rely on the constitutional principles of separation of powers and independence of judiciary to direct that Information Commissions must be manned by persons with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court. The principles of separation of powers and independence of judiciary embodied in our Constitution no doubt require that judicial power should be exercised by persons with judicial experience, training and acumen. For this reason, when judicial powers vested in the High Court were sought to be transferred to tribunals or judicial powers are vested in tribunals by an Act of the legislature, this Court has insisted that such tribunals be manned by persons with judicial experience and training, such

and District Judges of some experience. Accordingly, when the powers of the High Court under Companies Act, 1956 were sought to be transferred to Tribunals by the Companies (Amendment) Act, 2002, a Constitution Bench of this Court has held in *Union of India v. R. Gandhi, President Madras Bar Association* (supra):

“When the legislature proposes to substitute a tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the judicial members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as technical members. Therefore, only persons with a judicial background, that is, those who have been or are Judges of the High Court and lawyers with the prescribed experience, who are eligible for appointment as High Court Judges, can be considered for appointment as judicial members.”

In *Pareena Swarup v. Union of India* (supra), having found that judicial powers were to be exercised by the Appellate Tribunals under the Prevention of Money- Laundering Act, 2002 this Court held that to protect the constitutional guarantee of independence of judiciary, persons who are qualified to be judges be appointed as members of the Appellate Tribunal. But, as we have seen, the powers exercised by the Information Commissions under the Act were not earlier vested in the High Court or subordinate court or any other court and are not in any case judicial powers and therefore the Legislature need not provide for appointment of judicial members in the Information

A
B
C
D
E
F
G
H

A Commissions.

25. Perhaps for this reason, Parliament has not provided in Sections 12(5) and 15(5) of the Act for appointment of persons with judicial experience and acumen and retired Judges of the High Court as Information Commissioners and retired Judges of the Supreme Court and Chief Justice of the High Court as Chief Information Commissioner and any direction by this Court for appointment of persons with judicial experience, training and acumen and Judges as Information Commissioners and Chief Information Commissioner would amount to encroachment in the field of legislation. To quote from the judgment of the seven-Judge Bench in *P. Ramachandra Rao v. State of Karnataka* (supra):

D “Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature.”

E 26. Moreover, Sections 12(5) and 15(5) of the Act while providing that Chief Information Commissioner and Information Commissioners shall be persons with eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance, also does not prescribe any basic qualification which such persons must have in the respective fields in which they work. In the judgment under review, however, this Court has “read into” Sections 12(5) and 15(5) of the Act missing words and held that such persons must have a basic degree in the respective field as otherwise Sections 12(5) and 15(5) of the Act are bound to offend the doctrine of equality. This “reading into” the provisions of Sections 12(5) and 15(5) of the Act, words which Parliament has not intended is contrary to the principles of statutory interpretation recognised by this Court. In *Union of India and Another v. Deoki Nandan Aggarwal* (supra) this Court has held that the court could not correct or make

or omissions in the language of the statute. V. Ramaswami, J. A
writing the judgment on behalf of a three Judge Bench says:

“It is not the duty of the Court either to enlarge the scope B
of the legislation or the intention of the legislature when the
language of the provision is plain and unambiguous. The
Court cannot rewrite, recast or reframe the legislation for
the very good reason that it has no power to legislate. The
power to legislate has not been conferred on the courts. C
The Court cannot add words to a statute or read words
into it which are not there. Assuming there is a defect or
an omission in the words used by the legislature the Court
could not go to its aid to correct or make up the deficiency. D
Courts shall decide what the law is and not what it should
be. The Court of course adopts a construction which will
carry out the obvious intention of the legislature but could
not legislate itself. But to invoke judicial activism to set at
naught legislative judgment is subversive of the
constitutional harmony and comity of instrumentalities.”

27. In the judgment under review, this Court has also held E
that if Sections 12(5) and 15(5) of the Act are not read in the
manner suggested in the judgment, these Sections would offend
the doctrine of equality. But on reading Sections 12(5) and
15(5) of the Act, we find that it does not discriminate against
any person in the matter of appointment as Chief Information
Commissioner and Information Commissioners and so long as F
one is a person of eminence in public life with wide knowledge
and experience in law, science and technology, social service,
management, journalism, mass media or administration and
governance, he is eligible to be considered for appointment as
Chief Information Commissioner or Information Commissioner. G
However, to ensure that the equality clause in Article 14 is not
offended, the persons to be considered for appointment as
Chief Information Commissioner or Information Commissioner
should be from different fields, namely, law, science and
technology, social service, management, journalism, mass H

A media or administration and governance and not just from one
field.

28. Sections 12(6) and 15(6) of the Act, however, provide
that the Chief Information Commissioner or an Information
Commissioner shall not be a Member of Parliament or Member B
of the Legislature of any State or Union Territory, as the case
may be, or hold any other office of profit or connected with any
political party or carry on any business or pursue any profession.
There could be two interpretations of Sections 12(6) and 15(6)
of the Act. One interpretation could be that a Member of C
Parliament or Member of the Legislature of any State or Union
Territory, as the case may be, or a person holding any other
office of profit or connected with any political party or carrying
on any business or pursuing any profession will not be eligible
to be considered for appointment as a Chief Information
Commissioner and Information Commissioner. If this D
interpretation is given to Sections 12(6) and 15(6) of the Act,
then it will obviously offend the equality clause in Article 14 of
the Constitution as it debars such persons from being
considered for appointment as Chief Information
Commissioner and Information Commissioners. The second E
interpretation of Sections 12(6) and 15(6) of the Act could be
that once a person is appointed as a Chief Information
Commissioner or Information Commissioner, he cannot
continue to be a Member of Parliament or Member of the
Legislature of any State or Union Territory, as the case may be, F
or hold any other office of profit or remain connected with any
political party or carry on any business or pursue any profession.
If this interpretation is given to Sections 12(6) and 15(6) of the
Act then the interpretation would effectuate the object of the Act
inasmuch as Chief Information Commissioner and Information G
Commissioners would be able to perform their functions in the
Information Commission without being influenced by their
political, business, professional or other interests. It is this
second interpretation of Sections 12(6) and 15(6) of the Act
which has been rightly given in the judgment H

Sections 12(6) and 15(6) of the Act have been held as not to be violative of Article 14 of the Constitution. Therefore, the argument of Mr. Sharma, learned counsel for the respondent-writ petitioner, that if we do not read Sections 12(5) and 15(5) of the Act in the manner suggested in the judgment under review, the provisions of Sections 12(5) and 15(5) of the Act would be *ultra vires* the Article 14 of the Constitution, is misconceived.

29. In the judgment under review, in direction no.5, the Central Government and/or the competent authority have been directed to frame all practice and procedure related rules to make working of the Information Commissions effective and in consonance with the basic rule of law and with particular reference to Sections 27 and 28 of the Act within a period of six months. Sections 27(1) and 28(1) of the Act are extracted hereinbelow:

“27. Power to make rules by appropriate Government.—(1) The appropriate Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

28. Power to make rules by competent authority.—(1) The competent authority may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.”

The use of word “may” in Sections 27 and 28 of the Act make it clear that Parliament has left it to the discretion of the rule making authority to make rules to carry out the provisions of the Act. Hence, no *mandamus* can be issued to the rule making authority to make the rules either within a specific time or in a particular manner. If, however, the rules are made by the rule making authority and the rules are not in accordance with the provisions of the Act, the Court can strike down such rules as *ultra vires* the Act, but the Court cannot direct the rule making authority to make the rules where the Legislature

A
B
C
D
E
F
G
H

A confers discretion on the rule making authority to make rules. In the judgment under review, therefore, this Court made a patent error in directing the rule making authority to make rules within a period of six months.

B 30. Nonetheless, the selection and appointment of Chief Information Commissioner and Information Commissioners has not been left entirely to the discretion of the Central Government and the State Government under Sections 12 and 15 of the Act. Sections 12(3) and 15(3) provide that the Chief Information Commissioner and Information Commissioners shall be appointed by the President or the Governor, as the case may be, on the recommendation of the Committee named therein. Sections 12(5) and 15(5) provide that Chief Information Commissioner and Information Commissioners have to be persons of eminence in public life with wide knowledge and experience in the different fields mentioned therein, namely, law, science and technology, social service, management, journalism, mass media or administration and governance. Thus, the basic requirement for a person to be appointed as a Chief Information Commissioner or Information Commissioner is that he should be a person of eminence in public life with wide knowledge and experience in a particular field. Parliament has insisted on this basic requirement having regard to the functions that the Chief Information Commissioner and Information Commissioners are required to perform under the Act. As the preamble of the Act states, democracy requires an informed citizenry and transparency of information which are vital to its functioning and also requires that corruption is contained and Governments and their instrumentalities are held accountable to the governed. The preamble of the Act, however, cautions that revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information. Moreover, under the Act, a citizen has the right to information held or under the control of

hence Information Commissioners are to ensure that the right to privacy of person protected under Article 21 of the Constitution is not affected by furnishing any particular information.

31. Unfortunately, experience over the years has shown that the orders passed by Information Commissions have at times gone beyond the provisions of the Act and that Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or Information Commissioners or that the persons appointed answer the criteria laid down in Sections 12(5) and 15(5) of the Act but they do not have the required mind to balance the interests indicated in the Act and to restrain themselves from acting beyond the provisions of the Act. This experience of the functioning of the Information Commissions prompted this Court to issue the directions in the judgment under review to appoint judicial members in the Information Commissions. But it is for Parliament to consider whether appointment of judicial members in the Information Commissions will improve the functioning of the Information Commissions and as Sections 12(5) and 15(5) of the Act do not provide for appointment of judicial members in the Information Commissions, this direction was an apparent error. Sections 12(5) and 15(5) of the Act, however, provide for appointment of persons with wide knowledge and experience in law. We hope that persons with wide knowledge and experience in law will be appointed in the Information Commissions at the Centre and the States. Accordingly, wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming before the Information Commissions, he will ensure that the matter is heard by an Information Commissioner who has such knowledge and experience in law.

A
B
C
D
E
F
G

A 32. Under Order XL of the Supreme Court Rules, 1966 this Court can review its judgment or order on the ground of error apparent on the face of record and on an application for review can reverse or modify its decision on the ground of mistake of law or fact. As the judgment under review suffers from mistake of law, we allow the Review Petitions, recall the directions and declarations in the judgment under review and dispose of Writ Petition (C) No. 210 of 2012 with the following declarations and directions:

- B
- C (i) We declare that Sections 12(5) and 15(5) of the Act are not *ultra vires* the Constitution.
- D (ii) We declare that Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner.
- E
- F
- G (iii) We direct that only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment as Information Commissioner and Chief Information Commissioner.
- H

- (iv) We further direct that persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.
- (v) We further direct that the Committees under Sections 12(3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.
- (vi) We also direct that wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.

33. There shall be no order as to costs.

B.B.B. Review Petition allowed.

- A NOVARTIS AG
v.
UNION OF INDIA & OTHERS
(Civil Appeal Nos. 2706-2716 of 2013)
- B APRIL 01, 2013
[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]
- Patents Act, 1970 :*
- C ss. 2(1)(j), 2(1)(ja) and 3(d) – Grant of patent – To
D *Imatinib Mesylate in Beta Crystalline form – Twin test of*
E *“Invention” and “patentability” – Held: The patent product fails*
F *in both the tests of ‘invention’ and ‘patentability’ – It is a known*
G *substance of Zimmermann patent – It is not a new product –*
Not only is Imatinib Mesylate known as substance of
Zimmermann but its pharmacological properties are known
in the Zimmermann patent – It does not qualify the test of
invention as laid down in s.2(1)(j) and 2(1)(ja) – Imatinib
Mesylate is known substance with known efficacy – Thus
BETA Crystalline form of Imatinib Mesylate is a new form of
known substance – It fully attracts s.3(d) – The higher
solubility that is attributed to the beta crystalline form of
Imatinib Mesylate would be limited to (i) More beneficial flow
properties, (ii) Better thermodynamic stability, and (iii) Lower
hygroscopicity – These properties, “physical attributes” would
give the subject product improved processability and better
and longer storability but, on the basis of those properties
alone, the beta crystalline form of Imatinib Mesylate certainly
cannot be said to possess enhanced efficacy over Imatinib
Mesylate, the known substance immediately preceding it,
within the meaning of s. 3(d) of the Act.

s.2(1)(j), (ac), (ja) – Invention – Held: In order to qualify as ‘invention’ a product must satisfy the test i.e. it must be new, it must be capable of being made or used in the industry

H

and it must come into being as a result of an invention which has a feature that entails technical advance over existing knowledge or has an economic significance and makes the invention not obvious to a person skilled in the art.

s.2(1)(j) – Invention – Chemicals and pharmaceuticals – Held: A new product in chemicals and especially pharmaceutical may not necessarily mean something altogether new or completely unfamiliar or not existing before.

s.3(d) – Test of Efficacy – Held: Depends upon the function, utility or the purpose of product under consideration – Test of enhanced efficacy in case of chemical substance, especially medicine, should receive narrow and strict interpretation

s.3(d) – Mere change of form with properties inherent to that form, would not qualify as “enhancement of efficacy” of a known substance.

Words and Phrases – ‘Efficacy’ – Meaning of, in the context of Patents Act, 1970.

The appellant in appeal Nos. 2706-2716 of 2013 filed application before Patent Office for grant of patent for Imatinib Mesylate in Beta Crystalline form. The application was made on July 17, 1998 giving July 18, 1997, the date on which the appellant had applied for grant of patent for the subject product in Switzerland as the ‘priority date’. The application of the appellant lay dormant under an arrangement called ‘Mailbox Procedure’. In 2003, the appellant was granted Exclusive Marketing Rights for the subject product. The application for patent was taken out of the ‘Mailbox’ after the amendments were made in the Patents Act, 1970, w.e.f. January 1, 2005. Five pregrant oppositions were filed against the patent application of the appellant.

A

B

C

D

E

F

G

H

A The application of the appellant was rejected on the grounds viz. the invention claimed, was anticipated by prior publication i.e. Zimmerman patent; that the invention claimed, was obvious to a person skilled in the art, in view of the disclosure provided in the Zimmerman patent specifications; that patentability of the claimed invention was disallowed by s. 3(d); and that the Swiss priority date i.e. July 17, 1997 was wrongly claimed as priority date for the application in India and hence the invention was also anticipated by the specification made in the application submitted in Switzerland. The appellant challenged the orders before High Court which was later transferred to Intellectual Property Appellate Board. The appeals were dismissed by the Board on the ground that patentability of the subject product was hit by s. 3(d) as well as 3(b).

B

C

D

E

F

G

H

One of the appellants had also filed writ petitions seeking a declaration that s. 3(d) of the Patents Act was unconstitutional being violative of Art. 14 and being not in compliance with Trade Related Aspects of Intellectual Property Rights (TRIPS). The petitions were dismissed by the High Court.

The appellant directly approached the Supreme Court u/Art. 136 of the Constitution against the order of Appellate Board.

Dismissing the appeal of the appellant-applicant and allowing those filed by the objectors, the Court

HELD: 1. Any attempt to challenge the order passed by Intellectual Property Appellate Board directly before this Court, side-stepping the High Court, needs to be strongly discouraged. But the present case, if directed to High Court might render the matter infructuous inasmuch as the period for the patent applied for would come to an end in July 2018. Therefore, this cou

the appeals instead of directing the appellant to move the High Court. However, the present case cannot be treated as a precedent in that regard. [Paras 21 and 22] [175-B-C, F-G]

The WTO and India's Pharmaceuticals Industry (Patent Protection, TRIPS, and Developing Countries) by Chaudhuri, Sudip (Oxford University Press, 2005) – referred to.

2.1. The patent product, the beta crystalline form of Imatinib Mesylate, fails in both the tests of invention and patentability as provided under clauses (j), (ja) of section 2(1) and section 3(d) respectively. [Para 195] [276-C]

2.2. The Patents Act, 1970, dealt with “invention” and “patentability” as two distinctly separate concepts. The duality of the two concepts is best illustrated by section 4 of the Act, which prohibits the grant of patent (either process or product) “in respect of inventions relating to atomic energy falling within sub-section (1) of section 20 of the Atomic Energy Act, 1962”, and which has not undergone any change since inception. It is, therefore, fundamental that for grant of patent, the subject must satisfy the twin tests of “invention” and “patentability”. Something may be an “invention” as the term is generally understood and yet it may not qualify as an “invention” for the purposes of the Act. Further, something may even qualify as an “invention” as defined under the Act and yet may be denied patent for other larger considerations as may be stipulated in the Act. [Para 91] [226-B-E]

2.3. Chapter II has the Heading “Inventions Not Patentable” and section 3 has the marginal heading “What are not inventions.” As suggested by the Chapter heading and the marginal heading of section 3, and as may be seen simply by going through section 3, it puts at one place provisions of two different kinds: one that declares that certain things shall not be deemed to be “inventions” [for

A

B

C

D

E

F

G

H

A instance clauses (d) & (e)]; and the other that provides that, though resulting from invention, something may yet not be granted patent for other considerations [for instance clause (b)]. [Para 92] [226-F-H]

B

C

D

E

F

G

H

2.4. The amendment in section 3(d) is primarily in respect of medicines and drugs and, to some extent, agricultural chemical substances. In view of the larger perspective of the development of the law of patent over the past 100 years and especially keeping in mind the debates in the Parliament preceding the 2005 amendment, it cannot be said that section 3(d) is a provision *ex majore cautela*. There is vital distinction between the concepts of invention and patentability – a distinction that was at the heart of the Patents Act as it was framed in 1970, and which is reinforced by the 2005 amendment in section 3(d). [Paras 98 and 102] [228-F; 230-B-D]

2.5. The importance of the amendment made in section 3(d), that is, the addition of the opening words in the substantive provision and the insertion of explanation to the substantive provision, cannot be under-estimated. In the course of the Parliamentary debates, the amendment in section 3(d) was the only provision cited by the Government to allay the fears of the Opposition members concerning the abuses to which a product patent in medicines may be vulnerable. Therefore, the amendment/addition made in section 3(d) is meant especially to deal with chemical substances, and more particularly pharmaceutical products. The amended portion of section 3(d) clearly sets up a second tier of qualifying standards for chemical substances/ pharmaceutical products in order to leave the door open for true and genuine inventions but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious ground

G; 231-A]

2.6. If clause (d) is isolated from the rest of section 3, and the legislative history behind the incorporation of Chapter II in the Patents Act, 1970, is disregarded, then it is possible to see section 3(d) as an extension of the definition of “invention” and to link section 3(d) with clauses (j) and (ja) of section 2(1). In that case, on reading clauses (j) and (ja) of section 2(1) with section 3(d) it would appear that the Act sets different standards for qualifying as “inventions” things belonging to different classes, and for medicines and drugs and other chemical substances, the Act sets the invention threshold further higher, by virtue of the amendments made in section 3(d) in the year 2005. [Para 104] [231-B-D]

2.7. On a combined reading of clauses (j), (ac) and (ja) of section 2(1), in order to qualify as “invention”, a product must, therefore, satisfy the following test: (i) it must be “new”; it must be “capable of being made or used in an industry” and (iii) it must come into being as a result of an invention which has a feature that entails technical advance over existing knowledge; or has an economic significance; and makes the invention not obvious to a person skilled in the art. [Para 90] [225-E-G; 226-A]

2.8. Section 2(1)(j) defines “invention” to mean, “a new product or ...”, but the new product in chemicals and especially pharmaceuticals may not necessarily mean something altogether new or completely unfamiliar or strange or not existing before. It may mean something “different from a recent previous” or “one regarded as better than what went before” or “in addition to another or others of the same kind” However, in case of chemicals and especially pharmaceuticals if the product for which patent protection is claimed is a new form of a known substance with known efficacy, then the subject product must pass, in addition to clauses (j) and (ja) of section 2(1),

A the test of enhanced efficacy as provided in section 3(d) read with its explanation. [Para 192] [275-B-D]

2.9. The drug Gleevec directly emanates from the Zimmermann patent and comes to the market for commercial sale. Since the grant of the Zimmermann patent, the appellant has maintained that Gleevec (that is, Imatinib Mesylate) is part of the Zimmermann patent. It obtained drug approval for Gleevec on that basis. It claimed extension of the term of the Zimmermann patent for the period of regulatory review for Gleevec, and it successfully stopped NATCO Pharma Ltd. from marketing its drug in the UK on the basis of the Zimmermann patent. Not only the appellant but the US Board of Patent Appeals, in its judgment granting patent for beta crystalline form of Imatinib Mesylate, proceeded on the basis that though the beta crystal form might not have been covered by the Zimmermann patent, the Zimmermann patent had the teaching for the making of Imatinib Mesylate from Imatinib, and for its use in a pharmacological compositions for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. This finding was recorded by the US Board of Patent Appeals, in the case of the appellant itself, on the very same issue that is under consideration in the present case. The appellant is, therefore, fully bound by the finding and cannot be heard to take any contrary plea. [Para 126] [244-F-G; 245-A-C]

2.10. Imatinib Mesylate cannot be said to be a new product. Imatinib Mesylate is all there in the Zimmermann patent. It is a known substance from the Zimmermann patent. Imatinib Mesylate is fully part of the Zimmermann patent is also borne out from another circumstance. After the Zimmermann patent, the appellant applied for, and in several cases obtained, patent in the US not only for the beta and alpha crystalline forms of Imatinib Mesylate but also for Imatinib in a number of c

appellant, however, never asked for any patent for Imatinib Mesylate in non-crystalline form, for the simple reason that it had always maintained that Imatinib Mesylate is fully a part of the Zimmermann patent and does not call for any separate patent. Therefore, it cannot be said that the development of Imatinib Mesylate from Imatinib is outside the Zimmermann patent and constitutes an invention as understood in the law of patent in India. [Paras 131, 132 and 133] [248-E-H; 249-A-B]

2.11. Under the scheme of patent, a monopoly is granted to a private individual in exchange of the invention being made public so that, at the end of the patent term, the invention may belong to the people at large who may be benefited by it. To say that the *coverage* in a patent might go much beyond the *disclosure* thus seem to negate the fundamental rule underlying the grant of patents. [Para 139] [252-D-E]

2.12. Imatinib Mesylate is not a new product. Imatinib Mesylate is a known substance from the Zimmermann patent itself. Not only is Imatinib Mesylate known as a substance in the Zimmermann patent, but its pharmacological properties are also known in the Zimmermann patent and in the article published in the *Cancer Research* journal. The consequential finding, therefore, is that Imatinib Mesylate does not qualify the test of “invention” as laid down in section 2(1)(j) and section 2(1)(ja) of the Patents Act, 1970. [Para 157] [260-E-G]

2.13. So far as the beta crystal form of Imatinib Mesylate is concerned, even if accepted to be new, in the sense that it is not known from the Zimmermann patent, this being a pharmaceutical substance and moreover a polymorph of Imatinib Mesylate, it directly runs into section 3(d) of the Act with the explanation appended to the provision. [Para 158] [261-A-B]

2.14. It is not correct to say that in order to attract section 3(d), the subject product must be a new form of a *known* substance having *known* efficacy, and that a “conceivable” substance is not a “known substance” within the meaning of the provision. There is no sanction to construe the expression “known” in section 3(d). Clauses (e) and (f) of section 64(1) of the Act, which contain two of the grounds for revocation of patents, also use the expression “publicly known”. The expression “publicly known” may normally be construed more widely than “known”. But even the expression “publicly known” received quite the opposite interpretation by this Court in *Monsanto Company* case. [Para 158 & 159] [261-A-D, F-H; 262-A]

2.15. On facts also it cannot be accepted that Imatinib Mesylate or even Imatinib was not a known substance with known efficacy. Imatinib Mesylate was a known substance from the Zimmermann patent. In the NDA submitted by the appellant before the US FDA, it was clearly stated that the drug had undergone extensive preclinical, technical and clinical research. The clinical studies included one multiple dose tolerability/dose-finding study (Phase I) and three large open, uncontrolled efficacy and safety studies (Phase II); and a total of 1,234 patients with CML and other Ph+ leukemias were enrolled in the studies. The efficacy of Imatinib was equally known, as is evident from the Zimmermann patent itself. [Para 160] [262-H; 263-A-C]

2.16. The subject product, that is, beta crystalline form of Imatinib Mesylate, is thus clearly a new form of a known substance, i.e., Imatinib Mesylate, of which the efficacy was well known. It, therefore, fully attracts section 3(d) and must be shown to satisfy the substantive provision and the explanation appended to it. [Para 161] [263-C-D]

2.17. On the issue of section 3(d), there appears to be a major weakness in the case of the appellant. There is no clarity at all as to what is the substance immediately preceding the subject product, the beta crystalline form of Imatinib Mesylate. In course of the hearing, the counsel appearing for the appellant stressed that, in terms of invention, the beta crystalline form of Imatinib Mesylate is two stages removed from Imatinib in free base form. But this position is not reflected in the subject application, in which all the references are only to Imatinib in free base form (or to the alpha crystalline form of Imatinib Mesylate in respect of flow properties, thermodynamic stability and lower hygroscopicity). On going through the subject application, the impression one gets is that the beta crystalline form of Imatinib Mesylate is derived directly from Imatinib free base. This may, perhaps, be because once the beta crystalline form of the methanesulfonic acid salt of Imatinib came into being, the Imatinib free base got seeded with the nuclei of Imatinib Mesylate beta crystalline form and, as a result, starting from Imatinib one would inevitably arrive directly at the beta crystalline form of Imatinib Mesylate. But all this is nowhere said in the subject application. [Para 165] [264-E-H; 265-A-B]

2.18. The whole case of the appellant, as made out in the subject application and the affidavits filed the appellant before the Controller, is that the subject product, the beta crystalline form of Imatinib Mesylate, is derived from Imatinib, and that the substance immediately preceding the beta crystalline form is not Imatinib Mesylate but Imatinib in free base form. This position is sought to be canvassed in the subject application and the affidavits on the premise that the Zimmermann patent ended at Imatinib in free base and did not go beyond to Imatinib Mesylate. Not only is this premise unfounded, but the appellant itself appears to

A
B
C
D
E
F
G
H

A take a somewhat different stand, as before this Court it was contended that the subject product, in terms of invention, is two stages removed from Imatinib in free base, and the substance immediately preceding the subject product is Imatinib Mesylate (non-crystalline).
B That being the position, the appellant was obliged to show the enhanced efficacy of the beta crystalline form of Imatinib Mesylate over Imatinib Mesylate (non-crystalline). There is, however, no material in the subject application or in the supporting affidavits to make any
C comparison of efficacy, or even solubility, between the beta crystalline form of Imatinib Mesylate and Imatinib Mesylate (non-crystalline). [Paras 170 and 171] [267-B-F]

2.19. The higher solubility that is attributed to the beta crystalline form of Imatinib Mesylate may actually be a property of Imatinib Mesylate itself. If that be so, the additional properties that may be attributed to the beta crystalline form of Imatinib Mesylate would be limited to (i) More beneficial flow properties, (ii) Better thermodynamic stability, and (iii) Lower hygroscopicity.
D These properties, (“physical attributes” according to Manley), would give the subject product improved processability and better and longer storability but, on the basis of those properties alone, the beta crystalline form of Imatinib Mesylate certainly cannot be said to possess
E enhanced *efficacy* over Imatinib Mesylate, the known substance immediately preceding it, within the meaning of section 3(d) of the Act. [Para 172 and 173] [267-G-H; 268-A-C]

2.20. Efficacy means “the ability to produce a desired or intended result”. Hence, the test of efficacy in the context of section 3(d) would be different, depending upon the result the product under consideration is desired or intended to produce. In other words, the test of efficacy would depend upon the function, utility or the purpose of the product under cons

H

A in the case of a medicine that claims to cure a disease, the test of efficacy can only be “therapeutic efficacy”.
 B With regard to the genesis of section 3(d), and more particularly the circumstances in which section 3(d) was
 C amended to make it even more constrictive than before the “therapeutic efficacy” of a medicine must be judged
 D strictly and narrowly. The inference that the test of enhanced efficacy in case of chemical substances,
 especially medicine, should receive a narrow and strict interpretation is based not only on external factors but
 there are sufficient internal evidence that leads to the same view. The text added to section 3(d) by the 2005
 amendment lays down the condition of “enhancement of the known efficacy”. Further, the explanation requires the
 derivative to “differ significantly in properties with regard to efficacy”. What is evident, therefore, is that not all
 advantageous or beneficial properties are relevant, but only such properties that directly relate to efficacy, which
 in case of medicine, is its therapeutic efficacy. [Para 180] [270-A-F]

E 2.21. Each of the different forms mentioned in the explanation have some properties inherent to that form,
 F e. g., solubility to a salt and hygroscopicity to a polymorph. These forms, unless they differ significantly
 in property with regard to efficacy, are expressly excluded from the definition of “invention”. Hence, the
 mere change of form with properties inherent to that form would not qualify as “enhancement of efficacy” of a
 known substance. In other words, the explanation is meant to indicate what is not to be considered as
 therapeutic efficacy. [Para 181] [270-G-H; 271-A]

G *Goodman and Gilman in CPAA compilation, volume 9, page 22; LHC [Dorland’s Medical dictionary in Novartis’] volume P, page 19 – referred to.*

H 2.22. Just increased bioavailability alone may not

A necessarily lead to an enhancement of therapeutic efficacy. Whether or not an increase in bioavailability
 B leads to an enhancement of therapeutic efficacy in any given case must be specifically claimed and established
 C by research data. In the present case, no material has been offered to indicate that the beta crystalline form of
 D Imatinib Mesylate will produce an enhanced or superior efficacy (therapeutic) on molecular basis than what could
 be achieved with Imatinib free base *in vivo* animal model. [Para 189] [274-C-E]

C 2.23. Thus, in whichever way section 3(d) may be viewed, whether as setting up the standards of
 D “patentability” or as an extension of the definition of “invention”, the subject product, that is, the beta
 crystalline form of Imatinib Mesylate, fails the test of section 3(d), too, of the Act. [Para 190] [274-F]

E 2.24. In the US the drug Gleevec came to the market in 2001. It is beyond doubt that what was marketed then
 F was Imatinib Mesylate and not the subject product, Imatinib Mesylate in beta crystal form. Even while the
 G appellant’s application for grant of patent lay in the “mailbox” awaiting amendments in the law of patent in
 India, the appellant was granted Exclusive Marketing Rights on November 10, 2003, following which Gleevec
 was marketed in India as well. On its package, the drug was described as “Imatinib Mesylate Tablets 100 mg” and
 it was further stated that “each film coated tablet contains: 100 mg Imatinib (as Mesylate)”. On the package
 there is no reference at all to Imatinib Mesylate in beta crystalline form. What appears, therefore, is that what
 was sold as Gleevec was *Imatinib Mesylate* and not the subject product, the beta crystalline form of Imatinib
 Mesylate. If that be so, then the case of the appellant appears in rather poor light and the claim for patent for
 beta crystalline form of *Imatinib Mesylate* would only appear as an attempt to obtain

Mesylate, which would otherwise not be permissible in this country. [Paras 193 and 194] [275-E-G; 276-A-B]

2.25. The finding of the court that the subject product, the beta crystalline form of Imatinib Mesylate, does not qualify the test of Section 3(d) of the Act, does not mean that Section 3(d) bars patent protection for all incremental inventions of chemical and pharmaceutical substances. It will be a grave mistake to read this judgment to mean that section 3(d) was amended with the intent to undo the fundamental change brought in the patent regime by deletion of section 5 from the Parent Act. That is not said in this judgment. [Para 191] [274-G-H; 275-A]

Monsanto Company v. Coramandal Indag Products (P) Ltd. (1986) 1 SCC 642 – referred to.

Glaverbel vs. British (1993) RPC 80); *In re Hogan* 559 F.2d 595; *A.C. Edwards Ltd. v. Acme Signs & Displays Ltd.* [1992] R.P.C. 131; *Astellas Pharma Inc v. Comptroller-General of Patents* 2009 EWHC 1916 (Pat); *Plant Genetics System, N.V. v. DeKalb Genetics Corp.* 315 F. 3d 1335, 1341 (Fed. Cir. 2003); *Chiron Corp. v. Genentech, Inc* 363 F. 3d 1247, 1257 (Fed. Cir. 2004) – referred to.

Article under the title “Inhibition of the Abl Protein-Tyrosine Kinase in Vitro and in Vivo by a 2-Phenylaminopyrimidine Derivative”. A published in journal called ‘Cancer Research’, in January 1996 issue; *Nature Medicine* magazine of the year 1996 under the title “Effects of a selective inhibitor of the Abl tyrosine kinase on the growth of Bcr-Abl positive cells” ; *Terrell on Law of Patents* 16th edition, page no. 51, para 3.2/7; *Terrell on Law of Patent* 16th edition, page no. 192; *Terrell on the Law of Patents* (Seventeenth Edition, 2011) in Chapter 9; *Chisum on Patents: A Treatise on the Law of Patentability, Validity, and*

Infringement (Vol. 3, June 2007) in Chapter: “Adequate Disclosure” – referred to.

3. The haste with which the Government was constrained to rush the Bill for amendment of Patent’s Act, 1970 through Parliament to make the law compatible with the TRIPS Agreement perhaps explains the somewhat unclear drafting of some very important provisions, which called for much greater clarity; the presence of some terms and expressions in the definition section that are nowhere used in the Act; and a few loose ends that could have been properly tied up if more time and attention was given to the drafting. [Para 86] [223-G-H; 224-A]

4. The best way to understand a law, is to know the reason for it. In order to understand what the law really is, it is essential to know the ‘why’ and ‘how’ of the law. Why the law is what it is and how it came to its present form? [Paras 27 and 29] [177-F; 179-C]

Utkal Contractors and Joinery Pvt. Ltd. and others v. State of Orissa and others (1987) 3 SCC 279; *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others* (1987) 1 SCC 424 – relied on.

Case Law Reference:

F	(1987) 3 SCC 279	relied on	Para 27
	(1987) 1 SCC 424	relied on	Para 28
	[1992] R.P.C. 131	relied on	Para 145
	2009 EWHC 1916 (Pat)	referred to	Para 145
G	(1986) 1 SCC 642	Para 159	
	(1993) RPC 80	referred to	Para 134
	559 F.2d 595	referred to	Para 149
	315 F. 3d 1335, 1341	referred to	Para 154
H	(Fed. Cir. 2003)		

363 F. 3d 1247, 1257 referred to Para 154 A
(Fed. Cir. 2004)

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2706-2716 of 2013.

From the Judgment & Order dated 26.06.2009 in MP No.1/2007, TA No.1/2007, MP. No. 2/2007, TA No. 2/2007, MP No. 3/2007, TA No. 3/2007, MP No. 4/2007, TA No.4/2007, MP No. 5/2007, MP No. 5/2007, TA No. 5/2007, MP No. 33/2008 of the Intellectual Property Appellate Board.

WITH

C.A. No. 2717-27 of 2013.

C.A. No. 2728 of 2013.

Paras Kuhad, ASG, Gopal Subramaniam, Harish N. Salve, T.R. Andhiyarujina, Anand Grover, L. Nageswara Rao, Dr. Rajeev Dhawan, Pravin Anand, Archana Shankar, Binny Kalra, Hari Shankar K., Tusha Malhotra, Aditya Gupta, Shyam Nandan, Rahul Narayan, Soumik Ghosal, Vikas Singh Jangra, Aditya Verma, Nishit Agrawal, Baldev Atreya, Shipra Ghose, Jitin Chaturvedi, Tanushree Sinha, Vikrant Y.S. Narula (for B.K. Prasad), Julie George, Prathiba Sivasubramanian, Chanchal Kr. Ganguli, C. Mukund, Rajeshwari, S. Hariharan, Mayank Pandey, Pratibha M. Singh, S. Majumdar, Saya Choudhary, Ashutosh Kumar, Surbhi Mehta, Kripa Pandit, Chetna Rai, Varun Tikmani, Ashwin Kumar, Abhinav Mukerji, Gaurav Sharma, Ashutosh Kumar, Taruna Prasad, Mohit Garg, (for Fox Mandal & Co.), Jayant K. Mehta, Sukant Vikram, Aditi Bhat, Renuka Iyer, Malavika Kapila, for the appearing parties and Shamnad Basheer (In-person) Gopal Shankarnarayanan.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Delay condoned.

A 2. Leave granted in all the special leave petitions.

B 3. What is the true import of section 3(d) of the Patents Act, 1970? How does it interplay with clauses (j) and (ja) of section 2(1)? Does the product for which the appellant claims patent qualify as a “new product” which comes by through an invention that has a *feature* that involves *technical advance over the existing knowledge and that makes the invention “not obvious” to a person skilled in the art?* In case the appellant’s product satisfies the tests and thus qualifies as “invention” within the meaning of clauses (j) and (ja) of section 2(1), can its patentability still be questioned and denied on the ground that section 3(d) puts it out of the category of “invention”? On the answer to these questions depends whether the appellant is entitled to get the patent for the beta crystalline form of a chemical compound called Imatinib Mesylate which is a therapeutic drug for chronic myeloid leukemia and certain kinds of tumours and is marketed under the names “Glivec” or “Gleevec”.

E 4. These questions were debated at the bar intensely and at great length. The debate took place within a very broad framework. The Court was urged to strike a balance between the need to promote research and development in science and technology and to keep private monopoly (called an ‘aberration’ under our Constitutional scheme) at the minimum. Arguments were made about India’s obligation to faithfully comply with its commitments under international treaties and counter arguments were made to protect India’s status as “the pharmacy of the world”. The Court was reminded of its duty to uphold the rights granted by the statute, and the Court was also reminded that an error of judgment by it will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and under-developed countries, dependent on generic drugs from India. We will advert to these and a number of other arguments at their proper place but we must first take note of the facts that give rise to the above questions and provide the c

5. *Jürg Zimmermann* invented a number of derivatives of N-phenyl-2- pyrimidine-amine, one of which is CGP 57148¹ in free base form (later given the International Nonproprietary Name 'Imatinib' by the World Health Organisation). These derivatives, including Imatinib,² are capable of inhibiting certain protein kinases, especially protein kinase C and PDGF (platelet-derived growth factor)-receptor tyrosine kinase and thus have valuable anti-tumour properties and can be used in the preparation of pharmaceutical compositions for the treatment of warm-blooded animals, for example, as anti-tumoral drugs and as drugs against atherosclerosis. The N-phenyl-2-pyrimidine-amine derivatives, including Imatinib, were submitted for patent in the US. The application was made on April 28, 1994 and patent was granted on May 28, 1996 under US Patent No. 5,521,184 (hereinafter referred to as 'the Zimmermann Patent'). The Zimmermann compounds (i.e., derivatives of N-phenyl-2-pyrimidine-amine) were also granted a European patent under Patent No. EP-A-0 564 409.

6. The appellant claims that beginning with Imatinib³ in free base form (as the 'e-duct'), in a two-stage invention they first produced its methanesulfonic acid addition salt, Imatinib Mesylate, and then proceeded to develop the beta crystalline form of the salt of Imatinib. According to the appellant, starting from Imatinib free base they could reach to the beta crystal form of Imatinib Mesylate in two ways: one "by *digesting* another crystal form, especially the alpha crystal form, or an amorphous starting material of the methanesulfonic acid addition salt of compound of formula I ..."; and second "by *dissolving* another crystal form, especially the alpha crystal form, or an amorphous starting material of the methanesulfonic acid addition salt of compound of formula I...". Describing the different processes, step by step, for producing Imatinib Mesylate starting from

1. 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3- yl)pyrimidin-2-ylamino]phenyl benzamide.
2. Ibid.
3. Ibid.

A Imatinib, it is stated that in the first process they would first arrive at Imatinib Mesylate in amorphous form, as the intermediate stage, and thereafter, following further processes, reach the beta crystal form of Imatinib Mesylate. Following the second process, they would reach the beta crystal form of Imatinib Mesylate directly, skipping the intermediate stage in which Imatinib Mesylate first appears in amorphous form. In the third process, they would start with the alpha crystal form of Imatinib Mesylate and arrive at its beta crystal form.

C 7. It was stated in course of submissions, however, that for practical purposes, the best way to produce the beta form is by proceeding directly from the free base form to the beta form, as in examples 2 and 3 given below, by introducing a specified amount of the beta crystals at the step specified. The three processes are described by the appellant under the following three examples:

EXAMPLE – 1⁴

Step 1 -98.6 gms of Imatinib free base is added to 1.4 liters of ethanol.

Step 2 - To the above, 19.2 gms of methanesulfonic acid is added drop wise for over 20 minutes.

Step 3 - Solution obtained in Step 2 is heated under reflux (i.e. boiling). It is heated in a manner to preserve the solution from escaping as a gas, so the gas is captured, condensed and obtained as a liquid. This solution is heated for 20 minutes.

Step 4 - Filtering the solution – the filtrate (which is obtained after filtering the resulting liquid) is

4. Examples 1 to 3 stated below are reproduced from the written notes titled "Novartis Document – XIV: Examples in 1602/MAS/1998 (Subject Patent Specification), submitted by Mr. Subramaniam Senior Advocate appearing for the appellant in course of hearing on Sep

evaporated down to 50%. In other words, half of the filtrate is allowed to vaporize. A

Step 5 - Residue is again filtered at 25 degrees Celsius.

Step 6 - Mother liquor (the liquid filtrate of step 5) is evaporated to dryness. B

Step 7 - Residue obtained after Step 6, and residue obtained after Step 5 are suspended in 2.2 l ethanol. C

Step 8 - The suspension obtained after Step 7 is dissolved under reflux and it becomes clear upon heating. Thereafter, 30 ml water is added to it.

Step 9 - Substance is cooled overnight to 25 degrees Celsius, filtered and dried at 65 degrees Celsius, until weight is constant. This results in alpha crystalline form. D

Step 10 - Alpha form is stirred in methanol for two days at about 25 degrees Celsius. Then the crystals are isolated by filtration and dried overnight at room temperature. This results in beta crystalline form. E

EXAMPLE - 2

Step 1 - 50 gms of Imatinib free base is added to 480 liters (sic milliliters!) of methanol. F

Step 2 - To the above, 9.71 gms of methanesulfonic acid and 20 ml methanol is added. This mixture (sic is heated) at 50 degrees Celsius. G

Step 3 - To the solution obtained from Step 2, 5 gms of activated carbon is added and the mixture is H

boiled for 30 minutes under reflux, filtered and evaporated.

Step 4 - The residue obtained from Step 2 (sic 3) is dissolved in 150 ml methanol and inoculated (introduced) with a few mgms (sic mg) of beta form of imatinib mesylate leading to crystallization of the product. B

Step 5 - The product is dried at 50 megabars (unit to measure pressure) and at 60 degrees Celsius. This leads to crystallization of beta form of imatinib mesylate. C

Step 6 - The retention values (distance traveled by each chemical component in relation to the distance the solution front moves) obtained are as follows; D

Methylene chloride: ethyl acetate: Methanol: concentrated aqueous ammonium hydroxide solution = 6:10:30:2 (sic 60:10:30:2)

Step 7 - To the above, High Pressure Chromatography (technique for separation of mixtures) is applied for 10.2 minutes E

EXAMPLE - 3

Step 1 - 670 gms of alpha form of imatinib mesylate is heated in 1680 ml of methanol. F

Step 2 - The solution obtained from Step 1 is then inoculated at 60 degrees Celsius with 55 (sic mg of) beta form of imatinib mesylate. Upon this, the product starts to crystallize. G

Step 3 - Thereafter, the crystals are dried at 50 megabars and at 100 degrees Celsius. This leads to crystallization of beta form H

Step 4 - The retention values (distance traveled by each chemical component in relation to the distance the solution front moves) obtained are as follows;

Methylene chloride: ethyl acetate: Methanol: concentrated aqueous ammonium hydroxide solution = 6:10:30:2 (sic 60:10:30:2)

Step 5 - To the above, High Pressure Chromatography is applied for 10.2 minutes.

[Examples are also given for preparation of 100 mg tablets and 100 mg capsules of Imatinib Mesylate but there is no need to go into that at this stage.]

8. The appellant filed the application (Application No.1602/MAS/1998)⁵ for grant of patent for Imatinib Mesylate in beta crystalline form at the Chennai Patent Office on July 17, 1998. In the application it claimed that the invented product, the beta crystal form of Imatinib Mesylate, has (i) more beneficial flow properties; (ii) better thermodynamic stability; and (iii) lower hygroscopicity than the alpha crystal form of Imatinib Mesylate. It further claimed that the aforesaid properties makes the invented product “new” (and superior!) as it “stores better and is easier to process”; has “better processability of the methanesulfonic acid addition salt of a compound of formula I”, and has a “further advantage for processing and storing”.

9. It is significant to note that the comparison of the aforesaid properties of the beta crystal form of Imatinib Mesylate was made with its alpha crystal form. In the patent application, there is no claim of superiority of the beta crystal

5. The initial application that was filed was for “Crystal modification of a N-phenyl-2-pyrimidineamine derivative, processes for its manufacture and its use”. This application included both the alpha and beta crystalline forms. Later on during the course of prosecution of the patent application, the claims of the original application were restricted only to the beta form of Imatinib Mesylate and a separate divisional application no. 799/CHE/04 was filed for the alpha form in 2004.

A form of Imatinib Mesylate in regard to the aforesaid three properties, or any other property, over the starting material Imatinib, or even over Imatinib Mesylate in amorphous form or any form other than the alpha crystal form. On the contrary, insofar as Imatinib in free base form is concerned, it was unambiguously stated in the patent application as under:

“It goes without saying that **all the indicated inhibitory and pharmacological effects are also found with the free base, 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl) pyrimidin-2-ylamino]phenyl] benzamide, or other cells thereof.** The present invention relates especially to the b-crystal form of the methanesulfonic acid addition salt of a compound of formula I in the treatment of one of the said diseases or in the preparation of a pharmacological agent for the treatment thereto.”

(emphasis added)

10. In fairness to the appellant, however, it should be stated that the application was made at the time when there was a different patent regime. After the application was made and before it was taken up for consideration, a number of amendments were introduced in the Indian Patents Act, 1970, which brought about fundamental changes in the patent law of the country. The appellant was, however, fully aware of these changes in the law and, in order to reinforce its claim for patent for the subject product and to bring its claim within the four corners of the changed law, it filed four (4) affidavits of certain experts, two of which stated that the beta crystal form of Imatinib Mesylate has much higher bioavailability as compared to Imatinib in free base form. In due course, we shall examine how far the properties attributed to the subject product in the patent application and the affidavits make it “new” and entitled to grant of patent, but for the moment we may note how the case has come to the present stage.

11. As noted above the patent ap

July 17, 1998, giving July 18, 1997, the date on which the appellant had applied for grant of patent for the subject product in Switzerland, as the “priority date”. On July 18, 1997, Switzerland was not one of the “Convention Countries” as defined under section 2 (1)(d) read with section 133 of the Act and it was notified as a convention country as per section 133 of the Act on November 30, 1998.

12. In 1997, when the appellant filed its application for patent, the law in India with regard to product patent was in a transitional stage and the appellant’s application lay dormant under an arrangement called “the mailbox procedure”. Before the application for patent was taken up for consideration, the appellant made an application (Application No. EMR/01/2002) on March 27, 2002, for grant of exclusive marketing rights (EMR) for the subject product under section 24A of the Act, which was at that time on the statute book and which now stands deleted. The Patent Office granted EMR to the appellant by order dated November 10, 2003.

13. The appellant’s application for patent was taken out of the “mailbox” for consideration only after amendments were made in the Patents Act, with effect from January 1, 2005. But before it was taken up for consideration, the patent application had attracted five (5) pre-grant oppositions⁶ in terms of section 25(1) of the Act. And it was in response to the pre-grant oppositions that the appellant had filed the affidavits on the issue of bioavailability of Imatinib Mesylate in beta crystalline form.

14. The Assistant Controller of Patents and Designs heard all the parties on December 15, 2005, as provided under rule 55 of the Patent Rules, 2003, and rejected the appellant’s application for grant of patent to the subject product by 5 (five)

6. The oppositions were made by M/s. Cancer Patients Aid Association (Respondent No. 4), NATCO Pharma Ltd. (Respondent No. 5), CIPLA Ltd. (Respondent No. 6), Ranbaxy Laboratories Ltd. (Respondent No. 7), Hetro Drugs Ltd. (Respondent No. 8).

A
B
C
D
E
F
G
H

A separate, though similar, orders passed on January 25, 2006 on the 5 (five) opposition petitions. The Assistant Controller held that the invention claimed by the appellant was anticipated by prior publication, i.e., the Zimmermann patent; that the invention claimed by the appellant was obvious to a person skilled in the art in view of the disclosure provided in the Zimmermann patent specifications; and further that the patentability of the alleged invention was disallowed by section 3(d) of the Act; and also that July 18, 1997, the Swiss priority date, was wrongly claimed as the priority date for the application in India and hence, the alleged invention was also anticipated by the specification made in the application submitted in Switzerland.

15. At that time, the appellate authority under the Act had yet to become functional. The appellant, therefore, challenged the orders passed by the Assistant Controller in writ petitions filed directly before the Madras High Court. Apart from challenging the orders of the Assistant Controller, the appellant also filed two writ petitions (one by the appellant and the other by its Indian power of attorney holder) seeking a declaration that section 3(d) of the Act is unconstitutional because it not only violates Article 14 of the Constitution of India but is also not in compliance with “TRIPS”. After the formation of the Intellectual Property Appellate Board, the five writ petitions challenging the five orders of the Assistant Controller were transferred from the High Court to IPAB by order dated April 4, 2007, where these cases were registered as appeals and were numbered as TA/1 to 5/2007/PT/CH. The other two writ petitions assailing section 3(d) of the Act were finally heard by a Division Bench of the High Court and dismissed by the judgment and order dated August 6, 2007. The appellant did not take that matter any further.

16. The appellant’s appeals against the orders passed by the Assistant Controller were finally heard and dismissed by the IPAB by a long and detailed judgment

H

17. The IPAB reversed the findings of the Assistant Controller on the issues of anticipation and obviousness. It held that the appellant's invention satisfied the tests of novelty and non-obviousness, and further that in view of the amended section 133, the appellant was fully entitled to get July 18, 1997, the date on which the patent application was made in Switzerland, as the priority date for his application in India. The IPAB, however, held that the patentability of the subject product was hit by section 3(d) of the Act. Referring to section 3(d) the IPAB observed:

"Since India is having a requirement of higher standard of inventive step by introducing the amended section 3(d) of the Act, what is patentable in other countries will not be patentable in India. As we see, the object of amended section 3(d) of the Act is nothing but a requirement of higher standard of inventive step in the law particularly for the drug/pharmaceutical substances."

18. The IPAB also referred to the judgment of the Madras High Court, dismissing the appellant's writ petitions challenging the constitutional validity of section 3(d) where the High Court had observed:

"We have borne in mind the object which the amending Act wanted to achieve namely, to prevent evergreening; to provide easy access to the citizens of the country to life saving drugs and to discharge their constitutional obligation of providing good health care to its citizens."

19. In light of the High Court's observation, the IPAB also referred to the pricing of the drug Gleevec by the appellant while it enjoyed EMR over it, and held that the patentability of the subject product would also be barred by section 3(b) of the Act and in this regard observed as follows:

"We are fully conscious of the Appellant's benevolent GIPAP program for free distribution of GLEEVEC to

A
B
C
D
E
F
G
H

A certain cancer patients. But as per information furnished in its written counter-argument by R 3 that when the Appellant was holding the right as EMR on GLEEVEC it used to charge Rs.1,20,000/- per month for a required dose of the drug from a cancer patient, not disputed by the Appellant, which in our view is too unaffordable to the poor cancer patients in India. Thus, we also observe that a grant of product patent on this application can create a havoc to the lives of poor people and their families affected with the cancer for which this drug is effective. This will have disastrous effect on the society as well. Considering all the circumstances of the appeals before us, we observe that the Appellant's alleged invention won't be worthy of a reward of any product patent on the basis of its impugned application for not only for not satisfying the requirement of section 3(d) of the Act, but also for its possible disastrous consequences on such grant as stated above, which also is being attracted by the provisions of section 3(b) of the Act which prohibits grant of patent on inventions, exploitation of which could create public disorder among other things (Sic .) We, therefore, uphold the decision of R 8 on section 3(d) of the Act to the extent that product patent cannot be made available to the Appellant..."

F 20. Though agreeing with the Assistant Controller that no product patent for the subject patent could be allowed in favour of the appellant, the IPAB held that the appellant could not be denied the process patent for preparation of Imatinib Mesylate in beta crystal form. The IPAB ordered accordingly.

G 21. Against the order of the IPAB the appellant came directly to this Court in a petition under Article 136 of the Constitution. When the matter was first taken up before this Bench, we first thought of dismissing the SLPs at the threshold as the appellant had an alternative remedy to challenge the judgment and order of the IPAB before t.

H

However, Mr. Gopal Subramaniam, the senior advocate appearing for the appellant, submitted that the SLPs were filed on August 11, 2009, and the Court issued notice to the respondents on September 11, 2009. Further, before coming to this Bench, the matter was listed before another Bench, where it was heard on merits on different dates from August 9, 2011 to September 6, 2011. Mr. Subramaniam further submitted that relegating the appellant to the High Court might render the matter infructuous in as much as the period for the patent applied for would come to end after 20 years from the date of the application, i.e. in July 2018. He submitted that the High Court would take at least 2 – 3 years before a final decision would be rendered and then, whatever be the High Court’s decision, the matter was bound to come to this Court. In this to and fro whatever remains of the patent period would also lapse. Mr. Subramaniam further submitted that the case involved a number of seminal issues and it was in the larger interest that an authoritative pronouncement on those issues be made by this Court.

22. Initially some of the respondents strongly opposed the maintainability of the petitions made directly to this Court by-passing the High Court, but in the end all agreed that given the importance of the matter, this Court may itself decide the appeals instead of directing the appellant to move the High Court. It is in such circumstances that we agreed to hear the parties and decide the appeals on merits. However, we, wish to make it clear that any attempt to challenge the IPAB order directly before this Court, side-stepping the High Court, needs to be strongly discouraged and this case is certainly not to be treated as a precedent in that regard.

23. As this Court now proceeds to decide the case on merits, it needs to be noted that after notice was issued in the SLPs filed by Novartis AG, all the five parties who had filed pre-grant oppositions before the Controller (hereinafter referred to as the Objectors) filed their respective counter-affidavits. Two

A
B
C
D
E
F
G
H

A of the Objectors, namely NATCO Pharma Ltd. and M/s Cancer Patients Aid Association, additionally filed Special Leave Petition, challenging the findings recorded by the IPAB in favour of Novartis AG. Leave to appeal has also been granted in all those SLPs, and hence, all the issues are open before this
B Court and this Court is deciding the case unbound by any findings of the authority or the tribunal below.

24. In connection with the case of the appellant, the first and foremost thing that needs to be kept in mind is that it falls in the transitional period between two fundamentally different patent regimes. In 1998, when the application was made on behalf of the appellant, the Patents Act, 1970, had a provision in section 5 with the marginal heading, “*Inventions where only methods or processes of manufacture patentable*” that barred grant of patent to **substances** intended for use, or capable of being used, as food or medicine or drug, or prepared or produced by chemical processes. The application was then put in the “mailbox” and was taken out for consideration when many changes had been made in the Patents Act, 1970, with effect from January 1, 2005, to make the patent law in the country compliant with the terms of an international agreement entered into by the Government of India. Following the international agreement, the Patents Act, 1970, was subjected to large scale changes in three stages; and finally, by the Patents (Amendment) Act, 2005, section 5 was altogether deleted from the Parent Act (Patents Act, 1970). Between January 1, 1995 and January 1, 2005, the Patents Act, 1970, underwent wide ranging changes, but if we are asked to identify the single most important change brought about in the law of patent in India as a result of the country’s obligations under the international agreement, we would unhesitatingly say the deletion of section 5 from the Patents Act, which opened the doors to product patents in the country. It is, however, important to note that the removal of section 5 from the statute book was accompanied by amendments in clauses (j) and (ja) of section 2(1), apart from some other ancillary clauses of sec

amendments in section 3, which redefined the concepts of invention and patentability. A

25. Some important provisions of the Patents Act, 1970, as they stand after the amendment of the Act in 2005, and with which we are especially concerned in this case, indeed present a problem of interpretation. Why was section 5, which, in one sense, was the distinctive feature of the patent law in India, taken off the statute book? What does the legislature wish to say through clauses (j) and (ja) of section 2(1), section 3 and several other sections? How is it that some of the provisions of the Act apparently seem to be of no use or purpose, e.g., sections 2(1)(l) and 2(1)(ta)? Why is it that some of the crucial provisions in the Act appear to be wanting in precision and clarity? B C

26. It is easy to know why section 5 was deleted but to understand the import of the amendments in clauses (j) and (ja) of section 2(1) and the amendments in section 3 it is necessary to find out the concerns of Parliament, based on the history of the patent law in the country, when it made such basic changes in the Patents Act. What were the issues the legislature was trying to address? What was the mischief Parliament wanted to check and what were the objects it intended to achieve through these amendments? D E

27. The best way to understand a law is to know the reason for it. In *Utkal Contractors and Joinery Pvt. Ltd. and others v. State of Orissa and others*⁷, Justice Chinnappa Reddy, speaking for the Court, said: F

“9. ... **A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation.** The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. G

7. (1987) 3 SCC 279.

H

A The external aids are statement of Objects and Reasons when the Bill is presented to Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead...” B

(emphasis added) C

28. Again in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*⁸ Justice Reddy said: C

D “33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. **A statute is best interpreted when we know why it was enacted.** With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. **If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context.** With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have E F G

H 8. (1987) 1 SCC 424.

to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'Prize Chit' in *Srinivasa* and we find no reason to depart from the Court's construction."

(emphasis added)

29. In order to understand what the law really is, it is essential to know the "why" and "how" of the law. Why the law is what it is and how it came to its present form? The adage is more true in case of the law of patents in India than perhaps any other law.

30. Therefore, in order to correctly understand the present law it would be necessary to briefly delve into the legislative history of the law of patents in the country.

31. At the time of Independence, India's patent regime was governed by the Patents and Designs Act, 1911, which had provisions both for product and process patents⁹. It was, however, generally felt that the patent law had done little good to the people of the country. The way the Act was designed benefited foreigners far more than Indians. It did not help at all in the promotion of scientific research and industrialization in the country, and it curbed the innovativeness and inventiveness of Indians.

9. **Section 2(8) "Invention"** means any manner of new manufacture and includes an improvement and an alleged invention

Section 2(10) "Manufacture" includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture.

Section 14- Term of Patent. (1)The term limited in every patent for the duration thereof shall, save as otherwise expressly provided by this Act, be sixteen years from its date.

32. Shortly after Independence, therefore, in 1949, a committee was constituted under the chairmanship of Justice (Dr.) Bakshi Tek Chand, a retired judge of the Lahore High Court, to undertake a comprehensive review of the working of the 1911 Act.

33. The Committee submitted its interim report on August 4, 1949 and the final report in 1950 making recommendations for prevention of misuse or abuse of patent rights in India. It also observed that the Patent Act should contain a clear indication that food and medicine and surgical and curative devices were to be made available to the public at the cheapest price commensurate with giving reasonable compensation to the patentee. Based on the committee's recommendations, the 1911 Act was amended in 1950 (by Act XXXII of 1950) in relation to working of inventions, including compulsory licensing and revocation of patents. In 1952, a further amendment was made (by Act LXX of 1952) to provide for compulsory license in respect of food and medicines, insecticide, germicide or fungicide, and a process for producing substance or any invention relating to surgical or curative devices. The committee's recommendation prompted the Government to introduce a bill (Bill no. 59 of 1953) in Parliament, but the bill was not pressed and it was allowed to lapse.

34. In 1957, another committee came to be appointed under the chairmanship of Justice N. Rajagopala Ayyangar to take a fresh look at the law of patent and to completely revamp and recast it to best sub-serve the (contemporary) needs of the country¹⁰.

35. Justice Ayyangar painstakingly collected valuable data (taking the figures for the years 1930 to 1939 from the Bakshi Tek Chand report) and, compiling them into a number of

10. The Bakshi Tek Chand Committee's (also called Patents Enquiry Committee I) report and the Ayyangar Committee's report are important milestones in the development of the patent

tables,¹¹ showed the share of Indians in the field of patents. He analyzed the figures in the tables and pointed out that during the period 1930-37, the grant of patents to Indians and foreigners was roughly in the ratio of 1:9. Even after Independence, though a number of institutions for post-graduate training were set up and several national laboratories were established to encourage a rapid growth of scientific education, the proportion of Indian and the foreign patents remained substantially the same, at roughly 1:9. Justice Ayyangar further pointed out that this ratio does not take into account the economic or industrial or scientific importance of the inventions. If these factors are taken into account, Indians would appear to be lagging even further behind. Further, taking into reckoning the number of inventions for which renewal fees were paid beyond the 6th year, which would give a rough idea of the value attached to the invention by the patentee, the patents taken by Indians would appear to be of little worth as compared with patents held by foreign nationals.

36. Justice Ayyangar examined the nature of the patent right and considered the arguments advanced as justifications/rationalizations for grant of patents. He described the patent law, in his report, as an instrument for managing the political economy of the country. He observed:

“It would not be an exaggeration to say that the industrial progress of a country is considerably stimulated or retarded by its patent system according as to whether the system is suited to it or not.” (p. 9, para 16)

He also quoted from Michel¹² with approval as under:

“* * * Patent systems are not created in the interest of the inventor but in the interest of national economy. The rules

11. The different tables compiled in the Justice Ayyangar’s report are put together at one place at the end of this judgment in Appendix I.

12. Michel on Principal National Patent Systems, Vol. I, P.15.

A
B
C
D
E
F
G
H

A and regulations of the patent systems are not governed by civil or common law but by political economy.”

B 37. Observing that industrial countries and under-developed countries had different demands and requirements, Justice Ayyangar pointed out that the same patent law would operate differently in two countries at two different levels of technological and economic development, and hence the need to regulate the patent law in accordance with the need of the country. Commenting upon the Patents and Designs Act, 1911, (even after its post-Independence amendments) Justice Ayyangar said:

D “It is further obvious however that the system would not yield the same results when applied to under-developed countries. I entirely agree with the views of the Patents Enquiry Committee that “the Indian Patent system has failed in its main purpose, namely, to stimulate invention among Indians and to encourage the development and exploitation of new inventions for industrial purposes in the country so as to secure the benefits thereof to the largest section of the public.” (Interim Report, p. 165).

F 38. Justice Ayyangar observed that the provisions of the Patent law have to be designed, with special reference to the economic conditions of the country, the state of its scientific and technological advancement, its future needs and other relevant factors, and *so as to minimize, if not to eliminate, the abuses to which a system of patent monopoly is capable of being put.* Bearing in view the matters set above, he recommended retaining the patent system, but with a number of improvements.

G 39. One of the improvements suggested was to define, with precision, those inventions which should be patentable *and equally clearly identify certain inventions, the grant of patents to which would retard research, or industrial progress, or be detrimental to the national health or well-being, and to make those inventions non-patentable.*

40. Justice Ayyangar's report specially discussed (a) patents for chemical inventions; and (b) patents for inventions relating to food and medicine.

A

40. Justice Ayyangar's report specially discussed (a) patents for chemical inventions; and (b) patents for inventions relating to food and medicine.

B

41. In regard to patents for chemical substances, he examined the history of the law in other countries and pointed out that Germany was the first to adopt the system of confining the patentability of inventions relating to chemical products or substances to process claims. The law was then followed in many other countries in the world, for instance Austria, Brazil, Czechoslovakia, Holland, Hungary, Japan, Mexico, Norway, Poland and the U.S.S.R. Products produced by chemical process were not patentable though processes for making such products were patentable, if, of course, they satisfied the other tests of patentability, e.g. novelty, subject matter, etc. In light of the experience of the other countries, Justice Ayyangar recommended:

C

D

E

F

"I have considered the matter with the utmost care and have reached the conclusion that the chemical and pharmaceutical industry of this country would be advanced and the tempo of research in that field would be promoted if the German system of permitting only process claims were adopted."

42. Coming next to the patents for inventions relating to food and medicine, Justice Ayyangar pointed out that barring the US, there was hardly any country that allowed unrestricted grant of patents in respect of articles of food and medicines, or as to the licensing and working of patents in this class. In none of the countries of Europe were patents granted for product claims for articles of food or medicine, and in a few (Denmark for articles of food; and Italy, under the law of 1957,

G

H

A for medicinal products) even claims for processes for producing them were non-patentable. He explained that the reason for this state of law is stated to be that the denial of product claims is necessary in order that important articles of daily use such as medicine or food, which are vital to the health of the community, should be made available to everyone at reasonable prices and that no monopoly should be granted in respect of such articles. It is considered that the refusal of product patents would enlarge the area of competition and thus result in the production of these articles in sufficient quantity and at the lowest possible cost to the public.

B

C

D

E

F

G

H

43. Justice Ayyangar submitted a comprehensive Report on Patent Law Revision in September 1959 and the new law of patent, namely, the Patents Act, 1970, came to be enacted mainly based on the recommendations of the report, and came into force on April 20, 1972, replacing the Patents and Designs Act, 1911.

44. Section 1 of the new Act gave it its name and territorial extent and provided that it would come into effect on such date as the Central Government may appoint, by notification in the official gazette. Section 2 contained the definition and interpretation clauses; it defined the terms "invention" and "medicine" in clauses (j) and (l) respectively as under¹³:

"Section 2(1)(j) "invention" means any new and useful –

- (i) art, process, method or manner of manufacture;
- (ii) machine, apparatus or other article;
- (iii) substance produced by manufacture,

and includes any new and useful improvement of

13. The provisions quoted here are as those were enacted in the 1970 Act and before those provisions underwent the amendments with effect from January 1, 2005.

any of them, and an alleged invention. A

Section 2(1)(I) “medicine or drug” includes –

- (i) all medicines for internal or external use of human beings or animals, B
- (ii) all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of diseases in human beings or animals, C
- (iii) all substances intended to be used for or in the maintenance of public health, or the prevention or control of any epidemic disease among human beings or animals, D
- (iv) insecticides, germicides, fungicides, weedicides and all other substances intended to be used for the protection or preservation of plants; E
- (v) all chemical substances which are ordinarily used as intermediates in the preparation or manufacture of any of the medicines or substances above referred to.” F

45. Sections 1 and 2 comprised Chapter I, following which Chapter II was headed “Inventions not patentable”. Chapter II had three sections which, as originally framed, are as under:

“Section 3. What are not inventions.– The following are not inventions within the meaning of this Act,–

- (a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws; G
- (b) an invention the primary or intended use of which would be contrary to law or morality or injurious to public health; H

- A (c) the mere discovery of a scientific principle or the formulation of an abstract theory;
- B (d) the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;
- C (e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
- D (f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;
- E (g) a method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment more efficient or for the improvement or restoration of the existing machine, apparatus or other equipment or for the improvement or control of manufacture;
- F (h) a method of agriculture or horticulture;
- F (i) any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products.

Section 4. Inventions relating to atomic energy not patentable.– No patent shall be granted in respect of an invention relating to atomic energy falling within sub-section (1) of section 20 of the Atomic Energy Act, 1962 (33 of 1962).

Section 5. Inventions where only methods or processes of manufacture patentable.— In the case of inventions—

- (a) claiming substances intended for the use, or capable of being used, as food or as medicine or drug, or
- (b) relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds), no patent shall be granted in respect of claims for the substances themselves, but claims for the methods of processes of manufacture shall be patentable.”

46. It is significant to note that section 5 in chapter II of the Act expressly excluded product patents for substances intended for use and capable of being used as food or as medicine or drug, and substances prepared or produced by chemical process, and made these substances non-patentable. Section 4 similarly prohibited grant of patent in respect of an invention relating to atomic energy. The Act thus clearly recognized and maintained the distinction between invention and patentability.

47. We have briefly examined some aspects of the legislative history of the patent law in India. We may now take a look at how the Patent and Designs Act, 1911, and the Patents Act, 1970, impacted the pharmaceutical industry and the availability of drugs in the country.

48. Sudip Chaudhuri in his book titled, *The WTO and India's Pharmaceuticals Industry*¹⁴ describes the market shares of multi-national companies and Indian companies in India by means of a table as under:

14. Chaudhuri, Sudip, *The WTO and India's Pharmaceuticals Industry* (Patent Protection, TRIPS, and Developing Countries) (Oxford University Press, 2005).

Market Shares of MNCs & Indian Companies in the Pharmaceutical Industry in India

Year	MNCs (%)	Indian Companies
1952	38	62
1970	68	32
1978	60	40
1980	50	50
1991	40	60
1998	32	68
2004	23	77

Sources: For 1952, Pharmaceutical Enquiry Committee 1954, pp. 20 – 1, 61 – 6;

For 1970, Ministry of Petroleum & Chemicals 1971, P. 1;

For 1978, Chaudhuri 1984, p. 176 (based on ORG 1978);

For 1980, 1991, and 1998, Kalsekar 2003;

49. The fall and rise of the Indian pharmaceutical industry is explained as the result of certain factors, not the least important of which was the change in the patent law in the country, which made medicines and drugs and chemical substances non-patentable. Chaudhuri explains that before the introduction of sulfa drugs (1930s) and penicillin (1940) that brought about the therapeutic revolution, drugs of natural origin were more important than synthetic ones.

(that is, raw materials) for about three-fourths of the drugs mentioned in British and other pharmacopoeias actually grew in India.

50. By the time the Second World War started (1939), several indigenous firms were engaged in manufacturing drugs, and indigenous producers met 13 per cent of the medicinal requirements of the country. They still had a long way to go to attain self-sufficiency but in terms of the range of operations they were already manufacturing all types of drugs. By the early 1950s, because of the spread of manufacturing activities, the indigenous sector dominated the pharmaceutical industry in India. It accounted for about 62 per cent of the market in 1952 (the table above). However, the rise and growth of multinational corporations (MNCs) worldwide in the post-Second World War period, as well as the therapeutic revolution changed these dynamics. The MNCs started research for developing new drugs in the 1930s-40s. As a result, in the late 1940s and during the 1950s and even after that at a slower rate, new drugs discovered by the MNCs began to be available for medical use. The indigenous sector was not equipped for research for developing new drugs, that is, for developing a new chemical entity. With the introduction of new drug at a rapid rate by the MNCs, the role of patents became important. Because of the patent regime under the 1911 Act and the unsupportive industrial policy, the indigenous sector lost its status in the 1950s and the 1960s. In contrast to 62 per cent of the market in the early 1950s, the market share of the indigenous sector declined to 32 per cent by 1970. In contrast, the market share of the MNCs increased from 38 per cent in 1952 to 68 per cent in 1970 (the table above).

51. However, according to Chaudhuri, the situation changed in the 1970s. Several official initiatives were taken in the 1970s, of which the most important one was the enactment of the Patents Act, 1970, which changed the environment in favour of the indigenous sector.

A
B
C
D
E
F
G
H

A 52. In regard to the Patents Act, 1970, Chaudhuri maintains that Patent “reforms” contributed directly to the transformation of the pharmaceutical industry. He points out that under the Patents Act, 1970, articles of food, medicines and drugs and chemical substances could be patented only for a new method or process of manufacture, not for the products as such (section 5 of the 1970 Act). Further, unlike in the previous patent regime, for each particular drug only one method or process – the best known to the applicant - could be patented (sections 5 and 10 of the 1970 Act). Also, even in case of a process patent for an article of food, medicine or drug, the term of the patent was brought down from fourteen (14) years to five (5) years from the date of sealing of the patent, or seven (7) years from the date of patent whichever was earlier.

D 53. He then examines the growth of the Indian pharmaceutical industry driven by the new patent regime in three phases:

- . Till the early 1970s;
- E . The late 1970s and the 1980s; and
- . Since the 1990s

F 54. Till the early 1970s the industry was dominated by MNCs who commanded 68% of the market share. India was dependent on imports for many essential bulk drugs. This import dependence constricted consumption in a country deficient in foreign exchange, and inhibited the growth of the industry. Drug prices in India were very high.

G 55. In the late 1970s and 1980s, Indian companies started large-scale production of bulk drugs. The development of the bulk drugs sector is actually the most important achievement of the pharmaceutical industry in India. This led to the transformation of the industry.

H 56. The most rapid growth of the

industry took place from the 1990s onwards. Both production and exports grew remarkably fast. The production of both bulk drugs and formulations started increasing sharply and steadily. From Rs.6,400 million in 1989-90, bulk drugs production increased to Rs.77,790 million in 2003-04; and from Rs.34,200 million in 1989-90, formulation productions increased to Rs.276,920 million in 2003-04. The growth was most remarkable from 2000 to 2005, when production increased much more than it had in the last two decades. Indian companies further consolidated their domination in the domestic market. Their market share increased from 60 per cent in 1991 to 68 per cent in 1998 and 77 per cent in 2003.

57. The growth was also very fast in the export markets. India became a net exporter by 1988-89, and since then there has only been an increase in the Indian exports. As a result, net exports as a percentage of exports have increased from 4.4 per cent in 1988-9 to about 50 per cent in the early 1990s and more than 75 per cent in the early 2000s. More than three-fourths of bulk drug production and almost one-fourth of the formulations production are exported. The USA, which has the toughest regulatory requirements, has emerged as India's largest export partner in pharmaceuticals.

58. Dealing with the growth of the Indian pharmaceutical industry after the change in the patent law, Chaudhuri writes:

“Because of the rapid growth and structural transformation in the last three decades or so, India now occupies an important position in the international pharmaceutical industry... India has received worldwide recognition as a low cost producer of high quality bulk drugs and formulations. India produces about 350 bulk drugs ranging from simple pain killers to sophisticated antibiotics and complex cardiac products. Most of the bulk drugs are produced from basic stages, involving complex multi-stage synthesis, fermentation and extractions. For more than 25

A
B
C
D
E
F
G
H

A bulk drugs, India accounts for more than 50 per cent of the international trade. India is a major force to reckon with in the western markets for such drugs as ibuprofen, sulphamethoxazole...”

B 59. Even as the country's pharmaceutical industry, helped by the basic changes made in the patent system by the Patent Act, 1970, was going from strength to strength, certain developments were taking place at the international level that would deeply impact the Patent system in the country. Following the Uruguay round of multilateral negotiations under the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPS) was arrived at and it came into force on January 1, 1995. The TRIPS Agreement is the most comprehensive multilateral agreement to set detailed minimum standards for the protection and enforcement of intellectual property rights, and aims at harmonizing national intellectual property systems. All members of the World Trade Organisation (WTO) are bound by the obligations under the TRIPS Agreement. India is one of the founding members of the GATT and thus a member of the WTO from its inception from January 1, 1995, and is bound by the obligations under TRIPS Agreement like all other members of the WTO. Some of the Articles of the Agreement, which have a bearing on our discussion, are reproduced below.

**“Article 1
Nature and Scope of Obligations**

G 1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

H

2. For the purposes of this Agreement, the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. xxx
Article 3
National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection¹⁵ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not

15. For the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

A applied in a manner which would constitute a disguised restriction on trade.

Article 7
Objectives

B The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8
Principles

D 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

F 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

PART II
Section 5: Patents

Article 27
Patentable Subject Matter

G 1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and a

application.¹⁶ Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 28
Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

A
B
C
D
E
F
G
H

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing¹⁷ for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

PART V
Dispute Prevention and Settlement
Article 63
Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

A
B
C
D
E
F
G
H

16. For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

17. This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.



2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6ter of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64
Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

A
B
C
D
E
F
G
H

A 2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

B 3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

Article 65
Transitional Arrangements

E 1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

F 2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

G 3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

H

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

A
B

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

C

Article 70

Protection of Existing Subject Matter

1 to 6 xxx

D

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

E

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

F

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

G

H

A
B

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

C

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

D

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member."

E

F

60. The Agreement (vide. Part V: Article 64) provides for a mechanism for resolution of disputes between the members of the WTO. In case of a dispute, a panel of specially appointed trade experts interprets the provisions of the Agreement and issues a report. The panel's decision may be subjected to appeal before the WTO Appellate Body. If a party to the decision fails to abide by a decision, the other party can impose trade sanctions on the member in breach, upon authorization by the Dispute Settlement Body. The dispute resolution mechanism in the TRIPS is strong and effective as was proved in the case of India herself.

G

H

61. Article 65 (sub-articles 1 and 2)

the application of the provisions of the Agreement for a period of 5 years, that is, till January 1, 2000; sub-Article 4 allowed India to delay for a further period of five years, that is, till January 1, 2005, the application of the provision relating to product patent, in respect of all articles excluded by the Patent Act, 1970¹⁸, which included pharmaceuticals and agricultural chemical products. But, Article 70 (sub-articles 8 and 9) enjoined that in the meanwhile it should provide for a means by which applications for patents for inventions in respect of pharmaceutical and agricultural chemical products could be filed and also for the grant of “exclusive marketing rights” for such products. In discharge of its obligations under the Agreement, the Government of India promulgated the Patents (Amendment) Ordinance, 1994 (Ordinance No. 13 of 1994), on December 31, 1994, amending the Patents Act, 1970. The Ordinance provided for making “a claim for patent of an invention for a **substance itself intended for use, or capable of being used, as medicine or drug**” (as required by sub-paragraph (a) of Article 70.8 of the TRIPS Agreement) and for the grant of exclusive marketing rights with respect to the product that is the subject matter of such a patent claim (as required by Article 70.9 of the Agreement). The Ordinance, however, lapsed on March 26, 1995, on expiration of six weeks from the commencement of the next session of the Parliament, without being replaced by any corresponding Act¹⁹. The Patents

18. Section 5 of the Act as before it was amended:

Section 5. Inventions where only methods or processes of manufacture patentable.— In the case of inventions –

- (a) claiming substances intended for the use, or capable of being used, as food or as medicine or drug, or
- (b) relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds), no patent shall be granted in respect of claims for the substances themselves, but claims for the methods of processes of manufacture shall be patentable.

19. During this brief period, 125 applications for product patents were received and filed.

A
B
C
D
E
F
G
H

A (Amendment) Bill, 1995, which was intended to give permanent legislative effect to the provisions of the Ordinance, was introduced in the Lok Sabha in March 1995. The Bill was passed by the Lok Sabha and it was then introduced in the Rajya Sabha where it was referred to a Select Committee of the House for examination and report. The Select Committee was unable to give its report before the dissolution of the Lok Sabha on May 10, 1996. The Patents (Amendment) Bill, 1995, lapsed with the dissolution of the 10th Lok Sabha.

C 62. In this state of the patent law in the country, India was twice taken to the WTO panel, first on a complaint by the USA (WT/DS50/AB/R, dated December 19, 1997) and the second time on a complaint filed by the European Communities (WT/DS79/R, dated August 24, 1998). The complaint by the USA was in regard to the absence, in India, of either patent protection for pharmaceutical and agricultural chemical products under Article 27 of the TRIPS Agreement, or of a means for the filing of patent applications for pharmaceutical and agricultural chemical products pursuant to Article 70.8 of the TRIPS Agreement and of the legal authority for the grant of exclusive marketing rights for such products pursuant to Article 70.9 of the TRIPS Agreement. The WTO panel returned the finding that India had not complied with its obligations under Article 70.8 (a) and, in the alternative, paragraphs 1 and 2 of Article 63 and also 70.9 of the TRIPS Agreement. India took the matter in appeal. By a decision dated December 19, 1997, the Appellate Body affirmed the panel’s findings that India had not complied with its obligations under Article 70.8(a) and Article 70.9 of the TRIPS Agreement, but set aside the panel’s finding relating to the alternative claim by the United States under Article 63 of TRIPS Agreement. In conclusion, the Appellate Body recommended “that the Dispute Settlement Body request India to bring its legal regime for patent protection of pharmaceutical and agricultural chemical products into conformity with India’s obligations under Article 70.8 and 70.9 of the TRIPS Agreement”.

H

63. In the proceedings arising from the complaint filed by the United States, the European Communities were added as the Third Party before the panel and as the Third Participant before the Appellate Body. Nonetheless, the European Communities and their members filed a similar but separate complaint against India (WT/DS79/R, dated August 24, 1998). The WTO panel, accepting the complainant's request, extended the findings in the earlier dispute (WT/DS50), as modified by the Appellate Body, to the complaint filed by the European Communities and their member States as well. This matter did not go to the WTO Appellate Body.

64. The TRIPS Agreement also provides for a built-in mechanism for review through the biennial Ministerial Conference (vide Article 71). The Ministerial Conference is the highest decision-making body of the WTO and it can make decisions on all matters under any of the WTO agreements, including the TRIPS Agreement. The fourth WTO Ministerial Conference in Doha on November 14, 2001, adopted the Doha Declaration on the TRIPS and Public Health. The Doha Declaration is as follows:

“1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to

A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

- a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
- b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
- c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
- d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the TRIPS Agreement's exhaustion of intellectual property rights provisions of Article 17.

6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

A
B

7. We reaffirm the commitment of developed-country members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country members pursuant to Article 66.2. We also agree that the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.”

C
D
E

65. In the course of the hearing, we were told that the Doha Declaration effectively reflected and addressed the deep disquiet of the developing and the least-developed countries regarding their obligation under TRIPS to grant patent protection for pharmaceutical and agricultural chemical products and the likelihood of its highly adverse consequence on public-health. Dr. Dhawan, appearing for Cipla (one of the Objectors), was particularly severe in his criticism of the TRIPS Agreement and called it a “predatory and coercive” agreement. The other counsel, though, appearing for the different Objectors, were more muted in their criticism of the TRIPS Agreement. Mr. Kuhad, the learned Additional Solicitor General appearing for the Union of India, and Mr. Grover, Senior Advocate, appearing on behalf of the M/s. Cancer Patients Aid Association (one of

F
G
H

A the Objectors), especially adapted their submissions, taking the TRIPS Agreement as a fact that cannot be simply wished away. However, all the counsel representing the Union of India and the different Objectors unanimously took the stand that the TRIPS Agreement has sufficient flexibility (vide Articles 7, 8 and B 27), which was further reaffirmed by the Doha Declaration (in paragraphs 4 to 6), to enable the member States to control the patent rights in a manner as to avoid any adverse impact on public-health. It was contended on behalf of the Union of India and the Objectors that the TRIPS Agreement coupled with the C Doha Declaration leaves it open to the member States to adjust their respective patent systems by regulating the grant of patents and to set up higher standards for patent protection for pharmaceutical and agricultural chemical products. The Union of India and all the Objectors maintained that the patent law in D India, as it stands to-day after major changes were brought about in the Patents Act, 1970 in 2005, is fully TRIPS compliant. But they insisted that the Indian law must be judged and interpreted on its own terms, and not on the basis of standards of patentability prescribed in some countries of the western E world.

66. We have referred to the TRIPS Agreement and certain developments arising from it not to comment upon the fairness or otherwise of the Agreement nor to examine the correctness and wisdom of the decision of the Government of India to F subscribe to the Agreement. That is farthest from our mind. We have referred to the Agreement as being the main reason behind the basic changes brought about in the patent law of the country by legislative action. We have also referred to the Agreement as being the cause of a good deal of concern not G only in this country but also (as we shall see presently) in other parts of the world; the concern being that patent protection to pharmaceutical and agricultural chemical products might have the effect of putting life-saving medicines beyond the reach of a very large section of people. In the following lines we shall H see how the Indian legislature addressed

harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries).

67. We have seen above that, simultaneously with the TRIPS coming into force, the Government of India had brought an Ordinance to comply with the provisions of Article 70 (8) and (9), but the Ordinance lapsed without being replaced by any enactment. Complaints were then filed on which pronouncements were made against India. On the complaint filed by the USA, the decision of the Appellate Body was rendered on December 19, 1997; and on the complaint filed by the European Communities, the report of the Panel came on August 24, 1998. Thus faced with the threat of trade sanctions, Parliament passed the Patents (Amendment) Act 1999 (Act No. 17 of 1999) on March 26, 1999, which amended the provisions of the Patents Act 1970 retrospectively, with effect from January 1, 1995, the date when the TRIPS Agreement came into force. By the Amendment Act of 1999, section 5 of the Parent Act was amended to provide for making “a claim for patent of an invention for a **substance itself intended for use or capable of being used, as medicine or drug**”²⁰. The Amendment Act further incorporated in the Parent Act, Chapter IVA, which contained provisions for grant of exclusive marketing rights in respect of pharmaceutical substances for which a claim for patent was made under section 5 of the Act. The Amendment Act of 1999 thus complied with Article 70(8) and (9) of the TRIPS Agreement.

68. Three years later the Patents (Amendment) Act, 2002

20. Excepting all chemical substances which are ordinarily used as intermediates in the preparation or manufacture of any of the medicines or substances referred to in sub-clauses (i) to (iv) of section 2 (1) (l) of the Parent Act.

(Act No. 38 of 2002) came to be enacted on June 25, 2002. It brought large scale amendments in the Patents Act, 1970. The Statement of Objects and Reasons for the Amendment Act of 2002 is stated as under:

“Amendment Act 38 of 2002 – Statement of Objects and Reasons.– The law relating to patents is contained in the Patents Act, 1970 which came into force on the 20th April, 1972. **The Act was last amended in March, 1999 to meet India’s obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)** which forms part of the Agreement establishing the World Trade Organisation (WTO). Development of technological capability in India, coupled with the need for integrating the intellectual property system with international practices and intellectual property regimes, requires that the Act be modified into a modern, harmonised and user-friendly legislation to **adequately protect national and public interests while simultaneously meeting India’s international obligations under the TRIPS Agreement which are to be fulfilled by 31st December, 1999.**

2. xxx

3. While considering amendment to the Act, **efforts have been made to make the law not only TRIPS complaint (sic) but also to provide therein necessary and adequate safeguards for protection of public interest, national security, bio-diversity, traditional knowledge, etc.** Opportunity is also proposed to be availed of for harmonising the procedure for grant of patents in accordance with international practices and to make the system more user friendly.

4. Some of the salient features of the Bill are as under:–

(a) to define the term “invention



A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

international practices and consistent with TRIPS Agreement; A

(b) to modify section 3 of the present Act to include **exclusions permitted by TRIPS Agreement** and also subject-matters like discovery of any living or non-living substances occurring in nature in the list of exclusions which in general do not constitute patentable invention; B

(c) to align rights of patentee as per article 28 of the TRIPS Agreement; C

(d) to (k) xxx; C

(l) to amend several provisions of the Act with a view to simplifying and rationalising the procedures aimed at benefiting users. D

(emphasis added)

69. The Amendment Act of 2002 greatly expanded the definition clause in section 2 of the Parent Act by including a number of new expressions and terms and redefining some earlier terms. E

70. "Invention" was defined in the Parent Act as under:

"Section 2(1)(j) "Invention" means any new and useful- F

(i) art, process, method or manner of manufacture;

(ii) machine, apparatus or other article;

(iii) substance produced by manufacture, G
and includes any new and useful improvement of any of them, and an alleged invention."

71. "Invention" was re-defined by the Amendment Act of 2002 as under: H

A **"Section 2(1)(j) "invention"** means a new product or process involving an inventive step and capable of industrial application."

B 72. The expressions "capable of industrial application" and "inventive step" were separately defined in clauses (ac) and (ja) respectively which are as under:

C **"Section 2(1)(ac) "capable of industrial application"**, in relation to an invention, means that the invention is capable of being made or used in an industry.

C **Section 2(1)(ja) "inventive step"** means a feature that makes the invention not obvious to a person skilled in the art."

D 73. Section 3 of the Parent Act, which provided for exclusions from patentability, was recast. In section 5 of the Parent Act, an Explanation was added after sub-section (2). Chapter XVI was substituted with the Chapter Heading "Working of Patents, Compulsory Licenses and Revocation". Section 83 in this Chapter laid down the general principles applicable to working of patented inventions; section 84 provided for compulsory licenses; and section 85 for revocation of patents for non-working. Here, it may not be out of place to take note of section 83 which provided as under: E

F **"Section 83: General principles applicable to working of patented inventions.-** Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely: -

G (a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;

H (b) that they are not granted

patentees to enjoy a monopoly for the importation of the patented article; A

(c) that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations; B

(d) that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio- economic and technological development of India; C

(e) that patents granted do not in any way prohibit Central Government in taking measures to protect public health; D

(f) that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and E

(g) that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.” F

74. The many amendments to and enlargement of the Parent Act by the Amendment Act of 2002 laid most of the ground-work, but India was yet to take the one final step to make its patent law compliant with the mandate of TRIPS. And that was to amend the Act to allow for grant of product patents for pharmaceutical and agricultural chemical substances. Steps G

A were taken to finally amend the Patents Act, 1970, but the draft Bill lapsed in February 2004. Further efforts were made but the legislature was unable to bring an enactment to make that final amendment in the Act by December 2004; thus, the Government of India had no option but to amend the law through an Ordinance. Therefore, in order not to default on its obligations under the TRIPS Agreement, the Government brought the Patents (Amendment) Ordinance, 2004 (Ordinance No. 7 of 2004) with effect from January 1, 2005. By this Ordinance, section 5 of the Patents Act, 1970, which barred the grant of patent for substances intended for use or capable of being used as food or as medicine or drugs or substances prepared or produced by chemical processes was done away with, opening the doors for grant of patents to, amongst others, pharmaceutical products. B

D 75. But the troubles were far from over, because the Ordinance was to lapse on March 31, 2005. Hence, it was imperative for Parliament to pass an enactment, replacing the Ordinance before it lapsed on March 31, 2005. The pressure of time under which Parliament was obliged to deal with the matter and pass the Act, replacing Ordinance No. 7 of 2004 and amending the Patents Act, 1970, is best stated in the *Statement of Objects and Reasons* for the Patents (Amendment) Act, 2005 (Act 15 of 2005). In paragraph 5 of the *Statement of Objects and reasons* it is stated as under: E

F “Amendment Act 15 of 2005 – Statement of Objects and Reasons.–

G 5. The time-frame for this set of amendments was most crucial as any slippage in meeting the January 01, 2005 deadline had the potential of inviting retaliatory action under the WTO disputes mechanism. Having availed of the entire ten-year transition period provided under the TRIPS Agreement, India had no legal basis to defend its default on the deadline. The past record of delayed implementation would also not ha H

case. This default would also have created a legal vacuum for the “mailbox” applications, as there would not be any mechanism to deal with them from January 01, 2005. This would have amounted to a specific default on the international commitment to examine and dispose of these cases, and might have again provided an opportunity to WTO member countries to raise a dispute against India in the WTO. There would also have been a legal vacuum in respect of fresh applications after January 01, 2005, as the law was salient on whether the “mailbox” provision would subsist or whether it would have ceased. Finally, there would have been an erosion of India’s credibility in the international field. In the circumstances it was considered necessary to bring in the required amendments in time and as Parliament was not in session, the President promulgated the Patents (Amendment) Ordinance, 2005 (Ord. 7 of 2004) on the 26th December, 2004.”

76. Parliament had an absolutely unenviable task on its hands. It was required to forge, within a very limited time, an Act that would be TRIPS compliant without, in any way, compromising on public health considerations. It is seen above that the TRIPS Agreement had aroused grave concerns about its impact on public health. India had learnt from experience the inverse relationship between product patents and the indigenous pharmaceutical industry, and its effects on the availability of essential drugs at affordable prices. It is also seen above that after the patent system in India barred the grant of patents for pharmaceutical and chemical substances, the pharmaceutical industry in the country scaled great heights and became the major supplier of drugs at cheap prices to a number of developing and under developed countries. Hence, the reintroduction of product patents in the Indian patent system through the TRIPS Agreement became a cause of alarm not only in this country but also for some international agencies. Our attention was invited to a letter of the HIV/AIDS Director of the

A
B
C
D
E
F
G
H

A WHO, dated December 17, 2004, to the Minister of Health and Family Welfare, Government of India. The letter deserves to be noted in full.

“17 December 2004

Dr. A Ramadoss

Minister of Health and Family Welfare
Government of India
Nirman Bhawan, Maulana Azad Road
New Delhi-110 001
India

B
C

Dear Dr. Ramadoss,

We would like to bring to your attention that several of our Member States have expressed their concern that in the future, generic antiretroviral drugs from India may no longer be available to them. Among other places, these concerns were expressed by the delegations of Ghana, Lesotho, Malawi, and Namibia at our recent Procurement & Supply Management (PSM) Workshop in Nairobi, Kenya (2-9 December, 2004), and by Bangladesh, Cambodia, China, Indonesia, Korea, Laos, Thailand, Papua New Guinea, and Vietnam at the Asian Regional Workshop on the WTO/TRIPS Agreement and Access to Medicines held in Kuala Lumpur, Malaysia (28-30 November 2004).

D
E
F

As you are aware, WHO has been actively monitoring the implications of trade agreements on public health. One key issue is the impact of the end of the transition period at 1 January 2005 allowed under the TRIPS Agreement, which delayed the application of product patents, on the local production and supply of generic antiretroviral agents.

The WTO Ministerial Declaration on the TRIPS Agreement and Public Health adopted in Doha, 2001 affirmed that “the TRIPS Agreement can and should be interpreted and implemented in a manner support

H

right to protect public health and, in particular, to promote access to medicines for all.” In line with this, recent resolutions of the World health Assembly have also urged that national legislation should be adapted in order to use to the full the flexibilities contained in the TRIPS Agreement (WHA 56.27, May 2003 and 57.14, May 2004). In accordance with its mandate, WHO will therefore seek to provide technical assistance and support to Member States to promote implementation of the TRIPS Agreement consistent with the public health objective of ensuring access to medicines.

As India is the leader in the global supply of affordable antiretroviral drugs and other essential medicines, we hope that the Indian government will take the necessary steps to continue to account for the needs of the poorest nations that urgently need access to antiretrovirals, without adopting unnecessary restrictions that are not required under the TRIPS Agreement and that would impede access to medicines.

We thank you for your attention to this issue and send our best regards.

Sincerely,

Dr. Jim Yong Kim
Director
Department of HIV/AIDS”

(emphasis added)

77. We were also shown another letter dated February 23, 2005, from the Director of Advocacy, Communication and Leadership for UNAIDS, to the Minister of Commerce and Industry, Government of India. This letter is also useful as reflecting the concern of the international community over the impending change in the patent system in India. This letter is

A
B
C
D
E
F
G
H

A as under:

“Honourable Minister
Mr Kamal Nath
Ministry of Commerce and Industry
Udyog Bahavan
New Delhi 110001
India

23 February 2005

Reference: ACL/AD/lp

Excellency,

I have the honour to refer to India’s leadership in promoting access to and supplying affordable essential generic HIV medicines to those most in need in developing countries, which has long been recognized and applauded by the international community. India can rightly take pride in the fact that it has significantly supported the response to the global AIDS emergency through helping to ensure AIDS medicines are more affordable and accessible.

Affordable HIV medications from India have so far saved thousands of lives yet more than 8,000 people around the world continue to die every day because they have no access to treatment. Despite concerted efforts across the world, only about one in ten people in urgent need of HIV antiretroviral treatment in low- and middle-income countries has access to existing medicines.

Current legislative proposals intended to take the 1970 Indian Patents Act beyond the commitments agreed in the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) threaten to undermine India’s leadership in providing affordable medicines. For example, the requirement that countries wishing to import from India under the WTO 2005 Agreement

A
B
C
D
E
F
G
H

2003 Decision must issue a compulsory license in every case goes far beyond the WTO Decision. This requirement in the Indian Ordinance places a cumbersome and often unnecessary administrative burden on the importing country. Often, there will be no patent in the importing country and compulsory licenses are only required where a valid patent has been issued. Under the WTO Declaration on TRIPS and Public Health (the Doha Declaration) of November 2001, Least Developed Countries are not even required to issue patents in the pharmaceutical sector until 2016. In addition, the limitations under the Ordinance of the pre-grant opposition rule contained in the previous law removes an important opportunity for People Living with HIV and other members of civil society to participate in an open and transparent process.

The implications of the current Ordinance are potentially devastating: the vast majority of countries hardest hit by AIDS do not have sufficient manufacturing capacity in the pharmaceutical sector and must rely upon imports from major producing countries such as India if they are to succeed in scaling up access to HIV treatment to the millions of their people in need.

UNAIDS strongly supports the rights of governments to avail themselves of the flexibilities in TRIPS in promoting the widest possible access to affordable medicines and technologies.

Therefore, we would respectfully urge you to consider all appropriate legal means to protect and scale up access to essential affordable medicines. The Doha Declaration, in which India played an important role, makes clear that the interests of public health and equitable access to medicines for all should be primary concerns in the application of the TRIPS Agreement and related trade and intellectual property rules.

A
B
C
D
E
F
G
H

A UNAIDS has learnt that a Global Day of Action is planned for 26 February 2005 against the Indian Patent Ordinance. Civil society, organizations of people living with HIV and AIDS and the media will be watching closely. This day presents an opportunity for India to send out a strong message in support of both research innovation and access to affordable HIV-related pharmaceuticals and other essential medicines, while fully complying with the applicable multilateral trade and intellectual property agreements.

B
C Please accept, Excellency, the assurance of my highest consideration.

Achmat Dangor
Director
D Advocacy, Communication and Leadership
cc: Dr Prasada Rao, UNAIDS Regional Director, Regional Support Team, Bangkok
Permanent Mission of India to the United Nations and other International Organizations in Geneva”

E 78. It was thus under the twin pressure of time and anxiety to safeguard the public health objectives that Parliament was called upon to deliberate over the amendments required to be made in the patent law to make it fully compliant with the TRIPS Agreement.

F 79. On December 18, 2004, the Bill to further amend the Patents Act, 1970, which was materially the same as Ordinance No. 7 of 2004, was introduced in Parliament. The Bill evoked a highly insightful and informed debate on the subject. To anyone going through the debate on the Bill, Parliament would appear keenly alive to national interests, human-rights considerations and the role of India as the producer and supplier of drugs to different parts of the world where impoverished humanity is critically in need of those drugs at cheap and affordable prices. Cutting across party lines, member after member from the Opposition

A the grave risk in creating private monopolies in an area like
B pharmaceuticals, the abuses to which product patents in
C pharmaceutical products were vulnerable, and the ploys used
by big companies to artificially extend the period of patent to
keep competitors out and keep the prices of the patented
product high. It was strongly argued that, while fulfilling its
commitment under the TRIPS agreement, the Government must
not bring in a patent regime where all the gains achieved by
the Indian pharmaceutical industry are dissipated and large
sections of Indians and people in other parts of the world are
left at the mercy of giant multinational pharmaceutical
companies.

80. One of the members from the Opposition benches
said:

D “Sir, even if this were a Bill, which affects only India,
still it would be an extremely important one. But it is a Bill,
which affects most parts of the world. We are supplying
50 per cent of the cheapest drugs in the world to places
like Papua New Guinea, Laos, Kenya, Africa, etc. All these
countries have complained to the WHO about this Bill.”

E The two biggest international health organizations in the
world, namely WHO, and Medicines Sans Frontiers have
written to the Government saying that this is a very very
serious matter. This has been the subject of editorials all
over the world right from America onwards to every country
from Bangladesh, Cambodia, China, Indonesia, Nairobi,
Korea, Laos, Thailand, Vietnam, etc. All of them have
complained about our Bill. It is a Bill that affects so many
parts of the world. Do you not think that we should have a
slightly more serious discussion on it, rather than
attempting to pass it through?”

The same member speaking at a later stage in the debate
said:

H

A “India has benefited from the low cost generic industry to
dominate 30 per cent of the low cost drugs in the world....

B Secondly, it (the bill) is vague about the evergreening
effect in which companies extend their patent rights by
switching from capsules to tablets, for instance. This
extends monopolies. Parliament must make sure that it
protects the rights of India to make these generic
drugs. We should remove the provision that allows this
evergreening. ... What should and what should not be
patentable has also been left open to
C interpretation. Earlier, the new use for a substance could
not be patented. Now this has been qualified to allow it by
putting “mere new use” instead of “new use”.

xxx

D Sir, I am going to limit my speech to six points only. This
is what we need:

- E
1. We need to limit the scope of patentability to only
new chemical entities.
 2. No patents for new usage and dosage of known
drugs.
 3. Retain pre-grant opposition in its original form.
 4. Simple procedures with a time limit for grant of
compulsory licences.
 5. Immunity for generic drugs which are already
available in the market.
 6. Introduction of ceiling on royalty to pharmaceutical
companies”

81. Another member, also from one of the parties in the
Opposition, had this to say:

H

“Sir, a lot of things have been said for and against the Bill. Certain basic positions have to be re-stated even now. That is, in India, we had legislation in 1891 on the Patents and Designs. That was product regime, under which it had been told that in India, in relation to medicines, at that time, 85 per cent of our medicinal requirements was met by import of medicines from abroad. In those days, probably, the transnational corporations were not as big as they are today. But even then, with the product regime that was there upto 1911, the situation in this country was such that we had to depend upon imports for the 85 per cent of our medicinal requirements.

After 1970, when India adopted a new Patents legislation, where we had adopted a process regime, the situation was reversed. This 85 per cent of our country’s medicinal requirement was met by our own products. That was a remarkable achievement. Not only that, we started exporting to countries which does not have the facility of infrastructure to produce their own medicines. We supplied medicine to meet their requirements. But will the Minister now assure that we will be able to meet our own requirements at a cheaper rate after adopting this product regime? Can it be assured that we would be able to meet the requirements of medicine of our people? Because, that was not our experience in the past. ...”

82. It is interesting to note that in the Parliamentary debate, the names of the appellant company (Novartis) and the drug (Gleevec) being the subject matter of this case were repeatedly mentioned, and the excessively high price fixed for the drug after the grant of “exclusive marketing rights” to the appellant was expressly cited as the likely result of bringing in the product patent regime in pharmaceuticals. One of the members said:

“Sir, a company which obtains a patent by changing their chemicals, before the expiry of the patent, they will again apply for a patent and again get a patent. So, in this way,

A
B
C
D
E
F
G
H

A they will continue to get a patent for the same medicine. For example, the drug called ‘Glevic’ (sic Gleevec/Glivec), is used for the treatment of Leukaemia. It is patented by Novartis. This was originally patented in 1993. The cost of the drug for the treatment of this disease comes to about Rs.1,20,000 per month²¹ in India. At the same time, the generic versions are available in the country which cost only Rs.8,000 to Rs.10,000.”

C 83. As the deliberations were going on in Parliament, negotiations were also held between the ruling party and some of the opposition parties, in course of which certain amendments were suggested in the Bill. And in order to allay the apprehensions and fears voiced by the Opposition, one of the members from the Government said:

D “Madam, I am concluding. I would only like to refer to the amendment which is being incorporated in Clause 3 which talks of the known inventions, the products which are not considered to be inventions and therefore cannot be covered by the patent and patents cannot be sought for them. A good amendment is being introduced to that effect in Clause 3 of the Bill which says:

F “The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance of (sic or) the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine

21. Here it will be unfair not to state that in course of hearing of the case when the Court expressed its bewilderment over the price of the drug, it was strenuously stated on behalf of the appellant that they also ran a huge charitable programme under which the drug was supplied free to the needy persons. However, to the question by the Court why the appellant could not abolish the charitable programme and at the same time bring down the price of the drug so as the total revenue from the sale of the drug remains the same as it is with the abnormally high price and the charitable programme, no satisfactory answer was provided.

or apparatus unless such known process results in a new product or employs at least one new reactant.” A

The explanation to that should completely allay the fears of our friends on the other side. I hope they would accept that.”

84. Speaking at the conclusion of the debate, the minister who had sponsored the Bill also referred to the amendment proposed in section 3(d). He said: B

“There are so many provisions here. In regard to evergreening, I just want to read out section 3(d) which says that a mere discovery of a new property or a new use for a known substance or the mere use of known process in a new product – these are exceptions, these will not be granted any patent – and substances obtained by a mere ad-mixture resulting only in aggregation of properties of the components thereof or, processes of producing such substances will not be given patents...” C D

85. Finally, after three days of debate (March 18, 21 and 22) the Bill, along with the amendments proposed by the minister, was passed by the Lok Sabha on March 22, 2005. Some of the very important amendments that were incorporated in the Bill related to section 2(1)(ja) and section 3(d), and the insertion of the provision for pre-grant opposition to grant of patent. After being passed by the Lok Sabha, the Bill was presented in the Rajya Sabha where it was passed on March 23, 2005. It received the assent of the President on April 4, 2005, and was published in the official gazette of April 5, 2005. E F

86. Thus, after deliberations that took place for just four days, the Patents Act, 1970, came in a completely new *avatar*. The haste with which the Government was constrained to rush the Bill through Parliament to make the law compatible with the TRIPS Agreement perhaps explains the somewhat unclear drafting of some very important provisions, which called for G

H

A much greater clarity; the presence of some terms and expressions in the definition section²² that are nowhere used in the Act; and a few loose ends that could have been properly tied up if more time and attention was given to the drafting.

B 87. We have seen in some detail the “why” and the “how” of the law. Let us now examine what the law is in light of its “why” and “how”. In order to understand the meaning of “invention” under the Patents Act, 1970, as it stands today after its amendment by the amending Act of 2005, we must refer to clauses (ac), (j) and (ja) of section 2(1) of the Act:²³ C

“**Section 2. Definitions and interpretation.** — (1) In this Act, unless the context otherwise requires,—

D **(ac) “capable of industrial application”**, in relation to an invention, means that the invention is capable of being made or used in an industry;

E **(j) “invention”** means a new product or process involving an inventive step and capable of industrial application;

F **(ja) “inventive step”** means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;”

F 88. Section 2(1)(j) requires a product to satisfy three conditions to qualify as an invention.

(i) It must be “new”, that is to say it must not have been

G 22. Section 2(1)(l): “New Invention”, section 2(1)(ta) “Pharmaceutical substance”.

H 23. Clauses (l) and (ta) of section 2(1) are also on the issue of “invention” but as noted above those provisions, though defined in section 2 are not used anywhere else in the Act and, therefore, we do not take those provisions in consideration for construing the meaning of

anticipated;

A

A

And

(ii) Its coming into being must involve an “*inventive step*”; and

(c) makes the invention not obvious to a person skilled in the art.

(iii) It must be “capable of industrial application”, that is to say it must be capable of being made or used in an industry [section 2(1)(ac)].

B

B

91. We have seen the meaning of “invention”; we have also seen earlier that the Patents Act, 1970, dealt with “invention” and “patentability” as two distinctly separate concepts. The duality of the two concepts is best illustrated by section 4 of the Act, which prohibits the grant of patent (either process or product) “in respect of inventions relating to atomic energy falling within sub-section (1) of section 20 of the Atomic Energy Act, 1962”, and which has not undergone any change since inception. It is, therefore, fundamental that for grant of patent the subject must satisfy the twin tests of “invention” and “patentability”. Something may be an “invention” as the term is generally understood and yet it may not qualify as an “invention” for the purposes of the Act. Further, something may even qualify as an “invention” as defined under the Act and yet may be denied patent for other larger considerations as may be stipulated in the Act. Having, therefore, seen the meaning of “invention”, we may now advert to section 3 as it stands after the amendment of the Act in 2005.

89. “Inventive step” is separately defined in section 2(ja) to mean a feature of an invention that involves technical advance as compared to the existing knowledge, or having economic significance or both and that makes the invention *not obvious* to a person skilled in the art. To paraphrase, the invention that creates the product must have a feature that involves technical²⁴ advance as compared to the existing knowledge or having economic significance or both and this feature should be such as to make the invention not obvious to a person skilled in the art.

C

C

90. On a combined reading of causes (j), (ac) and (ja) of section 2(1), in order to qualify as “invention”, a product must, therefore, satisfy the following tests:

E

E

(i) It must be “new”;

(ii) It must be “capable of being made or used in an industry”

F

F

(iii) It must come into being as a result of an invention which has a feature that:

(a) entails technical advance over existing knowledge;

G

G

Or

(b) has an economic significance

92. Section 3 is in Chapter II of the Act, which initially contained sections 3, 4 and 5, but after the deletion of section 5 with effect from January 1, 2005, Chapter II has only two sections: sections 3 and 4. The Chapter has the Heading “Inventions Not Patentable” and section 3 has the marginal heading “What are not inventions.” As suggested by the Chapter heading and the marginal heading of section 3, and as may be seen simply by going through section 3, it puts at one place provisions of two different kinds: one that declares that certain things shall not be deemed to be “inventions” [for instance clauses (d) & (e)]; and the other that provides that, though resulting from invention, something may yet not be granted patent for other considerations [for instance clause (b)].

24. “Adjective: 1. of or relating to a particular subject, art, or craft or its techniques. 2. of, involving, or concerned with applied or industrial sciences” : The New Oxford Dictionary of English, Edition 1998.

H

H

93. For the purpose of these appeals, however, we need only to focus on clause (d) of section 3. A

94. We have seen earlier that, in course of the debate in Parliament, an amendment (by way of addition) in clause (d) of section 3 was proposed by the Government in order to allay the fears of the members from the Opposition concerning the introduction of product patents for pharmaceuticals and agricultural chemicals, and it was on the Government's assurance that the proposed amendment in section 3(d) (besides some other changes in the Act) would take care of the apprehensions about the abuse of product patent in medicines and agricultural chemical substances that the Bill was passed by Parliament. We once again examine here what was the amendment introduced in section 3(d) by the amending Act of 2005. Immediately before its amendment in 2005, section 3(d) was, in the Patents (Amendment) Ordinance, 2004 (Ordinance No. 7 of 2004), as under:— B
C
D

“Section 3. What are not inventions.— The following are not inventions within the meaning of this Act,— E

(d) the mere discovery of any new property or *mere* new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.” F

95. After the amendment with effect from Jan 1, 2005, section 3(d) stands as under: -

“Section 3. What are not inventions.— The following are not inventions within the meaning of this Act,— G

(d) **the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance** or the mere discovery of any new property or new use for a known H

A substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

**Explanation.—For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.” B
C**

96. As may be seen, the amendment (i) adds the words “the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or” at the beginning of the provision; (ii) deletes the word “mere” before “new use”; and (iii) adds an explanation at the end of the clause. D

97. A perusal of the Parliamentary debate would further reveal that the whole debate centered on medicines and drugs. It would not be an exaggeration to say that eighty per cent of the debate was focused on medicines and drugs and the remaining twenty per cent on agricultural chemicals. In the entire debate, no substance of any other kind came under discussion. E

98. The aforementioned amendment in section 3(d) is one of the most crucial amendments that saw the Bill through Parliament and, as noted, the amendment is primarily in respect of medicines and drugs and, to some extent, agricultural chemical substances. F

99. In regard to section 3(d) both Mr. Andhyarujina and Mr. Subramaniam, learned counsel appearing for the appellant, strenuously argued that section 3(d) is not meant to be an exception to clauses (j) and (ja) of section 2(1) of the Act. Both the learned counsel insisted that section 3(d) has no application G

to the case of the subject product. The subject product, having satisfied the tests of invention as provided in clauses (j) and (ja) of section 2(1), cannot be denied patent for allegedly failing to satisfy the tests under section 3(d). Mr. Andhyarujina submitted that section 3(d) is a provision put in *ex abundanti cautela non nocet*²⁵ to remove all doubts.

100. Mr. Subramanium submitted that section 3(d) is *ex majore cautela*²⁶. The learned counsel submitted that the primary purpose of section 3(d), as is evidenced from the legislative history, is to prevent “evergreening” and yet to encourage incremental inventions. “Evergreening” is a term used to label practices that have developed in certain jurisdictions wherein a trifling change is made to an existing product, and claimed as a new invention. The coverage/protection afforded by the alleged new invention is then used to extend the patentee’s exclusive rights over the product, preventing competition. Mr. Subramanium submitted that, by definition, a trifling change, or in the words of the section “a mere discovery of a new form of a known substance”, can never ordinarily meet the threshold of novelty and inventive step under clauses (j) and (ja) of section 2(1). An invention cannot be characterized by the word “mere”. The word “invention” is distinct from the word “discovery”. He, therefore, submitted that section 3(d) operates only as *ex majore cautela*, ensuring that mere discoveries can never, by an effort at interpretation of clauses (j) and (ja) of section 2(1), be considered inventions.

101. In regard to the concerns about public health issues and the flexibility of the TRIPS Agreement coupled with the Doha Declaration, allowing the scope to address the issues of public health, Mr. Subramanium submitted that those concerns are addressed in the Act, in provisions relating to compulsory

25. Abundant caution does no harm.

26. Out of abundant caution.

A licensing²⁷, revocation of patents²⁸, and the multiple stages for opposition to the grant of patent²⁹.

102. The submission may appear plausible if the scrutiny of the law is confined only to the Act as it stands today after undergoing the amendments in 2005. But examined in the larger perspective of the development of the law of patent over the past 100 years and especially keeping in mind the debates in the Parliament preceding the 2005 amendment, it would appear completely unacceptable. We find no force in this submission that section 3(d) is a provision *ex majore cautela*. To our mind, the submission completely misses the vital distinction between the concepts of invention and patentability – a distinction that was at the heart of the Patents Act as it was framed in 1970, and which is reinforced by the 2005 amendment in section 3(d).

103. We are clearly of the view that the importance of the amendment made in section 3(d), that is, the addition of the opening words in the substantive provision and the insertion of explanation to the substantive provision, cannot be underestimated. It is seen above that, in course of the Parliamentary debates, the amendment in section 3(d) was the only provision cited by the Government to allay the fears of the Opposition members concerning the abuses to which a product patent in medicines may be vulnerable. We have, therefore, no doubt that the amendment/addition made in section 3(d) is meant especially to deal with chemical substances, and more particularly pharmaceutical products. The amended portion of section 3(d) clearly sets up a second tier of qualifying standards for chemical substances/pharmaceutical products in order to leave the door open for true and genuine inventions

27. See Chapter XVI: “Working of Patents, Compulsory Licences and Revocation” in the Patents Act, 1970.

28. See sections 63, 64, and 65 of the Patents Act, 1970.

29. See section 25 of the Patents Act, 1970.-

but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds.

104. We have so far seen section 3(d) as representing “patentability”, a concept distinct and separate from “invention”. But if clause (d) is isolated from the rest of section 3, and the legislative history behind the incorporation of Chapter II in the Patents act, 1970, is disregarded, then it is possible to see section 3(d) as an extension of the definition of “invention” and to link section 3(d) with clauses (j) and (ja) of section 2(1). In that case, on reading clauses (j) and (ja) of section 2(1) with section 3(d) it would appear that the Act sets different standards for qualifying as “inventions” things belonging to different classes, and for medicines and drugs and other chemical substances, the Act sets the invention threshold further higher, by virtue of the amendments made in section 3(d) in the year 2005.

105. Admittedly, the genesis of this patent application lies in one of the derivatives of N-phenyl-2- pyrimidine-amine in free base called Imatinib³⁰, vide example 21 of the Zimmermann patent. According to the appellant, beginning with Imatinib, the subject product, i.e., Imatinib Mesylate in beta crystalline form, was brought to being by not one but two inventions.

106. The first invention lies in selecting example 21 out of the 37 examples given in the Zimmermann patent and then choosing methanesulfonic acid to produce the methanesulfonic acid addition salt of the free base Imatinib, called Imatinib Mesylate. It was emphasized by both Mr. Gopal Subramaniam and Mr. Andhyarujina, Senior Advocates appearing for the appellant, that the Zimmermann patent did not teach or suggest to a person skilled in the art to select example 21 in preference to other compounds of which examples were given in the Zimmermann patent. Further, even if example 21 was selected,

30. 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl)pyrimidin-2-ylamino]phenyl benzamide.

A the Zimmermann patent did not teach a person to select one particular salt. The Zimmermann patent did not teach a person how to prepare Mesylate salt of example 21. Hence, the coming into being of Imatinib Mesylate from Imatinib in free base was the result of an invention that involved technical advance as compared to the existing knowledge and brought into existence a new substance.

107. In the second invention, the appellant arrived at the beta crystal form of methanesulfonic acid addition salt of Imatinib. It was contended on behalf of the appellant that once the salt form of Imatinib was arrived at, the inventors had to further research to be able to ensure that that particular salt form of Imatinib is suitable for administration in a solid oral dosage form. This research further required defining the process parameters that brought into being the beta crystalline form of Imatinib Mesylate. It was argued on behalf of the appellant that there is certainly no mention of polymorphism or crystalline structure in the Zimmermann patent. The relevant crystalline form of the salt that was synthesized needed to be invented. There was no way of predicting that the beta crystalline form of Imatinib Mesylate would possess the characteristics that would make it orally administrable to humans without going through the inventive steps. It was further argued that the Zimmermann patent only described, at most, how to prepare Imatinib free base, and that this free base would have anti-tumour properties with respect to the BCR ABL kinase. Thus, arriving at the beta-crystalline form of Imatinib Mesylate for a viable treatment of Chronic Myeloid Leukemia required further invention – not one but two, starting from Imatinib in free base form, as stated above.

G 108. The subject product admittedly emerges from the Zimmermann patent. Hence, in order to test the correctness of the claim made on behalf of the appellant, that the subject product is brought into being through inventive research, we need to examine in some detail the Zimmermann patent and certain developments that took place o

109. An application for grant of patent for the Zimmermann invention (Pyrimidine Derivatives and Processes for the Preparation thereof) was filed in the United States of America on April 2, 1993, by Ciba Geigy³¹ (US Patent Application No. 08/042,322). This application was abandoned and another continuation-in-part application was then filed on April 28, 1994 (US Patent Application No. 5,521,184). The Zimmermann invention³² related to N-phenyl-2-pyrimidine-amine derivatives

31. In 1996, CIBA Geigy merged with Sandoz to form Novartis, the present appellant.

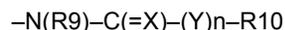
32. The invention relates to N-phenyl-2-pyrimidine-amine derivatives, to processes for the preparation thereof, to medicaments comprising those compounds, and to the use thereof in the preparation of pharmaceutical compositions for the therapeutic treatment of warm-blooded animals.

The invention relates to N-phenyl-2-pyrimidine-amine derivatives of formula I

wherein

R1 is 4-pyrazinyl, 1-methyl-1H-pyrrolyl, amino- or amino-lower alkyl-substituted phenyl wherein the amino group in each case is free, alkylated or acylated, 1H-indolyl or 1H-imidazolyl bonded at a five-membered ring carbon atom, or unsubstituted or lower alkyl-substituted pyridyl bonded at a ring carbon atom and unsubstituted or substituted at the nitrogen atom by oxygen,

R2 and R3 are each independently of the other hydrogen or lower alkyl, one or two of the radicals R4, R5, R6, R7 and R8 are each nitro, fluoro-substituted lower alkoxy or a radical of formula II



wherein

R9 is hydrogen or lower alkyl,

X is oxo, thio, imino, N-lower alkyl-imino, hydroximino or O-lower alkyl-hydroximino,

A (called, "formula I" in the patent application), and the compounds thereof, the process for their preparation, and to their therapeutic uses. In the patent application, it was expressly stated that the compounds of formula I included their respective salts:

B "Salt-forming groups in a compound of formula I are groups or radicals having basic or acidic properties. Compounds having at least one basic group or at least one basic radical, for example a free amino group, a pyrazinyl radical or a pyridyl radical, **may form acid addition salts, for example with inorganic acids, such as hydrochloric acid, sulfuric acid or a phosphoric acid, or with suitable organic carboxylic or sulfonic acids...**"

Further:

D "Owing to the close relationship between the novel compounds in free form and in the form of their salts, including those salts that can be used as intermediates, for example in the purification of the novel compounds or for the identification thereof, hereinbefore and hereinafter **any reference to the free compounds should be understood as including the corresponding salts, where appropriate and expedient.**"

(emphasis added)

Y is oxygen or the group NH, n is 0 or 1 and

R10 is an aliphatic radical having at least 5 carbon atoms, or an aromatic, aromatic-aliphatic, cycloaliphatic, cycloaliphatic-aliphatic, heterocyclic or heterocyclic-aliphatic radical,

and the remaining radicals R4, R5, R6, R7 and R8 are each independently of the others hydrogen, lower alkyl that is unsubstituted or substituted by free or alkylated amino, piperazinyl, piperidinyl, pyrrolidinyl or by morpholinyl, or lower alkanoyl, trifluoromethyl, free, etherified or esterified hydroxy, free, alkylated or acylated amino or free or esterified carboxy,

and to salts of such compounds having at le

110. As regards the pharmacological properties of the compounds of formula I it was stated in the application:

“The compounds of formula I have valuable pharmacological properties and can be used, for example, as anti-tumoral drugs and as drags (sic drugs) against atherosclerosis.”

111. The application also described the tests undertaken for determining the protein kinase C-inhibiting activities of compounds of formula I and their pharmaceutically acceptable salts as follows:

“To determine protein kinase C-inhibiting activity, protein kinase C from pig brain purified in accordance with the procedure described by T. Uchida and C. R. Filburn in J. Biol. Chem. 259, 12311-4 (1984) is used. The protein kinase C-inhibiting activity of the compounds of formula I is determined by the method of D. Fabbro et al., Arch. Biochem. Biophys. 239, 102-111 (1985). In that test the compounds of formula I inhibit protein kinase C at a concentration IC₅₀ of as low as approximately from 0.1 to 10 µmol/liter, especially approximately from 0.05 to 5 µmol/liter. On the other hand, the compounds of formula I inhibit other enzymes, for example protein kinase A, phosphorylase protein kinase and certain types of tyrosine protein kinase, for example the tyrosine protein kinase of EGF (epidermal growth factor) receptors, only at a far higher concentration, for example 100 times higher. That is an indication of the selectivity of the compounds of formula I. With a view to reducing undesired side effects, it is important for the protein kinase C-inhibitors to be as selective as possible, i.e. inter alia to have as little effect as possible on other enzymes, especially when the effect of the activity of those other enzymes has no equivalent or synergistic effect on the disease to be treated.

xxx

A
B
C
D
E
F
G
H

A As might already be expected on the basis of the inhibiting action on protein kinase C described above, the compounds of formula I wherein R₄ and R₈ are hydrogen, and their pharmaceutically acceptable salts, have anti-proliferative properties which can be demonstrated directly in the following, different test. In that test the inhibiting action of compounds of formula I on the growth of human T24 bladder carcinoma cells is determined...”

It was also stated:

C “The tumour-inhibiting activity of the compounds of formula I can also be demonstrated in vivo.

The tumour-inhibiting activity is determined using female Balb/c nude mice in which human T24 bladder carcinoma has been transplanted...”

The application further claimed:

E “Owing to the properties described, compounds of formula I can be used not only as tumour-inhibiting active ingredients but also as drugs against non-malignant proliferative diseases, e.g. atherosclerosis, thrombosis, psoriasis, sclerodermitis and fibrosis. They are also suitable for the further applications mentioned above for protein kinase C-modulators and can be used especially in the treatment of diseases that respond to the inhibition of PDGF-receptor kinase.

G Some of the compounds of formula I, e.g. N-[3-(1,1,2,2-tetrafluoroethoxy)phenyl]-4-(3-indolyl)-2-pyrimidine-amine, furthermore inhibit the tyrosine kinase activity of the receptor for the epidermal growth factor (EGF). This receptor-specific enzyme activity is a key factor in the signal transmission in a host of mammalian cells, including human cells, especially epithelial cells, cells of the immune system and cells of the central a system.”

H

It was also said in the application:

“These compounds of formula I, which inhibit the tyrosine kinase activity of the receptor for the epidermal growth factor (EGF) are therefore useful, inter alia, for the treatment of benign or malignant tumours. They are able to effect tumour regression and to prevent metastatic spread and the growth of micrometastases. In particular, they can be used for treating epidermal hyperproliferation (psoriasis), for treating neoplasms of epithelial character, e.g. mastocarcinomas, and leucemias. In addition, the compounds of formula I are useful for treating diseases of the immune system and inflammations, subject to the involvement of protein kinases. These compounds of formula I can also be used for treating diseases of the central or peripheral nervous system, subject to the involvement of signal transmission by protein kinases.”

A
B
C
D

It was further stated in the application:

“Acid addition salts can be convened into the free compounds in customary manner, for example by treatment with a suitable basic agent.

E
F
G

xxx

The processes described above, including the processes for removing protecting groups and the additional process steps, are, unless otherwise indicated, carried out **in a manner known per se**, for example in the presence or absence of preferably inert solvents and diluents, if necessary in the presence of condensation agents or catalysts...”

It was also affirmed in the application:

“The invention relates also to a method of treating warm-blooded animals suffering from a tumoral disease, **which comprises administering to warm-blooded animals**

H

A
B
C
D
E
F
G

requiring such treatment an effective, tumour-inhibiting amount of a compound of formula I or of a pharmaceutically acceptable salt thereof... Effective doses, for example daily doses of approximately from 1 to 1000 mg, especially from 50 to 500 mg, are administered to a warm-blooded animal of approximately 70 kg body weight according to species, age, individual condition, mode of administration and the individual syndrome.

The invention relates also to pharmaceutical compositions comprising an effective amount, especially an amount effective in the prevention or therapy of one of the above-mentioned diseases, **of the active ingredient together with pharmaceutically acceptable carriers that are suitable for topical, enteral, for example oral or rectal, or parenteral administration, and may be inorganic or organic, solid or liquid. For oral administration there are used especially tablets or gelatin capsules comprising the active ingredient together with diluents, for example lactose, dextrose, sucrose, mannitol, sorbitol, cellulose and/or glycerol...** Tablets may also comprise binders, for example magnesium aluminium silicate, starches, such as corn, wheat or rice starch, gelatin, methylcellulose, sodium carboxymethylcellulose and/or polyvinylpyrrolidone, and, if desired, disintegrators, for example starches, agar, alginic acid or a salt thereof, such as sodium alginate, and/or effervescent mixtures, or adsorbents, dyes, flavourings and sweeteners.”

112. The application gave examples to illustrate the invention, making it clear at the same time that those illustrations did not limit the invention in any way. Example 21, which admittedly relates to Imatinib, the “e-duct” for the subject product, is as under:

“EXAMPLE 21

Analogously to Example 20, N-{5-[4-(4-methyl-piperazinomethyl)-benzoylamido]-2-methylphenyl}-4-(3-pyridyl)-2-pyrimidine-amine is prepared from 10.68 g (32.8 mmol) of 4-(4-methyl-piperazinomethyl)-benzoyl chloride; m.p. 211°-213°, R_f =0.33 (methylene chloride:methanol:25% aqueous ammonia solution=95:5:1).”

A

B

Examples 35 to 37 were in respect of tablets in different doses.

113. In the claim at the end of the application under serial no. 23, it was stated as follows:

C

“The compound according to claim 1 of the formula I, said compound being N-{5-[4-(4-Methyl-piperazino-methyl)-benzoylamido]-2-methyl-phenyl}-4-(3-pyridyl)-2-pyrimidine-amine **or a pharmaceutically acceptable salt thereof.**”

D

(emphasis added)

114. The US Patent No. 5,521,184 (the Zimmermann patent) was granted on May 28, 1996.

E

115. Later, the appellant made the application for patent for beta crystalline form of Imatinib Mesylate (the subject of the present appeals) in the US on January 18, 2000. The US patent for beta crystalline form of Imatinib Mesylate was granted to the appellant about five and a half years later on May 17, 2005 following the order of the US Appellate Court dated November 23, 2003. It is, however, interesting to note that Gleevec, the drug was launched much earlier in the market, on the basis of the Zimmermann patent itself.

F

116. On April 9, 1998, the appellant filed the Investigational New Drug Application (IND # 55,666) for Gleevec and on February 27, 2001, the original New Drug Application (NDA # 21-335) before the Food and Drug Administration (FDA), USA, for Imatinib Mesylate, formerly STI571, CGP57148B (capsules) for the treatment of patients with Chronic Myeloid Leukemia.

G

H

A The application contained results of extensive preclinical, technical and clinical research, and it stated as under:

B

“The clinical studies discussed in this NDA include one multiple dose tolerability/dose-finding study (phase I) and three large open, uncontrolled efficacy and safety studies (phase II), as an accelerated development to allow early registration in CML patients. A total of 1234 patients with CML and other Ph+ leukemias have been enrolled in these trials. The results of the Gleevec studies are discussed in the perspective of the current state of knowledge in the treatment of CML as described with a comprehensive review of the literature for each target population (Appendix 4-6 of the Integrated Summary of Efficacy).”

C

D

117. In the patent information furnished in connection with the NDA as required under (US Code) 21 C.F.R. § 314.53, the active ingredient of the drug was stated as Imatinib Mesylate. The Drug Substance³³ (active ingredient), Drug Product³⁴ (composition/formulation) and method of use were declared to be covered by US Patent No. 5,521,184 (i.e. the Zimmermann patent). It was further declared that the United States Patent No. 5,521,184 covered the composition, formulation, and/or method of use of Imatinib Mesylate (STI571).

E

F

118. In the chemistry review(s) of the NDA # 21-335 (drug approval for capsules) made on March 27, 2001, there was again a reference to US Patent # 5,521,184 (expiration date – 5/28/2013).

33. 21 Code of Federal Regulations s 314.3: Drug substance means an active ingredient that is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease or to affect the structure or any function of the human body, but does not include intermediates use in the synthesis of such ingredient.

34. 21 Code of Federal Regulations s 314.3: Drug product means a finished dosage form, for example, tablet, capsule, or solution, that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients.

H

119. The FDA approval for the drug Gleevec (Imatinib Mesylate) 50 mg and 100 mg capsules was granted vide Letter dated May 10, 2001³⁵. Following this, the drug was commercially launched in the market long before the grant of patent for beta crystalline form of Imatinib Mesylate.

120. In the package insert of Gleevec™ (Imatinib Mesylate capsules) the description of the drug was stated as follows:

“GLEEVEC™ capsules contain imatinib mesylate equivalent to 100 mg of imatinib free base. Imatinib mesylate is designed chemically as 4-[(4-Methyl-1-piperazinyl)methyl]-N-[4-methyl-3-[[4-(3-pyridinyl)-2-pyrimidinyl]amino]-phenyl]benzamide methanesulfonate...”

121. After the grant of drug approval for Gleevec, on July 3, 2001, the appellant made a Patent Term Extension Application for the Zimmermann patent (US Patent No. 5,521,184) under 35 USC § 156(g)(1)(B), for extending the term of the patent for the time taken in the regulatory review for Gleevec. This application leaves no room for doubt that Imatinib Mesylate, marketed under the name Gleevec, was submitted for drug approval as covered by the Zimmermann patent. In column 4 of the application, it was stated that the sole active ingredient in Gleevec is Imatinib Mesylate. Further, it was stated that Imatinib, or any salt thereof, including Imatinib Mesylate, had not previously been approved for commercial marketing under the Federal Food, Drug and Cosmetic Act prior to the approval of NDA # 21-235. In column 9 of the application, it was stated as under:

“(9) Statement Showing How the Claims of the Patent for Which Extension is Sought Cover the Approved Product:

35. Later on the appellant also got the drug approval vide letter dated April 18, 2003 in NDA # 21-588 granting approval to commercially market Gleevec (Imatinib Mesylate) Tablets, 100 mg and 400 mg. Needless to say that in regard to the tablet as well the reference is to the Zimmermann patent.

A The operative claims in question are Claims 1-5, 10-13, and 21-23. Each of claims 1-5, 10-13 and 23 claim a compound or compounds which include the approved product, imatinib mesylate. Claim 21 claims a composition containing a compound or compounds which include the approved product, imatinib mesylate. Claim 22 claims a method of treating tumors in warm-blooded animals with a compound or compounds which include the approved product, imatinib mesylate.”

C 122. The application was accepted and the term of the patent, which was due to expire on May 28, 2013, was extended for the period of 586 days.

D 123. It is noted above that the appellant had made an application no. 09/463,097 in the USA for grant of patent for beta crystalline form of Imatinib Mesylate. The application was rejected by the examiner and, against the examiner’s decision, the appellant preferred an appeal (that is, appeal no. 2003-0919) before the Board of Patent Appeals and Interferences. The Board of Patent Appeals, by its judgment and order dated November 23, 2003, allowed the appellant’s appeal and reversed the examiner’s decision, rejecting claims 1 through 8, 10, and 13 through 16. Dealing with the examiner’s rejection of appellant’s claim 14 under 35 USC § 112, the Board of Patent Appeals referred to claims 21 and 22 of the Zimmermann patent. With reference to those claims in the Zimmermann patent, the Board of Patent Appeals observed and held as under:

G “Under the provisions 35 U.S.C. § 282, a patent shall be presumed valid; and each claim of a patent shall be presumed valid independently of the validity of other claims.

H Accordingly, claims 21 and 22 of the U.S. Patent No.5,521,184 (the Zimmermann patent), shall be presumed valid. **We may presume, therefore, that claims 21 and 22 are base**

disclosure; and that the specification of the Zimmermann patent teaches any person skilled in the art how to use a compound of formula I, or a pharmaceutically acceptable salt thereof, in a pharmaceutical composition for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. In claim 23, Zimmermann recites imatinib, a specific compound within the scope of formula I, or a pharmaceutically acceptable salt thereof. In light of 35 U.S.C. § 282, therefore, we may presume that the specification of the Zimmermann patent teaches any person skilled in the art how to use imatinib, or a pharmaceutically acceptable salt thereof, in a pharmaceutical composition for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. On these facts, we disagree that the examiner has set forth adequate reasons or evidence to doubt the objective truth of statements in applicants' specification that an effective amount of the b-crystal form of imatinib mesylate may be administered to a patient as the manipulative step in a method for treating tumour disease in a patient.

The rejection under 35 U.S.C. § 112, first paragraph, is reversed.”

(emphasis added)

124. From the above passage from the judgment, it is evident that, according to the Board of Patent Appeals, the Zimmermann patent teaches any person skilled in the art how to use Imatinib, a compound of formula I, or a pharmaceutically acceptable salt thereof, in a pharmaceutical composition for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. However, the Board of Patent Appeals held that the teaching in the Zimmermann patent did not go beyond Imatinib Mesylate and did not extend

A
B
C
D
E
F
G
H

A to beta crystalline form of Imatinib Mesylate, which represented a *manipulative step*³⁶ in a method of treating tumor disease in a patient.

B 125. Further, NATCO Pharma Ltd., one of the Objectors to the grant of patent to the appellant in this country, had marketed a drug called VEENAT 100 (capsules) in the UK. A legal notice on behalf of the appellant was given to NATCO Pharma Ltd. on February 13, 2004. The notice stated that the appellant was the proprietor of European patent EP-A- 0 564 409 (the Zimmermann patent) and that this patent claimed, among other things, the compound Imatinib and acid addition salts of that compound such as the Mesylate salt. In the notice it was pointed out that NATCO Pharma Ltd. was selling, in the UK market, VEENAT 100 capsules, the active pharmaceutical ingredient of which was Imatinib Mesylate as claimed in the Zimmermann patent. The importation, sale and offer to sell VEENAT 100 capsules in the UK market infringed the Zimmermann patent and NATCO Pharma Ltd. was therefore warned to immediately cease the importation, sale and promotion of VEENAT 100 capsules and other pharmaceutically substances containing “Imatinib”. The matter was finally settled out of court, we are told, at considerable expense to NATCO Pharma Ltd. which of course had to stop marketing its drug VEENAT 100 capsules in the UK.

F 126. From the above discussion it would be clear that the drug Gleevec directly emanates from the Zimmermann patent and comes to the market for commercial sale. Since the grant of the Zimmermann patent, the appellant has maintained that Gleevec (that is, Imatinib Mesylate) is part of the Zimmermann patent. It obtained drug approval for Gleevec on that basis. It claimed extension of the term of the Zimmermann patent for the period of regulatory review for Gleevec, and it successfully

36. Not an “inventive step”! A “manipulative step” may or may not be an “inventive step”, which is the requirement under Indian



stopped NATCO Pharma Ltd. from marketing its drug in the UK on the basis of the Zimmermann patent. Not only the appellant but the US Board of Patent Appeals, in its judgment granting patent for beta crystalline form of Imatinib Mesylate, proceeded on the basis that though the beta crystal form might not have been covered by the Zimmermann patent, the Zimmermann patent had the teaching for the making of Imatinib Mesylate from Imatinib, and for its use in a pharmacological compositions for treating tumours or in a method of treating warm-blooded animals suffering from a tumoral disease. This finding was recorded by the US Board of Patent Appeals, in the case of the appellant itself, on the very same issue that is now under consideration. The appellant is, therefore, fully bound by the finding and cannot be heard to take any contrary plea.

127. We have looked, so far, at the Zimmermann patent and the developments that have taken place on its basis. We now propose to take a look at certain publications. A journal called *Cancer Research*, in its issue of January 1996, published an article under the title “Inhibition of the Abl Protein-Tyrosine Kinase in Vitro and in Vivo by a 2-Phenylaminopyrimidine Derivative”. This article was authored by several people, including Jürg Zimmermann. In this article there is a detailed discussion about the anti-tumoral properties of Imatinib and its methanesulfonate salt, i.e., Imatinib Mesylate. In the abstract at the beginning of the article, it is stated as under:

“ABSTRACT

Oncogenic activation of Abl proteins due to structural modifications can occur as a result of viral transduction or chromosomal translocation. The tyrosine protein kinase activity of oncogenic Abl proteins is known to be essential for their transforming activity. Therefore, we have attempted to identify selective inhibitors of the Abl tyrosine protein kinase. **Herein we describe an inhibitor (CGP**

A
B
C
D
E
F
G
H

57148³⁷⁾ of the Abl and platelet-derived growth factor (PDGF) receptor protein-tyrosine kinases from the 2-phenylaminopyrimidine class, which is highly active *in vitro* and *in vivo*. Submicromolar concentrations of the compound inhibited both v-Abl and PDGF receptor autophosphorylation and PDGF-induced *c-fos* mRNA expression selectively in intact cells. ... Furthermore, anchorage-independent growth of *v-abl-* and *v-sis-*transformed BALB/c 3T3 cells was inhibited potently by CGP 57148. When tested *in vivo*, CGP 57148 showed antitumor activity at tolerated doses against tumorigenic *v-abl-* and *v-sis-* transformed BALB/c 3T3 cells. In contrast, CGP 57148 had no antitumor activity when tested using *src-*transformed BALB/c 3T3 cells. These findings suggest that CGP 57148 may have therapeutic potential for the treatment of diseases that involve abnormal cellular proliferation induced by Abl protein-tyrosine kinase deregulation or PDGF receptor activation.”

(emphasis added)

128. Under the heading “MATERIALS AND METHODS”, it is stated as under:

“Materials. CGP 57148 and its methane sulfonate salt (CGP 57148B³⁸⁾ were synthesized by CIBA Pharmaceuticals Division, as will be described elsewhere. For *in vitro* and cellular assays, a stock concentration of 10 mM CGP 57148 was prepared in Me2SO and stored at – 20°C. No significant difference in results could be seen between the two forms of CGP 57148. The form used in *in vitro* experiments is indicated in the text and legends. All *in vivo* experiments were performed using CGP 57148B. ...”

129. The article goes on to discuss the *in vivo*
37. Imatinib.
38. Imatinib Mesylate.

experiments and the *in vitro* selectivity of CGP 57148 for inhibition of protein kinases: Identification of CGP 57148 as an inhibitor of v-Abl kinase. The article also discussed the *in vivo* anti-tumour activity of CGP 57148B and it states as follows:

“In Vivo Antitumor Activity.

The maximally tolerated dose for a single p.o. or i.p. administration of CGP 57148B in BALB/c mice was >500 mg/kg. BALB/c AMuLV and BALB/c 3T3 v–sis cells, which were sensitive in the colony-forming assay, were used to test CGP 57148B for antitumor activity in female BALB/c nude mice. Once daily i.p. applications of 50, 12.5, or 3.13 mg/kg CGP 57148B given for 30 consecutive days resulted in a strong antitumor effect against AMuLV-transformed BALB/c 3T3 tumors (Fig. 5A). Similarly, anti-tumor experiments using v–sis- transformed BALB/c 3T3 cells revealed dose-dependent antitumor activity (Fig. 5B). Maximal T/C (X100%) values of 4% (AMuLV tumors) and 11% (v–sis tumors) were obtained when CGP 57148B was administered at 50mg/kg body weight. In contrast, CGP 57148B showed no antitumor activity against tumors derived from NIH-527src cells when 50 mg/kg were administered p.o. once daily for 30 days (T/C, 102%). Using the same route of application, T/C values of 7 and 22% against AMuLV and v–sis tumors, respectively, were obtained when 50 mg/kg CGP 57148B were given.”

It is further stated in the article:

“CGP 57148 selectively inhibited the *in vitro* activity of the v-Abl protein-tyrosine kinase and showed preferential inhibition of v-Abl autophosphorylation in cells. We have examined the specificity of CGP 57148 by analyzing its effects on signal transduction via different tyrosine kinase receptor-mediated pathways. Although the ligand-induced activation of the EGF, bFGF, insulin, and IGF-1 receptor tyrosine kinases were not affected by CGP 57148, the

A
B
C
D
E
F
G
H

A PDGF pathway was sensitive to inhibition by the compound. The antiproliferative activity of CGP 57148 against both v-*abl*- and v-*sis*- transformed BALB/c 3T3 support the selectivity profile of CGP 57148 further.”

B The article concludes by observing as follows:

C “The reported findings with CGP 57148 suggest that it may be a development candidate for use in the treatment of Philadelphia chromosome-positive leukemias. Additional potential applications for CGP 57148 may include proliferative diseases that involve abnormal PDGF receptor activation.”

D 130. Another article was published in *Nature Medicine* magazine of the year 1996 under the title “Effects of a selective inhibitor of the Abl tyrosine kinase on the growth of Bcr-Abl positive cells”. This article, too, was authored by several people, including Jürg Zimmermann. In this article also, there is a discussion about Imatinib as a compound designed to inhibit Abl protein tyrosine kinase.

E 131. In the face of the materials referred to above, we are completely unable to see how Imatinib Mesylate can be said to be a new product, having come into being through an “invention” that has a feature that involves technical advance over the existing knowledge and that would make the invention not obvious to a person skilled in the art. Imatinib Mesylate is all there in the Zimmermann patent. It is a known substance from the Zimmermann patent.

G 132. That Imatinib Mesylate is fully part of the Zimmermann patent is also borne out from another circumstance. It may be noted that after the Zimmermann patent, the appellant applied for, and in several cases obtained, patent in the US not only for the beta and alpha crystalline forms of Imatinib Mesylate, but also for Imatinib in a number of different forms. The appellant, however, never asked for a

H

A Mesylate in non-crystalline form, for the simple reason that it had always maintained that Imatinib Mesylate is fully a part of the Zimmermann patent and does not call for any separate patent.

B 133. We thus find no force in the submission that the development of Imatinib Mesylate from Imatinib is outside the Zimmermann patent and constitutes an invention as understood in the law of patent in India.

C 134. Mr. Andhyarujina and Mr. Gopal Subramanium, learned Senior Advocates appearing for the appellant, strenuously argued that the patent information furnished by the appellant before the US FDA, or its Patent Term Extension Application, or the legal notice given at its behest to NATCO Pharma Ltd. should not be construed to mean that Imatinib Mesylate was anticipated in the Zimmermann patent. Mr. D Andhyarujina submitted that the Zimmermann patent did not describe any working method for converting Imatinib to Imatinib Mesylate. The Zimmermann patent did not describe any working method for converting Imatinib to Imatinib Mesylate. It only stated that a salt may be formed by acid without disclosing any method, but simply calling the method to be “*per se*”. E The Zimmermann patent mentioned multiple choices of compounds including Imatinib free base but not any salt of any compound, much less Imatinib Mesylate. Mr. Andhyarujina further submitted that it is well settled that the disclosure of an invention must be in a manner clear enough and complete enough for the invention to be performed by a person skilled in the art (Terrell on Law of Patents 16th edition, page no. 51, para 3.2/7). F The learned counsel further submitted that there was a difference between that which is *covered* and that which is *disclosed*. Imatinib Mesylate is *covered* by the Zimmermann patent but not *disclosed* therein. He further submitted that, in any case, in patent law subsequent conduct of the patentee is irrelevant in construing the patent (Terrell on Law of Patent 16th edition, page no. 192 citing *Glaverbel vs. British* (1993) RPC 80). Referring to the two articles in *Cancer Research* and

A
B
C
D
E
F
G
H

A *Nature Medicine*, Mr. Andhyarujina submitted that though in the first article there was a reference to Imatinib Mesylate, there was no teaching as to how it is to be prepared. In the *Nature Medicine* article there was no reference to Imatinib Mesylate but only to Imatinib.

B 135. Mr. Gopal Subramanium submitted that the Zimmermann patent is a patent for “Pyrimidine Derivatives and Processes for the Preparation thereof”. The patent is related to a genus of compounds, and each of the compounds within the genus shares a common chemical structure (Markush structure) and common properties with respect to the inhibition of certain tyrosine kinases (there being a total of 518 kinases in existence). C Mr. Subramanium further submitted that the appellant in its application before the US Food and Drug Administration Authority had made a reasonable assertion that D the Zimmermann patent *covers* the product that was made out of the beta crystalline form of Imatinib Mesylate, i.e., Gleevec³⁹. Further, on the basis of the US FDA approval, the appellant obtained an extension of the period of protection under the Zimmermann patent with respect to Gleevec.

E 136. Mr. Subramanium further submitted that the scope of *coverage* is distinct from the scope of *disclosure* in a patent. Imatinib Mesylate could be said to be not new and known from the Zimmermann patent only in case there was a complete F *disclosure* of the method of its preparation in the Zimmermann patent. The learned counsel strongly contended that *coverage* under a patent of the Markush kind cannot lead to any presumption of *disclosure*, much less any *enabling disclosure* of all the compounds within the genus. The learned counsel G further contended that *coverage* that is granted in respect of a patent is not always coextensive with what is *disclosed* in that

39. There is a factual error in the submission in as much as in the Drug Approval application before the US FDA the drug Gleevec is represented as Imatinib Mesylate. Before the US FDA the drug was represented as a crystalline form of Imatinib Mesylate.

H

A patent. In certain circumstances, where it is a pioneering invention (as in the case of the Zimmermann invention), the patent may be entitled to larger *coverage* than what is specifically *disclosed* in it. The learned counsel argued that *coverage* cannot be used to presume an *enabling disclosure* of the beta crystalline form of Imatinib Mesylate in the Zimmermann patent. *Disclosure* in a specification can never be presumed, and that is a question of the clear teaching contained in the specification. The teaching of a patent lies in the *disclosure/specification* that supports the claim. The *disclosure* describes the invention. The claim defines through language the various ways the invention could be used, i.e., possible but not actualized products. This is the scope of protection granted under the patent. For the purpose of *prior art*, it is the *disclosure* in the *specification* supporting the claim and not the written description or the claims themselves, that must be assessed. The claim can never be the teaching. He further contended that it would be wrong to say that the appellant's claims for beta crystalline form of Imatinib Mesylate is a case of double or repeat patenting, that is, the same invention is being sought to be patented twice. The claim for patent for beta crystalline form of Imatinib Mesylate relates to a second and different invention. Though the invention in the first part (Imatinib) may be necessary to arrive at the invention in the second part, the final product does not come into existence without inventions. The principle is that if a product is *covered*, it means that it infringes a patent. Whether the patent infringed disclosed every aspect of the product in its specification is a separate inquiry.

137. Mr. Subramaniam maintained that the boundary of the Zimmermann patent was extended up to Imatinib Mesylate but the enablement or disclosure made therein ended at Imatinib. He submitted that it was possible for Zimmermann himself, or for anyone else, to invent Imatinib Mesylate starting from Imatinib. The inventor of Imatinib Mesylate, be it Zimmermann or anyone else, would also be entitled to get patent for Imatinib

A
B
C
D
E
F
G
H

A Mesylate, but in case the inventor was anyone other than Zimmermann, he would require Zimmermann's permission for marketing Imatinib Mesylate, since Imatinib had the protection of the Zimmermann patent⁴⁰.

B 138. The submissions of Mr. Andhyarujina and Mr. Subramaniam are based on making a distinction between the *coverage* or claim in a patent and the *disclosure* made therein. The submissions on behalf of the appellant can be summed up by saying that the boundary laid out by the claim for *coverage* is permissible to be much wider than the *disclosure/enablement/teaching* in a patent.

C
D
E
F
139. The dichotomy that is sought to be drawn between *coverage* or claim on the one hand and *disclosure* or *enablement* or *teaching* in a patent on the other hand, seems to strike at the very root of the rationale of the law of patent. Under the scheme of patent, a monopoly is granted to a private individual in exchange of the invention being made public so that, at the end of the patent term, the invention may belong to the people at large who may be benefited by it. To say that the *coverage* in a patent might go much beyond the *disclosure* thus seem to negate the fundamental rule underlying the grant of patents.

F 140. In India, section 10(4) of the Patents Act, 1970 mandates:

“Section 10. Contents of specifications.– (4) Every Complete specification shall –

- (a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;
- (b) disclose the best method of performing the

H 40. Blocking Patents!

invention which is known to the applicant and for which he is entitled to claim protection; and A

(c) end with a claim or claims defining the scope of the invention for which protection is claimed;

(d) be accompanied by an abstract to provide technical information on the invention: B

Provided that –

(i) the Controller may amend the abstract for providing better information to third parties; ...” C

And, section 10(5) provides as under:

“(5) The claim or claims of a complete specification shall relate to a single invention, or to a group of inventions linked so as to form a single inventive concept, shall be clear and succinct and shall be fairly based on the matter disclosed in the specification.” D

141. The UK Patents Act, 1977, in sub-sections (2), (3), and (5) of section 14, provides as under: E

“**Making of an application**

14. – (2) Every application for a patent shall contain – F

(a) a request for the grant of a patent;

(b) a specification containing a description of the invention, a claim or claims and any drawing referred to in the description or any claim; and G

(c) an abstract;

but the foregoing provision shall not prevent an application being initiated by documents complying with section 15(1) below. H

A (3) The specification of an application shall disclose the invention in a manner which is clear enough and complete enough for the invention to be performed by a person skilled in the art.

B (5) The claim or claims shall –
(a) define the matter for which the applicant seeks protection;

(b) be clear and concise;

C (c) be supported by the description; and

(d) relate to one invention or to a group of inventions which are so linked as to form a single inventive concept.” D

142. Further, section 112(a) of the Title 35 of US Code provides as under:

“**35 U.S.C. § 1124⁴¹**

E (a) IN GENERAL.– The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.” F

G 143. Terrell on the *Law of Patents* (Seventeenth Edition, 2011) in Chapter 9: “Construction of the Specification and

41. Recall that it is on the basis of this provision that the U.S. Board of Patent Appeals had held in the case regarding the appellant’s claim for patent for beta crystalline form of Imatinib Mesylate that “in light of 35 U.S.C. § 282, therefore, we may presume that the specification of the Zimmermann patent teaches any person skilled in the art how to use Imatinib or a pharmaceutically acceptable salt thereof,....”



Claims”, under the heading “Principles equally applicable to infringement and validity” states: A

“9.05 – Section 125(1) defines an “invention” as (unless the context otherwise requires) that specified in a claim of the specification, and both validity (see sections 1 to 4 and 72 of the Act) and infringement (see section 60) are to be tested by reference to the “invention”. It is, of course, a fundamental principle that the construction of a claim is the same whether validity or infringement is to be considered; **no patentee is entitled to the luxury of an “elastic” claim which has a narrow meaning in the former case but a wide meaning in the latter.** Under English procedure, infringement and validity are normally litigated at the same time and therefore the court is astute to avoid such a result. ...” B C

(emphasis added) D

144. Chisum on *Patents: A Treatise on the Law of Patentability, Validity, and Infringement* (Vol. 3, June 2007) in Chapter: “Adequate Disclosure” notes: E

“§ 7.03 – The Enablement Requirement

Since 1790, the patent laws have required that the inventor set forth in a patent specification sufficient information to enable a person skilled in the relevant art to make and use the invention. F

The “invention” that must be enabled is that defined by the particular claim or claims of the patent or patent application. This is consistent with the general principle of patent law that the claim defines the invention for purposes of both patentability and infringement.” G

145. Nevertheless, both Mr. Andhyarujina and Mr. Subramaniam strenuously argued that the *coverage* or the claim, and the *disclosure* or the teaching, have different H

A parameters in a patent, and that the former may have an extended boundary within which *disclosure* or teaching may be confined to a narrower extent. In support of the submission, Mr. Andhyarujina relied upon a decision of the Court of Appeal in *A.C. Edwards Ltd. v. Acme Signs & Displays Ltd.*⁴² and another of the High Court of Justice Chancery Divisions Patent Court in *Astellas Pharma Inc v. Comptroller-General of Patents.*⁴³ B

146. Mr. Gopal Subramaniam strongly relied upon the decision of United States Court of Customs and Patent Appeals in *In re Hogan*⁴⁴ in support of his contention. C

147. In *Hogan*, the Court of Customs and Patent Appeals held that a patent application that disclosed and enabled a method of making the crystalline form of polymer was entitled to a claim for the method of making a solid polymer, because the only known method for making a solid polymer at the time was the applicants’ method of making the crystalline form. D

148. The Hogan decision was rendered in a jurisdiction that has the historical background of Blocking Patents. Further, *Hogan* that relates to the saga of acrimonious litigation over the claim of priority of invention for crystalline polypropylene among five competing companies was a rather unusual decision even in the US. E

149. In *Hogan*,⁴⁵ the Court of Custom and Patent Appeals had before it an appeal from the decision of the Board of Appeals, affirming the rejections by the Patent and Trademark F

42. [1992] R.P.C. 131

G 43. [2009] EWHC 1916 (Pat)

44. 559 F.2d 595

45. The following discussion on the Hogan decision is partially based on the article “Allocating Patent Rights Between Earlier and Later Inventions” by Charles W Adams, Professor of Law at the University of Tulsa College of Law, published in the Saint Louis University Law Journal (Vol. 54, 55, 2009, pp 56-112). H

Office (PTO) of the applicant's claims 13-15 for "Solid Polymers of Olefins" under 35 USC § 102, 103, 112 (first paragraph) and 132. A

150. The application, though filed in 1971, was in continuation of the first application filed on January 27, 1953. One of the main issues involved in the case was whether a "later state of the art" could be taken as evidence to support a rejection of the patent claim. B

151. Among the reasons given by the Board for rejecting the claim of the applicant was that the disclosure in the original 1953 Hogan and Banks' application was not enabling, because the disclosure was limited to making crystalline polymers. But the claims which the Board rejected included an amorphous polymer as well, which was manifestly outside the scope of the enabling teaching present in the case. The Court of Customs and Patent Appeals reversed the decision of the Board of Patent Appeals, observing and holding as under: C

"The PTO has not challenged appellants' assertion that their 1953 application enabled those skilled in the art in 1953 to make and use "a solid polymer" as described in claim 13. Appellants disclosed, as the only then existing way to make such a polymer, a method of making the crystalline form. To now say that appellants should have disclosed in 1953 the amorphous form which on this record did not exist until 1962, would be to impose an impossible burden on inventors and thus on the patent system. There cannot, in an effective patent system, be such a burden placed on the right to broad claims, To restrict appellants to the crystalline form disclosed, under such circumstances, would be a poor way to stimulate invention, and particularly to encourage its early disclosure. To demand such restriction is merely to state a policy against broad protection for pioneer inventions, a policy both shortsighted and unsound from the standpoint of D E F G

H

A promoting progress in the useful arts, the constitutional purpose of the patent laws."

152. The Court seems to have taken the view that the amorphous form did not exist at the time of the patent application and therefore, that the patentee could not have been expected to claim the amorphous form at that time. The Court further took the view that the broad claim for a solid polymer would satisfy the enablement requirement under the state of the art, as that was known at the time of the filing of the patent application, because the amorphous form was not known at that time. The Court observed: B C

"Consideration of a later existing state of the art in testing for compliance with § 112, first paragraph, would not only preclude the grant of broad claims, but would wreak havoc in other ways as well. The use of a subsequently-existing improvement to show lack of enablement in an earlier-filed application on the basic invention would preclude issuance of a patent to the inventor of the thing improved, and in the case of issued patents, would invalidate all claims (even some "picture claims") therein. Patents are and should be granted to later inventors upon unobvious improvements. Indeed, encouragement of improvements on prior inventions is a major contribution of the patent system and the vast majority of patents are issued on improvements. It is quite another thing, however, to utilize the patenting or publication of later existing improvements to "reach back" and preclude or invalidate a patent on the underlying invention." D E F

153. The polypropylene case in the US gave rise to an extraordinary legal precedent for the enablement requirement, according to which a patentee is free to claim a genus that includes unknown species that may be discovered in the future, if the specification describes and enables all the species that are known at the time of filing the patent application. The G

H

rationale on which the decision is based is described by Professors Merges and Duffy as the “temporal paradox”⁴⁶. The professors explain that, approached in this way, the description and enablement requirements for the genus are determined as of the date of filling the patent, and the patentee gets the benefit of any addition to the genus discovered later.

A
B

154. It needs to be noted here that even in the US, *Hogan* represents a decision given in the context of the special set of facts and circumstances of the litigation over polypropylene. In later decisions, the Federal Circuit appears to have drastically narrowed *Hogan’s* scope as a precedent. In *Plant Genetics System, N.V. v. DeKalb Genetics Corp.*⁴⁷ the effect of *Hogan* was considerably constricted and its effect is virtually eliminated in *Chiron Corp. v. Genentech, Inc.*⁴⁸ Since *Chiron*, the Federal Circuit has not referred to *Hogan* in any of its cases that involve claims to a genus where a single species was enabled.

C
D

155. Mr. Subramaniam refers to the *Hogan* decision in order to support his contention that the Zimmermann patent is a patent covering a genus with certain known species, and many other species that were unknown at that time, but which are equally covered by the patent, even though there is no enabling disclosure in the patent in respect thereof. But it is already found and held earlier that Imatinib Mesylate is a known substance from the Zimmermann patent. The finding that Imatinib Mesylate is a known substance from the Zimmermann patent is not based on the conduct of the appellant alone, as objected to by Mr. Andhyarujina, but the finding has been arrived at on an objective consideration of all the material facts

E
F

46. Apart from the Hogan Decision, Mr. Subramaniam also relied upon the relevant passage under the heading “Enablement and the Temporal Paradox” from the book “Patent Law and Policy: Cases and Materials” (Fifth Edition) by Robert Patrick Merges and John Fitzgerald Duffy...at pg. 298-300

G

47. 315 F. 3d 1335, 1341 (Fed. Cir. 2003)

48. 363 F. 3d 1247, 1257 (Fed. Cir. 2004)

H

A and circumstances. In view of that finding, we fail to see any application of the *Hogan* decision to the facts of the case. We have also considered the two decisions relied upon by Mr. Andhyarujina. Those two decisions also have no application to the facts of the present case, for the same reason as in case of *Hogan*.

B

156. However, before leaving *Hogan* and proceeding further, we would like to say that in this country the law of patent, after the introduction of product patent for all kinds of substances in the patent regime, is in its infancy. We certainly do not wish the law of patent in this country to develop on lines where there may be a vast gap between the *coverage* and the *disclosure* under the patent; where the scope of the patent is determined not on the intrinsic worth of the invention but by the artful drafting of its *claims* by skillful lawyers, and where patents are traded as a commodity not for production and marketing of the patented products but to search for someone who may be sued for infringement of the patent.

C
D

157. In light of the discussions made above, we firmly reject the appellant’s case that Imatinib Mesylate is a new product and the outcome of an invention beyond the Zimmermann patent. We hold and find that Imatinib Mesylate is a known substance from the Zimmermann patent itself. Not only is Imatinib Mesylate known as a substance in the Zimmermann patent, but its pharmacological properties are also known in the Zimmermann patent and in the article published in the *Cancer Research* journal referred to above. The consequential finding, therefore, is that Imatinib Mesylate does not qualify the test of “invention” as laid down in section 2(1)(j) and section 2(1)(ja) of the Patents Act, 1970.

E
F

G

158. This leaves us with the beta crystal form of Imatinib Mesylate, which, for the sake of argument, may be accepted to be new, in the sense that it is not known from the Zimmermann patent. (Whether or not it involves an “inventive

H

step” is another matter, and there is no need to go into that aspect of the matter now). Now, the beta crystalline form of Imatinib Mesylate being a pharmaceutical substance and moreover a polymorph of Imatinib Mesylate, it directly runs into section 3(d) of the Act with the explanation appended to the provision. Mr. Subramaniam, however, contended that section 3(d) has no application in this case. The main ground on which he denied the applicability of section 3(d) to decide the question of grant of patent to the beta crystalline form of the Imatinib Mesylate is earlier held to be untenable. He, however, questioned the applicability of section 3(d) on another ground. Mr. Subramaniam submitted that in order to attract section 3(d), the subject product must be a new form of a *known* substance having *known* efficacy. The learned counsel laid some stress on the expression “known” that equally qualifies the substance of which the subject product may be another form, and the efficacy of that substance. The learned counsel submitted that a “conceivable” substance is not a “known substance” within the meaning of the provision. He contended that the word “known” here connotes proven and well-established; “known efficacy” implies efficacy established empirically and proven beyond doubt. He further contended that neither Imatinib nor Imatinib Mesylate had any known efficacy and that, therefore, there was no question of showing that the beta crystalline form of Imatinib Mesylate had any enhanced efficacy over Imatinib or Imatinib Mesylate.

159. There is no sanction to construe the expression “known” in section 3(d) in the manner suggested by Mr. Subramaniam, and the submission is unacceptable both in law and on facts. It may be noted here that clauses (e) and (f) of section 64(1) of the Act, which contain two of the grounds for revocation of patents, also use the expression “publicly known”. The expression “publicly known” may normally be construed more widely than “known”, and in that sense it is closer to the submission made by Mr. Subramaniam. But even the expression “publicly known” received quite the opposite

A
B
C
D
E
F
G
H

A interpretation by this Court in *Monsanto Company v. Coramandal Indag Products (P) Ltd.*⁴⁹ In paragraph 6 of the judgment, Justice Chinnappa Reddy, speaking for the Court, held and observed as under:

B “...To satisfy the requirement of being publicly known as used in clauses (e) and (f) of Section 64(1), it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of knowledge of the patented product or process either as men of science or men of commerce or consumers. The section of the public, who, as men of science or men of commerce, were interested in knowing about Herbicides which would destroy weeds but not rice, must have been aware of the discovery of Butachlor. There was no secret about the active agent Butachlor as claimed by the plaintiffs since there was no patent for Butachlor, as admitted by the plaintiffs. Emulsification was the well-known and common process by which any herbicide could be used. Neither Butachlor nor the process of emulsification was capable of being claimed by the plaintiff as their exclusive property. The solvent and the emulsifier were not secrets and they were admittedly not secrets and they were ordinary market products. From the beginning to the end, there was no secret and there was no invention by the plaintiffs. The ingredients, the active ingredients the solvent and the emulsifier, were known; the process was known, the product was known and the use was known. The plaintiffs were merely camouflaging a substance whose discovery was known through out the world and trying to enfold it in their specification relating to Patent Number 125381. The patent is, therefore, liable to be revoked. ...”

160. On facts also we are unable to accept that Imatinib Mesylate or even Imatinib was not a known substance with

H ⁴⁹. (1986) 1 SCC 642.

A known efficacy. It is seen above that Imatinib Mesylate was a known substance from the Zimmermann patent. In the NDA submitted by the appellant before the US FDA, it was clearly stated that the drug had undergone extensive preclinical, technical and clinical research. The clinical studies included one multiple dose tolerability/dose-finding study (Phase I) and three large open, uncontrolled efficacy and safety studies (Phase II); and a total of 1,234 patients with CML and other Ph+ leukemias were enrolled in the studies. The efficacy of Imatinib was equally known, as is evident from the Zimmermann patent itself, besides the two articles referred to above.

C 161. The subject product, that is, beta crystalline form of Imatinib Mesylate, is thus clearly a new form of a known substance, i.e., Imatinib Mesylate, of which the efficacy was well known. It, therefore, fully attracts section 3(d) and must be shown to satisfy the substantive provision and the explanation appended to it.

E 162. We now proceed to examine how far the beta crystalline form of Imatinib Mesylate stands up to the test of section 3(d) of the Act. It is noted, in the earlier part of judgment, that the patent application submitted by the appellant contains a clear and unambiguous averment that all the therapeutic qualities of beta crystalline form of Imatinib Mesylate are also possessed by Imatinib in free base. The relevant extract from the patent application is once again reproduced here:

F “It goes without saying that **all the indicated inhibitory and pharmacological effects are also found with the free base, 4-(4-methylpiperazin-1-ylmethyl)-N-[4-methyl-3-(4-pyridin-3-yl) pyrimidin-2-ylamino]phenyl benzamide, or other cells thereof.** The present invention relates especially to the b-crystal form of the methanesulfonic acid addition salt of a compound of formula I in the treatment of one of the said diseases or in the preparation of a pharmacological agent for the treatment thereto.”

H (emphasis added)

A 163. Now, when all the pharmacological properties of beta crystalline form of Imatinib Mesylate are equally possessed by Imatinib in free base form or its salt, where is the question of the subject product having any enhanced efficacy over the known substance of which it is a new form?

B 164. It may also be stated here that while going through the Zimmermann patent one cannot but feel that it relates to some very serious, important and valuable researches. The subject patent application, on the other hand, appears to be a loosely assembled, cut-and-paste job, drawing heavily upon the Zimmermann patent. As a matter of fact, Mr. Kuhad, learned Additional Solicitor General, submitted before us a tabular chart showing over a dozen statements and averments made in the subject application that are either lifted from the Zimmermann patent or are very similar to corresponding statements in the Zimmermann patent. The aforesaid chart is appended at the end of the judgment as Appendix II.

F 165. It further needs to be noted that, on the issue of section 3(d), there appears to be a major weakness in the case of the appellant. There is no clarity at all as to what is the substance immediately preceding the subject product, the beta crystalline form of Imatinib Mesylate. In course of the hearing, the counsel appearing for the appellant greatly stressed that, in terms of invention, the beta crystalline form of Imatinib Mesylate is two stages removed from Imatinib in free base form. The same is said in the written notes of submissions filed on behalf of the appellant. But this position is not reflected in the subject application, in which all the references are only to Imatinib in free base form (or to the alpha crystalline form of Imatinib Mesylate in respect of flow properties, thermodynamic stability and lower hygroscopicity). On going through the subject application, the impression one gets is that the beta crystalline form of Imatinib Mesylate is derived directly from Imatinib free base. This may, perhaps, be because once the beta crystalline form of the methanesulfonic acid salt

being, the Imatinib free base got seeded with the nuclei of Imatinib Mesylate beta crystalline form and, as a result, starting from Imatinib one would inevitably arrive directly at the beta crystalline form of Imatinib Mesylate. But all this is nowhere said in the subject application.

166. Apart from the subject application, the appellant filed four affidavits before the Controller. Two of the affidavits are meant to explain and refute the results of the experiments conducted by the IICT at the instance of one of the objectors, NATCO Pharma Ltd. But the other two, one by Paul William Manley, dated July 22, 2005, and the other by Giorgio Pietro Massimini, dated __September 2005, were filed to meet the requirements of section 3(d), which was amended while the application lay in the “mailbox”.

167. Massimini, in paragraph 8 of the affidavit, explained that it was being filed to meet the conditions under section 3(d) of the Act. He stated that the proviso to section 3(d) was unique to India and there was no analogous provision in any other country of the world. The appellant was, therefore, never called upon to satisfy the tests laid down in section 3(d) of the Act to establish the patentability of the patent subject. He further stated that since no occasion to do so had arisen earlier, no study relating to the efficacy of the free base was carried out in the past. Upon coming to know the requirement of section 3(d), the deponent, asked by the appellant, immediately commenced such a study, ensuring that accuracy and universally accepted scientific and ethical guidelines were not sacrificed.

168. Manley, in paragraph 8 of his affidavit, stated:

“The **physical properties** of the Free Base and imatinib mesylate differ in that the Free Base is only very slightly soluble in water (0.001 g/100 ml) while imatinib mesylate is very soluble in water (beta crystalline form: 130 g/100 ml). Other physical characteristics of the subject compound are described at pages 2 – 3 of the specification. The

A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

attendant advantages because of these properties are also simultaneously described therein. These characteristics and hence the attendant properties/ advantages are not shared by the Free Base. Furthermore, the Beta form significantly differs from the alpha form:

Physical attributes:

- (a) The beta crystal form has substantially more beneficial flow properties and thus results in better processability than the alpha crystal form.
- (b) The beta-crystal form of the methanesulfonic acid addition salt is the thermodynamically more stable form at room temperature. Greater stability is thus to be expected.
- (c) The beta-crystal form is less hygroscopic than the alpha-crystal form of the methanesulfonic acid addition salt of a compound of formula I.
- (d) The lower hygroscopicity is a further advantage for processing and storing the acid addition salt in the beta-crystal form.”

(emphasis added)

169. Massimini, in paragraph 9 of his affidavit stated:

“A study conducted in rats provided statistical evidence for a difference in the relative bioavailability of the Free Base and Imatinib mesylate in the beta crystalline form. In such study, a mean AUC (0-48h) value of 264.000 h*ng/mL was found for the Free Base compared with a mean AUC (0-48h) value of 344000 h*ng/mL for Imatinib mesylate having the beta crystal form. In other words, an about 30% improvement in bioavailability was observed for the beta crystalline for of Imatinib mesylate compared to the Free Base. The test results are attached

“A”.

170. It is to be noted that the higher solubility of the beta crystalline form of Imatinib Mesylate is being compared not to Imatinib Mesylate but, once again, to Imatinib in free base form. The whole case of the appellant, as made out in the subject application and the affidavits, is that the subject product, the beta crystalline form of Imatinib Mesylate, is derived from Imatinib, and that the substance immediately preceding the beta crystalline form is not Imatinib Mesylate but Imatinib in free base form. This position is sought to be canvassed in the subject application and the affidavits on the premise that the Zimmermann patent ended at Imatinib in free base and did not go beyond to Imatinib Mesylate. Not only is this premise unfounded as shown earlier, but the appellant itself appears to take a somewhat different stand, as before this Court it was contended that the subject product, in terms of invention, is two stages removed from Imatinib in free base, and the substance immediately preceding the subject product is Imatinib Mesylate (non-crystalline).

171. That being the position, the appellant was obliged to show the enhanced efficacy of the beta crystalline form of Imatinib Mesylate over Imatinib Mesylate (non-crystalline). There is, however, no material in the subject application or in the supporting affidavits to make any comparison of efficacy, or even solubility, between the beta crystalline form of Imatinib Mesylate and Imatinib Mesylate (non-crystalline).

172. As regards the averments made in the two affidavits, for all one knows the higher solubility that is attributed to the beta crystalline form of Imatinib Mesylate may actually be a property of Imatinib Mesylate itself. One does not have to be an expert in chemistry to know that salts normally have much better solubility than compounds in free base form. If that be so, the additional properties that may be attributed to the beta crystalline form of Imatinib Mesylate would be limited to the following:

A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

- i. More beneficial flow properties,
- ii. Better thermodynamic stability, and
- iii. Lower hygroscopicity

173. The aforesaid properties, (“physical attributes” according to Manley), would give the subject product improved processability and better and longer storability but, as we shall see presently, on the basis of those properties alone, the beta crystalline form of Imatinib Mesylate certainly cannot be said to possess enhanced *efficacy* over Imatinib Mesylate, the known substance immediately preceding it, within the meaning of section 3(d) of the Act.

174. We have so far considered the issue of enhanced efficacy of the subject product in light of the finding recorded earlier in this Judgment that Imatinib Mesylate (non-crystalline) is a known substance from the Zimmermann patent and is also the substance immediately preceding the patent product, that is, Imatinib Mesylate in beta crystalline form.

175. Let us now consider the case of the appellant as made out in the subject application and the supporting affidavits, and examine the issue of enhanced efficacy of the beta crystalline form of Imatinib Mesylate vis-à-vis Imatinib in free base form. It is seen above that all the pharmacological effects of Imatinib Mesylate in beta crystalline form are equally possessed by Imatinib in free base form. The position is not only admitted but repeatedly reiterated in the patent application. Mr. Subramaniam, with his usual fairness and candour, explained the position by stating that Imatinib free base is *actually* the active therapeutic ingredient, but in free base form Imatinib has very little or no solubility. It is, therefore, not capable of being administered as a drug to human beings. In the words of Mr. Subramaniam, if given in solid dosage form, Imatinib free base would sit in the stomach like a brick and would pass out with

A no therapeutic effect. The invention of methanesulfonic acid
addition salt of Imatinib makes the therapeutic ingredient (that
continues to be the same) highly soluble, and therefore very
suitable for being administered as a drug to humans. The
further invention of the beta crystalline form of Imatinib Mesylate
adds to its properties and makes it an even better drug than
B Imatinib Mesylate. The subject product, that is, the beta
crystalline form of Imatinib Mesylate, thus demonstrates a
definite and tangible enhancement of efficacy over Imatinib in
free base form.

C 176. The way in which the case is presented by Mr.
Subramaniam is an entirely new case made before this Court
for the first time. Nevertheless, let us consider the case of the
appellant as presented by Mr. Subramaniam.

D 177. The portion added in section 3(d) by the 2005
amendment reads as under:

E The mere discovery of a new form of a known substance
which does not result in the enhancement of the known
efficacy of that substance... [is not inventions within the
meaning of the Act].

F 178. The *Explanation* to section 3(d) also added by the
2005 amendment provides as under:

G “*Explanation.*—For the purposes of this clause, salts,
esters, ethers, polymorphs, metabolites, pure form, particle
size, isomers, mixtures of isomers, complexes,
combinations and other derivatives of known substance
shall be considered to be the same substance, unless they
differ significantly in properties with regard to efficacy.”

H 179. It may be seen that the word “efficacy” is used both
in the text added to the substantive provision as also in the
explanation added to the provision.

A 180. What is “efficacy”? Efficacy means⁵⁰ “the ability to
produce a desired or intended result”. Hence, the test of
efficacy in the context of section 3(d) would be different,
depending upon the result the product under consideration is
desired or intended to produce. In other words, the test of
B efficacy would depend upon the function, utility or the purpose
of the product under consideration. Therefore, in the case of a
medicine that claims to cure a disease, the test of efficacy can
only be “therapeutic efficacy”. The question then arises, what
would be the parameter of therapeutic efficacy and what are
C the advantages and benefits that may be taken into account for
determining the enhancement of therapeutic efficacy? With
regard to the genesis of section 3(d), and more particularly the
circumstances in which section 3(d) was amended to make it
even more constrictive than before, we have no doubt that the
D “therapeutic efficacy” of a medicine must be judged strictly and
narrowly. Our inference that the test of enhanced efficacy in case
of chemical substances, especially medicine, should receive
a narrow and strict interpretation is based not only on external
factors but there are sufficient internal evidence that leads to
the same view. It may be noted that the text added to section
E 3(d) by the 2005 amendment lays down the condition of
“enhancement of the known efficacy”. Further, the explanation
requires the derivative to “differ significantly in properties **with
regard to efficacy**”. What is evident, therefore, is that not all
advantageous or beneficial properties are relevant, but only
F such properties that directly relate to efficacy, which in case of
medicine, as seen above, is its therapeutic efficacy.

G 181. While dealing with the explanation it must also be
kept in mind that each of the different forms mentioned in the
explanation have some properties inherent to that form, e. g.,
solubility to a salt and hygroscopicity to a polymorph. These
forms, unless they differ significantly in property with regard to
efficacy, are expressly excluded from the definition of
“invention”. Hence, the mere change of form with properties

A inherent to that form would not qualify as “enhancement of efficacy” of a known substance. In other words, the explanation is meant to indicate what is not to be considered as therapeutic efficacy.

B 182. We have just noted that the test of enhanced therapeutic efficacy must be applied strictly, but the question needs to be considered with greater precision. In this connection, we take note of two slightly diverging points of view urged before this Court.

C 183. Mr. Anand Grover, learned counsel appearing for one of the Objectors, Cancer Patients Aid Association, took a somewhat rigid position. The learned counsel submitted that in the pharmaceutical field, drug action is explained by “pharmacokinetics” (effect of the body on the drug) and “pharmacodynamics” (effect of the drug on the body). He further submitted that efficacy is a pharmacodynamic property, and contended that, in the field of pharmaceuticals, efficacy has a well-known meaning. Efficacy is the capacity of a drug to produce an effect. The IUPAC describes efficacy as “the property that enables drugs to produce responses”. It is that property of a drug which produces stimulus. When comparing the efficacy of two substances, efficacy describes “the relative intensity with which agonists vary in the response they produce even when they occupy the same number of receptors”. [IUPAC Glossary of Terms used in Medicinal Chemistry, 1998 in CPAA volume 9, at page 7]. In the words of Goodman and Gilman, “the generation of response from the drug receptor complex is governed by a property described as efficacy”. They further clarify that “efficacy is that property intrinsic to a particular drug that determines how good an agonist the drug is” [Goodman and Gilman in CPAA compilation, volume 9, at page 22, LHC]. Another source describes efficacy as “the ability of the drug to produce the desired therapeutic effect” [Dorland’s Medical dictionary in Novartis’ volume P, at page 19].

H 184. Mr. Grover further submitted that in pharmacology, efficacy is distinct from affinity, potency and bioavailability.

A Affinity, a pharmacodynamics property, “is the tendency of a molecule to associate with another”. The affinity of a drug is its ability to bind to its biological target (receptor, enzyme, transport system, etc.). Potency is “the dose of drug required to produce a specific effect of given intensity as compared to a standard reference”. Bioavailability, on the other hand, is a pharmacokinetic property. It “is the term used to indicate the fraction extent to which a dose of drug reaches its site of action or a biological fluid from which the drug has access to its site of action” [Goodman and Gilman in CPAA compilation, volume..., internal page 4]; or “the degree to which a drug or other substance becomes available to the target tissue after administration” [Dorland’s Medical Dictionary in Novartis’ volume B, at page 65]. A demonstration of increase in bioavailability is not a demonstration of enhanced efficacy.

D 185. Prof. Basheer, who appeared before this Court purely in academic interest as an intervenor-cum-amicus, agreed that not all advantageous properties of a new form (such as improved processability or flow characteristics, storage potential, etc.) ought to qualify under section 3(d), but only those properties that have some bearing on efficacy. However, taking a less rigid position than Mr. Grover, Prof. Basheer argued that safety or significantly reduced toxicity should also be taken into consideration to judge enhanced therapeutic efficacy of a pharmaceutical product in terms of section 3(d).⁵¹

F 51. Prof. Basheer traced the origins of the amended part of section 3(d) in Article 10(2)(b) of European Drug Regulatory Directive, 2004 which defines a “generic medicinal product” as:

G “a medicinal product which has the same qualitative and quantitative composition in active substances and the same pharmaceutical form as the reference medicinal product, and whose bioequivalence with the reference medicinal product has been demonstrated by appropriate bioavailability studies. The different salts, esters, isomers, mixtures of isomers, complexes or derivatives of an active substance shall be considered to be the same active substance, unless they differ significantly in properties with regard to safety and/or efficacy. In such cases, additional information providing proof of the safety and/or efficacy of the various salts, esters or derivatives of a authorized active substance must be supplied by the applicant.”

186. We have taken note of the submissions made by Mr. Grover and Prof. Basheer in deference to the importance of the issue and the commitment of the counsel to the cause. However, we do not propose to make any pronouncement on the issues raised by them, as this case can be finally and effectively decided without adverting to the different points of view noted above.

A
B

187. In whatever way therapeutic efficacy may be interpreted, this much is absolutely clear: that the physico-chemical properties of beta crystalline form of Imatinib Mesylate, namely (i) more beneficial flow properties, (ii) better thermodynamic stability, and (iii) lower hygroscopicity, may be otherwise beneficial but these properties cannot even be taken into account for the purpose of the test of section 3(d) of the Act, since these properties have nothing to do with therapeutic efficacy.

C
D

188. This leaves us to consider the issue of increased bioavailability. It is the case of the appellant that the beta crystalline form of Imatinib Mesylate has 30 per cent increased bioavailability as compared to Imatinib in free base form. If the submission of Mr. Grover is to be accepted, then bioavailability also falls outside the area of efficacy in case of a medicine. Leaving aside the submission of Mr. Grover on the issue, however, the question is, can a bald assertion in regard to increased bioavailability lead to an inference of enhanced therapeutic efficacy? Prof. Basheer quoted from a commentator⁵² on the issue of bioavailability as under:

E
F

He pointed out that the expressions used in a different context in the European Drug Regulatory Directive were incorporated in the Patents Act for an altogether different purpose and raised some important and interesting points for interpretation of section 3(d) but in this case we see no reason to go into those aspects of the matter.

G
H

52. 42 FR 1640 (1977). Cf. Moffitt, Jane, Appropriateness of Bioavailability and Bioequivalency as Pre-Market Clearance Considerations, 34 Food Drug Cosm. L.J. 640 (1979)

A “It is not the intent of a bio-availability study to demonstrate effectiveness, but to determine the rate and extent of absorption. If a drug product is not bio-available, it cannot be regarded as effective. **However a determination that a drug product is bio-available is not in itself a determination of effectiveness.**”

B

(emphasis added)

189. Thus, even if Mr. Grover’s submission is not taken into consideration on the question of bioavailability, the position that emerges is that just increased bioavailability alone may not necessarily lead to an enhancement of therapeutic efficacy. Whether or not an increase in bioavailability leads to an enhancement of therapeutic efficacy in any given case must be specifically claimed and established by research data. In this case, there is absolutely nothing on this score apart from the adroit submissions of the counsel. No material has been offered to indicate that the beta crystalline form of Imatinib Mesylate will produce an enhanced or superior efficacy (therapeutic) on molecular basis than what could be achieved with Imatinib free base *in vivo* animal model.

C
D
E

190. Thus, in whichever way section 3(d) may be viewed, whether as setting up the standards of “patentability” or as an extension of the definition of “invention”, it must be held that on the basis of the materials brought before this Court, the subject product, that is, the beta crystalline form of Imatinib Mesylate, fails the test of section 3(d), too, of the Act.

F

191. We have held that the subject product, the beta crystalline form of Imatinib Mesylate, does not qualify the test of Section 3(d) of the Act but that is not to say that Section 3(d) bars patent protection for all incremental inventions of chemical and pharmaceutical substances. It will be a grave mistake to read this judgment to mean that section 3(d) was amended with the intent to undo the fundamental change brought in the patent

G
H

regime by deletion of section 5 from the Parent Act. That is not said in this judgment. A

192. Section 2(1)(j) defines “invention” to mean, “a new product or ...”, but the new product in chemicals and especially pharmaceuticals may not necessarily mean something altogether new or completely unfamiliar or strange or not existing before. It may mean something “different from a recent previous” or “one regarded as better than what went before” or “in addition to another or others of the same kind”⁵³. However, in case of chemicals and especially pharmaceuticals if the product for which patent protection is claimed is a new form of a known substance with known efficacy, then the subject product must pass, in addition to clauses (j) and (ja) of section 2(1), the test of enhanced efficacy as provided in section 3(d) read with its explanation. B C D

193. Coming back to the case of the appellant, there is yet another angle to the matter. It is seen above that in the US the drug Gleevec came to the market in 2001. It is beyond doubt that what was marketed then was Imatinib Mesylate and not the subject product, Imatinib Mesylate in beta crystal form. It is also seen above that even while the appellant’s application for grant of patent lay in the “mailbox” awaiting amendments in the law of patent in India, the appellant was granted Exclusive Marketing Rights on November 10, 2003, following which Gleevec was marketed in India as well. On its package, the drug was described as “Imatinib Mesylate Tablets 100 mg” and it was further stated that “each film coated tablet contains: 100 mg Imatinib (as Mesylate)”. On the package there is no reference at all to Imatinib Mesylate in beta crystalline form. E F G

53. The New Oxford Dictionary of English Edition 1998

54. A copy of the package is enclosed at the end of the judgment as appendix III. H

A What appears, therefore, is that what was sold as Gleevec was Imatinib Mesylate and not the subject product, the beta crystalline form of Imatinib Mesylate.

B 194. If that be so, then the case of the appellant appears in rather poor light and the claim for patent for beta crystalline form of Imatinib Mesylate would only appear as an attempt to obtain patent for Imatinib Mesylate, which would otherwise not be permissible in this country.

C 195. In view of the findings that the patent product, the beta crystalline form of Imatinib Mesylate, fails in both the tests of invention and patentability as provided under clauses (j), (ja) of section 2(1) and section 3(d) respectively, the appeals filed by Novartis AG fail and are dismissed with cost. The other two appeals are allowed. D

E 196. Before putting down the records of this case, we would like to express our deep appreciation for the way the hearing of the case took place before the Court. Every counsel presented the issues under consideration from a different angle and every counsel who addressed the Court had something important and valuable to contribute to the debate. It was also acknowledged that the illuminating addresses of the counsel were the result of the hard work and painstaking research by the respective teams of young advocates working for each senior advocate. The presence of those bright young ladies and gentlemen in the court room added vibrancy to the proceedings and was a source of constant delight to us. F

K.K.T.

Appeals disposed of.

APPENDIX I

Table (1)

Comparative Table of Applications for Patents in India during the periods (a) 1930-38: (b) 1949-58

1930-1938				1949-58			
Year	Total number of application	By Indians	By other than Indian	Year	Total number of application	By Indians	By other than Indian
1930	1,099	114	985	1949	1,725	345	1,380
1931	940	109	831	1950	1,851	352	1,499
1932	928	162	766	1951	2,108	422	1,686
1933	954	199	755	1952	2,272	473	1,799
1934	1,007	203	804	1953	2,235	406	1,829
1935	980	156	824	1954	2,497	403	2,094
1936	1,068	199	869	1955	2,736	403	2,333
1937	1,246	202	1,044	1956	3,067	482	2,585
1938	1,243	220	1,023	1957	3,456	527	2,929
1939	1,060	238	822	1958	3,572	52	3,043
	10,525	1,802 (17%)	8,723		25,519	4,342 (17%)	21,177

A

B

C

D

E

F

G

H

Table (2)

Patents Granted From 1950-57- analysed according to the subject of the inventions

Year	Food				Total		
	Indian		Foreign				
	No.	Percentage	No.	Percentage			
1950	22	16.5	111	83.5	133		
1951	35	28.6	87	71.4	122		
1952	18	18.9	77	81.1	95		
1953	30	18.8	129	81.2	159		
1954	31	8.3	341	91.7	372		
1955	48	10.0	430	90.0	478		
1956	30	7.0	402	93.0	432		
1957	8	13.5	51	86.5	59		
Total	222		1628		1850		
Year	Chemical				Total		
	1950	13	4.5	271		95.4	284
	1951	33	8.7	378		91.3	411
	1952	36	8.0	414		92.0	450
	1953	27	7.1	351		92.9	378
	1954	44	9.7	409		90.3	453
	1955	56	12.5	448		87.5	504
	1956	34	6.6	479		93.4	513
	1957	68	9.3	656		90.7	727
Total	311		3406		3717		

A

B

C

D

E

F

G

H

Table (3)
Applications for Patents relating to Drugs and Pharmaceuticals

Pharmaceuticals					
Year	Indian		Foreign		Total
	No.	Percentage	No.	Percentage	
1947	12	7.7 (sic 17.7)	143	72.3	155
1948	7	5.5	121	94.5	128
1949	5	3.5	139	96.5	144
1950	8	5.0	151	95.0	159
1951	17	7.7	203	92.3	220
1952	18	6.2	224	93.8	242
1953	18	6.3	267	93.7	285
1954	13	4.1	300	95.9	312
1955	7	2.1	325	97.9	332
1956	13	2.6	476	97.4	489
1957	25	5.3	543	94.7	568
Total	143		2892		3035

Table (5)
Number of Patents in force on the 1st January, 1958

Total Number	13,774
Owned by Indians	1,157
Owned by Indians and Foreigners jointly	21
Owned by Foreigners	12,596

APPENDIX II

Comparative Chart of Zimmermann Patent & Application for Beta-Crystalline form of Imatinib Mesylate in India

	Zimmermann Patent (Vol. C-4)	Beta-crystal Application in India (Vol. C-4)
1.	Column 4: The compounds of formula I have valuable pharmacological properties and can be used, for example, as anti-tumoral drugs and as drags (sic drugs) against atherosclerosis.	Page No. 60: The methanesulfonic acid addition salt of a compound of formula I, which is preferably used in the β -crystal form...possesses valuable pharmacological properties and may, for example, be used as an anti-tumour agent, as an agent to treat atherosclerosis.
2.	Column 5: “...and anti-bacterial active ingredients..”	Page No. 60: “...preventing the invasion of warmblooded animal cells by certain bacteria, such as Porphyromonas gingivalis.”
3.	Column 4: The phosphorylation of proteins has long been known as an important step in the differentiation and protein kinases which are divided into serine/threonine kinases and tyrosine kinases. The serine/threonine kinases include protein kinase C	Page No. 60: The phosphorylation of proteins has long been known as an essential step in the differentiation and division of proliferation of cells. The cells. Phosphorylation is catalysed by protein kinases subdivided into serine/threonine and tyrosine kinase

	and the tyrosine kinases the PDGF (platelet-derived growth factor)-receptor tyrosine Kinase.	kinases include PDGF (Platelet-derived Growth Factor) receptor tyrosine kinase.
4.	Column 7: PDGF (platelet-derived growth factor) is a very frequently occurring growth factor which plays an important role both in normal growth and in pathological cell proliferation, such as in carcinogenesis and disorders of the smooth muscle cells of blood vessels, for example in atherosclerosis and thrombosis.	Page No. 60 PDGF (Platelet-derived Growth Factor) is a very commonly occurring growth factor, which plays an important role both in normal growth and also in pathological cell proliferation, such as is seen in carcinogenesis and in diseases of the smooth-muscle cells of blood vessels, for example in atherosclerosis and thrombosis.
5.	Column 7: The inhibition of PDGF-stimulated receptor tyrosine kinase activity in vitro is measured in PDGF receptor immunocomplexes of BALB/c 3T3 cells, analogously to the method described by E. Andrejauskas-Buchdunger and U. Regenass in Cancer Research 52, 5353-5358 (1992). The compounds of formula I described in detail above inhibit PDGF-dependent cell-free receptor phos-	Page No. 60: The inhibition of PDGF-stimulated receptor tyrosine kinase activity in vitro is measured in PDGF receptor immune complexes of BALB/c 3T3 cells, as described by E. Andrejauskas-Buchdunger and U. Regenass in Cancer Research 52, 5353-5358 (1992). A compound of formula I described in more detail hereinbefore, such as especially its β -crystal form, inhibits PDGF-dependent

A
B
C
D
E
F
G
H

A
B
C
D
E
F
G
H

phorylation at concentrations of from 0.005 to 5 μ mol/liter, especially from 0.01 to 1.0, more especially from 0.01 to 0.1 μ mol/liter. The inhibition of PDGF-receptor tyrosine kinase in the intact cell is detected by means of Western Blot Analysis, likewise analogously to the method described by E. Andrejauskas-Buchdunger and U. Regenass in Cancer Research 52, 5353-5358 (1992). In that test the inhibition of ligand-stimulated PDGF-receptor autophosphorylation in BALB/c mouse cells is measured with the aid of anti-phosphotyrosine with the aid of anti-phosphotyrosine antibodies. The compounds of formula I described in detail above inhibit the tyrosine kinase activity of the PDGF receptor at	acellular receptor phosphorylation.
---	-------------------------------------

	concentrations of from 0.005 to 5 µmol/liter, especially from 0.01 to 1.0 and more especially from 0.01 to 0.1 µmol/liter. At concentrations below 1.0 µmol/liter, those compounds also inhibit the cell growth of a PDGF-dependent cell line, namely BALB/c 3T3 mouse fibroblasts.	
6.	Column 8: The compounds of this invention inhibit enzyme activity by 50% (IC50) typically in a concentration of 0.1 to 10 µm.	Page No. 61: “...the corresponding methanesulfonate salt inhibit the tyrosine kinase activity of the PDGF receptor at an IC50 (concentration at which activity is inhibited by 50% compared with the control) of about 120 µM and about 100 µM, respectively.”
7.	Column 7: Owing to the properties described, compounds of formula I can be used not only as tumour-inhibiting active ingredients but also as drugs against non-malignant proliferative diseases, e.g. atherosclerosis, thrombosis, psoriasis, sclerodermitis and fibrosis.	Page No. 61: On the basis of the described properties, the methanesulfonic acid addition salt of a compound of formula I, such as especially the βcrystal form thereof, may be used not only as a tumour-inhibiting substance, for example in small cell lung cancer, but also as an agent to treat non-malignant proliferative disorders, such as

A
B
C
D
E
F
G
H

A		They are also suitable for the further applications mentioned above for protein kinase C-modulators and can be used especially in the treatment of diseases that respond to the inhibition of PDGF-receptor kinase.	atherosclerosis, thrombosis, psoriasis, scleroderma, and fibrosis... It may especially be used for the treatment of diseases which respond to an inhibition of the PDGF receptor kinase.
B			
C	8.	Column 9: In addition, the compounds of formula I prevent the development of resistance (multi-drug resistance) in cancer treatment with other chemotherapeutic drugs or remove existing resistance to other chemotherapeutic drugs.	Page No. 62: In addition, the methanesulfonic acid addition salt of a compound of formula I, such as especially its βcrystal form C, prevents the development of multidrug resistance in cancer therapy with other chemotherapeutic agents or other chemotherapeutic agents.
D			
E	9.	Column 6: Some of the compounds of formula I wherein R4 and R8 are hydrogen inhibit not only protein kinase C but, at a concentration IC50 as low as approximately from 0.01 to 5 µmol/liter, especially approximately from 0.05 to 1 µmol/liter, also certain tyrosine kinases, such as especially PDGF-receptor kinase or abl-	Page No. 62: Also abl kinase, especially v-abl kinase, is inhibited by 4-(4methylpiperazin-1-ylmethyl) -N-(4methyl-3-(4-pyridin-3-yl)pyrimidin-2-ylamino) phenyl] benzamide and its methanesulfonate salt.
F			
G			
H			

	kinase, for example v-abl kinase.		A
10.	Column 7: The above-mentioned inhibition of v-abl-tyrosine kinase is determined in accordance with the methods of N. Lydon et at., Oncogene Research 5, 161 – 173 (1990) and J.F. Geissler et al., Cancer Research 52, 4492-4498 (1992). In those methods [Val ⁵]-angiotensin II and [Y- ³² P]ATP are used as substrates.	Page No. 62: The inhibition of v-abl tyrosine kinase is determined by the methods of N. Lydon et at. Oncogene Research 5, 161 – 173 (1990) and J.F. Geissler et al., Cancer Research 52, 4492-8 (1992). In those methods [Val ⁵]-angiotensinII and [γ- ³² P]-ATP are used as substrates.	B C
11.	Column 20: The invention relates also to a method of treating warm-blooded animals suffering from a tumoral disease, which comprises administering to warm-blooded animals requiring such treatment an effective, tumour-inhibiting amount of a compound of formula I or of a pharmaceutical acceptable salt thereof.	Page No.68: The invention relates also to a process for the treatment of warmblooded animals suffering from said diseases, especially a tumour disease,is administered to warm-blooded animals in need of such treatment.	D E F
12.	Column 20: The invention relates further to the use of a compound of formula I or of a pharmaceutical acceptable salt thereof for	Page No.68 : The invention relates moreover to the use of the β-crystal form of the methanesulfonic acid addition salt of a compound	G H

A	inhibiting PDGF-receptor kinase or to the use of a compound of formula I wherein R4, and R8 are each hydrogen, or of a pharmaceutically acceptable salt thereof, for inhibiting protein kinase C in warm-blooded animals or for preparing pharmaceutical compositions for use in the or animal body.	of formula I for the inhibition of the above-mentioned tyrosine kinases, especially PDGF receptor kinase, v-abl kinase, and/or c-kit receptor kinase, or for the preparation of pharmaceutical compositions for use in treating the human or animal body.
B		
C		
D	13. Column 20: Effective doses, for example daily doses of approximately from 1 to 1000 mg, especially from 50 to 500 mg, are administered to a warmblooded animal of approximately 70 kg body weight according to species, age, individual condition, mode of administration and the individual syndrome.	Page No. 68: Depending on species, age, individual condition, mode of administration, and the clinical picture in question, effective doses, for example daily doses of about 12500 mg, preferably 1-1000 mg, especially 5-500 mg, are administered to warm-blooded animals of about 70 kg bodyweight.
E		
F		
G	14. Column 20: The invention relates also to pharmaceutical compositions comprising an effective amount, especially an amount effective in the prevention or therapy of one of the above-mentioned diseases, of the active in-	Page No. 68: The invention relates also to pharmaceutical preparations which contain an effective amount, especially an effective amount for prevention or treatment of one of the said diseases, of the methanesulfonic acid addition
H		

<p>redient together with pharmaceutically acceptable carriers that are suitable for topical, enteral, for example oral or rectal, or parenteral administration, and may be inorganic or organic, solid or liquid. For oral administration there are used especially tablets or gelatin capsules comprising the active ingredient together with diluents, for example lactose, dextrose, sucrose, mannitol, sorbitol, cellulose and/or glycerol, and/or lubricants, for example silicic acid, talc, stearic acid or salts thereof, such as magnesium or calcium stearate, and/or polyethylene glycol. Tablets may also comprise binders, for example magnesium aluminium silicate, starches, such as corn, wheat or rice starch, gelatin, methylcellulose, sodium carboxymethylcellulose and/or polyvinylpyrrolidone, and, if desired, disintegrators, for example starches, agar, alginic acid or a salt</p>	<p>of formula I in the α-crystal (sic β crystal) form, together with pharmaceutically acceptable carriers which are suitable for topical, enteral for example oral or rectal, or parenteral administration and may be inorganic or organic and solid or liquid. Especially tablets or gelatin capsules containing the active substance together with diluents, for example lactose, dextrose, sucrose, mannitol, sorbitol, cellulose and/or glycerin, and/or lubricants, for example silicic, talc, stearic acid, or salts thereof, typically magnesium or calcium stearate, and/or polyethylene glycol, are used for oral administration. Tablets may likewise contain binders, for example magnesium aluminium silicate, starches, typically corn, wheat or rice starch, gelatin, methylcellulose, sodium carboxymethylcellulose and/or polyvinylpyrrolidone, and, if so desired, disintegrants, for example starches, agar, alginic acid or a salt thereof, typically sodium alginate, and/or</p>
--	---

A
B
C
D
E
F
G
H

<p>thereof, such as sodium alginate, and/or effervescent mixtures, or absorbents, dyes, flavourings and sweeteners. The pharmacologically active compounds of the present invention can also be used in the form of parenterally administrable compositions or in the form of infusion solutions. Such solutions are preferably isotonic aqueous solutions or suspensions, which, for example in the case of lyophilised compositions that comprise the active ingredient alone or together with a carrier, for example mannitol, can be prepared before use. The pharmaceutical compositions may be sterilised and/or may comprise excipients, for example preservatives, stabilisers, wetting agents and/or emulsifiers, solubilisers, salts for regulating the osmotic pressure and/or buffers. The present pharmaceutical composi-</p>	<p>effervescent mixtures, or adsorbents, colouring agents, flavours, and sweetening agents. The pharmacologically active compounds of the present invention may further be used in the form of preparations for parenteral administration or infusion solutions. Such solutions are preferably isotonic aqueous solutions or suspensions, these possibly being prepared before use, for example in the case of lyophilised preparations containing the active substance either alone or together with a carrier, for example mannitol. The pharmaceutical substances may be sterilised and/or may comprise excipients, for example preservatives, stabilisers, wetting agents and/or emulsifiers, solubilisers, salts for regulation of the osmotic pressure, and/or buffers. The present pharmaceutical preparations which, if so desired, may contain further pharmacologically active substances, such as antibiotics, are prepared in a manner known per se for</p>
--	---

A
B
C
D
E
F
G
H

<p>tions which, if desired, may comprise further pharmacologically active substances, such as antibiotics, are prepared in a manner known per se, for example by means of conventional mixing, granulating, confectioning, dissolving or lyophilising processes, and comprise approximately from 1% to 100%, especially from approximately 1% to approximately 20%, active ingredient(s).</p>	<p>example by means of conventional mixing, granulating, coating, dissolving or lyophilising processes, and contain from about 1% to 100%, especially from about 1% to about 20%, of the substance or substances.</p>
<p>15. Column 21: The following Examples illustrate the invention but do not limit the invention in any way. The Rf values are determined on silica gel thin-layer plates (Merck, Darmstadt, Germany). The ratio to one another of the eluants in the eluant mixtures used is given in proportions by volume (v/v), and temperatures are given in degrees Celsius.</p>	<p>Page No. 69: The following Examples illustrate the invention without limiting the scope thereof. R1 – values are determined on TLC plates coated with silica gel (Merck, Darmstadt, Germany). The ratio of the solvents to one another in the solvent systems used is indicated by volume (v/v), and temperatures are given in degrees Celsius (°C).</p>

A	A
B	B
C	C
D	D
E	E
F	F
G	G
H	H