To recuse or not to: A critique on the Constitution Bench Judgment in *Indore Development Authority* case

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Introduction

1. While adjudicating the issues pertaining to Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'the Act of 2013), Constitution Bench of the Hon'ble Supreme Court in *Indore Development Authority* v. *Manohar Lal and Others*[1] (hereinafter referred to as 'the Constitution Bench') was faced with a peculiar request that the learned presiding Judge should recuse from the Bench. As the situation unfolded, arguments were heard by the Bench on recusal, resulting in an exhaustive judgment on the issue, dated October 23, 2019. However, issues germane to the demand for recusal were missed out without any discussion. The pertinent facts that could bring them up found only a cursory mention in the judgment without proper details, resulting in shifting of spotlight to the issues not so relevant. This produced a Constitution Bench judgment lacking in many vital aspects, which have been discussed in the paper in the background of relevant facts that should have been focused upon.

Factual Background

2. This issue of recusal has a background, which finds a brief mention in the judgment itself, shorn of details. The pivotal case around which the issue revolves is, *Pune Municipal Corporation & Another* v. *Harkchand Misirimal Solanki and Others*[2], decided by a three judges Bench of the Hon'ble Supreme Court. The land owners in the matter had come up with a plea that in view of Section 24(2) of the 2013 Act, the land acquisition proceedings in question had lapsed since no compensation was paid to them more than five years prior to commencement of the 2013 Act. In this background, the Hon'ble Bench determined true meaning of the expression "compensation has not been paid" occurring in Section 24(2) of the 2013 Act, to decide the issue whether the acquisition proceedings had, in fact, lapsed. The opinion has been rendered in para 17 and 20 of the judgment, which is as under:

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[1] 2019 (14) SCALE 470.

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[2] (2014) 3 SCC 183.

17. ……. We are the view, therefore, that for the purposes of Section 24 (2), the compensation shall be regarded as "paid" if the compensation has been offered to the person interested and such compensation has been deposited in the court where reference under Section 18 can be made on happening of any of the contingencies contemplated under Section 31(2) of the 1894 Act. In other words, the compensation may be said to have been "paid" within the meaning of Section 24(2) when the Collector (or for that matter Land Acquisition Officer) has discharged his obligation and deposited the amount of compensation in court and made that amount available to the interested persons to be dealt with as provided in Section 32 and 33.

20. From the above, it is clear that the award pertaining to the subject land has been made by the Special Land Acquisition Officer more than five years prior to the commencement of the 2013 Act. It is also admitted position that compensation so awarded has neither been paid to the landowners/persons interested nor deposited in the court. The deposit of compensation amount in the Government treasury is of no avail and cannot be held to be equivalent to compensation paid to the landowners/persons interested. We have, therefore, no hesitation in holding that the subject land acquisition proceedings shall be deemed to have lapsed under Section 24(2) of the 2013 Act.

3. Subsequently, provisions of the 2013 Act came to be adjudicated upon by a Division Bench of the Hon'ble Supreme Court in another matter, *Shree Balaji Nagar Residential Association* v. *State of Tamil Nadu & Ors.*[3]. The parties were heard on the primary legal aspect, whether in computing five years' period prior to commencement of the Act for lapse of acquisition proceedings under Section 24(2) of the 2013 Act, the period during which land acquisition proceedings remained stayed by an order of Court, was required to be excluded. The Hon'ble Court concluded that the period was to be counted, as the 2013 Act did not consciously exclude it from being counted.

4. The view expressed by the Court in *Shree Balaji Nagar Residential Association*[4] case was doubted by another Division Bench in *Yogesh Neema and Others* v. *State of Madhya Pradesh & Ors.*[5]. The Hon'ble Court was of the view, "legal effect of the absence of any specific exclusion of the period covered by an interim order in Section 24(2) of the 2013 Act requires serious reconsideration having regard to the fact that it is an established principle of law that the act of the Court cannot be understood to cause prejudice to any of the contesting parties in a litigation"; accordingly, the following two question of law were framed for authoritative pronouncement by a larger Bench.

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[3] (2015) 3 SCC 535.
[4] *Ibid.*
[5] (2016) 6 SCC 387.

(i) Whether the conscious omission referred to in para 11 of the judgment in Sree Balaji Nagar Residential Assn. makes any substantial difference to the legal position with regard to the exclusion or inclusion of the period covered by an interim order of the Court for the purpose of determination of the applicability of Section 24(2) of the 2013 Act?

(ii) Whether the principle of "actus curiae neminem gravabit", namely, act of the court should not prejudice any party would be applicable in the present case to exclude the period covered by an interim order for the purpose of determining the question with regard to taking of possession as contemplated in Section 24(2) of the 2013 Act?

5. In another Civil Appeal No.20982 of 2017 *Indore Development Authority* v. *Shailendra (dead) through LRs*[6], a Division Bench of the Hon'ble Supreme Court headed by Justice Arun Mishra, vide order dated December 07, 2017, opined that several other issues with reference to applicability of Section 24 of the 2013 Act have not been considered in *Pune Municipal Corporation*[7] case. Therefore, the matter should be considered by a larger Bench. The order also noted, the issue of counting the period of stay/injunction for lapse of acquisition proceedings under Section 24(2) has already been referred to a larger Bench in *Yogesh Neema*[8] case.

6. Since the earlier judgment in *Pune Municipal Corporation*[9] case was rendered by a three judges Bench, a larger Bench consisting of three Hon'ble Judges of Supreme Court, including Justice Arun Mishra, was constituted to decide three issues referred to it.

7. The opinion of larger Bench was rendered by the Court, vide judgment dated February 08, 2018, in Civil Appeal No.20982 of 2017 titled *Indore Development Authority* v. *Shailendra (dead) through LRs*[10], with other connected matters, (for short 'the larger Bench'). Two learned Judges of this larger Bench, i.e., Justice Arun Mishra and Justice Adarsh Kumar Goel, delivered the majority view holding the judgment delivered by three judges Bench in *Pune Municipal Corporation*[11] case as *per incuriam.*

8. The Bench proceeded to decide five questions of law (instead of the three referred to it). By way of a comprehensive judgment, the majority of two learned. Judges (in paragraph 152) decided against referring the judgment rendered by three learned Judges in *Pune Municipal Corporation*[12] case to further larger Bench, and declared it *per incuriam.* It was further held, since the majority had taken a view that the judgment was *per incuriam,* it stood so declared (irrespective of the third learned Judge on the larger Bench disagreeing). The majority also declared that other decisions following the view taken in *Pune Municipal Corporation*[13] case were also *per incuriam,* and open to be reviewed in

[6] 2018 SCC online SC 100.
[7] *Supra* n. 2.
[8] *Supra* n. 5.
[9] *Supra* n. 2.
[10] *Supra* n. 6.
[11] *Supra* n. 2.
[12] *Supra* n. 2.
[13] *Supra* n. 2.

appropriate cases on the basis of this decision. Finally, the five questions posed were answered in the following manner:

153. Our answers to the questions are as follows:

Q. No. I:- The word ‘paid’ in section 24 of the Act of 2013 has the same meaning as ‘tender of payment’ in section 31(1) of the Act of 1894. They carry the same meaning and the expression ‘deposited’ in section 31(2) is not included in the expressions ‘paid’ in section 24 of the Act of 2013 or in ‘tender of payment' used in section 31(1) of the Act of 1894. The words ‘paid'/tender' and ‘deposited' are different expressions and carry different meanings within their fold.

In section 24(2) of the Act of 2013 in the expression ‘paid,' it is not necessary that the amount should be deposited in court as provided in section 31(2) of the Act of 1894. Non-deposit of compensation in court under section 31(2) of the Act of 1894 does not result in a lapse of acquisition under section 24(2) of the Act of 2013. Due to the failure of deposit in court, the only consequence at the most in appropriate cases may be of a higher rate of interest on compensation as envisaged under section 34 of the Act of 1894 and not lapse of acquisition.

Once the amount of compensation has been unconditionally tendered and it is refused, that would amount to payment and the obligation under section 31(1) stands discharged and that amounts to discharge of obligation of payment under section 24(2) of the Act of 2013 also and it is not open to the person who has refused to accept compensation, to urge that since it has not been deposited in court, acquisition has lapsed. Claimants/landowners after refusal, cannot take advantage of their own wrong and seek protection under the provisions of section 24(2).

Q. No. II:- The normal mode of taking physical possession under the land acquisition cases is drawing of Panchnama as held in Banda Development Authority (supra).

Q. No. III:- The provisions of section 24 of the Act of 2013, do not revive barred or stale claims such claims cannot be entertained.

Q. No. IV:- Provisions of section 24(2) do not intend to cover the period spent during litigation and when the authorities have been disabled to act under section 24(2) due to the final or interim order of a court or otherwise, such period has to be excluded from the period of five years as provided in section 24(2) of the Act of 2013. There is no conscious omission in section 24(2) for the exclusion of a period of the interim order. There was no necessity to insert such a provision. The omission does not make any substantial difference as to legal position.

Q. No. V:- The principle of actus curiae neminem gravabit is applicable including the other common law principles for

determining the questions under section 24 of the Act of 2013. The period covered by the final/ interim order by which the authorities have been deprived of taking possession has to be excluded. Section 24(2) has no application where Court has quashed acquisition.

9. All the three learned Judges on the larger Bench unanimously agreed only to the answers No. II to V given by the majority. On question No.I, which pertained to the issue decided by three Judges Bench in *Pune Municipal Corporation* [14] case, the third learned Judge (Justice Mohan M Shantanagoudar) did not agree with the majority. Although unable to agree with the judgment, he did not declare it *per incuriam*; instead, required it to be referred to a larger Bench. In a separate judgment the learned Judge answered the three questions referred for consideration to the larger Bench in the following manner:

> 63. The questions posed by the references stand answered by me as follows:
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> I. QUESTION NO. 1: The acquisition proceedings do not lapse if the amount is deposited in the Treasury and such fact is made known to the claimants by the competent authority as required in law. Only interest is attracted, in case if the deposit is not made in Court. Consequently, I am unable to persuade myself to agree with the outcome of Pune Municipal Corporation (supra). However, according to me the judgment in Pune Municipal Corporation (supra) is not rendered in per incuriam.
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> In view of the above, the judgment in Pune Municipal Corporation (supra) may have to be reconsidered by a larger bench, inasmuch as Pune Municipal Corporation (supra) was decided by a bench of three judges. The Registry is directed to place the papers before the Hon'ble Chief Justice of India for appropriate orders.
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> I. QUESTION NO. 2 AND QUESTION NO. 3: For the aforementioned reasons, I am unable to persuade myself to agree with Sree Balaji (supra), and the same stands overruled. Question No. 2 and Question No. 3 posed by the reference stand answered as follows:
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> (i) The conscious omission referred to in paragraph 11 of the judgment in Sree Balaji (supra) does not make any substantial difference to the legal position with regard to the exclusion or inclusion of the period covered by an interim order of the Court for the purpose of determination of the applicability of Section 24(2) of the 2013 Act. In fact, excluding such periods of

[14] *Supra* n. 2.

interim stay from the calculation of the time period of five years under S. 24(2) makes a reading of the Act more consistent.

(ii) The principle of "actus curiae neminem gravabit", or that the act of the court should not prejudice any parties, would be applicable in the present case to exclude the period covered by an interim order for the purpose of determining the question with regard to taking of possession as contemplated in Section 24(2) of the 2013 Act.

Conflicting Opinions Noticed

10. These conflicting opinions on certain aspects of Section 24 of the 2013 Act, rendered in (i) *Pune Municipal Corporation*[15] case (by a Bench of three learned Judges), and (ii) *Indore Development Authority*[16] case (rendered by the majority of two learned Judges of the larger Bench) declaring the former judgment *per incuriam*, came to the notice of a three Judges Bench in *State of Haryana & Ors.* v. *M/s G.D. Goenka Tourism Corporation Ltd.*[17] on 21.02.2018, whereupon, pending hearing on the issue of referring the matter to a larger Bench, other Benches of the Hon'ble Supreme Court were requested to defer hearing on the issue until a decision, one way or the other, was taken by a larger Bench or not. The High Courts were also requested not to deal with any case relating to the interpretation of or concerning Section 24 of the 2013 Act till then. The interim order, dated February 21, 2018, requesting all Benches to defer hearing was necessitated for the following reasons recorded in the order itself:

> Hearing is not concluded on the issue whether the matter should at all be referred to a larger Bench or not. However, we were informed by Mr. Rohatgi that some cases have already been decided on the basis of the judgment rendered in the case of Indore Development Authority (supra), without the matter being referred to a larger Bench.
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> We have also been informed by learned counsel appearing on both the sides that some similar matters are listed tomorrow as well and it is possible that in the next couple of days similar matters may be listed before various High Courts.

11. Next day, when this interim order was brought to the notice of a Division Bench presided over by Justice Adarsh Kumar Goel (in SLP (C) 9798 of 2016 and another Division Bench presided over by Justice Arun Mishra (in Civil Appeal No. 4835 of 2015), the two Benches by taking note of the order passed by the Bench in *M/s G.D. Goenka Tourism Corporation Ltd.*[18] Case dated February 21, 2018, referred the matter to Hon'ble the Chief Justice for resolution of

[15] *Supra* n. 2.
[16] *Supra* n. 6.
[17] SLP (C) 8453 of 2017.
[18] *Supra* n. 17.

issues by a larger Bench, vide orders passed on the same date February 22, 2018.

12. The five judges Constitution Bench *Indore Development Authority* v. *Manohar Lal and Others* [19] , was accordingly constituted. No particular question was referred to the Bench, which observed it would consider all aspects including correctness of the decision in *Pune Municipal Corporation* [20] case and other judgments following that case, and the judgments rendered in *Indore Development Authority*[21] case.

The View Taken

13. At the outset, the Constitution Bench was faced with the preliminary objection regarding recusal of one of the learned Judges, Justice Arun Mishra, on the ground that the learned Judge had expressed a final view in *Indore Development Authority* [22] case by declaring the judgment in *Pune Municipal Corporation*[23] case *per incuriam.* The learned Judge, whose recusal of the Constitution Bench was sought, went ahead to find an answer to the question, to recuse or not to. He has authored the Constitution Bench judgment, wherein loads of decisions of the Hon'ble Supreme Court have been referred to and discussed in detail, to drive home the point that it has been a matter of practice with the Court to constitute larger Benches with the learned Judges who have either been a part of the referral order(s) or have themselves delivered judgments dealing with issues sought to be reconsidered.

14. Relying upon the precedents, the Constitution Bench judgment concludes,

"Thus, it is apparent that this is the consistent practice of this Court that Judges who had rendered the earlier decision have presided over or been a part of the larger Bench." It has been further held, "Thus, rendering a decision on any issue of law and the corrective procedure of it cannot be said to be ground for recusal of a Judge; otherwise, no Judge can hear a review, curative petition, or a reference made to the larger Bench". The Judges, it has been observed, have to correct the decision, apply the law, and independently interpret the decision as per the fact situation of the case which may not be germane to the earlier matter. A judgment is a not a halting-place, it is a stepping stone. It is not like a holy book which cannot be amended or corrected. It may also work to the advantage of all concerned if a Judge, who has decided the matter either way, is also a member of the larger Bench.

The Aspects Overlooked

15. So far so good. The precedents cited by the Constitution Bench and the practices underlined, are not to be faulted with looking at the issue of recusal as such. However, the issues that spring up for consideration in the peculiar background of facts leading to formation of the Constitution Bench, are too conspicuous to be ignored. They are part of the record, and stare one in the eye. In case such specifics escape consideration in the judgment rendered by a Constitution Bench of the highest court, the majesty of law is bound to take a beating. A judgment to be treasured must deal with all the relevant aspects that arise for

[19] *Supra* n. 1.
[20] *Supra* n. 2.
[21] *Supra* n. 6.
[22] *Supra* n. 6.
[23] *Supra* n. 2.

consideration, discuss them threadbare without losing focus and reach a conclusion, laying down a binding precedent to follow for times to come. It is here that the Constitution Bench judgment appears to have dithered.

16. **Firstly**, the judgment throws up a dilemma for all those concerned with dispensation of justice, as the long cherished principles of judicial discipline and propriety appear to dwindle at the hands of the ones entrusted to defend them. Still, it does not reflect upon the issue of breach of judicial propriety and the consequent request for recusal of the learned Judge. Should a learned Judge adorn the Constitution Bench to re-consider the judgment rendered by a three judges Bench, which was declared *per incuriam* by a majority of two learned Judges (including him), especially when the third learned Judge on the larger Bench dissented and required the issue to be referred to a Constitution Bench. This flies in the face of the principles of judicial discipline and propriety that a Bench of co-ordinate strength cannot even comment upon the judgment rendered by another Bench of equal strength, what to talk of over ruling or declaring it *per incuriam*.

17. The principles have been reiterated by the Hon'ble Supreme Court in a range of pronouncements. To cite a few, the five judges Bench judgment in *Sub-Committee of Judicial Accountability* v. *Union of India & Others*[24], while examining the issue of judicial propriety, held:

> 5. …Indeed, no coordinate Bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercise or judgment rendered in a cause or matter before another coordinate Bench.

Again, in *Pradip Chandra Parija* v. *Pramod Chandra Patnaik*[25], another Bench of five Judges had the occasion to answer the question, "whether two learned Judges of this Court can disagree with a judgment of three learned Judges of this Court and whether, for that reason, they can refer the matter before them directly to a Bench of five Judges?" The Hon'ble Court's view was expressed as follows:

> 6. In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect,

[24] (1992) 4 SCC 97.

[25] (2002) 1 SCC 1.

reference to a Bench of five learned Judges is justified.

In yet another judgment rendered by the Hon'ble Supreme Court in *State of Bihar* v. *Kalika Kuer alias Kalika Singh & Others* [26], the Court underlined judicial propriety by holding as under:

> 10. …..In connection with this observation, we would like to say that an earlier decision may seem to be incorrect to a Bench of a co-ordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the Court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the latter bench of co-ordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways - either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits.

18. **Secondly**, the practice of Judges, who had rendered earlier decision(s), presiding over or being part of a larger Bench on the same issue, is not in dispute. It is too well accepted and consistently followed to form a ground for recusal. The facts preceding formation of the Constitution Bench, however, point to a situation not akin to the precedents cited in the judgment. The learned Judge, whose recusal was sought, had first referred the judgment in *Pune Municipal Corporation*[27] case for consideration by a larger Bench. The Bench was constituted with the learned Judge, who made the reference, heading it. The larger Bench judgment was delivered in *Indore Development Authority*[28] case, wherein the majority of two learned judges (of which the learned Judge making reference was a part) by a detailed judgment running into over one hundred fifty pages, after discussing the provisions in question from every possible angle, gave its well considered view declaring *per incuriam* the judgment of three judges Bench in *Pune Municipal Corporation*[29] case, and declining to refer it to a larger Bench. The law so declared was considered final, and the matters relating to Section 24(2) of the 2013 Act were decided on that basis. No need was felt to refer the same to a larger Bench till a three judges Bench in *M/s G.D. Goenka Tourism Corporation Ltd.*[30] case took notice of the odd situation arising out of the conflicting opinions on interpretation of Section 24(2), and by an interim order requested stay on further proceedings of all such matters pending before other Benches till it decides on referring the matter to a larger Bench. Thereupon, the learned Judges, who delivered the majority view on the larger Bench, had a change of mind and decided to refer the matter for adjudication before

[26] (2003) 5 SSC 448.

[27] *Supra* n. 2.
[28] *Supra* n. 6.
[29] *Supra* n. 2.
[30] *Supra* n. 17.

a larger/Constitution Bench by passing separate orders on the same date.

19. Therefore, the issue to reflect upon before the Constitution Bench was, should a learned Judge adorn the Constitution Bench on the strength of being a referral Judge when he himself (by way of majority opinion in the larger Bench) declined to refer the judgment to be re-considered by a Constitution Bench; and altered his opinion on being faced with an interim order by a three judges Bench that desired restrain from adjudication of all cases arising on the issue and being decided on the basis of two Judges majority view (authored by him) declaring the three Judges judgment, which is to be re-considered, *per incuriam*. Whether rendering a detailed judgment by a referral judge on an earlier larger Bench finally deciding an issue, which is to be considered again by a Constitution Bench, is same as rendering a differing opinion by a judge sometime in the past and sought to be re-considered for the first time. To put it differently, whether the opinion rendered by a referral judge on a larger Bench, which was specially constituted to answer a legal issue, is on similar footing as an earlier opinion by a judge on the issue in the ordinary course. That is, whether a referral opinion is to be treated differently than an original/first opinion? The issue required to be addressed by the Constitution Bench in right earnest, as the learned Judge whose recusal was sought had already authoritatively answered the issue under consideration of the Constitution Bench while delivering judgment of the larger Bench in *Indore Development Authority*[31] case, which was constituted on his reference. These issues nowhere find mention, though they incessantly keep knocking your mind while going through the judgment. In this backdrop, the views expressed in the judgment declining recusal by stating, "In the present case also, the reference has been made by me and my recusal has been sought. Thus, based on the consistent practice, we find that no ground for recusal is made out." appear too simplistic.

20. **Thirdly**, while dealing with the objection of legal predisposition, raised to seek recusal of the learned Judge on the strength of his having already taken final view on the issue by delivering judgment of the larger Bench in *Indore Development Authority*[32] case, the Constitution Bench observed as under:

> 28. Recusal has been prayed for on the ground of legal predisposition. Where recusal is sought on the ground, various questions arise for consideration. Firstly, legal predisposition is the outcome of a judicial process of interpretation, and the entire judicial system exists for refining the same. There is absolutely nothing wrong in holding a particular view in a previous judgment for or against a view canvassed by a litigant. No litigant can choose, who should be on the Bench. …… This would open the flood gates of forum shopping. Recusal upon an imagined apprehension of legal pre-disposition would, in reality amount to

[31] *Supra* n. 6.
[32] *Supra* n. 6.

acceding to the request that a Judge having a particular view and leanings in favour of the view which suits a particular litigant, should man the Bench. It would not only be allowing Bench hunting but would also be against the judicial discipline and will erode the confidence of the common man for which the judicial system survives.

21. Rightly observed, "Legal predisposition is the outcome of a judicial process of interpretation". Further, the observation goes, "There is absolutely nothing wrong in holding a particular view in a previous judgment for or against a view canvassed by a litigant. No litigant can choose, who should be on the Bench." Pertinently, predisposition is a legal concept. It refers to a situation where an impression gains ground that the previous view taken by the judge on an issue, might make him feel inclined towards taking the same view again. The circumstances leading to such an impression gaining ground must be apparent on the record. Did the facts before the Constitution Bench make it so apparent? Could taking a final detailed view on the interpretation of Section 24(2) of the 2013 Act by the concerned learned Judge while delivering majority judgment for the larger Bench, by declining to refer the issue to a still larger Bench in apparent violation of judicial propriety, afford the plea of legal predisposition to the parties? The issue was not addressed from this perspective; instead, the Constitution Bench opined, it would allow a litigant to choose who should be on the Bench to decide his/her case. And that would endanger independence of judiciary, and also open flood gates of such requests, forum shopping, etc. The reasoning appears too farfetched, and somewhere loses track. The argument of legal predisposition gets mired in client's perverse demand and its ill effects on the judicial system as such. The two issues, of legal predisposition and client's attempt to choose a judge, are altogether different, having different connotations. The former is purely a legal issue, and the latter mundane and illegitimate. The two cannot be mixed up, not the least in the facts of the matter before the Constitution Bench. The plea was in fact required to be addressed head on, by referring not only to the previous view taken by the learned Judge in the larger Bench, but also to all the circumstances surrounding the entire debate (like judicial propriety, declining to refer the issue to a larger Bench, the view taken by the other Bench, and so on, as discussed in the previous paragraphs). Alas, it has not been done. One gets an impression the finesse in addressing the argument is missing.

22. Further, the plea of legal predisposition has been discarded as an "imagined apprehension". Imagined it can well be, but the fact has to be established and discussed. Prior to dismissing the plea as "imagined apprehension" no discussion follows. One is at a loss to understand how the plea of legal predisposition based on the previous view taken by the learned Judge in the larger Bench, which was constituted on the same issue, and the circumstances surrounding the entire debate (like judicial propriety, declining to refer the issue to a larger Bench, the view taken by the other Bench, and so

on, as discussed in the previous paragraphs), could be termed imaginary. By merely referring to the previous view by the learned Judge as 'the one taken on a smaller Bench, the correctness of which has to be tested by a larger Bench', the facts have not been placed in correct perspective. Consequently, the discussion too, based on scanty facts, is equally undistinguished.

23. **Fourthly**, the Constitution Bench judgment interestingly refers to roster making power of Hon'ble the Chief Justice, and that a request for recusal would amount to taking over this power by litigants. The observations are:

> 31. If requests for recusal are acceded to for the asking, litigants will be unscrupulously taking over the roster making powers of the Chief Justice and that would tantamount to interference with the judicial system, by the mighty to have a particular Bench by employing several means and putting all kinds of pressures from all angles all around. It is the test of the ability of the judicial system to withstand such onslaught made from every nook and corner. Any recusal in the circumstances is ruled out, such prayer strengthens the stern determination not to succumb to any such pressure and not to recuse on the ground on which recusal sought because for any reason, such a prayer is permitted, even once, it would tantamount to cowardice and give room to big and mighty to destroy the very judicial system. Moreover, recusal in such unjustified circumstances, would become the norm.

24. Can accepting a request for recusal by a Judge amount to taking over roster making power of the Chief Justice by litigants? Yes, the judgment says, and proceeds to view it as interference with the judicial system by the mighty to have a particular Bench. It states, the system has to withstand such onslaughts; recusal in such circumstances is ruled out, as it would be cowardice. Such flight of imagination is not easy to fathom! Recusal by a single member of the Constitution Bench, by answering his call to duty, has been taken as usurping the roster making power of Hon'ble the Chief Justice, and jolting the judicial system itself! Can this fanciful, threatening and self-destructive imagery provide justification to decline the request for recusal? The issue should instead have been discussed on facts, the circumstance surrounding the learned Judge taking his previous view in the larger Bench and relevant legal principles, in case recusal was to be declined. Declining the request by alluding to heightened and fanciful circumstances, and treating it as a spinelessness act, hardly provides any justification. After all, it was not for the first time recusal of a Judge had been sought.

25. **Fifthly**, as another ground to decline the request for recusal, the Constitution Bench judgment records,

> 33. It also passes comprehension whether in a Constitution Bench, consisting of five Judges, prayer for recusal of a Judge who has taken a particular view earlier, is justified? The Bench consists of five

> Judges. Each Judge may have his own view. They would not succumb to a view held by one of the judges. They may also have their own view in the matter. Are they also to be disqualified? In case the petitioner's prayer is to be allowed, then they may want a Bench of 5:0 in their favour or 4 in favour and 1 against or 3 in favour and 2 against. That is not how the system can survive. The very idea of seeking recusal is inconceivable and wholly unjustified, and the prayer cannot be acceded to.

The reasoning sounds better and in line with the sanctity attached to high Constitutional office a Judge occupies, if looked at in reverse; that each Judge's view on the Constitution Bench is sacrosanct. Is it not that none of them should give an impression of any inclination in favour or against the issue to be adjudicated upon? Must not each one have his/her independent view? Hence, is it not justified to seek recusal of one Judge alone on the Constitution Bench? Besides, there appears to be no factual or other basis for the observation, "In case the petitioner's prayer is to be allowed, then they may want a Bench of 5:0 in their favour or 4 in favour and 1 against or 3 in favour and 2 against." The judgment does not record such a prayer having raised by the parties, nor does any instance of such a prayer having ever been made before a Bench comes to mind. Still, on that basis it has been held, the system cannot survive in this manner and the very idea of seeking recusal becomes inconceivable!

26. **To conclude**, the judgment in *Supreme Court Advocates-on-Record Association & Anr.* v. *Union of India*[33], has been referred to, which holds, decision to recuse is that of the Judge concerned, and unjustified pressure should never be allowed. According, the learned Judge writing the Constitution Bench Judgment records;

> 42…..There is no question of recusal on pre-disposition as to the legal issue or as to the relief to be granted, such an apprehension also is baseless. The ultimate test is that it is for the Judge to decide and to find out whether he will be able to deliver impartial justice to a cause with integrity with whatever intellectual capacity at his command and he is not prejudiced by any fact or law and is able to take an independent view. The answer would lie in examining whether without having any bias or without any pressure or not even irked by such a prayer for recusal, can he decide the case impartially. In case the answer is that he will be able to deliver justice to the cause, he cannot and must not recuse from any case as the duty assigned by the Constitution has to be performed as per the oath and there lies the larger public interest. He cannot shake the faith that the common man reposes in the judiciary as it is the last hope for them.

By rejecting all the arguments against recusal the learned Judge underlines, the ultimate test is decision only of the judge concerned, whether he would be able to deliver impartial justice with

[33] *(2016) 5 SCC 808.*

integrity. In case his answer is in the affirmative, he must not recuse from a case and discharge the duty assigned by the Constitution. The reasoning sounds eloquent, except that it misses out on one very vital aspect. Before deciding to recuse or not to, the Judge concerned must answer whether in public perception the majesty of law would be held high by his decision, since 'Not only must Justice be done, it must also be seen to be done'[34]. It would certainly have been better for the posterity had the aspect been taken in view by the learned Judge. This becomes more pertinent, given that the Constitution Bench judgment has been authored by the learned Judge whose recusal has been sought; and other learned Judges on the Bench merely agreed to "concur with his reasoning and conclusions that no legal principle or norm bars his participation in the present Bench which is to hear the reference…".

[34] *R*v. *Sussex Justices, ex-parte McCarthy*, (1023) All ER Rep 233