
State of Gujarat Vs H.E. The Governor of Gujarat and Others

Special Civil Application No. 12632 of 2011 With Special Civil Application No. 13499 of 2011 With Civil Application No. 9363 of 2011 With Civil Application No. 9364 of 2011 With Civil Application No. 9416 of 2011 With Writ Petition (PIL) No. 104 of 2011

Court: Gujarat High Court

Date of Decision: Jan. 18, 2012

Acts Referred:

Constitution of India, 1950 " Article 136, 142, 154, 154(1), 162#Gujarat Lokayukta Act, 1986 " Section 14, 15, 2, 2(7), 20#Protection of Human Rights Act, 1993 " Section 24(3), 6(3)

Hon'ble Judges: V.M. Sahai, J

Bench: Single Bench

Advocate: Kamal B Trivedi, A.G. assisted by Mr. PK Jani, Government Pleader with Ms Sangeeta Vishen, Assistant Government Pleader in Special Civil application No. 12632 of 2011, Mr. Mihir Thakore, With Mr. Dhaval D Vyas in Special Civil application No. 13499 of 2011, Mr. Amit A. Panchal in WP PIL No. 104 of 2011, for the Appellant; Shalin N Mehta for Respondent Nos. 2 and 3.Mr Girish Patel, Assisted By Mr. AJ Yagnik With Mr. Dr Mukul Sinha and Mr. DN Kiratsata for Intervener in Special Civil Application No. 12632 of 2011, Mr. Kamal B Trivedi, Advocate General assisted by Mr. PK Jani, Government Pleader with Ms Sangeeta Vishen, Assistant Government Pleader for respondent No. 1 and in WP (PIL) No. 104 of 2011, for the Respondent

Final Decision: Dismissed

Judgement

Honorable Mr. Justice V.M. Sahai

1. In these writ petitions the warrant of appointment of Justice (Retired) R.A. Mehta as Lokayukta, State of Gujarat issued on 25.8.2011 by the

Her Excellency the Governor of Gujarat, without or contrary to the aid and advice of the Council of Ministers headed by the Chief Minister,

ignoring the letters dated 18.8.2011 written by the Chief Minister, has been challenged.

2. The Division Bench which heard the matter gave a split verdict on 10.10.2011 and referred the matter on 11.10.2011 to the Hon"ble Acting

Chief Justice, who on 15.11.2011 nominated me to hear the matter. On 23.11.2011 a preliminary objection was raised that the Hon"ble Judges of

the Division Bench had not formulated the points on which they differed, therefore, the reference was incompetent. The preliminary objection was

upheld on 24.11.2011 and the reference was returned to the Acting Chief Justice. It appears that the matter was sent back to the Division Bench.

On 9.12.2011 the points of disagreement have been formulated by the Division Bench. The matter has again been nominated to me on 13.12.2011

by the Acting Chief Justice. In Writ Petition (PIL) No. 104 of 2011, the same Division Bench has passed an order on 13.12.2011 adopting the

orders dated 10th and 11th October, 2011 passed in Special Civil Application No. 12632 of 2011 and 13499 of 2011 and the points of

disagreement recorded by the Division Bench on 09.12.2011 had also been adopted and the matter was sent to the Acting Chief Justice for

necessary orders. The Acting Chief Justice has nominated this writ petition also on 15.12.2011 to be heard by me on the points of disagreement.

3. The points of disagreement framed by the Division Bench are as follows:

(1) Looking to the nature of consultation required for appointment of Lokayukta u/s 3 of the Gujarat Lokayukta Act, in the present case as a

matter of fact, whether the consultative process between the Hon"ble the Chief Justice and the Hon"ble the Chief Minister had come to a close and

there was a deadlock between the two dignitaries?

(2) Whether the Governor of the State was authorized to act in a manner she did while issuing notification appointing Justice R.A. Mehta as

Lokayukta of the State without the aid and advice of the Council of Ministers?

(3) What final order? In other words, should the petitions be allowed or should the petitions be dismissed. Further if the petitions are to be

allowed, should further direction for appointment of a new Lokayukta within time frame be given to the State Government?

4. Before considering the points involved, it is necessary to state that the Administrative Reforms Commission was constituted in the year 1966 by

the Central Government in view of public outcry and need for expeditious redressal of the grievances of the citizens to root out corruption in public

life within the democratic system of Government. The interim report of this Commission recommended setting up an institution of Lokayukta and

Lokpal. It had to be an institution in which average citizen will have faith and confidence that he will be able to secure quick and inexpensive

justice. In view of the interim report of the Commission, the institution of Lokayukta was established in various States. Gujarat Lokpal and

Lokayukta Bill, 1975 in its statement and object makes the recommendation of the Commission the main object for appointment of Lokayukta to

inquire into the complaints in respect of actions taken by all public functionaries.

5. The Gujarat Lokayukta Act, 1986 (for short the Act) was passed by the State Legislature. In exercise of the powers conferred by section 23 of

the Act, the Governor of Gujarat made the Gujarat Lokayukta Rules, 1989. The provisions of the Act reveal that it is a vital piece of legislation. Its

aim is to set up a strong institution of Lokayukta. On the one hand it creates confidence in the people that investigations in complaints and

allegations against public functionaries would be undertaken, and on the other hand it safeguards the dignity and prestige of the public functionary

from public gaze against false, vexatious and frivolous allegations or complaints. Lokayukta has wide powers and under the Act he is not only given

independence and insulation from external influences, but the protections enables the Lokayukta to work under a free and fair environment so that

he may perform his duties under the Act without fear or favor. The eligible person to be appointed Lokayukta should be without any blemish and

of an impeachable integrity and character. The institution of Lokayukta is a people's court. It ensures stability of democracy. It is the hope of

common man to ventilate his grievances against the corruption of public functionaries and seek his remedy.

FACTS

6. The appointment and functions in State of Gujarat are governed by the provisions of the Act. Three Lokayukta Justice D.H. Shukla

(26.7.1988-25.7.1993), Justice J.C. Bhatt (9.11.1993-8.11.1998) and Justice S.M. Soni (25.11.1998-24.11.2003) had functioned. The last

Lokayukta was Justice S.M. Soni (Retired) who relinquished the office of Lokayukta on 24.11.2003 on his last working day. The office of

Lokayukta has been lying vacant since November 2003. No records have been produced before me as to what steps were taken to fill the

vacancy till 6.8.2006.

7. The process of appointment of Lokayukta was initiated by the Chief Minister on 7.8.2006. He wrote to the Chief Justice as under :

Hon. Justice (Retired) Shri S.M. Soni relinquished the office of Hon. Lokayukta on 24th November 2003 afternoon. The question of finding a

successor of Shri Soni as Lokayukta, Gujarat State is engaging the attention of the Government.

xxxx

I propose to send the name of Hon. Justice (Retired) Shri Kshitij R. Vyas for consideration of His Excellency the Governor of Gujarat for

appointment as Lokayukta, Gujarat State.

I shall be grateful, if you could kindly inform me whether you have any objection to the name of Hon. Justice (Retired) Shri Kshitij R. Vyas for

appointment as Lokayukta, Gujarat State. Incidentally, I would like to draw your attention to the fact that as per the provisions of section 3 of the

Act the consultation in this regard is with the Chief Justice of the High Court and not with the High Court of Gujarat.

8. In response to the said communication, the then Acting Chief Justice Y.R. Meena replied by letter dated 7.8.2006 signed on 8.8.2006 stating as

under :

I have no objection in appointment of Hon"ble Justice Kshitij R. Vyas, Former Chief Justice, Bombay High Court as Lokayukta, Gujarat State.

9. The Government on 10.8.2006, after the receipt of consent from the Chief Justice, sent the file to His Excellency the Governor, State of Gujarat

(for short the Governor), for appointment of Justice (Retired) K.R. Vyas as Lokayukta.

10. A query was raised on 25.8.2006 by the Governor as to whether the Leader of Opposition had been consulted in this regard or not. A request

was also made to the office of Chief Minister for sending the minutes for perusal. The Government by its letter dated 29.8.2006 informed the

Governor that there was no tradition of drawing the minutes; and the entire file was sent which contained all the necessary details.

11. The Governor on 13.9.2006 sent a letter to the office of the Chief Minister seeking reply to various queries. The Governor also desired

information of the process of consultation followed by other States. The information"s were collected and submitted to the Governor on

27.2.2007.

12. The then Governor of Gujarat, however, had certain reservations about appointment of Justice K.R. Vyas, Former Chief Justice of the

Bombay High Court as Lokayukta in view of the fact that he was appointed as Chairman of Human Rights Commission, State of Maharashtra.

The Governor, therefore, on 6.2.2009 conveyed to the State as under :

A proposal for appointment of Lokayukta under Sub- section (1) of the Section 3 of the Lokayukta Act has been under my consideration wherein

it is proposed to appoint Hon"ble Justice (Retired) Shri Kshitij R. Vyas (Former Chief Justice of the Mumbai High Court) as Lokayukta.

In this connection an objection with regard to the modality adopted by the Government in soliciting consultation with the Opposition Leader has

been raised by the then Opposition Leader and on its consideration, I found it necessary to examine the matter in light of relevant provisions of law,

tradition and standing practice in different States. Some information in this behalf was provided to me by the Government vide letter dated 22nd

February, 2007, however as the question required examination of issues in greater detail, particularly, with regard to the concept, quality, modality

etc. of the consultation as contemplated by law, I deemed it expedient to take up the matter for legal consultations.

While expert legal opinion in this regard is awaited, it has come to my attention that Hon"ble Justice (Retired) Shri Kshitij R. Vyas has already

been appointed as the Chairman of the Human Rights Commission of the Maharashtra State and he has taken over the charge of the post since

long.

In view of this development, it appears that the present proposal for his appointment as Lokayukta, Gujarat cannot now be processed further

particularly in light of the provision made under Sub-section 3 of the section 24 of the Protection of Human Rights Act, 1993 which reads as under:

Section 24(3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or

under the Government of India.

In view of the above provision of law, it appears to me that Hon"ble Justice (Retired) Shri Kshitij R. Vyas is no longer available for appointment as

Lokayukta, Gujarat State since even after his ceasing to hold the office of the Chairman, Human Rights Commission of the Maharashtra State, he

is not eligible for further employment.

It is therefore appropriate that the present proposal is treated as closed and the State Government is informed to make a fresh proposal in due

compliance with the requirements laid down by law.

Papers accordingly be returned to the State Government for further necessary action.

13. In view of report dated 2.7.2009 of General Administration Department that Section 24(3) of the Protection of Human Rights Act, 1993,

would not come in the way of appointment to the post of Lokayukta, the Government of Gujarat was of the opinion that the appointment of Justice

(Retired) K.R. Vyas as the Chairman, Human Rights Commission would not make him ineligible for appointment as Lokayukta. The appointment

was insisted and a request was made to the Governor to reconsider the appointment of Justice (Retired) K.R. Vyas as Lokayukta.

14. In response to the State"s request for reconsideration of the previous decision, the then Governor addressed a letter on 10.9.2009 to the Chief

Minister that the request for appointment of Justice (Retired) K.R. Vyas cannot be accepted. The letter is extracted as under :

I have considered the Government"s proposal for the appointment of Hon"ble Justice (Retd.) Shri Kshitij R. Vyas, former Chief Justice, Mumbai

High Court as the Lokayukta, Gujarat State.

I have also gone through the provisions of the Gujarat Lokayukta Act, 1986 and the Protection of Human Rights Act, 1993. I have also got the

matter examined through several legal experts in the field.

Based on the feedback that I have received, I am of the view that while it is true that Sub-section (ii) of Section 3 of the Gujarat Lokayukta Act,

1986 prescribes that ""a person shall not be qualified for appointment as Lokayukta unless he is or has been a Judge of a High Court"", in view of

sub-section (iii) of section 6 of the Protection of Human Rights Act, 1993 since Shri Kshitij R. Vyas, Hon"ble former Chief Justice of the Mumbai

High Court has held office of the Chairman of the Human Rights Commission of the Maharashtra State constituted under the provisions of the

Protection of Human Rights Act, 1993, the Government"s proposal for the appointment of Shri Vyas as the Lokayukta, Gujarat State cannot be

agreed to.

15. On the same day, on 10.9.2009, another letter was written by the Governor to the Chief Minister with a request to send a fresh proposal for

appointment of Lokayukta after consultation with the Chief Justice of the State and the Leader of Opposition in the State Legislative Assembly.

The letter reads as under :

I have come to know that the post of Lokayukta has been lying vacant in Gujarat since 25.11.2003. Government's proposal for appointment of

Shri Kshitij R. Vyas Hon"ble former Chief Justice of Mumbai High Court and at present Chairman of the Human Rights Commission of the

Maharashtra State cannot be agreed to in view of the clear cut provisions of the Protection of Human Rights Act, 1993. In this context, I would

like you to send a fresh proposal of the Government for appointment of the Lokayukta after due consultation with the Hon"ble Chief Justice of the

Gujarat High Court and the Leader of Opposition in the State Legislative Assembly as per the provisions of Section 3(1) of the Gujarat Lokayukta

Act, 1986.

An early action in this regard would highly be appreciated as the post has been lying vacant since long.

16. On 29.12.2009, a letter was sent by the Private Secretary to Her Excellency the Governor, to the Registrar General of the High Court, which

reads as below :

The post of the Lokayukta has been lying vacant for the last some years. It is necessary that the post is filled up at the earliest.

As per the provisions of Section 3(1) of the Gujarat Lokayukta Act, 1986, the Lokayukta shall be appointed by the Governor after consultation

with the Hon"ble Chief Justice of the Gujarat High Court and after consultation also with the Leader of the Opposition in the Legislative Assembly.

In this context, I am directed by Her Excellency to request you to place the above for kind perusal of the Hon"ble Chief Justice for sending a panel

for consideration and thereafter a consultation will be held with him by Her Excellency the Governor.

This was replied to by the then Registrar General on 2.1.2010 ensuring to place the said communication before the Hon"ble Chief Justice after

Winter Vacation.

17. The Chief Minister, conveyed to the Chief Justice under his communication dated 8.2.2010 as under :

The matter regarding appointment of Lokayukta was under consideration for quite some time. Government, after completing the process of

consultation with the Leader of Opposition in the State Assembly and the Hon"ble Chief Justice of the Gujarat State, had recommended the name

of Hon"ble Justice (Retired) Shri Kshitij R. Vyas for appointment as Lokayukta, Gujarat State. However, H.E. The Governor, who is the

appointing authority in the case of Lokayukta, has finally disapproved the proposal for appointment of Shri Kshitij R. Vyas as Lokayukta, Gujarat

State, in view of sub-section (iii) of section 6 of the Protection of Human Rights Act, 1993, since Shri Kshitij R. Vyas has held the office of the

Chairman of the Human Rights Commission of Maharashtra.

The question of filling up the vacant office of the Lokayukta, Gujarat State is now required to be considered afresh as per section 3 of the Gujarat

Lokayukta Act, 1986. I shall be grateful if you could kindly suggest a panel of three Judges (retired) of the High Court of Gujarat for consideration

for appointment as Lokayukta, Gujarat State. On receipt of these names, the formal procedure for appointment of Lokayukta, Gujarat State as

stipulated in section 3(1) of the Gujarat Lokayukta Act, 1986, will be undertaken afresh.

18. On 24.2.2010, the Chief Justice Gujarat High Court recommended a panel of four names for appointment to the post of Lokayukta. He

mentioned that such names are not shown on the basis of preference and any one of them may be appointed. He stated :

May I draw your attention to the correspondence regarding appointment to the post of Lokayukta, which has been lying vacant since last few

years. According to me, the following persons are fit to be appointed to the post of Lokayukta in the State of Gujarat:

1. Mr. Justice Pravinsingh Motisinh Chauhan
2. Mr. Justice Babulal Chandulal Patel
3. Mr. Justice Ramesh Prabhudas Dholakia
4. Mr. Justice Jayprakash Ramakant Vora.

I may mention that the aforesaid names are not shown on the basis of preference and any one of them can be appointed.

19. On 2.3.2010, the Chief Minister wrote to the Leader of Opposition to participate in the process of consultation for appointment of Lokayukta

for which a meeting would be held on 4.3.2010. The Leader of Opposition on 3.3.2010 wrote back to the Chief Minister objecting to the Chief

Minister initiating the process of consultation. The relevant contents of letter 3.3.2010 are reproduced below :

Having regard to the said provisions of the Act, the principal object of the Act which has been enacted being to inquire into allegations against

public functionaries, including the Chief Minister, the State Legislature in its legislative wisdom has expressly conferred power of appointment of a

Lokayukta only upon the Governor. The only statutory requirement envisaged in making of appointment of a Lokayukta by the Governor is

consultation with the Chief Justice of the High Court and leader of opposition in the Legislative Assembly. Thus, under the provisions of the said

Act, there is no scope for consultation with the Chief Minister of the State either by the Governor or by the leader of opposition. In fact and in law,

the Chief Minister of the State of Gujarat has neither the authority nor the jurisdiction to embark upon any consultation with the undersigned-leader

of opposition in the appointment of a Lokayukta. The object of the Act being to inquire into the allegations even against the Chief Minister by the

Lokayukta it stands to reason and logic that there is neither any requirement of any consultation in the matter of appointment of a Lokayukta with

the Chief Minister of the State of Gujarat nor is the power of appointment of a Lokayukta conferred upon the Government. If the Act envisaged

the appointment of a Lokayukta by the Government, it would have expressly stated so.

20. On the 3.3.2010, the Governor also wrote to the Chief Minister stating that she had initiated the process of consultation and pursuant thereto,

consultation with the Leader of Opposition had already been held and she expressed that ""due to absence of legality"", proposed meeting at his end

be cancelled forthwith and necessary action of consultation was to be initiated by her only as per the Act.

21. The Chief Minister again on 3.3.2010 requested the Leader of Opposition to attend the meeting on 4.3.2010. However, the Chief Minister

again on 4.3.2010, requested the Leader of Opposition to participate in the meeting. The Leader of Opposition in his letter dated 4.3.2010

addressed to the Chief Minister, requested to terminate the process of consultation forthwith, on the ground that the Governor had already initiated

the process of consultation and also on the ground that the Council of Ministers had no say in the appointment of Lokayukta. The meeting on

4.3.2010 was adjourned for 5.3.2010. The Leader of Opposition was informed of the meeting fixed for 5.3.2010. The Leader of Opposition

reiterated his earlier view and declined to participate in the meeting. The Chief Minister held the meeting on 5.3.2010 in the absence of the Leader

of Opposition. The consultation with the Leader of Opposition in this regard was over.

22. On 4.3.2010 the Chief Minister by a separate letter had sought appointment with the Governor on legal and constitutional issues raised by her

in her letter. The Private Secretary to the Governor conveyed to the office of Chief Minister the timings of meeting fixed on 8.3.2010. The meeting

of the Governor with the Chief Minister and the Law Minister was held. After this meeting, a letter was addressed by the Chief Minister to the

Leader of Opposition for the purpose of consultation. This letter dealt with various provisions of law as also the judgments of various Courts to

support the proposed meeting to be held on 22.3.2010. The Leader of Opposition reiterated his stand by his letter dated 22.3.2011 stating that

the Council of Ministers had no role to play in the appointment of Lokayukta.

23. The meeting scheduled on 22.3.2010, took place in absence of the Leader of Opposition as he was of the opinion that such initiation was

contrary to the express provisions of the Act. He declined to participate in any such consultative process. Minutes of the meeting held on

22.3.2010 were drawn. It was recorded that the Chief Minister found the name of Justice (Retired) J.R. Vora, as most suitable for appointment as

Lokayukta for the State of Gujarat. It was also noted that :

Hon. CM expressed the view that in the process of consultation, the views of Hon"ble Chief Justice of the Gujarat High Court must be given

supremacy and with a solemn object to respect the names suggested by Hon"ble the Chief Justice, the Government should not restart the process

of consultation and should confine the question of selection to the four names suggested by Hon"ble the Chief Justice of the Gujarat High Court.

24. The Chief Minister directed that the name of Justice (Retired) J.R. Vora be placed before the Council of Ministers to obtain approval. On

31.3.2010 in the meeting of the Council of Ministers all the four names suggested by the Chief Justice were discussed and out of the four names,

Justice (Retired) J.R. Vora's name was approved as he was found most suitable for the appointment as Lokayukta for Gujarat State. On

1.4.2010, this file was sent to the Governor recommending the appointment of Justice (Retired) J.R. Vora as the Lokayukta of Gujarat State. The

relevant part of the note reads as under :

As directed by the Hon. CM in the meeting dated 22.3.2010, the name of Hon"ble Mr. Justice (Retired) J.R. Vora was placed before the Council

of Ministers for obtaining its approval in the matter of Hon"ble Mr. Justice (Retired) J.R. Vora as Lokayukta, Gujarat State. The Council of

Ministers headed by Hon. CM in its meeting dated 31.3.2010 accorded approval to the name of Hon"ble Mr. Justice (Retired) J.R. Vora for

appointment as Lokayukta, Gujarat State. A copy of the recommendation made by the Council of Ministers headed by Hon. CM in this regard is

kept at P.291/Cs for perusal.

In view of the abovementioned position, the papers may now be submitted to H.E. the Governor for consideration and approval to the proposal

for appointment of Hon"ble Mr. Justice (Retired) J.R. Vora as Lokayukta, Gujarat State.

25. On 23.4.2010 the Governor wrote to the Chief Justice soliciting his expert opinion as to who was a better choice amongst the two names

Justice (Retired) R.P. Dholakia and Justice (Retired) J.R. Vora (out of four) sent by him, for the post of Lokayukta. The letter reads as under :

With reference to your recommendation regarding the appointment on the post of Lokayukta, the State Government in the General Administration

Department has forwarded a proposal to me for my consideration recommending the name of Hon"ble Justice (Retd.) Shri J.R. Vora as the

Lokayukta, Gujarat State. Government has also given its observations regarding each of the four names recommended by you in the panel. I have

carefully considered all these.

I do agree with the Government's observation in the case of Hon"ble Justice Shri B.C. Patel who is at present a Member of the National Human

Rights Commission and therefore as per the provisions of Section 6(3) of the Protection of Human Rights Act, 1993, it would not be permissible

to appoint him as the Lokayukta, Gujarat State. Regarding Hon"ble Justice (Retd.) Shri P.M. Chauhan, Govt. has opined that he is at present 82

years old and this is too old an age for anybody to be appointed on the post of the Lokayukta. Because of his old age, Justice Shri P.M. Chauhan

might not be ideally suited for this assignment considering the functions to be discharged by the Lokayukta under the provisions of the Lokayukta

Act, 1986. I am also in agreement with the Govt."s views in this regard.

Under the circumstances, there are only two names available for consideration, namely Justice (Retd.) Shri R.P. Dholakia and Justice (Retd.) Shri

J.R. Vora. Since our choice has remained restricted to only two persons, I would like to solicit your expert opinion as to who would be the better

choice for the appointment on this honorable post looking to the high responsibilities that the post carries with it.

I would very much appreciate if your considered feedback in this regard is made available to me at the earliest so that the long pending matter

could be sorted out expeditiously.

26. The Chief Justice replied on 27.4.2010 that Justice (Retired) R.P. Dholakia would be a better choice for appointment to the post of

Lokayukta. The letter reads as under :

From Your Excellency's confidential D.O. letter No. GS.XXIV/8/Con-57/2010 dated 23rd April 2010, regarding appointment to the post of

Lokayukta, it appears that the State Government have some reservation with regard to name of Justice (Retd.) Shri P.M. Chauhan for

appointment to the post of Lokayukta, because of his old age. In view of the provisions Section 6(3) of the Protection of Human Rights Act, 1993,

Justice (Retd.) Shri B.C. Patel is also not eligible for appointment as Lokayukta.

Your Excellency has asked for my expert opinion on the question as to, who, amongst the rest of two Retired Judges, would be preferred (better

choice) for appointment to the post of Lokayukta. According to my view, Justice (Retd.) Shri R.P. Dholakia would be the better choice for

appointment to the post of Lokayukta, which carries more responsibilities.

I hope the matter will be sorted out expeditiously.

27. On 3.5.2010, the Governor wrote to the Chief Justice pursuant to reference she had made to the Attorney General of India seeking his expert

legal opinion, urging the Chief Justice to recommend only one suitable name in the wake of the decision of Apex Court in the case of N.

Kannadasan v. Ajoy Khose and others reported in (2009) 7 SCC 1 for the post. On 3.5.2010, the Governor wrote to the Chief Justice indicating

that :

After consideration of your panel, the State Government in the General Administration Department has forwarded its proposal to me

recommending the name of Hon"ble Justice (Retd.) Shri J.R. Vora to be appointed as the Lokayukta, Gujarat State. It was under my

consideration.

Meanwhile, I wanted to be sure about the correctness of the nature of process of consultation to be adopted in such cases and accordingly I had

made a reference to the Attorney General for India seeking his expert legal opinion on the subject. The same has been received by me recently (a

copy is enclosed for ready reference).

According to the expert opinion, it has become clear that the Chief Justice is the most suitable person to know about the suitability of the person to

be appointed as the Lokayukta. This is so in order to maintain the independence of the judiciary and to avoid any possibility of a sitting or retired

Judge depending on the Executives for such an important appointment. Once the name is given by the Hon"ble Chief Justice, it is binding to the

Government and the Council of Ministers has to forward the same to the Governor for appointment. It has also been held that sending a panel of

four names by the Chief Justice in this case is not in accordance with the law declared by the Apex Court as laid down in the judgment in

Kannadasan v. Ajoy Khose (2009) 7 SCC 1.

Accordingly, I would like to refer the whole matter back to you and would like to request you to re-examine it once again in the light of the expert

opinion of the Attorney General for India and recommend only one suitable name for appointment of the Lokayukta for consideration of the State

Government under intimation to me.

I would be happy if the matter receives your kind attention at the earliest."

The Governor consequently, requested the Chief Justice to recommend only one suitable name for appointment of the Lokayukta.

28. It appears that the Governor of Gujarat, however, had some reservation about the manner in which the name of Shri J.R. Vora was approved.

She, therefore, sent a note dated 5.5.2010 to the Chief Minister indicating that as per the decision of the Apex Court in the case of N. Kannaasan

v. Ajoy Khose (2009) 7 SCC 1, recommendation of panel of four persons by the Chief Justice would not be in accordance with law. She stated

that she had taken the opinion of the learned Attorney General of India and considered the opinion dated 23.4.2010. In view of the opinion the

Governor referred the matter back to the Chief Justice to re-examine the matter and recommend only one name for appointment as Lokayukta.

The note dated 5.5.2010 reads as under :

Based on the panel recommended by the Hon"ble Chief Justice, Gujarat High Court Justice Shri Mukhopadhyaji, the State Government in the

General Administration Department had forwarded a proposal to me recommending the name of Hon"ble Mr. Justice (Retd.) J.R. Vora to be

appointed as the Lokayukta, Gujarat State. The same was under my consideration.

Meanwhile, I wanted to be sure about the correctness of the nature of process of consultation to be adopted in such cases. Accordingly I had

made a reference to the Attorney General for India seeking his expert legal opinion on the subject. I have received the same recently.

According to this opinion, it has become clear that the Chief Justice of the High Court is the most suitable person to know about the suitability of

the person to be appointed as the Lokayukta. This is so in order to maintain the independence of the judiciary and to avoid any possibility of a

sitting or retired Judge depending on the Executives for such an important appointment. It has also been clarified in the opinion that sending a panel

of four names by the Chief Justice in this case is not in accordance with the law declared by the Apex Court as laid down in the judgment in N.

Kannadasan v. Ajoy Khose (2009) 7 SCC 1.

Accordingly, I have referred the whole matter back to the Hon"ble Chief Justice, Gujarat High Court requesting him to re-examine the matter once

again in the light of the expert opinion of the Attorney General for India and recommend only one name for appointment of the Lokayukta for

consideration of the State Government.

In view of the above, I am returning the present file. It should be submitted to me formally for consideration once the State Government receives a

formal proposal from the Hon"ble Chief Justice, Gujarat High Court.

29. That it would be appropriate to point out over here that on 10.5.2010 Justice (Retired) J.R. Vora was appointed as Director, Legal

Workshop and Training, Gujarat State Judicial Academy, by the High Court of Gujarat for a period of three years, and he took charge on

11.6.2010.

30. The letter of the Governor was replied by the Chief Justice on 29.12.2010, noting the fact that question was raised with regard to the name

recommended earlier for appointment to the post of Lokayukta, it was further mentioned that Justice (Retired) J.R. Vora, whose name had been

proposed and chosen for the said post, had been appointed as Director of Gujarat State Judicial Academy, in the interregnum, therefore, his name

need not be considered for appointment to the post of Lokayukta. In this background, the Chief Justice recommended the name of Justice

(Retired) S.D. Dave for appointment stating that he would be suitable for appointment to the post of Lokayukta, which carries more responsibilities. The letter dated 29.12.2010 is extracted below :

Please refer to Your Excellency"s Confidential D.O. letters No. GS.XXIV/8/Con.57/2010 dated 23.4.2010 and GS.XXIV/8/Con.61/2010 dated

3.5.2010 and my replies dated 24.2.2010 and 27.4.2010 regarding appointment to the post of Lokayukta.

It has already been noticed that the State Government have some reservation with regard to some of the names recommended earlier for

appointment to the post of Lokayukta, for the reasons mentioned therein. Hon"ble Justice (Retd.) Shri J.R. Vora, whose name has been proposed

for this post, has already been appointed by me as Director, Gujarat State Judicial Academy, in the interest of judiciary. Therefore, Justice (Retd.)

Shri Vora need not be considered for appointment to the post of Lokayukta, for the present. In this background, on examination of the matter in its

entirety, I recommend the name of Justice (Retd.) Shri Shurud Deoprasad Dave, for appointment to the post of Lokayukta. According to me,

Justice (Retd.) Shri Shurud Deoprasad Dave would be suitable for appointment to the post of Lokayukta, which carries more responsibilities.

I hope the matter will be sorted out expeditiously.

31. In response to the request of the Governor to recommend only one name instead of a panel of names, the Chief Justice also conveyed one

name to the Chief Minister on 31.12.2010 as under :

It has already been noticed that the State Government have some reservation with regard to some of the names recommended by me earlier for

appointment to the post of Lokayukta. Hon"ble Justice (Retd.) Shri J.R. Vora, whose name has been proposed for this post, has already been

appointed by me as Director, Gujarat State Judicial Academy, in the interest of judiciary. Therefore, he need not be considered for appointment to

the post of Lokayukta, for the present. I now recommend the name of Hon"ble Justice (Retd.) Shri Suhrud Deoprasad Dave, for the appointment

to the post of Lokayukta. According to me, Hon"ble Justice (Retd.) Shri Suhrud Deoprasad Dave would be suitable for appointment to the post

of Lokayukta, which carries more responsibilities.

I hope the matter will be sorted out shortly.

32. The Governor on 6.1.2011 requested the Chief Minister to process the matter expeditiously at the Government level and proposal of the Chief

Justice recommending the name of Justice (Retired) S.D. Dave be submitted to her formally for consideration at the earliest, since keeping such an

important post vacant any longer would not be in the interest of good governance.

33. On 21.2.2011, the Chief Minister, addressed a letter to the Chief Justice, reiterating the State's request for consulting Justice (Retired) J.R.

Vora on his willingness for being considered for appointment as Lokayukta. It was stated thus :

Please refer to your confidential d.o. letter dated 31st December, 2010 on the appointment of Lokayukta, Gujarat State.

The matter regarding appointment of Lokayukta, Gujarat State has been under consideration for quite some time. Government, after completing

the full process of consultation as envisaged in Section 3 of the Gujarat Lokayukta Act, 1986, had recommended the name of Hon"ble Mr. Justice

(Retired) J.R. Vora for appointment as Lokayukta, Gujarat State. As you know, the name of Hon"ble Mr. Justice (Retired) J.R. Vora is one of the

four names recommended by you vide your confidential d.o. letter dated 24th February, 2010. It would be rather unfortunate, if Hon"ble Justice

(Retired) J.R. Vora becomes unavailable for appointment as Lokayukta, Gujarat State because of his appointment as Director, Gujarat State

Judicial Academy. Keeping in view the importance of the office of Lokayukta, Gujarat State as also having regard to the fact that the entire

procedure for his appointment as Lokayukta, Gujarat State has been gone through, it will be in the public interest, if Hon"ble Mr. Justice (Retired)

J.R. Vora joins as Lokayukta, Gujarat State. If this happens, then the entire process of consultation, etc. for a new name may not have to be gone

through afresh, as per Section 3 of the Gujarat Lokayukta Act, 1986 which will ensure speedy filling up of the vacancy of Lokayukta, Gujarat

State.

In view of the above, I would earnestly request you to consult Hon"ble Mr. Justice (Retired) J.R. Vora on his willingness or otherwise for being

considered for appointment as Lokayukta, Gujarat State. In the event of Mr. J.R. Vora being willing to assume the responsibility as Lokayukta,

Gujarat State, you may kindly recommend his name once again so that the delay in filling up the vacancy of Lokayukta, Gujarat State could be

avoided.

The Chief Minister was of the opinion that since the entire procedure for appointment of Justice (Retired) J.R. Vora had already been gone

through; it will be in public interest that he joins the said post so that the entire process may not have to be gone through afresh.

34. On 8.3.2011 a reminder was sent. Further on 15.3.2011 a letter was addressed by the Governor to the Chief Minister to consider the name of

Justice (Retired) S.D. Dave which had been recommended by the Chief Justice at the earliest. A copy of this letter was also sent to the Chief

Justice. The letter dated 15.3.2011 is extracted below :

I have come to know from the newspapers reports that yesterday the issue of the appointment of the Lokayukta was discussed on the floor of the

Gujarat Legislative Assembly. Government is reported to have mentioned that once the proposal is received by the Government from the Gujarat

High Court, the Government would process it further and finalize the matter. In fact, this is far from the truth and therefore, I am compelled to draw

your kind attention to this.

In fact, Justice S.J. Mukhopadhyaya, Chief Justice of the Gujarat High Court vide his D.O. letter dated 29/12/2010 has already recommended the

name of Justice (Retired) Shri S.D. Dave for appointment to the post of the Lokayukta. I had also drawn your kind attention to the development

vide my D.O. letter dated 6.1.2011 and had requested you to get the matter processed expeditiously as the Government level in accordance with

the provision of Gujarat Lokayukta Act, 1986. I had urged the Government that the proposal in this regard might be submitted to me formally for

consideration at the earliest possible (Copy enclosed).

In view of the above, I would again like to request you to look into the matter and ensure that the Government proposal recommending the name

of Justice (Retd.) Shri S.D. Dave is sent to me at the earliest in the interest of good governance and transparency.

35. Since, Justice (Retired) J.R. Vora had been appointed as Director of the Gujarat State Judicial Academy, the Chief Justice on 22.3.2011,

wrote a letter to the Chief Minister stating that :

Taking into consideration the fact that by that time Hon"ble Mr. Justice (Retd.) J.R. Vora has already been appointed as Director, Gujarat State

Judicial Academy, in the interest of judiciary, by my letter dated 29th December, 2010, I requested Her Excellency not to consider the name of

Hon"ble Mr. Justice (Retd.) J.R Vora for appointment to the post of Lokayukta and to consider the name of Hon"ble Mr. Justice (Retd.) S.D.

Dave for appointment to the said post which carries more responsibility. Similar information was given to you by my letter dated 31st December

2010.

From the aforesaid letters it would be evident that name of Hon"ble Mr. Justice (Retd.) J.R. Vora was recalled by me for the reasons mentioned in

my letters dated 29th December 2010 and 31st December, 2010. Thereafter no consultation has been made with regard to name of Hon"ble Mr.

Justice (Retd.) S.D. Dave for appointment to the post of Lokayukta in light of Section 3(1) of the Gujarat Lokayukta Act, 1896. There is also

nothing on record to suggest that the Leader of Opposition has also been consulted in the matter.

This apart, under the law the Chief Justice of a High Court may give his option about any Sitting and Retired Honorable Judge of the High Court

for appointment to the post of Lokayukta, but it is not the duty of a Chief Justice of a State to call for any consent for any of the person, if selected

for appointment, which may be obtained by the appropriate authority.

In view of the aforesaid developments, I again request you to consider the name of Hon"ble Mr. Justice (Retd.) S.D. Dave for appointment to the

post of Lokayukta, Gujarat State and take up the matter with Her Excellency the Governor of Gujarat State and the Opposition leader.

36. On 1.5.2011 by a fax message to the Governor Justice (Retired) S.D. Dave requested her to recall his nomination on the ground of his

personal difficulties. The letter dated 1.5.2011 reads as under :

As I understand, my name has been recommended by Your Excellency in consultation with the Hon"ble the Chief Justice of the High Court of

Gujarat and the Leader of Opposition for the Office of the Lokayukta, Gujarat.

My circumstances oblige me to request Your Excellency to recall my Nomination. I am thankful to Your Excellency and the Members of the

Collegiums for the trust reposed in me.

37. On 4.5.2011, the Chief Minister wrote to the Chief Justice indicating that though the name of Justice (Retired) S.D. Dave was recommended

by the Chief Justice, on being consulted, he informed that he had already sent a fax to the Governor requesting to recall his nomination due to

personal circumstances. The Chief Minister, once again, repeated the request for recommending the name of Justice (Retired) J.R. Vora stating

that he had confirmed that Justice (Retired) J.R. Vora would resign from the post of Director of State Judicial Academy. He wrote that Justice

(Retired) J.R. Vora when consulted, had expressed his willingness to be considered for the said post and as consultation process concerning his

name had already been gone through, it would help expedite the process of appointment, therefore, name of Justice (Retired) J.R. Vora be

considered. The letter reads as under :

Please refer to your Confidential D.O. letter dated 22nd March, 2011 regarding appointment of the Lokayukta, Gujarat State.

The matter regarding appointment of Lokayukta, Gujarat State has been under consideration for quite sometime. Vide your letters dated 31st

December, 2010 and 22nd March, 2011 you have recommended the name of Hon"ble Mr. Justice (Retd.) S.D. Dave for appointment as

Lokayukta, Gujarat State. On being consulted telephonically, Hon"ble Mr. Justice (Retd.) S.D. Dave informed that he has already sent a fax

message to H.E. the Governor requesting her to recall his nomination due to his personal circumstances. As such, Hon"ble Mr. Justice (Retd.)

S.D. Dave cannot be considered for appointment to the post of Lokayukta, Gujarat State.

In furtherance of your Confidential D.O. letter dated 24th February, 2010 recommending 4 names, the entire procedure for one of the names i.e.

Hon"ble Mr. Justice (Retd.) J.R. Vora has been gone through and therefore, it is will be in the public interest if the name of Hon"ble Mr. Justice

(Retd.) J.R. Vora could be considered for the appointment as Lokayukta, Gujarat State. If this is done, then the whole procedure of consultation

etc., as envisaged in the Gujarat Lokayukta Act, 1986, may not have to be gone through again, and it will ensure speedy filling up of the vacancy

of Lokayukta, Gujarat State.

Keeping in view the contents of the penultimate paragraph of your Confidential D.O. letter dated 22nd March, 2011, Hon"ble Mr. Justice (Retd.)

J.R. Vora has been consulted and he has expressed his willingness to be considered for appointment as Lokayukta, Gujarat State.

Having regard to the position explained above, I would sincerely request you to kindly recommend the name of Hon"ble Mr. Justice (Retd.) J.R.

Vora for appointment as Lokayukta, Gujarat State. As confirmed by Shri Vora, he would resign from the post of Director, Gujarat State Judicial

Academy, in the event of his being approved for appointment to the post of Lokayukta, Gujarat State.

38. On 7.6.2011, the Chief Justice wrote to the Chief Minister stating that he had already mentioned in his earlier correspondence that as Justice

(Retired) J.R. Vora had already been appointed as Director of State Judicial Academy, in the interest of judiciary, his name may not be considered

for appointment to the post of Lokayukta. He further stated that in view of the development that Justice (Retired) S.D. Dave would not like to be

considered, he had considered Justice (Retired) R.A. Mehta suitable for appointment to the post. In the said letter, the Chief Justice stated as

under :

Kindly refer to your Confidential D.O. letter No. LKY-10- 2010-2239-G dated 4th May, 2011, regarding appointment of Lokayukta, Gujarat

State.

I have, by my D.O. letters dated 31st December 2010 and 22nd March 2011, recommended the name of Hon"ble Mr. Justice (Retd.) Suhrud

Deoprasad Dave for appointment to the post of Lokayukta. However, you have mentioned in your aforesaid letter dated 4th May 2011 that on

being consulted telephonically, you have been informed by Hon"ble Mr. Justice (Retd.) S.D. Dave that due to personal circumstances he has

requested Her Excellency to recall his nomination for appointment to the post of Lokayukta.

By the said letter dated 4th May 2011, you have reiterated your earlier request to consider the name of Hon"ble Mr. Justice (Retd.) J.R. Vora for

this post. As regards nomination of Hon"ble Mr. Justice (Retd.) J.R. Vora is concerned, I have already mentioned in my earlier correspondence

that as Hon"ble Mr. Justice Vora has already been appointed as the Director, Gujarat State Judicial Academy, in the interest of judiciary, his name

may not be considered for appointment to the post of Lokayukta.

In view of the present development that Hon"ble Mr. Justice (Retd.) S.D. Dave would not like to be considered for appointment as Lokayukta, I

now consider Hon"ble Mr. Justice (Retd.) Ramesh Amritlal Mehta suitable for appointment to this post. I accordingly, recommend the name of

Hon"ble Mr. Justice (Retd.) Ramesh Amritlal Mehta, for appointment to the post of Lokayukta, Gujarat State, which carries more responsibilities.

39. Simultaneously, on 7.6.2011, the Chief Justice also wrote to the Governor, stating that :

Please refer to Your Excellency's Confidential D.O. Letter No. G.S.26/2999/2011 dated 16th May 2011, regarding appointment of Lokayukta,

Gujarat State.

I have, by my D.O. letter dated 29th December 2010 recommended the name of Hon"ble Mr. Justice (Retd.) Suhrud Deoprasad Dave for

appointment to the post of Lokayukta. However, I have been informed that due to personal circumstances, Hon"ble Mr. Justice (Retd.) S.D.

Dave would not like to be considered for appointment to the post of Lokayukta.

As regards nomination of Hon"ble Mr. Justice (Retd.) J.R. Vora is concerned, I have already mentioned in my earlier correspondence that as

Hon"ble Mr. Justice Vora has already been appointed as the Director, Gujarat State Judicial Academy, in the interest of judiciary, his name may

not be considered for appointment to the post of Lokayukta.

In the case of Hon"ble Mr. Justice (Retd.) P.M. Chauhan, as mentioned in Your Excellency's letter dated 23rd April 2010, the Govt. of Gujarat

has opined that because of his old-age he might not be ideally suited for this assignment considering the functions to be discharged by the

Lokayukta under the provisions of the Lokayukta Act and Your Excellency was also in agreement with the said view of the Government.

In view of the present development that Hon"ble Mr. Justice (Retd.) S.D. Dave would not like to be considered for appointment as Lokayukta, I

now consider Hon"ble Mr. Justice (Retd.) Ramesh Amritlal Mehta suitable for appointment to this post. I accordingly, recommend the name of

Hon"ble Mr. Justice (Retd.) Ramesh Amritlal Mehta, for appointment to the post of Lokayukta, Gujarat State, which carries more responsibilities.

40. On 7.6.2011, the Governor also wrote to the Chief Minister stating that she had received a proposal from the Chief Justice recommending the

name of Justice (Retired) R.A. Mehta for appointment to the post of Lokayukta. She, therefore, requested the Chief Minister as under :

I have received today a proposal from the Hon"ble Chief Justice of Gujarat High Court Justice Shri Mukhopadhaya dated 7th June, 2011

recommending the name of Hon"ble Justice (Retd) Shri Ramesh Amritlal Mehta for appointment to the post of Lokayukta (copy enclosed).

May I request you to kindly get the matter processed expeditiously at the Government level in accordance with the provisions of the Gujarat

Lokayukta Act, 1986. The same may be submitted to me formally for consideration at the earliest possible.

41. On 16.6.2011, the Chief Minister wrote to the Chief Justice and raised certain objections about the recommendation of Justice (Retired) R.A.

Mehta. The letter reads as under :

Kindly refer to your confidential D.O. letter dated 7th June, 2011 on the subject of appointment of Lokayukta, Gujarat State. You have

recommended the name of Hon"ble Mr. Justice (Retired) Ramesh Amritlal Mehta for appointment as Lokayukta, Gujarat State.

I have perused the bio-data of Hon"ble Justice (Retired) R.A. Mehta. He was born on 4th May, 1936 and retired from Judgeship of the Gujarat

High Court on 4th May 1998. Thus, as on date he has crossed the age of 75 years. Looking to the arduous nature of duties and responsibilities

attached with the post of Lokayukta, Gujarat State, he may perhaps not be a suitable candidate for this job at such an advanced age.

The other important aspect is that Hon"ble Mr. Justice (Retired) R.A. Mehta is associated with a few NGOs, Social Activist Groups and he has

also given services as a panelist for them. It is obvious that because of his association with the NGOs, Social Activist Groups, etc. he may be in a

fixed frame of mind on certain issues relating to the governance in the State. He has also shared platform with such people as are known for their

antagonism for the State Government. I am enclosing copies of a few Newspaper clippings downloaded from the websites which clearly indicate

that Hon"ble Mr. Justice (retired) R.A. Mehta, while being a panelist for such NGOs, Social Activist Groups, etc. has expressed views against the

functioning of the present Government in the State. You will appreciate that if such a person having a specific biased perception for the

Government in the State is appointed as Lokayukta, he would not be able to perform his duties with the amount of objectivity, judiciousness and

impartiality expected of the Lokayukta. It may therefore be necessary to have a relook at the name proposed by you.

After such a protracted correspondence on the subject, I fail to understand as to why the name of Hon"ble Justice (Retired) J.R. Vora, in whose

case the whole process of consultation, etc. as envisaged in the Gujarat Lokayukta Act, 1986 has been gone through is not recommended,

especially when his name was included in the initial panel sent by you and when he has also expressed his willingness to be considered for

appointment as Lokayukta, by resigning from the post of Director, Gujarat State Judicial Academy in the event of his selection for the post of

Lokayukta. I would therefore earnestly request you to consider this matter again and recommend the name of Hon'ble Mr. Justice (Retired) J.R.

Vora for appointment as Lokayukta, Gujarat State so that this long pending issue could be resolved finally.

There is a front page article in today's DNA (15th June, 2011, Wednesday), a copy of which is enclosed for your perusal. It can be clearly seen

from this article how the whole issue is being politicized.

The Chief Minister once again repeated the request for clearing the name of Justice (Retired) J.R. Vora in whose case, the consultation has been

gone through. He, therefore, requested the Chief Justice to reconsider the matter and recommend the name of Justice (Retired) J.R. Vora for

appointment as Lokayukta.

42. On 2.8.2011, the Chief Justice wrote to the Chief Minister mentioning therein that he had gathered details of the activities of Justice (Retired)

R.A. Mehta and found nothing objectionable. There was nothing on record which would make him ineligible for the post of Lokayukta, he was

neither a member of any NGO nor he was a social activist. On the contrary, it shows his ability to work for the society even at the age of 75 years.

In this background, a request was made by the Chief Justice by his letter to take up the matter with the Council of Ministers and to forward the

name of Justice (Retired) R.A. Mehta to the Governor for his appointment as Lokayukta of the State of Gujarat. The letter dated 2.8.2011 reads

as under :

Kindly refer to your D.O. Letter No. LKY.2010-2239-G, dated 16th June 2011, whereby you have opined that Mr. Justice (Retd.) R.A. Mehta

would not be in a position to perform his duties with the amount of objectivity, judiciousness and impartiality expected of the Lokayukta. You have

also reiterated the name of Mr. Justice (Retd.) J.R. Vora for appointment to the post of Lokayukta.

During the last one and half months, I tried to gather the details about the activities of Mr. Justice (Retd.) R.A. Mehta and I find that there is no

such activity, which makes him ineligible for appointment to the post of Lokayukta. According to me, he is a man of high repute and integrity and

always maintained high reputation while he was in Judiciary and still he is maintaining high standards in the Society. Justice Mehta has never made

any public statement, which is detrimental to the Society, nor has he shown any aspiration to any Government, whether State or Central. It cannot

be said that he is associated with one or the other NGO as there is nothing to suggest that he is a member of an NGO or he is a social activist

cannot be treated as a qualification for his appointment to the post of Lokayukta. On the contrary, it would show the ability of a person who

knows the ground reality of the society even at the age of 75, which is prime requirement for the post.

I may refer to the decision of the Hon"ble Supreme Court in the case of Ashish Handa Vs. Chief Justice of High Court of Punjab and Haryana and

others, wherein the Hon"ble Supreme Court held that the executive is expected to approach the Chief Justice for the purpose of appointment to be

made to such post and the name suggested by the Chief Justice would have to be accepted. Hon"ble Supreme Court has also taken the similar

view subsequently in the case of N. Kannadasan v. Ajoy Khose, (2009) 7 SCC 1. Thus, it is evident that once the name is suggested by the Chief

Justice it is binding on the Government and the Council of Ministers is bound to forward such name to the Governor of the State for appointment.

I, therefore, request you to take up the matter with the Council of Ministers and to forward the name of Mr. Justice (Retd.) R.A. Mehta to Her

Excellency the Governor of Gujarat for his appointment as Lokayukta of the State of Gujarat.

I am forwarding a copy of this communication to Her Excellency the Governor of Gujarat for kind information and perusal.

43. On 16.8.2011, the Governor wrote to the Chief Minister and requested the Chief Minister to send the formal proposal of Justice (Retired)

R.A. Mehta for appointment as Lokayukta. She stated as under :

This is in continuation to my earlier D.O. letter dated 7th June, 2011 wherein I had mentioned that I was in receipt of a proposal from the Hon"ble

Chief Justice of Gujarat High Court Justice Shri Mukhopadhyaya dated 7th June, 2011 recommending the name of Hon"ble Justice (Retd.) Shri

R.A. Mehta for appointment to the post of Lokayukta. I had also requested you to kindly get the matter processed expeditiously at the

Government level in accordance with the provisions of the Gujarat Lokayukta Act, 1986 and submit a formal proposal for my consideration at the

earliest possible.

Even though a period of two months has passed I have not yet heard anything from the State Government. I am of the view that such an important

post of Lokayukta cannot be kept vacant any longer in the interest of good governance.

Looking to the importance and urgency of the matter, I had expected prompt action on the part of the Government with reference to my earlier

D.O. letter and the recommendation from the Hon"ble Chief Justice. Anyhow, there is no development on this front till date. I must be frank

enough to bring it to your notice that this inordinate and uncalled for delay is a cause of grave concern to me as the Governor of the State.

I would again like to draw your kind attention to the provisions of Section 3 of the Gujarat Lokayukta Act, 1986 wherein it is laid down that

Governor shall by warrant and seal appoint the Lokayukta after consultation with the Chief Justice of the High Court and the Leader of the

Opposition." This provision casts a statutory obligation on the part of the State Government to appoint the Lokayukta. If the State Government, in

spite of the recommendation from the Hon"ble Chief Justice of the High Court and endorsement from the Governor of the State could not appoint

the Lokayukta, such a failure or negligence could not be viewed lightly under the Constitution.

In view of the above, I would again like to request the State Government to send a formal proposal in this regard for my consideration so that the

appointment of the Lokayukta could be made forthwith.

Needless to point out to you at this juncture that Justice Shri Mukhopadhyaya, Hon"ble Chief Justice of the Gujarat High Court had in clear,

unambiguous terms clarified about the misgivings of the Government vide his D.O. Letter dated 2nd August, 2011 addressed to you, a copy of

which was also marked to me.

44. The Leader of Opposition on 16.8.2011 wrote to the Chief Minister that he has already given his consent to the Governor on the

recommendation of the name of Justice (Retired) R.A. Mehta for appointment as Lokayukta. The relevant part of the letter dated 16.8.2011 is

extracted below:

I am pained to inform you that since last seven and half years, that is from 24.11.2003, the Lokayukta"s post has been vacant in Gujarat. Since

you became the Chief Minister you have in a blatantly illegal manner ensured that the Lokayukta"s position remains vacant.

As per clause 3 of the Gujarat Lokayukta Act, Honorable Governor is supposed to consult Hon Chief Justice of Gujarat High Court and Leader

of the Opposition for the Lokayukta"s name. As per the law, Hon. Governor Kamalaji asked for a name from Hon. Chief Justice who forwarded

the name of retired high court judge R.A. Mehta for the post of Lokayukta. After the name came to Hon. Governor, as per the law, she consulted

me and I consented for the name....

45. On 18.8.2011, once again the Chief Minister addressed a letter to the Chief Justice raising several issues with respect to the recommendation

of Justice (Retired) R.A. Mehta for the post of Lokayukta. In the said letter, the Chief Minister had indicated the instances, which according to him

would show certain pre-judged bias on the part of Justice (Retired) R.A. Mehta against the present administration. The Chief Minister cited certain

instances in the letter where Justice (Retired) R.A. Mehta had participated in public hearing. He further stated that the recommendation of Justice

(Retired) R.A. Mehta was not acceptable and a name of recently retired judge be recommended. The letter dated 18.8.2011 reads as under :

Kindly refer to your confidential d.o. letter dated 2nd August, 2011 wherein you have again recommended the name of Hon"ble Mr. Justice

(Retired) R.A. Mehta for appointment as Lokayukta, Gujarat State.

While there cannot be any question of ""ineligibility"" of a person for appointment to the post of Lokayukta, Gujarat State merely because of his

association with one or more NGOs, nor can it be said that a person who is working for a social cause after retirement would be ""disqualified"" for

appointment to the post of Lokayukta. But the question in the case of Hon"ble Mr. Justice (Retired) R.A. Mehta is of his evident preconceived

notion of bias against the present political dispensation. I am not making this statement without any basis. You may like to peruse some of the

utterances of Hon"ble Mr. Justice (Retired) R.A. Mehta in different public fora:

~ The marooning of Surat city and district and other areas of Gujarat could have been averted if the release of Narmada water from Ukai dam

had been started 36-42 hours earlier with a nationalized flow rather than releasing 9 lakh cusecs of water from August 7 that was increased to 11

lakh cusecs within 24 hours.

The wrong policies of the Gujarat Government to fill the dam to its maximum capacity in attempt to avoid shortage of drinking and irrigation waters

had caused the floods.

(People"s Committee on Gujarat Flood 2-2006 - A fact-finding Committee set up by two NGOs concluded that the flood was a man-made

disaster. The PCGF was headed by Shri R.A. Mehta)

(It may be noted that Shri R.A. Mehta had pre- judged the issue without even verifying the facts. Later on, the Commission headed by Hon. Ms.

Justice (Retired) Sugnaben Bhatt came out with different findings in the Report dated 7.7.2008.)

(Source : oneindia.in 10th July, 2007 - copy enclosed)

~ In March 2002, Shri R.A. Mehta had called on the Chairperson of the NHRC and given an assessment of the situation highlighting the

prevailing sense of insecurity in the community in general and the minority community in particular.

(Source : NHRC Report, [http.WWW.NHIC.IN](http://WWW.NHIC.IN))

~ You may also recall that Jan Sangharsh Munch had suggested the name of Hon"ble Mr. Justice (Retired) R.A. Mehta for Inquiry Commission

headed by Hon"ble Mr. Justice Nanavati, after Hon"ble Mr. Justice K.G. Shah, passed away. This is an indirect testimony of the fact that Hon"ble

Mr. Justice (Retired) R.A. Mehta"s acceptability with the detractors of the State Government is very high.

~ What we witnessed today must be just a glimpse of the condition of internal displacement in Gujarat due to shameful 2002 violence. We as a

panel collectively say that there can be no denial that these people have been internally displaced as a direct result of the communal riots of 2002.

The position taken by the State Government that all affected people were rehabilitated is clearly not borne out. And this public hearing is proof that

the State Government has not fulfilled its responsibility. For five years the rights of these internally displaced people have been denied to them.

(Shri R.A. Mehta was one of the panelists of Antarik Visthapit Hak Raksha Samiti which held public hearing in February, 2007)

(Source : expressindia.com - copy enclosed)

~ After hearing the jury concluded that the depositions and related stories suggest gross cover up and the spreading of a myth that there is no

fear amongst the minority community in Gujarat and that the dark nights of 2002 should be forgotten as a nightmare. There is an intense, almost

universal, sentiment of fear and growing despair among Muslims in the State.

(Shri R.A. Mehta was a Jury Member for Anhad and Centre for Social Justice which held public hearing on 22nd February, 2011)

(Source : daily.bhaskar.com - copy enclosed)

There is an intense, almost universal sentiment of fear and growing despair among Muslim citizens of Gujarat.

(Shri R.A. Mehta was a Jury Member at the public hearing "Tracing Lives of Muslims in Gujarat Post - 2002 - organized jointly in Ahmedabad by

several Human Rights Associations)

(Source : IMO admin Communalism, Indian State, 17th March, 2011 - copy enclosed)

It can be seen from the above that the question is not of Shri R.A. Mehta maintaining high standards in the society, or of not having made any

public statement which is detrimental to the society, but the question is of his preconceived opinion and strong prejudiced mindset against the

present political dispensation in the State. While he may be technically eligible for being considered for appointment as Lokayukta, the moot

question is whether such a person having a strong biased perspective for the Government in the State if appointed as Lokayukta, will be able to

perform his duty with the high level of objectivity, judiciousness and impartiality expected of the Lokayukta. In all fairness, the answer to this

question will be in the negative. Although, I have no personal reservation against the name of Hon"ble Mr. Justice (Retired) R.A. Mehta, but as the

Head of the State Government, I am afraid, I may not be able to accept the name of Hon"ble Mr. Justice(Retired) R.A. Mehta, who, in my view,

cannot be considered the most suitable choice for the august post of Lokayukta, Gujarat State.

The other important aspect of the age is also not in his favor. We need to have a relatively younger person for the office of Lokayukta, Gujarat

State, as the term for the Lokayukta is of five years. Hence, it would be in the fitness of things, if you could recommend the name of a Judge who

has recently retired from the service.

I am sure you will take the contents of this letter in proper perspective and in right spirit, and recommend another name for the vacant post of

Lokayukta, Gujarat State.

46. Simultaneously, on 18.8.2011, the Chief Minister also wrote a letter to the Governor suggesting that the procedure laid down by the Apex

Court in N. Kannadasan (supra) would not apply in case of appointment of Lokayukta and that in other States also such procedure was not being

followed. Responding to the last communication of the Governor, the Chief Minister refuted the allegation of delay on the part of the State in

appointment of Lokayukta. The letter dated 18.8.2011 reads as below :

Kindly refer to your d.o. letter No. GS.26/CON/142/2011 dated 16th August, 2011 regarding appointment of Lokayukta, Gujarat State.

2. While I appreciate your concern for delay in appointment to the post of Lokayukta, Gujarat State, I would like to bring to your kind notice that

the delay being caused in the matter is not solely attributable to the State Government. The State Government has been trying sincerely and

persistently to ensure appointment of Lokayukta; however a number of Constitutional, legal and procedural issues have been raised from the

different functionaries involved in the process of the appointment. The delay has been caused in dealing with all these Constitutional, legal and

procedural issues. Had the process of appointment been kept strictly in conformity with the past precedents, there would have been no question of

any delay.

3. I would like to add here that as per my knowledge the ratio laid down by the Hon"ble Apex Court in its Judgment in N. Kannadasan v/s Ajoy

Khose (2009) 7 SCC 1, has not been followed by any of the States while appointing Lokayukta. In the recent cases of appointments of

Lokayukta in Karnataka and Maharashtra also, this judgment has not been followed. You may like to verify this from the concerned States. My

question is as to why is it being insisted that the abovementioned judgment of the Apex Court should be followed when it is not being followed

elsewhere? What is wrong if the Hon"ble Chief Justice of the Gujarat High Court sends a panel of three to four names for consideration of the

Government? Why should it be insisted that he should send only one name?

4. In so far as the recent letter dated 2nd August, 2011 from the Hon. Chief Justice of the Gujarat High Court is concerned, I may inform you that

the name recommended therein has not been accepted by the State Government for certain specific and valid reasons. A copy of my d.o. letter of

even No. dated 18.8.2011 addressed to the Hon. Chief Justice of the Gujarat High Court is enclosed for your perusal. I will be able to take

further course of action in the matter only after receiving the response to my said d.o. letter addressed to the Hon. Chief Justice of the Gujarat High

Court.

47. On 25th August 2011, the Governor issued the impugned warrant of appointment appointing Justice (Retired) R.A. Mehta as Lokayukta. The

warrant reads as under :

By virtue of the power vested in me by sub-section (1) of section 3 of the Gujarat Lokayukta Act, 1986 (Guj. Act No. 31 of 1986), I, Dr.

Shrimati Kamla, Governor of Gujarat, do hereby appoint, Shri Justice (Retd.) Ramesh Amritlal Mehta to be the Lokayukta with effect from the

date he assumes charge of his office.

Given at Raj Bhavan, Gandhinagar this twenty fifth day of August in the year two thousand eleven (3rd Bhadrapad, 1933 Saka).

48. On 25.8.2011 the communication of issuance of warrant was sent to Additional Registrar-cum-PPS to the Chief Justice by the Private

Secretary to the Governor intimating the appointment of Mr. Justice R.A. Mehta as the Lokayukta for the State of Gujarat. On 26.8.2011 a letter

was sent to the office of the Chief Minister by the Private Secretary to the Governor revealing this appointment under the hand and seal of the

Governor.

49. It is relevant to mention here that the Gujarat Lokayukta (Amendment) Bill, 2011 (Gujarat Bill No. 29 of 2011) was passed by the Legislative

Assembly of the State of Gujarat on 30.3.2011 which sought to widen the definition of "public functionary" contained in section 2(7) of the Act by

including various authorities, in light of the recommendation of the 13th Finance Commission. The authorities to be included were, the Mayor or the

Deputy Mayor of a municipal corporation, the President or the Vice-President of a municipality, the Sarpanch or the Up-Sarpanch of a village

panchayat, the President or the Vice-President of a taluka panchayat or a district panchayat, etc.

50. The bill was sent to the Governor on 15.4.2011 for assent. The Governor with the message dated 27.5.2011 returned the Bill on 27.5.2011

with objections for reconsideration of the amendments for the reason that there were large number of local bodies in Gujarat including 14000

Village Panchayats, 225 Taluka Panchayats, 26 District Panchayats, 159 Municipalities and 8 Municipal Corporations. The Governor pointed out

that the post of Lokayukta was lying vacant since 2003, therefore, the Lokayukta howsoever competent and efficient, would not be able to look

into the complaints of irregularities against such large number of persons. She suggested that increasing the number of Lokayukta's be considered

and the bill was sent back for reconsideration by the Legislative Assembly.

51. After considering the message of the Governor, an Ordinance was prepared by the General Administration Department on 17.8.2011 as the

Legislative Assembly was not in session. The State Government sent the Ordinance on 17.8.2011 for amending the Gujarat Lokayukta Act, 1986,

which ousted the Chief Justice from consultation process. The Ordinance also contained several changes in the Act, including section 3 of the Act.

Instead of the existing section 3 of the Act, the Ordinance provided for an institution of Lokayukta to consist of the Chairperson, who is or has

been a Judge of the High Court and such number of members not exceeding two. It further provided that for the purpose of conducting

investigation in accordance with the provisions of the Act, the Governor shall with the aid and advice of the Council of Ministers appoint a

Lokayukta. The appointment of Lokayukta shall be made after obtaining recommendation of a committee consisting of (i) the Chief Minister as

Chairperson, (ii) the Speaker of the Gujarat Legislative Assembly, (iii) the Minister in-charge of the Legal Department, (iv) a sitting judge of the

High Court, as may be nominated by the Chief Justice of the High Court of Gujarat, (v) the Leader of Opposition in the Legislative Assembly.

52. The Gujarat Lokayukta (Amendment) Ordinance, 2011 was sent on 17.8.2011 for the promulgation to the Governor. The Ordinance,

however, was returned by the Governor on 18.8.2011 by a detailed note particularly objecting to the changes and modifications proposed in

Sections 2, 3, 4, 7, 14, 15 and 20 of the existing Gujarat Lokayukta Act, 1986. She could not see any urgency in bringing about such an

Ordinance all of a sudden. It was further noted that the Chief Justice had already forwarded a proposal for appointment of Lokayukta and the

same was at the final stage of issuance of notification. The Governor therefore, wrote that ""in view of the above, I fail to appreciate the need of

promulgating the proposed Ordinance. As such, I am returning the Government file with the above observations"".

53. The General Administration Department without any delay on 18.8.2011 prepared another note which was finalized and signed by the Chief

Minister on 20.8.2011 and on the same day, the Government forwarded the Ordinance to the Governor for promulgation. Once again, the

Governor returned the Ordinance by note dated 26.8.2011 observing that in her view she did not find any justification in promulgating the

proposed Ordinance at this juncture and accordingly, she returned the Government file.

54. I have heard Mr. Kamal B. Trivedi, learned Advocate General assisted by Mr. P.K. Jani, learned Government Pleader and Ms. Sangeeta

Vishen, learned Assistant Government Pleader for the petitioners; Mr. Mihir Thakore, learned Senior counsel assisted by Mr. Dhaval Vyas for the

petitioners; and Mr. Amit Panchal, learned counsel appearing for the petitioner. Mr. Girish Patel, learned Senior counsel assisted by Mr. A.J.

Yagnik, Mr. Mukul Sinha and Mr. D.N. Kiratsata, learned counsel appearing for the interveners, Mr. Shalin Mehta, learned, learned counsel

appearing for respondent nos. 2 and 3.

55. The learned Advocate General appearing for petitioners in writ petition No. 12632 of 2011 has led the argument on behalf of the petitioners.

The argument of learned Advocate General has been adopted by Senior Counsel Mr. Mihir Thakore and Mr. Amit Panchal appearing for

petitioners in other writ petitions. Learned counsel Mr. Shalin Mehta appearing for respondent Nos. 2 and 3 has also been heard in all the writ

petitions. For the interveners, the argument has been led by learned Senior Counsel Mr. Girish Patel assisted by Mr. A.J. Yagnik. The other

learned counsel Mr. Mukul Sinha and Mr. D. N. Kiratsata also appearing for interveners have adopted the arguments of Mr. Girish Patel.

FIRST POINT

56. The first question which arises for consideration is whether looking to the nature of consultation required for appointment of Lokayukta u/s 3 of

the Gujarat Lokayukta Act, in the present case as a matter of fact, whether the consultative process between the Hon"ble the Chief Justice and the

Hon"ble the Chief Minister had come to a close and there was a deadlock between the two dignitaries? For deciding this question it is necessary

to extract Section 3 of the Gujarat Lokayukta Act, 1986 which reads as under:

3. Appointment of Lokayukta.-(1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall,

by warrant under his hand and seal, appoint a person to be known as the Lokayukta:

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court and except where such appointment is to

be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under Article 356 of the

Constitution is in operation in the State of Gujarat, after consultation also with the Leader of Opposition in the Legislative Assembly, or if there be

no such Leader, a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct.

(2) A person shall not be qualified for appointment as a Lokayukta unless he is or has been a Judge of a High Court.

(3) Every person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor or some person

appointed in that behalf by him, an oath or affirmation in the form set out for the purpose in the First Schedule.

57. The executive powers of the State are assigned to the Governor under Article 154(1) of the Constitution. The power of appointment of

Lokayukta is vested with the Governor of the State. It is to be made as per Section 3 of the Act, by the Governor by issuance of warrant under his

hand and seal after necessary consultation with the Chief Justice of the High Court and Leader of Opposition. The section does not provide that

any consultation has to be made with the Chief Minister. However, the Chief Minister is the Head of the Council of Ministers. Article 163 of the

Constitution of India provides that the Council of Ministers is to aid and advise the Governor in the exercise of all his functions. The exceptions are

where the Governor under the Constitution is required to exercise functions in his discretion. Therefore, the Chief Minister as the Head of the

Council of Ministers will automatically figure in the matter of appointment of Lokayukta u/s 3 of the Act. The Governor is the constitutional or

formal Head of the State, and has to make appointment of Lokayukta with the aid and advice of the Council of Ministers as provided by Article

163 of the Constitution.

NATURE OF CONSULTATION

58. A question arises that what is the nature of consultation between the Chief Justice of the High Court of the State, the Council of Ministers with

the Chief Minister as its Head and the Leader of Opposition? u/s 3 of the Act the expression, ""consultation"" means a meeting for deliberation or

discussion of persons on same subject. The object of consultation is to arrive at a meaningful purpose for which the consultation is being made. The

process of consultation under the Act can take place by convening a meeting of all the parties who are required to be part of the consultation

process at one place or by correspondence. No fixed method, manner or form for consultation is required to be followed. The expression

consultation"" may have different meaning in different situations depending on the nature and purport of the statute. The Apex Court after analyzing

the other decisions in Chandramouleshwar Prasad Vs. The Patna High Court and Others, , Union of India (UOI) Vs. Sankalchand Himatlal Sheth

and Another, , in S.P. Gupta Vs. President of India and Others, held in paragraph 569 the necessary concomitants of effective consultation. The

relevant paragraph 569 (6) and (7) are extracted as under :-

569. (6) That sufficient opportunity should be given to the authorities concerned to express their views so as to tender advice as deliberation is the

quintessence of consultation.

(7) After the data facts or materials are placed before the consultee and the consultant, there should be a full and complete application of minds in

respect of the subject to enable them to reach a satisfactory conclusion. In other words, the two minds must be able to confer and produce a

mutual impact on the identical facts which would constitute both the source and the foundation of the final decision.

Similar view had been taken by the Apex Court in State of Kerala Vs. Smt. A. Lakshmikutty and others, [Paragraph 22], Indian Administrative

Service (S.C.S.) Association, U.P. and Others Vs. Union of India (UOI) and Others, [Paragraph 26], Supreme Court Advocates-on-Record

Association and another Vs. Union of India, [Paragraph 461].

59. Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and

points involved to arrive at a satisfactory solution. u/s 3 of the Act consultation is obligatory. It has not been mentioned that the dignitaries who are

participating in the consultation process, their recommendation should be unanimous. But the legislative intent of section 3 of the Act is that the

three dignitaries shall perform their statutory duty keeping in view the larger interest of the State and public interest. Neither the Council of

Ministers with its Head the Chief Minister nor the Leader of Opposition have been given veto power as it would make the working of section 3 of

the Act impossible. The consulter and consultees would have to act objectively, in a fair and reasonable manner.

60. The Apex Court in Centre for PIL and Another Vs. Union of India (UOI) and Another, considered the argument of unanimity or consensus in

the matter of appointment of CVC urged by the petitioners and rejected it. It would be beneficial to extract the relevant parts of paragraphs 79 and

81 as below :

79. ... It was further submitted that if unanimity is ruled out then the very purpose of inducting the Leader of the Opposition in the process of

selection will stand defeated because if the recommendation of the Committee were to be arrived at by majority it would always exclude the

Leader of the Opposition since the Prime Minister and the Home Minister will always be ad idem.

81. We find no merit in these submissions. To accept the contentions advanced by the petitioners would mean conferment of a ""veto right"" on one

of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation....

61. The person to be appointed on the post of Lokayukta requires that he should have essential qualities like integrity and credentials of

impeccable nature and utmost commitment and sincerity towards the office of Lokayukta. Consultation process as contemplated under the Act is

between the Chief Justice of the State, Leader of Opposition and the Council of Ministers. Consultation with one dignitary, namely the Chief

Justice of the High Court of the State is a sine qua non. If any one of the aforesaid two dignitaries refuses to participate in the process of

consultation, then in such a situation, consultation would take place among the remaining dignitary and the Chief Justice of the State. Consultation

does not mean concurrence. Section 3 of the Act does not envisage unanimity in the consultative process. Either of the parties to the consultation

process should have opportunity to express their views along with materials which should be considered by other party, and after considering the

materials by application of mind, the other party must communicate his view to the party which had submitted the materials, only then the process

of consultation is complete and effective.

PRIMACY OF THE OPINION OF THE CHIEF JUSTICE

62. In Justice K.P. Mohapatra Vs. Sri Ram Chandra Nayak and Others, , considering the duties to be performed by the Lokayukta, the Apex

Court held that the opinion of the Chief Justice would have primacy. In this case the appointment of Lokayukta of Orissa State was under

challenge before the High Court in a public interest petition. The High Court set aside the appointment. The Apex Court, noticed that section 3(1)

of the Orissa Lokpal and Lokayukta Act had laid down that for the purpose of conducting the investigation in accordance with the provisions of

the Act, the Governor shall appoint a person to be known as Lokpal and one or more persons to be known as the Lokayukta. It was further

provided that the Lokpal shall be appointed after consultation with the Chief Justice of the High Court of Orissa and the Leader of the Opposition.

The Apex Court held as under:-

12. In context of the aforesaid functions of the Lokpal and the required qualification of a person who is to be appointed to hold such office, the

word "consultation" used in Section 3 is required to be interpreted. As provided under S. 3, a person is not qualified to be appointed as Lokpal

unless he is or has been a Judge of the Supreme Court or of a High Court. In the context of the functions which are to be discharged by the

Lokpal, it is apparent that they are of utmost importance in seeing that unpolluted administration of the State is maintained and mal-administration

as defined under S. 2(h) is exposed so that appropriate action against such mal-administration and administrator could be taken. The investigation

which Lokpal is required to carry out is that of quasi-judicial nature which would envisage not only knowledge of law, but also of the nature and

work which is required to be discharged by an administrator. In this context, the word "consultation" used in Section 3(1) Proviso (a) would

require that consultation with the Chief Justice of the High Court of Orissa is must or sine qua non. For such appointment, Chief Justice of the High

Court would be the best person for proposing and suggesting such person for being appointed as Lokpal. His opinion would be totally

independent and he would be in a position to find out who is most or more suitable for the said office. In this context, primacy is required to be

given to the opinion of the Chief Justice of the High Court. It is true that proviso (a) provides that Leader of the Opposition, if there is any, is also

required to be consulted. Therefore, if there is no Leader of Opposition, consultation is not required. This would indicate nature of such

consultation and which is to apprise him of the proposed action but his opinion is not binding to the Government. At the same time, his views or

objections are to be taken into consideration. If something is adverse against the person proposed by the Government, he would be entitled to

express his views and point it out to the Government. This, however, would not mean that he could suggest some other name and the Government

is required to consider it. It would, therefore, be open to the Government to override the opinion given by the Leader of the Opposition with

regard to the appointment of a Lokpal who is statutorily required to be a sitting or retired Judge of the Supreme Court or of a High Court. u/s 3(1)

of the Act, there is no question of initiation of proposal by the leader of the Opposition.

xxx xxx xxx xxx xxx xxx xxx

16. Applying the principle enunciated in the aforesaid judgment, Scheme of Section 3(1) of the Act read with the functions to be discharged by the

Lokpal and the nature of his qualification, it is apparent that the consultation with the Chief Justice is mandatory and his opinion would have

primacy. The nature of the consultation with the Leader of the Opposition is to apprise him about the proposal of selecting a person to the post and

also to take his views on the said proposal. However, the opinion rendered by the Leader of the Opposition is not binding on the State

Government and the Leader of the Opposition would have no power to recommend someone else for the said post.

63. The nature of consultation between the Chief Justice and the Chief Minister in selecting a name for appointment of Lokayukta has to be proper

consultation. The matter of consultation should not be dealt casually. The consultation between the high dignitaries like the Chief Justice, the Chief

Minister and Leader of Opposition of the State Assembly should not be negated on unreasonable ground giving a color that the Council of

Ministers who may fall within the domain of the Lokayukta do not like to have a Lokayukta or intend to have Lokayukta of their choice, which

would be against the spirit of the Act. Once the consultation had been made, the matter should be referred to the Governor of the State

recommending appointment.

64. The Apex Court in Supreme Court Advocates-on-Record Association and another Vs. Union of India, in paragraph 451 had considered the

question of primacy of opinion and held as under :

451. The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the

opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise

when the decision is reached in this manner by consensus, without any difference of opinion. However, if conflicting opinions emerge at the end of

the process, then only the question of giving primacy to the opinion of any of the consultees arises. For reasons indicated earlier, primacy to the

executive is negated by the historical change and the nature of functions required to be performed by each. The primacy must, therefore, lie in the

final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that

appointment is not considered to be suitable.

65. In another decision the Apex Court in N. Kannadasan v. Ajoy Khose and others (2009) 7 SCC 1 had considered the primacy of opinion. In

paragraph 112 it had been held as under :

112. Opinion of a Chief Justice by itself may not lead to an administrative decision but it, having regard to his primacy, save and except for cogent

reasons, would lead to an appointment. Indisputably, his opinion is final and, thus, for all intent and purport, decisive. The recommendations made,

thus, may be arrived at on the basis of his subjective satisfaction, but it must be based on objective criteria. Such subjective satisfaction must be

arrived at on consideration of all relevant criteria.

66. The consultation with the Chief Justice is mandatory and his view would hold primacy. In case of difference of opinion between the dignitaries

to the consultation process, the view of the Chief Justice of the High Court of the State must prevail. The functions and duties which the Lokayukta

is likely to perform under the Act would require appointment of an independent person who in the opinion of the Chief Justice is best suited for

such a position. The actions of the Council of Ministers headed by the Chief Minister, and also the Leader of Opposition, by the very nature of

position held by them, may be subjected to investigation by the Lokayukta in case of a complaint. It is only the Chief Justice, the third dignitary to

the consultation process, who has no personal stake in the matter. Being the Chief Justice of the State, he would be in the best position to

recommend the name of a person, who in his opinion would be able to perform such duties independently and impartially. It will be inconceivable

that against the will and wish of the Chief Justice, the Council of Ministers with the concurrence of the Leader of Opposition can decide to appoint

a Judge of the High Court as Lokayukta.

67. In case of breakdown of consultation between the Chief Minister and the Chief Justice, on the question of selection of name, the Chief

Justice's view would have primacy and his opinion would be binding on the Council of Ministers headed by the Chief Minister and the Leader of

Opposition. Various provisions of the Act envisage a strong institution of Lokayukta to investigate allegations of irregularities and corruption against

public functionaries. It starts with appointment of an independent Lokayukta who is or had been a Judge of a High Court and who is

recommended by the Chief Justice of the State. If the finality of the choice is vested in the Council of Ministers headed by the Chief Minister whose

actions directly or indirectly may come within the scanner of the Lokayukta. And if the finality of choice of appointment of Lokayukta is given to

the Council of Ministers, it would be permitting a person whose conduct is likely to be under investigation to choose his own judge. If such an

interpretation is given that the Council of Ministers headed by the Chief Minister would have the final authority in the appointment of Lokayukta, it

would be laying down an insalubrious trend which would be disastrous for the rule of law; it would result in derailment of democracy under the

Constitution by striking at the root of the scheme envisaged u/s 3 of the Act; and put our democracy in peril.

68. I am of the considered opinion that the nature of consultative process u/s 3 of the Act has to be read that it gives primacy to the opinion of the

Chief Justice of the State High Court, it would be binding and prevail over the view of the Council of Ministers headed by the Chief Minister and

the Leader of Opposition.

WHETHER THERE WAS A DEADLOCK

69. Another question that arises on fact of this case is, whether the consultative process between the Chief Justice of the State and the Chief

Minister had come to a close and there was a deadlock between the two dignitaries? The learned Advocate General appearing for the petitioner

has urged that the consultation process was not over as the letter of the Chief Minister dated 18.8.2011 was engaging the attention of the Chief

Justice and had not been replied, therefore, the consultation process was still going on and it had not come to an end. He vehemently urged that if

the Chief Justice had replied the letter dated 18.8.2011 then the consultation process may have come to a close but in absence of any reply it

cannot be inferred, the closure of consultation or a deadlock. He ardently urged that any person with questionable credentials could not be thrust

on the Government. In support of his argument he has relied on the letters of the Chief Minister dated 16.6.2011 and 18.8.2011. He also forcefully

urged that the process of consultation could not be snapped unilaterally when the Act contemplates the Government as a proposer for appointment

to the post of Lokayukta.

70. The Gujarat Lokayukta Act, 1986 was enacted with the aim to set up a strong institution of Lokayukta to create confidence in the people that

investigation in complaints and allegations against public functionaries would be inquired. The Act is a strong tool to fight corruption. In an inquiry

by Lokayukta a corrupt politician or bureaucrat may be exposed. It is imperative that the person to be appointed as Lokayukta should be an

independent person with impeccable stature and background so that he can do justice to his office. He must have probity. There can be no debate

on the question that the Lokayukta has to be of personal impeccable integrity, character and credibility.

71. Three Lokayukta, Justice (Retired) D.H. Shukla (26.7.1988 to 25.7.1993), Justice (Retired) J.C. Bhatt (9.11.1993 to 8.11.1998) and Justice

(Retired) S.M. Soni (25.11.1998 to 24.11.2003) had been appointed without any delay and they had functioned for almost full term. The last

Lokayukta was Justice (Retired) S.M. Soni who relinquished the office of Lokayukta on 24.11.2003, the last day on which he was completing his

term. The office of Lokayukta is lying vacant since 25.11.2003. No records have been produced before me as to what steps were taken to fill the

vacancy till 6.8.2006. The delay in the appointment of Lokayukta may have helped in hampering complaints and investigations against public

functionaries who may still be walking scot-free with their chin up. The Government's apathy is visible as it went into slumber in the matter of

appointment of Lokayukta. It woke up only on 7.8.2006. The process of appointment of Lokayukta was initiated by the Chief Minister on

7.8.2006 by proposing the name of a former Chief Justice.

72. At the threshold it is necessary to notice few facts. On 7.8.2006 the Chief Minister had recommended the name of Justice (Retired) Kshitij R.

Vyas but he could not be appointed. The Chief Minister on 8.2.2011 requested the Chief Justice to send fresh panel of names of retired judges

which was sent on 24.2.2010. The Council of Ministers headed by the Chief Minister on 31.3.2010 selected Justice (Retired) J.R. Vora and on

1.4.2010 the file was sent to the Governor for his appointment as Lokayukta. In pursuance of the opinion of the Attorney General of India and in

view of the decisions of the Apex Court in N. Kannadasan v. Ajoy Khose (2009) 7 SCC 1 sending panel of four names was not in accordance

with law, therefore, the Governor on 3.5.2010 wrote to the Chief Justice for recommending only one name. This was also informed on 5.5.2010

to the Chief Minister.

73. Justice (Retired) J.R. Vora joined on 11.6.2010 as Director, Gujarat State Judicial Academy in pursuance of appointment letter dated

10.5.2010. The Chief Justice on 31.12.2010 communicated to the Governor that the name of Justice (Retired) J.R. Vora need not be considered

as he had already been appointed as Director, Gujarat State Judicial Academy, in the interest of judiciary and recommended the name of Justice

(Retired) S.D. Dave. The Governor on 6.1.2011 requested the Chief Minister to complete the process expeditiously.

74. On 21.2.2011 the Chief Minister reiterated the name of Justice (Retired) J.R. Vora and requested the Chief Justice to consult him and send his

name once again after taking his willingness to assume the responsibility as Lokayukta. The Chief Justice on 22.3.2011 informed the Chief Minister

that the name of Justice (Retired) J.R. Vora was recalled for the reasons mentioned by him in his letters dated 29.12.2010 and 31.12.2010. He

further mentioned that it is not the duty of the Chief Justice to call for any consent from any person.

75. However, Justice (Retired) S.D. Dave on 1.5.2011 withdrew his name from consideration for the post of Lokayukta. The Chief Minister once

again on 4.5.2011 repeated his request for recommending the name of Justice (Retired) J.R. Vora stating that he had been consulted and he had

expressed his willingness to be considered for the post of Lokayukta.

76. The Chief Justice on 7.6.2011 wrote to the Chief Minister that as intimated earlier name of Justice (Retired) J.R. Vora cannot be considered

and he recommended the name of Justice (Retired) R.A. Mehta. The Chief Justice also informed the Governor. On the same day, the Governor

wrote to the Chief Minister to get the name of Justice (Retired) R.A. Mehta processed.

77. The Chief Minister on 16.6.2011 wrote to the Chief Justice raising serious objections to the recommendation of Justice (Retired) R.A. Mehta

for the post of Lokayukta. One of the objections was that Justice (Retired) R.A. Mehta was aged 75 years and he may not be a suitable candidate

for the job at such an advanced age. The other objections were that Justice (Retired) R.A. Mehta was associated with a few NGOs, Social

Activist Groups and he had also given services as a panelist for them. Because of his association with the NGOs, Social Activist Groups, etc. he

may be in a fixed frame of mind on certain issues relating to the governance in the State. He had also shared platform with such people who are

known for their antagonism for the State Government. Along with the letter dated 16.6.2011 copies of newspaper clippings downloaded from the

websites were enclosed. It was stated that if such a person having a specific biased perception for the Government in the State was appointed as

Lokayukta, he would not be able to perform his duties with the amount of objectivity, judiciousness and impartiality expected of the Lokayukta.

Therefore, the Chief Minister requested the Chief Justice to have a relook at the name proposed. The Chief Minister once again repeated the

request for clearing the name of Justice (Retired) J.R. Vora, and to recommend his name for appointment as Lokayukta. Along with the letter

dated 16.6.2011 there were 11 enclosures of newspaper clippings downloaded from the websites.

78. Looking to the gravitas of the objections dated 16.6.2011 of the Chief Minister to the recommendation of the name Justice (Retired) R.A.

Mehta, the Chief Justice inquired in the objections and after applying his mind, on 2.8.2011 wrote to the Chief Minister that during the last one and

half months, he tried to gather the details about the activities of Justice (Retired) R.A. Mehta and he found that there was no such activity, which

makes him ineligible for appointment to the post of Lokayukta. According to the Chief Justice, Justice (Retired) R.A. Mehta was a man of high

repute and integrity and always maintained high reputation while he was in Judiciary and he was still maintaining high standards in the Society.

Justice (Retired) R.A. Mehta had never made any public statement, which was detrimental to the Society, nor he had shown any aspiration to any

Government, whether State or Central. In his opinion, it could not be said that Justice (Retired) R.A. Mehta was associated with one or the other

NGO as there was nothing to suggest that he was a member of an NGO or he was a social activist. On the contrary, it showed his ability that he

knows the ground reality of the society even at the age of 75, which was prime requirement for the post. The Chief Justice referred to the decision

of the Apex Court in Ashish Handa Vs. Chief Justice of High Court of Punjab and Haryana and others, wherein it had been held that the executive

is expected to approach the Chief Justice for the purpose of appointment to be made to such post and the name suggested by the Chief Justice

would have to be accepted. Hon"ble Supreme Court has also taken the similar view subsequently in N. Kannadasan v. Ajoy Khose (2009) 7

SCC 1. The Chief Justice further mentioned that once the name had been suggested by the Chief Justice, it was binding on the Government and the

Council of Ministers were bound to forward such name to the Governor of the State for appointment. The Chief Justice requested the Chief

Minister to take up the matter with the Council of Ministers and to forward the name of Justice (Retired) R.A. Mehta to the Governor of Gujarat

for his appointment as Lokayukta of the State of Gujarat. The Chief Justice also forwarded a copy of the letter dated 2.8.2011 to the Governor of

Gujarat.

79. On 16.8.2011, the Governor also wrote to the Chief Minister and requested him to send the formal proposal of Justice (Retired) R.A. Mehta

for appointment as Lokayukta.

80. It is relevant to point out over here that the Leader of Opposition had all through refused to participate in the consultation process as he

believed that he is required to have consultation with the Governor. Throughout he had taken the stand that the Chief Minister cannot be part of the

consultative process. However, the Leader of Opposition on 16.8.2011 wrote to the Chief Minister that he had already given his consent to the

Governor agreeing on the name of Justice (Retired) R.A. Mehta.

81. On 18.8.2011 the Chief Minister once again wrote a letter to the Chief Justice stating therein that the question was not of Justice (Retired)

R.A. Mehta maintaining high standards in the society, or of not having made any public statement which was detrimental to the society, but the

question was of his preconceived opinion and strong prejudiced mindset against the present political dispensation in the State. While he may be

technically eligible for being considered for appointment as Lokayukta, the moot question was whether such a person having a strong biased

perspective for the Government in the State if appointed as Lokayukta, will be able to perform his duty with the high level of objectivity,

judiciousness and impartiality expected of the Lokayukta. The letter further stated that though, the Chief Minister had no personal reservation

against the name of Justice (Retired) R.A. Mehta, but as the Head of the State Government, he would not be able to accept the name of Justice

(Retired) R.A. Mehta, who could not be considered the most suitable choice for the august post of Lokayukta, Gujarat State. The other aspect of

age was also raised. The Chief Minister stressed upon the need to have a relatively younger person for the office of Lokayukta, Gujarat State, as

the term for the Lokayukta was of five years. Hence, it would be in the fitness of things, the Chief Justice recommends the name of a Judge who

had recently retired from service. The Chief Minister was sure, that the contents of this letter would be taken in proper perspective by the Chief

Justice and in right spirit, and he would recommend another name for the vacant post of Lokayukta, Gujarat State. Along with this letter 4

newspaper clippings downloaded from the websites were enclosed.

82. Simultaneously, on 18.8.2011, the Chief Minister also wrote a letter to the Governor suggesting that the procedure laid down by the Apex

Court in the case of N. Kannadasan (supra) would not apply in case of appointment of Lokayukta and in other States also such procedure was

not being followed. Responding to the last communication of the Governor, the Chief Minister refuted the allegation of delay on the part of the

State in appointment of Lokayukta. He further stated that in so far as the recent letter dated 2.8.2011 from the Chief Justice of the Gujarat High

Court was concerned, he informed the Governor that the name recommended therein had not been accepted by the State Government for certain

specific and valid reasons. A copy the letter dated 18.8.2011 addressed to the Chief Justice of the Gujarat High Court was enclosed. The Chief

Minister further mentioned in the letter that he would be able to take further course of action in the matter only after receiving the response to his

letter dated 18.8.2011 addressed to the Chief Justice of the Gujarat High Court.

83. On 25.8.2011, the Governor issued the impugned warrant appointing Shri Justice (Retd.) Ramesh Amritlal Mehta to be the Lokayukta with

effect from the date he assumes charge of his office. On 25.8.2011 the communication of issuance of warrant was sent to Additional Registrar-

cum-PPS to the Chief Justice by the Private Secretary to the Governor intimating the appointment of Justice (Retired) R.A. Mehta as the

Lokayukta for the State of Gujarat. On 26.8.2011 a letter was sent to the office of the Chief Minister by the Private Secretary to the Governor

revealing the appointment.

84. In the backdrop of the aforesaid facts I have considered the question as to whether there was a deadlock between the Chief Minister and the

Chief Justice on the recommended name of Justice (Retired) R.A. Mehta for the post of Lokayukta. While the consultation process was going on

the Chief Minister had every right to communicate to the Chief Justice on 16.6.2011 his reservations against the proposed name of Justice

(Retired) R.A. Mehta which were supported with copies of newspaper clippings downloaded from the websites and enclosed along with the letter.

It was also open to the Chief Minister to level accusations against Justice (Retired) R.A. Mehta that he would not be able to perform his duties

with the amount of objectivity, judiciousness and impartiality expected of the Lokayukta. The Chief Justice inquired into the allegations by applying

his mind for about one and half months. After being satisfied that the charges and accusations against Justice (Retired) R.A. Mehta were baseless,

the Chief Justice on 2.8.2011 wrote to the Chief Minister exercising primacy. The Chief Justice wrote about primacy of his opinion in clear terms in

his letter dated 2.8.2011. The relevant part of the letter reads as below:

...Thus, it is evident that once the name is suggested by the Chief Justice it is binding on the Government and the Council of Ministers is bound to

forward such name to the Governor of the State for appointment.

I, therefore, request you to take up the matter with the Council of Ministers and to forward the name of Justice (Retd.) R.A. Mehta to Her

Excellency the Governor of Gujarat for his appointment as Lokayukta of the State of Gujarat.

I am forwarding a copy of this communication to Her Excellency the Governor of Gujarat for kind information and perusal.

85. The opinion of the Chief Justice expressed in his letter dated 2.8.2011 clarifying the doubts of the Chief Minister mentioned in letter dated

16.6.2011 cleared the clouds over the name of Justice (Retired) R.A. Mehta. The Chief Justice expressed approval of merit and excellence of

Justice (Retired) R.A. Mehta as in his estimation he was suitable for appointment on the post of Lokayuka. The opinion of the Chief Justice

Gujarat High Court proved the probity of Justice (Retired) R.A. Mehta and it can be treated to be a formal certification of his personal and

institutional integrity. The request to the Council of Ministers headed by the Chief Minister to forward the name of Justice (Retired) R.A. Mehta to

the Governor of Gujarat for his appointment as Lokayukta had primacy and only formality for appointment was required to be undertaken. The

consultative process after the letter dated 2.8.2011 by the Chief Justice stood closed. The only course open to the Council of Ministers headed by

the Chief Minister was to forward the name of Justice (Retired) R.A. Mehta to the Governor for appointment. On 16.8.2011, the Governor also

wrote to the Chief Minister and requesting him to send the formal proposal of Justice (Retired) R.A. Mehta for appointment as Lokayukta.

86. Atleast three times, after only one name was recommended, the Chief Minister had requested the Chief Justice for considering again the name

of Justice (Retired) J.R. Vora. However, the Chief Justice was not agreeing to the name of Justice (Retired) J.R. Vora as he had already been

appointed as Director, Gujarat State Judicial Academy, and he had joined on 11.6.2010. The Chief Minister had requested the Chief Justice on

21.2.2011 to consult Justice (Retired) J.R. Vora on his willingness for the post of Lokayukta. On refusal by the Chief Justice that there was no

procedure of taking consent, the Chief Minister on 4.5.2011 wrote to the Chief Justice that Justice (Retired) J.R. Vora had confirmed that if he

was recommended for the post of Lokayukta he would resign from the post of Director, Gujarat State Judicial Academy. The Chief Justice

reiterated his earlier stand on the name of Justice (Retired) J.R. Vora. While objecting to the recommendation to the name of Justice (Retired)

R.A. Mehta on 16.6.2011 the Chief Minister again requested that the name of Justice (Retired) J.R. Vora be recommended. But the Chief Justice

did not oblige the Chief Minister by recommending the name of Justice (Retired) J.R. Vora.

87. The opinion of the Chief Justice dated 2.8.2011 having attained primacy in the consultation process which stood concluded no option was left

with the Council of Ministers headed by the Chief Minister except to forward the name of Justice (Retired) R.A. Mehta to the Governor for

appointment on the post of Lokayukta. The Chief Minister having failed in his attempt to get Justice (Retired) J.R. Vora recommended for the post

of Lokayukta; further looking to the binding nature of primacy of the opinion of the Chief Justice; and the letter dated 16.8.2011 written by the

Governor, it appears, that he tried to scuttle the appointment of Justice (Retired) R.A. Mehta as Lokayukta.

88. In an attempt to frustrate the appointment of Lokayukta, the Chief Minister wrote a letter on 18.8.2011 to the Chief Justice in response to the

letter dated 2.8.2011, by which the Chief Justice had exercised primacy of opinion, that ""as the Head of the State Government, he would not be

able to accept the name of Justice (Retired) R.A. Mehta, who could not be considered the most suitable choice for the august post of Lokayukta,

Gujarat State."" The Chief Minister requested the Chief Justice to recommend a new name of a judge who had recently retired from service.

Similar, letter dated 18.8.2011 was written by the Chief Minister to the Governor stating that ""in so far as the recent letter dated 2.8.2011 from the

Chief Justice of the Gujarat High Court is concerned, I may inform you that the name recommended therein has not been accepted by the State

Government for certain specific and valid reasons.

89. I have examined both the letter dated 16.6.2011 and 18.8.2011 written by the Chief Minister to the Chief Justice in juxtaposition. The

difference in the two letters is that in the letter dated 16.6.2011 the allegations against Justice (Retired) R.A. Mehta had been supported by 11

copies of newspaper clippings downloaded from the websites which had been enclosed along with the letter. However, in the letter dated

18.8.2011 the allegations are identical with same 4 enclosures, and 5 objections had been transcribed in the body of the letter, though these 5

objections were also enclosed along with the earlier letter dated 16.6.2011. In the letter dated 18.8.2011 no request was made by the Chief

Minister to reconsider, relook or review the opinion expressed by the Chief Justice in the letter dated 2.8.2011. I find that no request was made to

consider the objections again which were transcribed in the letter dated 18.8.2011. The letter of the Chief Minister unilaterally had conveyed the

final decision of the Chief Minister that the recommendation of Justice (Retired) R.A. Mehta for the post of Lokayukta was not acceptable. Similar

letter was written by the Chief Minister to the Governor on 18.8.2011. The letters written on 18.8.2011 by the Chief Minister had shut the

consultation and appointment process so far as to the name of Justice (Retired) R.A. Mehta was concerned.

90. The learned Advocate General has fervently submitted that the best authority in the present case to say with certainty that there was a

difference of opinion between the Chief Justice and the Chief Minister was none other than the Chief Justice himself and a deadlock in the

consultation process had been reached, could only be said by the Chief Justice by writing a letter to the Chief Minister or to the Governor. He

urged that in this matter, the Chief Justice had not filed any affidavit-in-reply. In the affidavit-in-reply filed by the respondent No. 3 no reply had

been given to the assertions made in paragraphs 2.1 to 2.6, 3.20, Grounds (f)(vi) and (g)(iii) of the writ petition. It had only been stated that the

paragraphs of the writ petition and grounds would be addressed by the counsel at the time of oral arguments. He fiercely urged that when the writ

petition had been filed by State of Gujarat through its Chief Secretary and the Law Minister, who were authorized by the Council of Ministers to

file the writ petition, then the Chief Justice was required to file an affidavit-in-reply duly sworn by him, as the matter involved consultation between

two high dignitaries, namely, the Chief Justice and the Chief Minister. He further urged that the silence on the part of Chief Justice would not permit

the Court to infer anything from the letters of the Chief Minister dated 18.8.2011, either about the primacy of opinion of the Chief Justice or that

there was a deadlock between the Chief Minister and the Chief Justice. To buttress his argument, he relied on the decision of the Apex Court in

S.P. Gupta Vs. President of India and Others, , paragraphs 81, 82, 85, 114, 570 to 577, 581, 585 to 590. He passionately urged that if the Chief

Justice of India could file a counter affidavit in the writ petition before the Supreme Court of India, then in fact situation of the present case, the

Chief Justice of Gujarat High Court could not remain silent and was required to file an affidavit so that every relevant aspect on the question of

effective consultation would have come before this Court. He severely urged that the question about effective consultation and deadlock be looked

into fairly, not by semantic hair-splitting and quibbling on words like "primacy". In support of his argument the learned Advocate General relied on

the decision of the Apex Court in State of Bihar and Others Vs. Dr. Asis Kumar Mukherjee and Others, (Paragraph 25). He also relied on the

Apex Court decision in Som Mittal Vs. Government of Karnataka, (Paragraph 9) and urged that the judgments are not to be construed as statutes

nor words or phrases in judgments are to be interpreted like provisions of a statute. He urged that the letters dated 16.6.2011, 2.8.2011 and

18.8.2011 could not be read like statutes but are to be read and interpreted contextually. Unless the letter dated 18.8.2011 was replied by the

Chief Justice, the only conclusion could be drawn was that the consultation process was not yet over. He intensely urged that the objections raised

by the Chief Minister in his letter dated 16.6.2011 were focused in the letter dated 18.8.2011. He strongly urged that the Governor before issuing

the warrant of appointment ought to have inquired from the Chief Justice as to what reply he had sent to letter of the Chief Minister dated

18.8.2011 which was being awaited by the Chief Minister. He also urged that the action of Governor in issuing the warrant without or contrary to

the aid and advice of the Council of Ministers was unconstitutional.

91. The argument of the learned Advocate General appearing for the petitioners that the Chief Minister was waiting for the reply of the Chief

Justice and till the letter dated 18.8.2011 was replied it cannot be inferred that the consultation process had come to an end and there was

deadlock, lacks merit and deserves to be rejected. This letter dated 18.8.2011 was not required to be replied by the Chief Justice as the

consultation process stood closed on 2.8.2011 when the Chief Justice exercised his primacy of opinion in explicit terms or in any case on

18.8.2011 when the Chief Minister refused to accept the name of Justice (Retired) R.A. Mehta. Further, the letter dated 18.8.2011 written by the

Chief Minister to the Governor, clearly demonstrates that he was waiting for a new name to be recommended by the Chief Justice. The argument

that the Chief Minister was waiting as to whether the Chief Justice exercises his primacy or not, is a disingenuous excuse. The only effort of the

Chief Minister was to hamstring the appointment of Lokayukta.

92. The Chief Justice was not required to file any affidavit duly sworn by him in view of the fact that his letter was self explanatory and he had

exercised his primacy of opinion in an unambiguous term on 2.8.2011. From the letter dated 2.8.2011 written by the Chief Justice it could easily

be discerned that he predicated his opinion about Justice (Retired) R.A. Mehta and found him suitable for the post of Lokayukta. It was neither

essential for the Chief Justice to recant his statement made in the letter dated 2.8.2011 nor it was obligatory on him to abjure the assertions made

in the writ petition. The decision in S.P. Gupta (supra) was based on its own facts and is not applicable to the facts of the case in hand. The

correspondence between the high dignitaries has been read in its true perspective. The procedure for initiation for appointment or the consultative

process for appointment of Lokayukta was never objected to by the Chief Minister. The perception of the learned Advocate General that the

letters were being read as statutes by the respondents is misconceived.

93. Section 4(1) of the Act ensures that the person to be appointed as Lokayukta shall not be a member of Parliament or a member of the

Legislature of any State. He shall not hold any office of trust or profit (other than his office as the Lokayukta) or be connected with any political

party or shall not carry on any business or practice any profession, before he enters upon his office. If the candidate for the post of Lokayukta

holds any such office then he must resign. Similarly, if he is connected with any political party he must sever his connection with it. If he is carrying

on any business he must sever his connection with the conduct and management of such business. If he is practicing any profession, suspend

practice of such profession. Section 4(2) of the Act further provides that a person shall be disqualified for appointment as a Lokayukta or from

continuing to hold such post if any member of his family (wife, husband, son, unmarried daughter and son's wife) has entered into any commercial

contract with the State Government and the contract is subsisting or has any dealing with the State Government relating to any business of a

commercial nature. Section 4 of the Act clearly lays down that a member of Parliament or a member of the Legislature of any State could be

appointed as Lokayukta, provided he resigns from the membership before he enters upon the office of Lokayukta. The section provides that even

a person connected with a political party could be appointed as Lokayukta but he has to sever his connection with the political party. Justice

(Retired) R.A. Mehta did not had any of the aforesaid disqualifications or disabilities and was fully eligible to be appointed as Lokayukta. The

office of Lokayukta is an integrity institution. It has been given autonomy and insulation from external influences. The Chief Justice had found that

Justice (Retired) R.A. Mehta had institutional competence, institutional and personal integrity. He can perform his duties of Lokayukta without fear

or favor. The objections of the Chief Minister dated 16.6.2011 had been considered and overruled by the Chief Justice after inquiry and

application of mind to the objections. The Chief Justice had highlighted the qualities of Justice (Retired) R.A. Mehta and vouched for him by finding

him suitable for the office of Lokayukta and exercised his primacy of opinion in the letter dated 2.8.2011.

94. There is yet another reason for holding that the consultation process between the Chief Minister and the Chief Justice stood clogged. In the

letter dated 18.8.2011 the Chief Minister had emphatically written that, "as the Head of the State Government, I am afraid, I may not be able to

accept the name of Hon"ble Mr. Justice (Retired) R.A. Mehta, who in my view, cannot be considered the most suitable choice for the august post

of Lokayukta, Gujarat State." The Chief Minister further requested for a new recommendation. Therefore, this letter dated 18.8.2011 written by

the Chief Minister closed all doors for consultation with regard to the name of Justice (Retired) R.A. Mehta. The Chief Minister finally and in

unequivocal terms had informed the Chief Justice that the name of Justice (Retired) R.A. Mehta was not acceptable. Nothing remained for

consultation between the two dignitaries so far as Justice (Retired) R.A. Mehta was concerned. Therefore, the opinion of the Chief Justice dated

2.8.2011 would attain primacy. And the consultation process came to an end on 2.8.2011 and in any case on 18.8.2011. The conclusive stand of

the Chief Minister resulted in a deadlock between the Chief Minister and the Chief Justice.

95. There is one more reason for arriving at the finding that stalemate had occurred between the two dignitaries. I find that after the letter dated

16.8.2011 was written by the Governor flurry of activities were started by the Government. First, the Chief Minister on 16.8.2011 appointed a

Former Judge, Supreme Court of India as Chairman, Commission of Inquiry to inquire in the allegations of corruption against the Chief Minister

and the Government, under the Commissions of Inquiry Act, 1952. Thereafter, the State Government issued the Gujarat Lokayukta (Amendment)

Ordinance 2011 on 17.8.2011 for amending the Gujarat Lokayukta Act, 1986, which ousted the Chief Justice from consultation process and his

role was minimized. The Ordinance also contained several changes in the Act which sought to amend the entire procedure for appointment of

Lokayukta. The Governor objected to it and returned it. Though the primacy of opinion of the Chief Justice in the matter of appointment of

Lokayukta had attained finality on 2.8.2011 and in any event on 18.8.2011, the dithering action of the Council of Ministers headed by the Chief

Minister under a delusion that the appointment of Lokayukta could be halted, led the Chief Minister to write letters dated 18.8.2011 to the Chief

Justice and the Governor that the State Government had not accepted the name of Justice (Retired) R.A. Mehta recommended by the Chief

Justice demonstrates opprobrium conduct of the State Government, which does not augur well for our democracy.

96. The swaggering action of the Chief Minister establishes that he taken the refusal of the Chief Justice in not recommending the name of Justice

(Retired) J.R. Vora for appointment as Lokayukta in a wrong way, and his letter written on 18.8.2011 challenge"s the superiority and primacy of

opinion of the Chief Justice on the recommended name of Justice (Retired) R.A. Mehta. The rancor and distrust of the Chief Minister had been

fierce and it has a withering effect on our democracy and integrity institution such as Lokayukta. And due to such defiance, it is testing our

democratic integrity institution of Lokayukta and the Courts power of judicial review. Satisfaction of the Chief Justice in inquiring in the allegations

raised by the Chief Minister on 16.6.2011 and his decision after inquiry communicated on 2.8.2011 that Justice (Retired) R.A. Mehta was suitable

for being appointed Lokayukta is not open for challenge. The personal integrity, conscientiousness, reputation, uprightness and sincerity of Justice

(Retired) R.A. Mehta which was testified by the Chief Justice is not open to judicial review, nor it had been challenged in these writ petitions.

There was no good or cogent reason available to the Chief Minister, for writing letter dated 18.8.2011 for not appointing Justice (Retired) R.A.

Mehta as Lokayukta, except adamantly reiterating the trite and stale allegations made earlier on 16.6.2011 which after inquiry had not been

accepted by the Chief Justice. The primacy of the Chief Justice has to be given effect, otherwise, there would be break down of the constitutional

machinery, rule of law and democracy would be at peril. u/s 3 of the Act the Council of Ministers headed by the Chief Minister or the Leader of

Opposition had not been conferred with any veto right or power to postpone the appointment of Lokayukta. For irrelevant reasons the Chief

Minister has refused to accept the primacy of the opinion of the Chief Justice and his letters dated 18.8.2011 suffers from the vice of official

arbitrariness.

97. For the aforesaid reasons I am of the considered opinion that the process of consultation envisaged u/s 3 of the Act was over and had come to

an end on 2.8.2011 and in any event on 18.8.2011 and nothing was left to be consulted between the Chief Justice and the Chief Minister on the

name of Justice (Retired) R.A. Mehta. I am further of the considered opinion that impasse had occurred due to imprudent conduct and inaction of

the Council of Ministers headed by the Chief Minister in refusing to accept primacy of opinion of the Chief Justice, and to follow the provision of

section 3 of the Act and Article 163 of the Constitution in forwarding the recommendation of the Chief Justice to the Governor for appointment of

Justice (Retired) R.A. Mehta as Lokayukta, State of Gujarat, which had resulted into a gridlock. I am further of the considered opinion that

answer to the first point is that looking to the nature of consultation required for appointment of Lokayukta u/s 3 of the Gujarat Lokayukta Act, in

the present case as a matter of fact, the consultative process between the Hon"ble the Chief Justice and the Hon"ble the Chief Minister had come

to a close and there was a deadlock between the two dignitaries.

SECOND POINT

98. The second question which arises for consideration is whether the Governor of the State was authorized to act in a manner she did while

issuing notification appointing Justice R.A. Mehta as Lokayukta of the State without the aid and advice of the Council of Ministers? The learned

Advocate General appearing for the petitioners has vehemently urged that as per Article 163(1) of the Constitution, the Governor must act in

accordance with the aid and advice of the Council of Ministers. u/s 3 of the Act read with Article 163 of the Constitution, the Governor could not

have acted without or de hors the advice of the Council of Ministers. He urged that in a Parliamentary Democracy, the executive functions through

the Council of Ministers and that the Governor is bound by the aid and advice of the Council of Ministers unless when discretion is vested on the

Governor under the Constitution itself. He further urged that in addition to the express provisions made in the Constitution requiring the Governor

to act in his own discretion, there are areas recognized in various decisions of the Apex Court where in special situations such discretionary powers

were necessary. He urged that once the Chief Minister had written a letter on 18.8.2011 to the Governor stating that Justice (Retired) R.A. Mehta

be not appointed as Lokayukta, then under Article 163(1) of the Constitution, the Governor on 25.8.2011 could not appoint Justice (Retired)

R.A. Mehta as Lokayukta without or contrary to the aid and advice of the Council of Ministers headed by the Chief Minister.

99. For considering the argument of learned counsel for the petitioner It is necessary to examine Articles 163 of the Constitution which reads as

under:

Article 163. (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his

functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question

arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the

decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the

ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into any court.

100. In Samsher Singh Vs. State of Punjab and Another, the Seven Judges Bench of the Apex Court has held that in a Parliamentary democracy,

under the Cabinet system of Government as embodied in our Constitution the Governor in exercise of powers under Article 163(1) would always

act on the aid and advice of the Council of Ministers and only in spheres where the Governor is required by or under the Constitution to exercise

his functions in his discretion the Governor would have discretionary powers. The Governor is the constitutional or formal head of the State and

exercises all powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers. It was held that

the Governor acts on the aid and advice of the Council of Ministers with the Chief Minister at the head in the case of State in all matters which vest

in the executive whether those functions are executive or legislative in character. The Governor cannot exercise the executive functions personally.

The Apex Court laid down the exceptions spelt out by the Constitution for the Governor to act independently which are as under:

(a). First, there are several constitutional functions, powers and duties of the Governor. These are conferred on him eo nomine the Governor. The

Governor, is, by and under the Constitution, required to act in his discretion in several matters. These constitutional functions and powers of the

Governor eo nomine as well as these in the discretion of the Governor are not executive powers of the State within the meaning of Article 154 read

with Article 162.

(b). Second, the Governor under Article 163 of the Constitution can take aid and advice of his Council of Ministers when he is exercising

executive power of the State. The Governor can exercise powers and functions without the aid and advice of his Council of Ministers when he is

required by or under the Constitution to act in his discretion, where he is required to exercise his constitutional functions conferred on him or

nominee as the Governor.

(c). Articles where the expression ""acts in his discretion"" is used in relation to the powers and functions of the Governor are those which speak of

special responsibilities of the Governor. These articles are 371A(1)(b), 371A(1)(d), 371A(2)(b) and 371A(2)(f). There are two paragraphs in

the Sixth Schedule, namely 9(2) and 18(3) where the words ""in his discretion"" are used in relation to determination of amount of royalties payable

by licensees or lessees prospecting for, or extracting minerals, to the District Council. Paragraph 18(3) has been omitted with effect from January

21, 1972.

(d). The provisions contained in Article 371A(1)(b) speak of the special responsibility of the Governor of Nagaland with respect to law and order

in the State of Nagaland and exercise of his individual judgment as to the action to be taken. The proviso states that the decision of the Governor in

his discretion shall be final and it shall not be called in question.

(e), Article 371A(1)(d) states that the Governor shall in his discretion make rules providing for the composition of the Regional Council for the

Tuensang District.

(f). Article 371A(2)(b) states that for periods mentioned there the Governor shall in his discretion arrange for an equitable allocation of certain

funds, between the Tuensang District and the rest of the State.

(g). Article 371A(2)(f) states that the final decision on all matters relating to the Tuensang District shall be made by the Governor in his discretion.

101. The Governor is the Chief Executive of the State and the executive powers of the State vests in him. Article 163(2) of the Constitution

provides that if any question arises, whether any matter is or is not a matter as respects which the Governor is by or under the Constitution

required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall

not be called in question on the ground that he ought or ought not to have acted in his discretion. No doubt the Constitution provides for a Council

of Ministers to aid and advise the Governor in the discharge of his executive functions, there is no provision in the Constitution which obliges the

Governor to follow the advice of the Council of Ministers headed by the Chief Minister, however, the Courts have held that, normally, the

Governor is to act in accordance with the aid and advice of the Council of Ministers. The argument of the learned Advocate General appearing for

the petitioners that the Governor could not have acted without or de hors the advice of the Council of Ministers unless where the discretion is

vested on the Governor under the Constitution itself or in the areas recognized in various decisions of the Apex Court where in special situations

such discretionary powers were necessary, deserves to be rejected. The reason for rejecting the argument is that merely because the Constitution

expressly provides that in some cases, the Governor could act in his discretion, it would not lead to an inference that the Governor can act in his

discretion only where the Constitution expressly so provided. Such an interpretation would render Article 163(2) otiose and nugatory. Article

163(2) postulates that there can be matters where the Governor can act in his discretion even though the Constitution had not expressly so

provided. Under Article 356 and Article 200 of the Constitution, the Governor could exercise his discretionary powers without or irrespective of

any aid or advice of the Council of Ministers. The dominant condition for exercise of discretionary power, without or contrary to the aid and

advice of the Council of Ministers has to be in extraordinary or exceptional cases where the action and conduct of the Council of Ministers headed

by the Chief Minister, results in failure of the constitutional machinery or the democracy is in peril. In such rare or rarest cases, where the

democracy is in danger of being waylaid, the Governor is under a statutory and constitutional obligation to exercise discretionary powers under

Article 163(1) and (2) of the Constitution of India.

102. The Courts are under a duty to interpret the Constitution to fulfill the needs and aspirations of the people. The Court has always developed

the law and has invented new concepts in construing and interpreting the Constitution and the common law by discovering new tools to impart

justice according to the need of time. Public interest is the paramount consideration. The Constitution makers had not assumed nor they could have

foreseen that where the decision making process had been adhered to and had been undergone in terms of the scheme of the Act and the

Constitution, the State Government or the executive would act with a niggling behavior creating a constitutional crisis. The decision of the

Constitution Bench of the Apex Court in *Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others*, is an example

of discretionary powers exercised by the Governor where the question of granting sanction for prosecution against the Minister of the State came

up for consideration. The Council of Ministers were of the opinion that no such sanction should be granted. Acting on the report of the Lokayukta,

however, the Governor proceeded to grant sanction. The Apex Court held as under:

19. Article 163 has been extracted above. Undoubtedly, in a matter of grant of sanction to prosecute the Governor is normally required to act on

aid and advice of the Council of Ministers and not in his discretion. However, an exception may arise whilst considering grant of sanction to

prosecute a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion. Similar would be the

situation if the Council of Ministers disable itself or disentitles itself.

xxx xxx xxx xxx xxx

31. We have, on the premises aforementioned, no hesitation to hold that the decision of the Council of Ministers was ex facie irrational whereas the

decision of the Governor was not. In a situation of this nature, the writ Court while exercising its jurisdiction under Article 226 of the Constitution

of India as also this Court under Articles 136 and 142 of the Constitution of India can pass an appropriate order which would do complete justice

to the parties. The High Court unfortunately failed to consider this aspect of the matter.

32. If, on these facts and circumstances, the Governor cannot act in his own discretion there would be a complete breakdown of the rule of law

inasmuch as it would then be open for Governments to refuse sanctioning spite of overwhelming material showing that a prima facie case is made

out. If, in cases where prima facie case is clearly made out, sanction to prosecute high functionaries is refused or withheld democracy itself will be

at stake. It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be

prosecuted as the requisite sanction will not be granted.

Similar view had been taken by the Apex Court in State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, (Paragraph 10).

103. The facts give rise to a paradigm case and the question which is required to be considered is that whether under Article 163 of the

Constitution, the Governor can act without or contrary to the aid and advice of the Council of Ministers in matter of appointment of Lokayukta u/s

3 of the Act? A new wave of democracy demanding empowerment of ordinary people for fighting corruption is sweeping India. Modern civil

society and present day world of globalization need corruption-free society. The country requires a culture of integrity. An integrity institution, such

as Lokayukta, is the dream of the disillusioned and is the hope of people to battle against corruption of public functionaries. The provisions made

under the Act must be viewed in context of the socio-economic conditions and aspirations of the people. Constitutional provisions are required to

be understood and interpreted with an object oriented approach and not in a narrow and pedantic sense. The Constitutional mini-crises had been

sparked by the Chief Minister which compelled the Governor to exercise his discretionary powers under Article 163 of the Constitution to protect

democracy and rule of law and the Governor appointed Justice (Retired) R.A. Mehta as Lokayukta on 25.8.2011.

104. The name of Justice (Retired) R.A. Mehta was recommended on 7.6.2011 by the Chief Justice for appointment of Lokayukta after Justice

(Retired) S.D. Dave withdrew his name on 1.5.2011, ignoring the request of the Chief Minister to recommend the name of Justice (Retired) J.R.

Vora whose name had earlier been recalled as he was appointed Director, Gujarat State Judicial Academy, in the interest of judiciary. The

recommendation made by the Chief Justice was seriously objected to by letter dated 16.6.2011 written by the Chief Minister to the Chief Justice.

Once the Chief Justice had considered the objections of the Chief Minister and after inquiry in the allegations, had reaffirmed his recommendation

on 2.8.2011 and exercised primacy of opinion, then the recommendation of the Chief Justice would be binding on the Council of Ministers. The

only course left open to the Chief Minister who is the head of Council of Ministers was to forward the name of Justice (Retired) R.A. Mehta to the

Governor, for his appointment as Lokayukta of the State of Gujarat. The Governor on 16.8.2011 wrote to the Chief Minister to send a formal

proposal so that appointment of Lokayukta could be made. The Leader of Opposition also on 16.8.2011 wrote to the Chief Minister that he had

already given his consent to the Governor for appointment of Justice (Retired) R.A. Mehta. But the Chief Minister instead of fulfilling his obligation

u/s 3 of the Act and Article 163 of the Constitution wrote to the Chief Justice on 18.8.2011 to send new name as he would not be able to accept

the name of Justice (Retired) R.A. Mehta for the post of Lokayukta. The Chief Minister also wrote to the Governor on the same day that the name

recommended in the letter dated 2.8.2011 by the Chief Justice had not been accepted by the State Government.

105. After the letter of the Governor dated 16.8.2011 was received by the Chief Minister to forward the name of Justice (Retired) R.A. Mehta for

appointment as Lokayukta, who was not the choice of the Chief Minister, he appears to have decided to thwart the appointment of Justice

(Retired) R.A. Mehta, ignoring the primacy of the opinion of the Chief Justice dated 2.8.2011.

106. First, the Chief Minister on 16.8.2011 appointed a Former Judge, Supreme Court of India, as the Chairman, Commission of Inquiry to

inquire in the allegations of corruption against the Chief Minister and the Government under the Commissions of Inquiry Act, 1952.

107. Thereafter, the Chief Minister pushed for promulgation of the Gujarat Lokayukta (Amendment) Ordinance 2011 on 17.8.2011 issued by

State Government, for amending the Gujarat Lokayukta Act, 1986, which would have ousted the Chief Justice from consultation process and

minimized his power in the matter of appointment of Lokayukta. The Ordinance also contained several changes in the Act which sought to alter the

entire procedure for appointment of Lokayukta. The Governor objected to it and returned the Ordinance on 18.8.2011. Immediately, another

office note dated 18.8.2011 was prepared by the General Administration Department and after signature of the Chief Minister on 20.8.2011, the

Ordinance was again forwarded to the Governor, which was returned by the Governor on 26.8.2011.

108. The other attempt to stall the appointment of Lokayukta was made by the Chief Minister by writing a letter on 18.8.2011 to the Chief Justice

that his recommendation dated 2.8.2011 of Justice (Retired) R.A. Mehta was not acceptable as he was not the suitable choice for the post of

Lokayukta and a new name be sent. Similar letter dated 18.8.2011 was written to the Governor by the Chief Minister stating that the name

recommended by the Chief Justice on 2.8.2011 had not been accepted by the State Government.

109. I have examined both the letters dated 16.6.2011 and 18.8.2011 written by the Chief Minister to the Chief Justice. The contents of both the

letters are almost the same. The only difference in the two letters is that in the earlier letter dated 16.6.2011 the allegations against Justice (Retired)

R.A. Mehta had been supported by enclosing copies of 11 newspaper clippings downloaded from the websites. Whereas in the letter dated

18.8.2011 the allegations are the same with the only difference that whatever was written with regard to Justice (Retired) R.A. Mehta in earlier

copies of 5 newspaper clippings downloaded from the websites had been transcribed in the letter, but there are only 4 enclosures. In the letter

dated 18.8.2011 nothing new was mentioned except that the name of Justice (Retired) R.A. Mehta was not acceptable and recommendation of

new name be sent.

110. The case in hand is one of its own kind. Earlier such typical situation never arose. Extraordinary situations demand extraordinary remedies.

While dealing with an unprecedented case, the Court has to innovate the law and may pass unconventional order keeping in mind that exceptional

fact situation requires exceptional measures. [See B.P. Achala Anand Vs. S. Appi Reddy and Another, , Paragraph 1]. Open resistance of the

Council of Ministers headed by the Chief Minister in not accepting the primacy of the opinion of the Chief Justice of Gujarat High Court in the

matter of appointment of Lokayukta has created a crisis situation. The Chief Minister acted in violation of section 3 of the Act and Article 163 of

the Constitution. The insistence of the Chief Minister to recommend the name of Justice (Retired) J.R. Vora for appointment as Lokayukta, who

was his choice, was not accepted by the Chief Justice on valid ground that Justice (Retired) J.R. Vora had been appointed Director, Gujarat State

Judicial Academy. If the choice of the Council of Ministers headed by the Chief Minister had been accepted it would have set a pernicious trend

and would have propitiated the public functionaries who were likely to fall within the scanner of Lokayukta and destroyed the integrity institution of

Lokayukta as envisaged under the Act. The objections of the Chief Minister were turned down by application of mind by the Chief Justice after

inquiry for one and half months. The Chief Justice on 2.8.2011 had exercised primacy of opinion. If I accept the argument of the learned counsel

for the petitioners that the Chief Minister by letters dated 18.8.2011 could rebuff the name of Justice (Retired) R.A. Mehta by sitting over the letter

of the Chief Justice dated 2.8.2011, which had primacy of opinion, then it, would be akin to inviting a disaster. The letter dated 18.8.2011 was a

miffed reaction of the Chief Minister and showed his discordant approach. There was no good reason to reject the name of Justice (Retired) R.A.

Mehta once the objections of the Chief Minister dated 16.6.2011 had been overruled on 2.8.2011 by the Chief Justice, then the Chief Minister

could not withhold the name of Justice (Retired) R.A. Mehta for appointment as Lokayukta. The argument of the learned counsel for the

petitioners has no substance and is rejected.

111. The constitutional framework in India guarantees rule of law to its citizens. The State is the custodian of law and is principally responsible for

governing by rule of law. Democracy is a potent tool to exercise control over the governance, and it can be effective only when the citizens are

empowered in expressing their views without fear and get inexpensive justice against the corrupt public functionaries. The facts of the case in hand

demonstrates that for about more than two years from 25.11.2003 to 6.8.2006 no steps were taken by the Government for appointment of

Lokayukta. On 7.8.2006 the Chief Minister himself proposed the name of a Former Chief Justice who could not be appointed. Thereafter, the

Chief Minister called for a panel of three names from the Chief Justice so that a name for appointment as Lokayukta could be chosen. He chose

the name of Justice (Retired) J.R. Vora. The Governor after taking legal opinion requested the Chief Justice to send one name, instead of a panel

of names in view of decisions of the Apex Court in Ashish Handa and N. Kannadasan (supra). Justice (Retired) J.R. Vora had been appointed as

Director Gujarat State Judicial Academy. Even then thrice the Chief Minister requested for recommending the name of Justice (Retired) J.R. Vora

but the Chief Justice did not agree and recommended the name of Justice (Retired) R.A. Mehta. The objections of the Chief Minister were

rejected by the Chief Justice and he exercised primacy of opinion which was binding. The primacy of opinion of the Chief Justice was not accepted

by the Chief Minister by writing letters dated 18.8.2011 to the Chief Justice and the Governor. The letters dated 18.8.2011 were warning bells for

our democratic system. The pranks of the Chief Minister who is the head of Council of Ministers demonstrates deconstruction of our democracy,

and the questionable conduct of stonewalling the appointment of Justice (Retired) R.A. Mehta as Lokayukta threatened the rule of law. The refusal

of the Chief Minister to perform its statutory or constitutional obligation, and the effort to metastasize the procedure for appointment of Lokayukta

by issuing the Gujarat Lokayukta (Amendment) Ordinance, 2011, to amend the Act, were deprave and truculent actions. The aforesaid

exceptional facts establish that deconstruction of democracy was at work. It was necessary to remove the aporia created by the action of the Chief

Minister and a responsible constitutional decision was required to be taken by the Governor so that democracy may thrive. The concept of the

Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. The Apex Court in M.P. Special Police

Establishment's case in paragraph 12 had held, "that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and

not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are

as set out in Shamsher Singh case, however, the exceptions mentioned in the judgment are not exhaustive. Other situations may be situations where

by reason of peril to democracy or democratic principles, an action may be compelled which from its nature is not amenable to Ministerial advice.

For preserving our democracy from being beleaguered and to prevent tyranny, it became absolutely essential for the Governor to exercise his

discretionary power under Article 163 of the Constitution and to appoint Justice (Retired) R.A. Mehta as Lokayukta, without or contrary to the

aid and advice of the Council of Ministers headed by the Chief Minister as their action and conduct were perilous to our democracy and rule of

law.

112. In view of the above discussion I am of the considered opinion that the two letters dated 18.8.2011 written by the Chief Minister

demonstrates that the Chief Minister was not serious about the appointment procedure envisaged u/s 3 of the Act for appointment of an

independent Lokayukta. The Council of Ministers headed by the Chief Minister had shown hostile attitude towards the primacy of the opinion of

the Chief Justice. ** The satisfaction of the Chief Justice after inquiry and exercise of primacy of opinion communicated on 2.8.2011 to the Chief

Minister is not open for judicial review. The letter of the Chief Minister dated 18.8.2011 and his action displayed arbitrariness and impudicity

which tends to erode the primacy of the opinion of the Chief Justice. The clear refusal of the Chief Minister to accept, primacy of opinion of the

Chief Justice had the velocity which had shattered the faith in rule of law which is the essence of democracy and integrity institution of Lokayukta.

Therefore, I am further of the considered opinion that looking to the brazen conduct and irrationality of the Council of Ministers headed by the

Chief Minister, the Governor rightly exercised her discretionary powers under Article 163 of the Constitution and appointed Justice (Retired) R.A.

Mehta as Lokayukta Gujarat State because acceptance of letter of the Chief Minister dated 18.8.2011 would have resulted in complete

breakdown of the rule of law and erosion of principles of democracy.

113. The Governor was justified and authorized to act u/s 3 of the Act and exercise her discretionary powers under Article 163 of the

Constitution, in the fact situation of this case, in the manner she did while issuing warrant/notification appointing Justice (Retired) R.A. Mehta as

Lokayukta of the Gujarat State, without or contrary to the aid and advice of the Council of Ministers headed by the Chief Minister to save

democracy and uphold rule of law. I am of the considered opinion that the answer to the second point is that, the Governor of the State was

authorized to act in a manner she did while issuing warrant/notification appointing Justice R.A. Mehta as Lokayukta of the State without the aid and

advice of the Council of Ministers.

THIRD POINT

114. What final order? In other words, should the petitions be allowed or should the petitions be dismissed. Further if the petitions are to be

allowed, should further direction for appointment of a new Lokayukta within time frame be given to the State Government? The appointment of

Lokayukta is to be made in accordance with the procedure prescribed by section 3 of the Act. Four high dignitaries are involved in the

appointment of Lokayukta, namely, the Governor, the Council of Ministers, Leader of Opposition and the Chief Justice of the State High Court. In

the event the writ petitions are allowed, even then, in my opinion, the Court, normally, would not be justified to issue a writ of mandamus or a

direction to the abovementioned high dignitaries to appoint a Lokayukta within a fixed time frame. The Court may make a request that appointment

of Lokayukta be made expeditiously. However, I need not go into this question any further as I am of the considered opinion that the answer to the

third point is that these writ petitions should be dismissed.

CONCLUSION

115. While answering the three point of disagreement between the members of the Division Bench referred to me, I could not persuade myself,

that the writ petitions be allowed, and agree with the opinion of Hon"ble Ms. Justice Sonia Gokani. I am in complete agreement with the view

taken by Hon"ble Mr. Justice Akil Kureshi that these writ petitions are to be dismissed. I do not find any merit in these writ petitions, accordingly,

the writ petitions are dismissed. In view of the majority of opinion, these writ petitions are dismissed.

116. Since the writ petitions have been dismissed no further orders are necessary in the connected Civil Applications, and they shall stand

disposed of.

117. In case the Gujarat High Court Rules, 1993, or any other rule requires, only then, the office may place this judgment and records of these writ

petitions and civil applications before Hon"ble The Acting Chief Justice.

**As expunged by [The Chief Minister acted under a false impression that he could turn down the superiority and primacy of the opinion of the

Chief Justice which was binding. The spiteful and challenging action demonstrates a false sense of invincibility.] State of Gujarat and Another Vs.

Hon"ble Mr. Justice R.A. Mehta (Retd.) and Others,