REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 176 OF 2009

RAM JETHMALANI & ORS. …PETITIONERS

VERSUS

UNION OF INDIA & ORS. …RESPONDENTS

WITH

I.A.NO.1 OF 2009

O R D E R

I

"Follow the money" was the short and simple advice given by the secret informant, within the American Government, to Bob Woodward, the journalist from Washington Post, in aid of his investigations of the Watergate Hotel break in. Money has often been claimed, by economists, to only be a veil that covers the real value and the economy. As a medium of exchange, money is vital for the smooth functioning of exchange in the market place.

However, increasing monetization of most social transactions has been viewed as potentially problematic for the social order, in as much as it signifies a move to evaluating value, and ethical desirability, of most areas of social interaction only in terms of price obtained in the market place.

2. Price based notions of value and values, as propounded by some extreme neo-liberal doctrines, implies that the values that ought to be promoted, in societies, are the ones for which people are willing to pay a price for. Values, and social actions, for which an effective demand is not expressed in the market, are neglected, even if lip service is paid to their essentiality. However, it cannot be denied that not everything that can be, and is transacted, in the market for a price is necessarily good, and enhances social welfare. Moreover, some activities, even if costly and without being directly measurable in terms of exchange value, are to be rightly viewed as essential. It is a well established proposition, of political economy, and of statecraft, that the State has a necessary interest in determining, and influencing, the kinds of transactions, and social actions, that occur within a legal order. From prevention of certain kinds of harmful activities, that may range from outright crimes, to regulating or controlling, and consequently mitigating, socially harmful modes of social and economic production, to promotion of activities

that are deemed to be of higher priority, than other activities which may have a lower priority, howsoever evaluated in terms of social utility, are all the responsibilities of the State. Whether such activities by the State result in directly measurable benefits or not is often not the most important factor in determining their desirability; their absence, or their substantial evisceration, are to be viewed as socially destructive.

3. The scrutiny, and control, of activities, whether in the economic, social or political contexts, by the State, in the public interest as posited by modern constitutionalism, is substantially effectuated by the State "following the money." In modern societies very little gets accomplished without transfer of money. The incidence of crime, petty and grand, like any other social phenomena is often linked to transfers of monies, small or large. Money, in that sense, can both power, and also reward, crime. As noted by many scholars, with increasing globalization, an ideological and social construct, in which transactions across borders are accomplished with little or no control over the quantum, and mode of transfers of money in exchange for various services and value rendered, both legal and illegal, nation-states also have begun to confront complex problems of cross-border crimes of all kinds. Whether this complex web of flows of funds,

instantaneously, and in large sums is good or bad, from the perspective of lawful and desired transactions is not at issue in the context of the matters before this Court.

4. The worries of this Court that arise, in the context of the matters placed before us, are with respect to transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State. The worries of this Court also relate to whether the activities of engendering such unaccounted monies, transferring them abroad, and the routing them back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as

desirable modes of individual and group action. The worries of this court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity. Finally, the worries of this Court are also with respect to the extent of incapacities, system wide, in terms of institutional resources, skills, and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance. Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives.

5. Large amounts of unaccounted monies, stashed away in banks located in jurisdictions that thrive on strong privacy laws protecting bearers of those accounts to avoid scrutiny, raise each and every worry delineated above. First and foremost, such large monies stashed abroad, and unaccounted for by individuals and entities of a country, would suggest the necessity of suspecting that

they have been generated in activities that have been deemed to be unlawful. In addition, such large amounts of unaccounted monies would also lead to a natural suspicion that they have been transferred out of the country in order to evade payment of taxes, thereby depleting the capacity of the nation to undertake many tasks that are in public interest.

6. Many schools of thought exist with regard to the primary functions of the State, and the normative expectations of what the role of the State ought to be. The questions regarding which of those schools provide the absolutely correct view cannot be the criteria to choose or reject any specific school of thought as an aid in constitutional adjudication. Charged with the responsibility of having to make decisions in the present, within the constraints of epistemic frailties of human knowledge, constitutional adjudicators willy-nilly are compelled to choose those that seem to provide a reasoned basis for framing of questions relevant, both with respect to law, and to facts. Institutional economics gives one such perspective which may be a useful guide for us here. Viewed from a functional perspective, the State, and governments, may be seen as coming into existence in order to solve, what institutional economists have come to refer to as, the coordination problems in providing public goods, and

prevent the disutility that emerges from the moral hazard of a short run utility maximizer, who may desire the benefits of goods and services that are to be provided in common to the public, and yet have the interest of not paying for their production.

7. Security of the nation, infrastructure of governance, including those that relate to law making and law keeping functions, crime prevention, detection and punishment, coordination of the economy, and ensuring minimal levels of material, and cultural goods for those who may not be in a position to fend for themselves or who have been left by the wayside by the operation of the economy and society, may all be cited as some examples of the kinds of public goods that the State is expected to provide for, or enable the provision of. In as much as the market is primarily expected to cater to purely self centered activities of individuals and groups, markets and the domain of purely private social action significantly fail to provide such goods. Consequently, the State, and government, emerges to rectify the coordination problem, and provide the public goods.

8. Unaccounted monies, especially large sums held by nationals and entities with a legal presence in the nation, in banks abroad, especially in tax havens or in jurisdictions with a known history of silence about sources

of monies, clearly indicate a compromise of the ability of the State to manage its affairs in consonance with what is required from a constitutional perspective. This is so in two respects. The quantum of such monies by itself, along with the numbers of individuals or other legal entities who hold such monies, may indicate in the first instance that a large volume of activities, in the social and the economic spheres within the country are unlawful and causing great social damage, both at the individual and the collective levels. Secondly, large quanta of monies stashed abroad, would also indicate a substantial weakness in the capacity of the State in collection of taxes on incomes generated by individuals and other legal entities within the country. The generation of such revenues is essential for the State to undertake the various public goods and services that it is constitutionally mandated, and normatively expected by its citizenry, to provide. A substantial degree of incapacity, in the above respect, would be an indicia of the degree of failure of the State; and beyond a particular point, the State may spin into a vicious cycle of declining moral authority, thereby causing the incidence of unlawful activities in which wealth is sought to be generated, as well as instances of tax evasion, to increase in volume and in intensity.

9. Consequently, the issue of unaccounted monies held by nationals, and other legal entities, in foreign banks, is of primordial importance to the welfare of the citizens. The quantum of such monies may be rough indicators of the weakness of the State, in terms of both crime prevention, and also of tax collection. Depending on the volume of such monies, and the number of incidents through which such monies are generated and secreted away, it may very well reveal the degree of "softness of the State."

10. The concept of a "soft state" was famously articulated by the Nobel Laureate, Gunnar Myrdal. It is a broad based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance. The more soft the State is, greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker.

11. When a catchall word like "crimes" is used, it is common for people, and the popular culture to assume that it is "petty crime," or crimes of passion committed by individuals. That would be a gross mischaracterization of the seriousness of the issues involved. Far more dangerous are the crimes that threaten national security, and national interest. For instance, with globalization, nation states are also confronted by the dark worlds of international arms dealers, drug peddlers, and various

kinds of criminal networks, including networks of terror. International criminal networks that extend support to home-grown terror or extremist groups, or those that have been nurtured and sustained in hostile countries, depend on networks of formal and informal, lawful and unlawful mechanisms of transfer of monies across boundaries of nation-states. They work in the interstices of the micro-structures of financial transfers across the globe, and thrive in the lacunae, the gaps in law and of effort. The loosening of control over those mechanisms of transfers, guided by an extreme neo-liberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-states, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe.

12. Increasingly, on account of "greed is good" culture that has been promoted by neo-liberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature. From mining mafias to political operators who, all too willingly, bend policies of the State to suit particular individuals or groups in the social and economic sphere, the raison d'etre for weakening the capacities and intent to enforce the laws is

the lure of the lucre. Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly it's poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price.

13. The paradigm of governance that has emerged, over the past three decades, prioritizes the market, and its natural course, over any degree of control of it by the State. The role for the State is visualized by votaries of the neo-liberal paradigm as that of a night watchman; and moreover it is also expected to take its hands out of the till of the wealth generating machinery. Based on the theories of Arthur Laffer, and pushed by the Washington Consensus, the prevailing wisdom of the elite, and of the policy makers, is that reduction of tax rates, thereby making tax regimes regressive, would incentivise the supposed genius of entrepreneurial souls of individuals, actuated by pursuit of self-interest and desire to accumulate great economic power. It was expected that this would enable the generation of more wealth, at a more rapid pace, thereby enabling the State to generate appropriate tax revenues even with lowered tax rates. Further, benefits were also expected in moral terms – that

the lowering of tax rates would reduce the incentives of wealth generators to hide their monies, thereby saving them from the guilt of tax evasion. Whether that is an appropriate model of social organization or not, and from the perspective of constitutional adjudication, whether it meets the requirements of constitutionalism as embedded in the texts of various constitutions, is not a question that we want to enter in this matter.

14. Nevertheless, it would be necessary to note that there is a fly in the ointment of the above story of friction free markets that would always clear, and always work to the benefit of the society. The strength of tax collection machinery can, and ought to be, expected to have a direct bearing on the revenues collected by the State. If the machinery is weak, understaffed, ideologically motivated to look the other way, or the agents motivated by not so salubrious motives, the amount of revenue collected by the State would decline, stagnate, or may not generate the revenue for the State that is consonant with its responsibilities. From within the neo-liberal paradigm, also emerged the under-girding current of thought that revenues for the State implies a big government, and hence a strong tax collecting machinery itself would be undesirable. Where the elite lose out in democratic politics of achieving ever decreasing tax rates, it would appear

that state machineries in the hands of the executive, all too willing to promote the extreme versions of the neo-liberal paradigm and co-opt itself in the enterprises of the elite, may also become all too willing to not develop substantial capacities to monitor and follow the money, collect the lawfully mandated taxes, and even look the other way. The results, as may be expected, have been disastrous across many nations.

15. In addition, it would also appear that in this miasmic cultural environment in which greed is extolled, conspicuous consumption viewed as both necessary and socially valuable, and the wealthy viewed as demi-gods, the agents of the State may have also succumbed to the notions of the neo-liberal paradigm that the role of the State ought to only be an enabling one, and not exercise significant control. This attitude would have a significant impact on exercise of discretion, especially in the context of regulating economic activities, including keeping an account of the monies generated in various activities, both legal and illegal. Carried away by the ideology of neo-liberalism, it is entirely possible that the agents of the State entrusted with the task of supervising the economic and social activities may err more on the side of extreme caution, whereby signals of wrong doing may be ignored even when they are strong. Instances of the powers that

be ignoring publicly visible stock market scams, or turning a blind eye to large scale illegal mining have become all too familiar, and may be readily cited. That such activities are allowed to continue to occur, with weak, or non-existent, responses from the State may, at best, be charitably ascribed to this broader culture of permissibility of all manner of private activities in search of ever more lucre. Ethical compromises, by the elite – those who wield the powers of the state, and those who fatten themselves in an ever more exploitative economic sphere- can be expected to thrive in an environment marked by such a permissive attitude, of weakened laws, and of weakened law enforcement machineries and attitudes.

16. To the above, we must also add the fragmentation of administration. Even as the range of economic, and social activities have expanded, and their sophistication increased by leaps and bounds, the response in terms of administration by the State has been to create ever more specialized agencies, and departments. To some degree this has been unavoidable. Nevertheless, it would also appear that there is a need to build internal capacities to share information across such departments, lessen the informational asymmetries between, and friction to flow of information across the boundaries of departments and agencies, and reduce the levels of consequent problems in

achieving coordination. Life, and social action within which human life becomes possible, do not proceed on the basis of specialized fiefdoms of expertise. They cut across the boundaries erected as a consequence of an inherent tendency of experts to specialize. The result, often, is a system wide blindness, while yet being lured by the dazzle of ever greater specialization. Many dots of information, now collected in ever increasing volume by development of sophisticated information technologies, get ignored on account of lack of coordination across agencies, and departments, and tendency within bureaucracy to jealously guard their own turfs. In some instances, the failure to properly investigate, or to prevent, unlawful activities could be the result of such over-specialization, frictions in sharing of information, and coordination across departmental and specialized agency boundaries.

17. If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish. Large unaccounted monies are generally an indication of that. In a recent book, Prof. Rotberg states, after evaluating many failed and collapsed states over the past few decades:

> *"Failed states offer unparalleled economic opportunity – but only for a privileged few. Those around the ruler or ruling oligarchy grow richer while their less fortunate brethren starve. Immense profits are available from an awareness of regulatory advantages and currency speculation and arbitrage. But the privilege of making real money when everything else is deteriorating is confined to clients of the ruling elite…. The nation-state's responsibility to maximize the well-being and prosperity of all its citizens is conspicuously absent, if it ever existed…. Corruption flourishes in many states, but in failed states it often does so on an unusually destructive scale. There is widespread petty or lubricating corruption as a matter of course, but escalating levels of venal corruption mark failed states."* [1]

18. India finds itself in a peculiar situation. Often celebrated, in popular culture, as an emerging economy that is rapidly growing, and expected to be a future economic and political giant on the global stage, it is also popularly perceived, and apparently even in some responsible and scholarly circles, and official quarters, that some of its nationals and other legal entities have stashed the largest quantum of unaccounted monies in foreign banks, especially in tax havens, and in other jurisdictions with strong laws of secrecy. There are also apparently reports, and analyses, generated by Government of India itself,

[1] "The Failure and Collapse of Nation-States – Breakdown, Prevention and Repair" in "WHEN STATES FAIL: CAUSES AND CONSEQUENCES", Rotberg, Robert I., Ed. Princeton University Press (2004).

which place the amounts of such unaccounted monies at astronomical levels.

19. We do not wish to engage in any speculation as to what such analyses, reports, and factuality imply with respect to the state of the nation. The citizens of our country can make, and ought to be making, rational assessments of the situation. We fervently hope that it leads to responsible, reasoned and reasonable debate, thereby exerting the appropriate democratic pressure on the State, and its agents, within the constitutional framework, to bring about the necessary changes without sacrificing cherished, and inherently invaluable social goals and values enshrined in the Constitution. The failures are discernible when viewed against the vision of the constitutional project, and as forewarned by Dr. Ambedkar, have been on account of the fact that man has been vile, and not the defects of a Constitution forged in the fires of wisdom gathered over eons of human experience. If the politico-bureaucratic, power wielding, and business classes bear a large part of the blame, at least some part of blame ought to be apportioned to those portions of the citizenry that is well informed, or is expected to be informed. Much of that citizenry has disengaged itself with the political process, and with the masses. Informed by contempt for the poor and the

downtrodden, the elite classes that have benefited the most, or expects to benefit substantially from the neo-liberal policies that would wish away the hordes, has also chosen to forget that constitutional mandate is as much the responsibility of the citizenry, and through their constant vigilance, of all the organs of the state, and national institutions including political parties. To not be engaged in the process, is to ensure the evisceration of constitutional content. Knee jerk reactions, and ill advised tinkering with the constitutional framework are not the solutions. The road is always long, and needs the constant march of the citizenry on it. There is no other way. To expect instant solutions, because this law or that body is formed, without striving to solve system wide, and systemic, problems that have emerged is to not understand the demands of a responsible citizenry in modern constitutional republican democracies.

20. These matters before us relate to issues of large sums of unaccounted monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted monies, as alleged by the Government of India itself is massive. The show cause notices were issued a substantial length of time ago. The named individuals

were very much present in the country. Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.

21. It is in light of the above, that we heard some significant elements of the instant writ petitions filed in this Court, and at this stage it is necessary that appropriate orders be issued. There are two issues we deal with below: (i) the appointment of a Special Investigation Team; and (ii) disclosure, to the Petitioners, of certain documents relied upon by the Union of India in its response.

II

22. The instant writ petition was filed, in 2009, by Shri. Ram Jethmalani, Shri. Gopal Sharman, Smt. Jalbala Vaidya, Shri. K.P.S. Gill, Prof. B.B. Dutta, and Shri. Subhash Kashyap, all well known professionals, social activists, former bureaucrats or those who have held responsible positions in the society. They have also formed an organization called Citizen India, the stated objective of

which is said to be to bring about changes and betterment in the quality of governance, and functioning of all public institutions.

23. The Petitioners state that there have been a slew of reports, in the media, and also in scholarly publications that various individuals, mostly citizens, but may also include non-citizens, and other entities with presence in India, have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals holding such accounts. The Petitioners allege that most of such monies are unaccounted, and in all probability have been generated through unlawful activities, whether in India or outside India, but relating to India. Further, the Petitioners also allege that a large part of such monies may have been generated within India, and have been taken away from India, breaking various laws, including but not limited to evasion of taxes.

24. The Petitioners contend: (i) that the sheer volume of such monies points to grave weaknesses in the governance of the nation, because they indicate a significant lack of control over unlawful activities through

which such monies are generated, evasion of taxes, and use of unlawful means of transfer of funds; (ii) that these funds are then laundered and brought back into India, to be used in both legal and illegal activities; (iii) that the use of various unlawful modes of transfer of funds across borders, gives support to such unlawful networks of international finance; and (iv) that in as much as such unlawful networks are widely acknowledged to also effectuate transfer of funds across borders in aid of various crimes committed against persons and the State, including but not limited to activities that may be classifiable as terrorist, extremist, or unlawful narcotic trade, the prevailing situation also has very serious connotations for the security and integrity of India.

25. The Petitioners also further contend that a significant part of such large unaccounted monies include the monies of powerful persons in India, including leaders of many political parties. It was also contended that the Government of India, and its agencies, have been very lax in terms of keeping an eye on the various unlawful activities generating unaccounted monies, the consequent tax evasion; and that such laxity extends to efforts to curtail the flow of such funds out, and into, India. Further, the Petitioners also contend that the efforts to prosecute the individuals, and other entities, who have secreted

such monies in foreign banks, have been weak or non-existent. It was strongly argued that the efforts at identification of such monies in various bank accounts in many jurisdictions across the globe, attempts to bring back such monies, and efforts to strengthen the governance framework to prevent further outflows of such funds, have been sorely lacking.

26. The Petitioners also made allegations about certain specific incidents and patterns of dereliction of duty, wherein the Government of India, and its various agencies, even though in possession of specific knowledge about the monies in certain bank accounts, and having estimated that such monies run into many scores of thousands of crores, and upon issuance of show cause notices to the said individual, surprisingly have not proceeded to initiate, and carry out suitable investigations, and prosecute the individuals. The individual specifically named is one Hassan Ali Khan. The Petitioners also contended that Kashinath Tapuria, and his wife Chandrika Tapuria, are also party to the illegal activities of Hassan Ali Khan.

27. Specifically, it was alleged that Hassan Ali Khan was served with an income tax demand for Rs. 40,000.00 Crores (Rupees Forty Thousand Crores), and that the Tapurias were served an income tax demand notice of Rs.

20,580.00 Crores (Rupees Twenty Thousand and Five Hundred and Eighty Crores). The Enforcement Directorate, in 2007, disclosed that Hassan Ali Khan had "dealings amounting to 1.6 billion US dollars" in the period 2001-2005. In January 2007, upon raiding Hassan Ali's residence in Pune, certain documents and evidence had been discovered regarding deposits of 8.04 billion dollars with UBS bank in Zurich. It is the contention of the Petitioners that, even though such evidence was secured nearly four and half years ago, (i) a proper investigation had not been launched to obtain the right facts from abroad; (ii) the individuals concerned, though present in India, and subject to its jurisdiction, and easily available for its exercise, had not even been interrogated appropriately; (iii) that the Union of India, and its various departments, had even been refusing to divulge the details and information that would reveal the actual status of the investigation, whether in fact it was being conducted at all, or with any degree of seriousness; (iv) given the magnitude of amounts in question, especially of the demand notice of income tax, the laxity of investigation indicates multiple problems of serious non-governance, and weaknesses in the system, including pressure from political quarters to hinder, or scuttle, the investigation, prosecution, and ultimately securing the

return of such monies; and (v) given the broadly accepted fact that within the political class corruption is rampant, ill-begotten wealth has begun to be amassed in massive quantities by many members in that class, it may be reasonable to suspect, or even conclude, that investigation was being deliberately hindered because Hassan Ali Khan, and the Tapurias, had or were continuing to handle the monies of such a class. The fact that both Income Tax department, and the Enforcement Directorate routinely, and with alacrity, seek the powers for long stretches of custodial interrogation of even those suspected of having engaged in money laundering, or evaded taxes, with respect to very small amounts, ought to raise the reasonable suspicion that inaction in the matters concerning Hassan Ali Khan, and Tapurias, was deliberately engineered, for nefarious reasons.

28. In addition, the Petitioners also state that in as much as the bank in which the monies had been stashed by Hassan Ali Khan was UBS Zurich, the needle of suspicion has to inexorably turn to high level political interference and hindrance to the investigations. The said bank, it was submitted, is the biggest or one of the biggest wealth management companies in the world. The Petitioners also narrated the mode, and the manner, in which the United States had dealt with UBS, with respect to monies of

American citizens secreted away with the said bank. It was also alleged that UBS had not cooperated with the U.S. authorities. Contrasting the relative alacrity, and vigour, with which the United States government had pursued the matters, the Petitioners contend the inaction of Union of India is shocking.

29. The Petitioners further allege that in 2007, the Reserve Bank of India had obtained some "knowledge of the dubious character" of UBS Security India Private Limited, a branch of UBS, and consequently stopped this bank from extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India. It was also claimed by the Petitioners that the SEBI had alleged that UBS played a role in the stock market crash of 2004. The said UBS Bank has apparently applied for a retail banking license in India, which was approved in principle by RBI initially. In 2008, this license was withheld on the ground that "investigation of its unsavoury role in the Hassan Ali Khan case was pending investigation in the Enforcement Directorate." However, it seems that the RBI reversed its decision in 2009, and no good reasons seem to be forthcoming for the reversal of the decision of 2008.

30. The Petitioners contend that such a reversal of decision could only have been accomplished through high level

intervention, and that it is further evidence of linkages between members of the political class, and possibly even members of the bureaucracy, and such banking operations, and the illegal activities of Hassan Ali Khan and the Tapurias. Hence, the Petitioners argued, in the circumstances it would have to be necessarily concluded that the investigations into the affairs of Hassan Ali Khan, and the Tapurias, would be severely compromised if the Court does not intervene, and monitor the investigative processes by appointing a special investigation team reporting directly to the Court.

31. The learned senior counsel for the Petitioners sought that this Court intervene, order proper investigations, and monitor continuously, the actions of the Union of India, and any and all governmental departments and agencies, in these matters. It was submitted that their filing of this Writ Petition under Article 32 is proper, as the inaction of the Union of India, as described above, violates the fundamental rights – to proper governance, in as much as Article 14 provides for equality before the law and equal protection of the law, and Article 21 promises dignity of life to all citizens.

32. We have heard the learned senior counsel for the Petitioners, Shri. Anil B. Divan, the learned senior counsel for interveners, Shri. K.K. Venugopal, and the

learned senior counsel for the petitioners in the connected Writ Petition, Shri. Shanti Bhushan. We have also heard the learned Solicitor General, Shri. Gopal Subramaniam, on behalf of the respondents.

33. Shri. Divan, specifically argued that, having regard to the nature of the investigation, its slow pace so far, and the non-seriousness on the part of the respondents, there is a need to constitute a Special Investigation Team ("SIT") headed by a former judge or two of this court. However, this particular plea has been vociferously resisted by the Solicitor General. Relying on the status reports submitted from time to time, the learned Solicitor General stated that all possible steps were being taken to bring back the monies stashed in foreign banks, and that the investigations in cases registered were proceeding in an appropriate manner. He expressed his willingness for a Court monitored investigation. He also further submitted that the Respondents, in principle, have no objections whatsoever against the main submissions of the Petitioners.

34. The real point of controversy is, given above, as to whether there is a need to constitute a SIT to be headed by a judge or two, of this court, to supervise the investigation.

35. We must express our serious reservations about the responses of the Union of India. In the first instance, during the earlier phases of hearing before us, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by us did the Union of India begin to admit that indeed the investigation was proceeding very slowly. It also became clear to us that in fact the investigation had completely stalled, in as much as custodial interrogation of Hassan Ali Khan had not even been sought for, even though he was very much resident in India. Further, it also now appears that even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician.

36. During the course of the hearings the Union of India repeatedly insisted that the matter involves many jurisdictions, across the globe, and a proper investigation could be accomplished only through the concerted efforts by different law enforcement agencies, both within the Central Government, and also various State governments. However, the absence of any satisfactory explanation of the slowness of the pace of investigation, and lack of any credible answers as to why the respondents did not act with respect to those actions that were feasible, and

within the ambit of powers of the Enforcement Directorate itself, such as custodial investigation, leads us to conclude that the lack of seriousness in the efforts of the respondents are contrary to the requirements of laws and constitutional obligations of the Union of India. It was only upon the insistence and intervention of this Court has the Enforcement Directorate initiated and secured custodial interrogation over Hassan Ali Khan. The Union of India has explicitly acknowledged that there was much to be desired with the manner in which the investigation had proceeded prior to the intervention of this court. From the more recent reports, it would appear that the Union of India, on account of its more recent efforts to conduct the investigation with seriousness, on account of the gravitas brought by this Court, has led to the securing of additional information, and leads, which could aid in further investigation. For instance, during the continuing interrogation of Hassan Ali Khan and the Tapurias, undertaken for the first time at the behest of this Court, many names of important persons, including leaders of some corporate giants, politically powerful people, and international arms dealers have cropped up. So far, no significant attempt has been made to investigate and verify the same. This is a further cause for the grave concerns of this Court, and points to the need for

continued, effective and day to day monitoring by a SIT constituted by this Court, and acting on behalf, behest and direction of this Court.

37. In light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences. The composition of the High Level Committee ("HLC") is said to be as follows: (i) Secretary, Department of Revenue, as the Chairman; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT. It was also submitted that the HLC may co-opt, as necessary, representation not below the rank of Joint Secretary from the Home Secretary, Foreign Secretary, Defense Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a systematic investigation into the

matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.

38. While it would appear, from the Status Reports submitted to this Court, that the Enforcement Directorate has moved in some small measure, the actual facts are not comforting to an appropriate extent. In fact we are not convinced that the situation has changed to the extent that it ought to so as to accept that the investigation would now be conducted with the degree of seriousness that is warranted. According to the Union of India the HLC was formed in order to take charge of and direct the entire investigation, and subsequently, the prosecution. In the meanwhile a charge sheet has been filed against Hassan Ali Khan. Upon inquiry by us as to whether the charge-sheet had been vetted by the HLC, and its inputs secured, the counsel for Union of India were flummoxed. The fact was that the charge-sheet had not been given even for the perusal of the HLC, let alone securing its inputs, guidance and direction. We are not

satisfied by the explanation offered by the Directorate of Enforcement by way of affidavit after the orders were reserved. Be it noted that a nodal agency was set up, pursuant to directions of this Court in Vineet Narain case given many years ago. Yet the same was not involved and these matters were never placed before it. Why?

39. From the status reports, it is clear that the problem is extremely complex, and many agencies and departments spread across the country have not responded with the alacrity, and urgency, that one would desire. Moreover, the Union of India has been unable to answer any of the questions regarding its past actions, and their implications, such as the slowness of the investigation, or about grant of license to conduct retail banking by UBS, by reversing the decision taken earlier to withhold such a license on the grounds that the said bank's credentials were suspect. To this latter query, the stance of the Union of India has been that entry of UBS would facilitate flow of foreign investments into India. The question that arises is whether the task of bringing foreign funds into India override all other constitutional concerns and obligations?

40. The predominant theme in the responses of Union of India before this court has been that it is doing all that it can to bring back the unaccounted monies stashed in various banks abroad. To this is added the qualifier that it

is an extremely complex problem, requiring the cooperation of many different jurisdictions, and an internationally coordinated effort. Indeed they are complex. We do not wish to go into the details of arguments about whether the Union of India is, or is not, doing necessary things to achieve such goals. That is not necessary for the matters at hand.

41. What is important is that the Union of India had obtained knowledge, documents and information that indicated possible connections between Hassan Ali Khan, and his alleged co-conspirators and known international arms dealers. Further, the Union of India was also in possession of information that suggested that because the international arms dealing network, and a very prominent dealer in it, could not open a bank account even in a jurisdiction that is generally acknowledged to lay great emphasis on not asking sources of money being deposited into its banks, Hassan Ali Khan may have played a crucial role in opening an account with the branch of the same bank in another jurisdiction. The volume of alleged income taxes owed to the country, as demanded by the Union of India itself, and the volume of monies, by some accounts US $8.04 billion, and some other accounts in excess of Rs. 70,000 crores, that are said to have been routed through various bank accounts of Hassan Ali Khan,

and Tapurias. Further, from all accounts it has been acknowledged that none of the named individuals have any known and lawful sources for such huge quantities of monies. All of these factors, either individually or combined, ought to have immediately raised questions regarding the sources being unlawful activities, national security, and transfer of funds into India for other illegal activities, including acts against the State. It was only at the repeated insistence by us that such matters have equal, if not even greater importance than issues of tax collection, has the Union of India belatedly concluded that such aspects also ought to be investigated with thoroughness. However, there is still no evidence of a really serious investigation into these other matters from the national security perspective.

42. The fact remains that the Union of India has struggled in conducting a proper investigation into the affairs of Hassan Ali Khan and the Tapurias. While some individuals, whose names have come to the adverse knowledge of the Union of India, through the more recent investigations, have been interrogated, many more are yet to be investigated. This highly complex investigation has in fact just begun. It is still too early to conclude that the Union of India has indeed placed all the necessary machinery to conduct a proper investigation. The formation of the HLC

was a necessary step, and may even be characterized as a welcome step. Nevertheless, it is an insufficient step.

43. In light of the above, we had proposed to the Union of India that the same HLC constituted by it be converted into a Special Investigation Team, headed by two retired judges of the Supreme Court of India. The Union of India opposes the same, but provides no principle as to why that would be undesirable, especially in light of the many lapses and lacunae in its actions in these matters spread over the past four years.

44. We are of the firm opinion that in these matters fragmentation of government, and expertise and knowledge, across many departments, agencies and across various jurisdictions, both within the country, and across the globe, is a serious impediment to the conduct of a proper investigation. We hold that it is in fact necessary to create a body that coordinates, directs, and where necessary orders timely and urgent action by various institutions of the State. We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values. However, it would be impossible for this Court to be involved in day to day investigations, or to constantly monitor each and every aspect of the investigation.

45. The resources of this court are scarce, and it is over-burdened with the task of rendering justice in well over a lakh of cases every year. Nevertheless, this Court is bound to uphold the Constitution, and its own burdens, excessive as they already are, cannot become an excuse for it to not perform that task. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by this Court would be unconscionable.

46. The issue is not merely whether the Union of India is making the necessary effort to bring back all or some significant part of the alleged monies. The fact that there is some information and knowledge that such vast amounts may have been stashed away in foreign banks, implies that the State has the primordial responsibility, under the Constitution, to make every effort to trace the sources of such monies, punish the guilty where such monies have been generated and/or taken abroad through unlawful activities, and bring back the monies owed to the Country. We do recognize that the degree of success, measured in terms of the amounts of monies brought back, is dependent on a number of factors, including aspects that relate to international political economy and relations, which may or may not be under our control. The fact remains that with respect to those

factors that were within the powers of the Union of India, such as investigation of possible criminal nexus, threats to national security etc., were not even attempted. Fealty to the Constitution is not a matter of mere material success; but, and probably more importantly from the perspective of the moral authority of the State, a matter of integrity of effort on all the dimensions that inform a problem that threatens the constitutional projects. Further, the degree of seriousness with which efforts are made with respect to those various dimensions can also be expected to bear fruit in terms of building capacities, and the development of necessary attitudes to take the law enforcement part of accounting or following the money seriously in the future.

47. The merits of vigour of investigations, and attempts at law enforcement, cannot be measured merely on the scale of what we accomplish with respect to what has happened in the past. It would necessarily also have to be appreciated from the benefits that are likely to accrue to the country in preventing such activities in the future. Our people may be poor, and may be suffering from all manner of deprivation. However, the same poor and suffering masses are rich, morally and from a humanistic point of view. Their forbearance of the many foibles and failures of those who wield power, no less in their name and behalf than of the rich and the empowered, is itself

indicative of their great qualities, of humanity, trust and tolerance. That greatness can only be matched by exercise of every sinew, and every resource, in the broad goal of our constitutional project of bringing to their lives dignity. The efforts that this Court makes in this regard, and will make in this respect and these matters, can only be conceived as a small and minor, though nevertheless necessary, part. Ultimately the protection of the Constitution and striving to promote its vision and values is an elemental mode of service to our people.

48. We note that in many instances, in the past, when issues referred to the Court have been very complex in nature, and yet required the intervention of the Court, Special Investigation Teams have been ordered and constituted in order to enable the Court, and the Union of India and/or other organs of the State, to fulfill their constitutional obligations. The following instances may be noted: Vineet Narain v Union of India[2], NHRC v State of Gujarat[3], Sanjiv Kumar v State of Haryana[4], and Centre for PIL v Union of India[5].

49. In light of the above we herewith order:

(i) That the High Level Committee constituted by the Union of India, comprising of (i) Secretary,

[2] (1996) 2 SCC 199
[3] (2004) 8 SCC 610
[4] (2005) 5 SCC 517
[5] (2011) 1 SCC 560.

Department of Revenue; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT be forthwith appointed with immediate effect as a Special Investigation Team;

(ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;

(iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent judges of this Court: (a) Hon'ble Mr. Justice B.P. Jeevan Reddy as Chairman; and (b) Hon'ble Mr. Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;

(iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal

or civil proceedings of: (a) all issues relating to the matters concerning and arising from unaccounted monies of Hassan Ali Khan and the Tapurias; (b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances of the stashing of unaccounted monies in foreign bank accounts by Indians or other entities operating in India; and (c) all other matters with respect to unaccounted monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. It is clarified here that within the ambit of responsibilities described above, also lie the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted monies out of and/or bring such monies back into the country, and use of such monies in India or abroad. The Special

Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.

(v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time;

(vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning;

(vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad.

(viii) That the Special Investigation Team also be empowered to further investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.

50. We accordingly direct the Union of India to issue appropriate notification and publish the same forthwith. It is needless to clarify that the former judges of this Court so appointed to supervise the Special Investigation Team are entitled to their remuneration, allowances, perks, facilities as that of the judges of the Supreme Court. The Ministry of Finance, Union of India, shall be responsible

for creating the appropriate infrastructure and other facilities for proper and effective functioning of the Special Investigation Team at once.

III

51. We now turn our attention to the matter of disclosure of various documents referenced by the Union of India, as sought by the Petitioners. These documents, including names and bank particulars, relate to various bank accounts, of Indian citizens, in the Principality of Liechtenstein ("Liechtenstein"), a small landlocked sovereign nation-state in Europe. It is generally acknowledged that Liechtenstein is a tax haven.

52. Apparently, as alleged by the Petitioners, a former employee of a bank or banks in Liechtenstein secured the names of some 1400 bank account holders, along with the particulars of such accounts, and offered the information to various entities. The same was secured by the Federal Republic of Germany ("Germany"), which in turn, apart from initiating tax proceedings against some 600 individuals, also offered the information regarding nationals and citizens of other countries to such countries. It is the contention of the Petitioners that even though the Union of India was informed about the presence of the names of a large number of Indian citizens in the list of

names revealed by the former bank employee, the Union of India never made a serious attempt to secure such information and proceed to investigate such individuals. It is the contention of the Petitioners that such names include the identities of prominent and powerful Indians, or the identities of individuals, who may or may not be Indian citizens, but who could lead to information about various powerful Indians holding unaccounted monies in bank accounts abroad. It is also the contention of the Petitioners that, even though they had sought the information under the Right to Information Act (2005), the Respondents had not revealed the names nor divulged the relevant documents. The Petitioners argue that such a reluctance is only on account of the Union of India not having initiated suitable steps to recover such monies, and punish the named individuals, and also because revelation of names of individuals on the list would lead to discovery of powerful persons engaged in various unlawful activities, both in generation of unlawful and unaccounted monies, and their stashing away in banks abroad.

53. It was also alleged by the Petitioners that in fact Germany had offered such information, freely and generally to any country that requests the same, and did not specify that the names and other information pertaining to such names ought to be requested only

pursuant to any double taxation agreements it has with other countries. The Petitioners also alleged that Union of India has chosen to proceed under the assumption that it could have requested such information only pursuant to the double taxation agreement it has with Germany. The Petitioners contend that the Government of India took such a step primarily to conceal the information from public gaze.

54. The response of the Union of India may be summed up briefly: (i) that they secured the names of individuals with bank accounts in banks in Liechtenstein, and other details with respect to such bank accounts, pursuant to an agreement of India with Germany for avoidance of double taxation and prevention of fiscal evasion; (ii) that the said agreement proscribes the Union of India from disclosing such names, and other documents and information with respect to such bank accounts, to the Petitioners, even in the context of these ongoing proceedings before this court; (iii) that the disclosure of such names, and other documents and information, secured from Germany, would jeopardize the relations of India with a foreign state; (iv) that the disclosure of such names, and other documents and information, would violate the right to privacy of those individuals who may have only deposited monies in a lawful manner; (v) that disclosure of names,

and other documents and information can be made with respect to those individuals with regard to whom investigations are completed, and proceedings initiated; and (vi) that contrary to assertions by the Petitioners, it was Germany which had asked the Union of India to seek the information under double taxation agreement, and that this was in response to an earlier request by Union of India for the said information.

55. For the purposes of the instant order, the issue of whether the Union of India could have sought and secured the names, and other documents and information, without having to take recourse to the double taxation agreement is not relevant. For the purposes of determining whether Union of India is obligated to disclose the information that it obtained, from Germany, with respect to accounts of Indian citizens in a bank in the Principality of Liechtenstein, we need only examine the claims of the Union of India as to whether it is proscribed by the double taxation agreement with Germany from disclosing such information. Further, and most importantly, we would also have to examine whether in the context of Article 32 proceedings before this court, wherein this court has exercised jurisdiction, the Union of India can claim exemption from providing such information to the Petitioners, and also with respect to issues of right to

privacy of individuals who hold such accounts, and with respect of whom no investigations have yet been commenced, or only partially conducted, so that the State has not yet issued a show cause and initiated proceedings.

56. We have perused the said agreement with Germany. We are convinced that the said agreement, by itself, does not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account holders in Liechtenstein. In the first instance, we note that the names of the individuals are with respect to bank accounts in the Liechtenstein, which though populated by largely German speaking people, is an independent and sovereign nation-state. The agreement between Germany and India is with regard to various issues that crop up with respect to German and Indian citizens' liability to pay taxes to Germany and/or India. It does not even remotely touch upon information regarding Indian citizens' bank accounts in Liechtenstein that Germany secures and shares that have no bearing upon the matters that are covered by the double taxation agreement between the two countries. In fact, the "information" that is referred to in Article 26 is that which is "necessary for carrying out the purposes of this agreement", i.e. the Indo-German DTAA. Therefore, the

information sought does not fall within the ambit of this provision. It is disingenuous for the Union of India, under these circumstances, to repeatedly claim that it is unable to reveal the documents and names as sought by the Petitioners on the ground that the same is proscribed by the said agreement. It does not matter that Germany itself may have asked India to treat the information shared as being subject to the confidentiality and secrecy clause of the double taxation agreement. It is for the Union of India, and the courts, in appropriate proceedings, to determine whether such information concerns matters that are covered by the double taxation agreement or not. In any event, we also proceed to examine the provisions of the double taxation agreement below, to also examine whether they proscribe the disclosure of such names, and other documents and information, even in the context of these instant proceedings.

57. Relevant portions of Article 26 of the double taxation agreement with Germany, a copy of which was submitted by Union of India, reads as follows:

> *"1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the purposes of this Agreement. Any information received by a Contracting State shall be treated as secret in the*

same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. They may disclose the information in public court proceedings or in judicial proceedings.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (order public)"

58. The above clause in the relevant agreement with Germany would indicate that, contrary to the assertions of Union of India, there is no absolute bar of secrecy. Instead the agreement specifically provides that the information may be disclosed in public court proceedings,

which the instant proceedings are. The proceedings in this matter before this court, relate both to the issue of tax collection with respect to unaccounted monies deposited into foreign bank accounts, as well as with issues relating to the manner in which such monies were generated, which may include activities that are criminal in nature also. Comity of nations cannot be predicated upon clauses of secrecy that could hinder constitutional proceedings such as these, or criminal proceedings.

59. The claim of Union of India is that the phrase "public court proceedings", in the last sentence in Article 26(1) of the double taxation agreement only relates to proceedings relating to tax matters. The Union of India claims that such an understanding comports with how it is understood internationally. In this regard Union of India cites a few treatises. However, the Union of India did not provide any evidence that Germany specifically requested it to not reveal the details with respect to accounts in the Liechtenstein even in the context of proceedings before this court.

60. Article 31, "General Rule of Interpretation", of the Vienna Convention of the Law of Treaties, 1969 provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

purpose." While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.

61. This Court in *Union of India v. Azadi Bachao Andolan*,[6] approvingly noted Frank Bennion's observations that a treaty is really an indirect enactment, instead of a substantive legislation, and that drafting of treaties is notoriously sloppy, whereby inconveniences obtain. In this regard this Court further noted the dictum of Lord Widgery, C.J. that the words "are to be given their general meaning, general to lawyer and layman alike…. The meaning of the diplomat rather than the lawyer." The broad principle of interpretation, with respect to treaties, and provisions therein, would be that ordinary meanings of words be given effect to, unless the context requires or otherwise. However, the fact that such treaties are drafted by diplomats, and not lawyers, leading to sloppiness in drafting also implies that care has to be taken to not render any word, phrase, or sentence redundant, especially where rendering of such word, phrase or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional

[6] (2004) 10 SCC 1

perspective. The government cannot bind India in a manner that derogates from Constitutional provisions, values and imperatives.

62. The last sentence of Article 26(1) of the double taxation agreement with Germany, "[T]hey may disclose this information in public court proceedings or in judicial decisions," is revelatory in this regard. It stands out as an additional aspect or provision, and an exception, to the preceding portion of the said article. It is located after the specification that information shared between contracting parties may be revealed only to "persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by this Agreement." Consequently, it has to be understood that the phrase "public court proceedings" specified in the last sentence in Article 26(1) of the double taxation agreement with Germany refers to court proceedings other than those in connection with tax assessment, enforcement, prosecution etc., with respect to tax matters. If it were otherwise, as argued by Union of India, then there would have been no need to have that last sentence in Article 26(1) of the double taxation agreement at all. The last sentence would become redundant if the interpretation

pressed by Union of India is accepted. Thus, notwithstanding the alleged convention of interpreting the last sentence only as referring to proceedings in tax matters, the rubric of common law jurisprudence, and fealty to its principles, leads us inexorably to the conclusion that the language in this specific treaty, and under these circumstances cannot be interpreted in the manner sought by Union of India.

63. While we agree that the language could have been tighter, and may be deemed to be sloppy, to use Frank Bennion's characterization, negotiation of such treaties are conducted and secured at very high levels of government, with awareness of general principles of interpretation used in various jurisdictions. It is fairly well known, at least in Common Law jurisdictions, that legal instruments and statutes are interpreted in a manner whereby redundancy of expressions and phrases is sought to be avoided. Germany would have been well aware of it.

64. The redundancy that would have to be ascribed to the said last sentence of Article 26(1) of the double taxation agreement with Germany, if the position of Union of India were to be accepted, also leads to a manifest absurdity, in the context of the Indian Constitution. Such a redundancy would mean that constitutional imperatives themselves are to be set aside. Modern constitutionalism, to which

Germany is a major contributor too, especially in terms of the basic structure doctrine, specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a constitution cannot change the identity of the constitution itself.

65. The basic structure of the Constitution cannot be amended even by the amending power of the legislature. Our Constitution guarantees the right, pursuant to Clause (1) of Article 32, to petition this Court on the ground that the rights guaranteed under Part III of the Constitution have been violated. This provision is a part of the basic structure of the Constitution. Clause (2) of Article 32 empowers this Court to issue "directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by" Part III. This is also a part of the basic structure of the Constitution.

66. In order that the right guaranteed by Clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such

information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by Clause (1) of Article 32.

67. Further, in as much as, by history and tradition of common law, judicial proceedings are substantively, though not necessarily fully, adversarial, both parties bear the responsibility of placing all the relevant information, analyses, and facts before this court as completely as possible. In most situations, it is the State which may have more comprehensive information that is relevant to the matters at hand in such proceedings. However, some agents of the State may perceive that because these proceedings are adversarial in nature, the duty and burden to furnish all the necessary information rests upon the Petitioners, and hence the State has no obligation to fully furnish such information. Some agents of the State may also seek to cast the events and facts in a light that is favourable to the government in the immediate context of the proceedings, even though such actions do not lead to rendering of complete justice in the task of protection of fundamental rights. To that extent, both the petitioners and this Court would be handicapped in proceedings under Clause (1) of Article 32.

68. It is necessary for us to note that the burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, the burden of protection of fundamental rights is primarily the duty of the State. Consequently, unless constitutional grounds exist, the State may not act in a manner that hinders this Court from rendering complete justice in such proceedings. Withholding of information from the petitioners, or seeking to cast the relevant events and facts in a light favourable to the State in the context of the proceedings, even though ultimately detrimental to the essential task of protecting fundamental rights, would be destructive to the guarantee in Clause (1) of Article 32, and substantially eviscerate the capacity of this Court in exercising its powers contained in clause (2) of Article 32, and those traceable to other provisions of the Constitution and broader jurisprudence of constitutionalism, in upholding fundamental rights enshrined in Part III. In the task of upholding of fundamental rights, the State cannot be an adversary. The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for

the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights.

69. Furthermore, we hold that there is a special relationship between Clause (1) of Article 32 and Sub-Clause (a) of Clause (1) of Article 19, which guarantees citizens the freedom of speech and expression. The very genesis, and the normative desirability of such a freedom, lies in historical experiences of the entire humanity: unless accountable, the State would turn tyrannical. A proceeding under Clause (1) of Article 32, and invocation of the powers granted by Clause (2) of Article 32, is a primordial constitutional feature of ensuring such accountability. The very promise, and existence, of a constitutional democracy rests substantially on such proceedings.

70. Withholding of information from the petitioners by the State, thereby constraining their freedom of speech and expression before this Court, may be premised only on the exceptions carved out, in Clause (2) of Article 19, "in the interests of sovereignty and integrity of India, security

of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence" or by law that demarcate exceptions, provided that such a law comports with the enumerated grounds in Clause (2) of Article 19, or that may be provided for elsewhere in the Constitution.

71. It is now a well recognized proposition that we are increasingly being entwined in a global network of events and social action. Considerable care has to be exercised in this process, particularly where governments which come into being on account of a constitutive document, enter into treaties. The actions of governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from. The redundancy, that the Union of India presses, with respect to the last sentence of Article 26(1) of the double taxation agreement with Germany, necessarily transgresses upon the boundaries erected by our Constitution. It cannot be permitted.

72. We have perused the documents in question, and heard the arguments of Union of India with respect to the double taxation agreement with Germany as an obstacle to disclosure. We do not find merit in its arguments

flowing from the provisions of double taxation agreement with Germany. However, one major constitutional issue, and concern remains. This is with regard to whether the names of individuals, and details of their bank accounts, with respect to whom there has been no completed investigations that reveal wrong doing and proceedings initiated, and there is no other credible information and evidence currently available with the Petitioners that there has been any wrong doing, may be disclosed to the Petitioners.

73. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values. The rights of

citizens, to effectively seek the protection of fundamental rights, under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter-alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

74. An argument can be made that this Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted

with the requisite speed and vigour in the case of large volumes of suspected unaccounted monies of certain individuals. There is an inherent danger in making exceptions to fundamental principles and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself. Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court. However, a decision by this Court that an exception could be carved out remains permanently as a part of judicial canon, and becomes a part of the constitutional interpretation itself. It can be used in the future in a manner and form that may far exceed what this Court intended or what the Constitutional text and values can bear. We are not proposing that Constitutions cannot be interpreted in a manner that allows the nation-state to tackle the problems it faces. The principle is that exceptions cannot be carved out willy-nilly, and without forethought as to the damage they may cause.

75. One of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions, would become entrenched as a part of the constitutional order. Such logic would then

lead to seeking exceptions, from protective walls of all fundamental rights, on grounds of expediency and claims that there are no solutions to problems that the society is confronting without the evisceration of fundamental rights. That same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale.

76. It is indeed true that the information shared by Germany, with regard to certain bank accounts in Liechtenstein, also contains names of individuals who appear to be Indians. The Petitioners have also claimed that names of all the individuals have been made public by certain segments of the media. However, while some of the accounts, and the individuals holding those accounts, are claimed to have been investigated, others have not been. No conclusion can be drawn as to whether those who have not been investigated, or only partially investigated and proceedings not initiated have committed any wrong doing. There is no presumption that every account holder in banks of Liechtenstein has acted unlawfully. In these circumstances, it would be inappropriate for this Court to order the disclosure of such names, even in the context of proceedings under Clause (1) of Article 32.

77. The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals. We cannot remain blind to such possibilities, and indeed experience reveals that public dissemination of banking details, or availability to unauthorized persons, has led to abuse. The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the State has acquired. Innocent citizens, including those actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society. Whether the State itself can access details of citizens bank accounts is a separate matter. However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of

wrong doing. It is only after the State has been able to arrive at a prima facie conclusion of wrong doing, based on material evidence, would the rights of others in the nation to be informed, enter the picture. In the event citizens, other persons and entities have credible information that a wrong doing could be associated with a bank account, it is needless to state that they have the right, and in fact the moral duty, to inform the State, and consequently the State would have the obligation to investigate the same, within the boundaries of constitutional permissibility. If the State fails to do so, the appropriate courts can always intervene.

78. The major problem, in the matters before us, has been the inaction of the State. This is so, both with regard to the specific instances of Hassan Ali Khan and the Tapurias, and also with respect to the issues regarding parallel economy, generation of black money etc. The failure is not of the Constitutional values or of the powers available to the State; the failure has been of human agency. The response cannot be the promotion of vigilantism, and thereby violate other constitutional values. The response has to necessarily be a more emphatic assertion of those values, both in terms of protection of an individual's right to privacy and also the protection of individual's right to petition this Court, under

Clause (1) of Article 32, to protect fundamental rights from evisceration of content because of failures of the State. The balancing leads only to one conclusion: strengthening of the machinery of investigations, and vigil by broader citizenry in ensuring that the agents of State do not weaken such machinery.

79. In light of the above we order that:

(i) The Union of India shall forthwith disclose to the Petitioners all those documents and information which they have secured from Germany, in connection with the matters discussed above, subject to the conditions specified in (ii) below;

(ii) That the Union of India is exempted from revealing the names of those individuals who have accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of who investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available;

(iii) That the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations have been concluded, either partially or wholly,

and show cause notices issued and proceedings initiated may be disclosed; and

(iv) That the Special Investigation Team, constituted pursuant to the orders of today by this Court, shall take over the matter of investigation of the individuals whose names have been disclosed by Germany as having accounts in banks in Liechtenstein, and expeditiously conduct the same. The Special Investigation Team shall review the concluded matters also in this regard to assess whether investigations have been thoroughly and properly conducted or not, and on coming to the conclusion that there is a need for further investigation shall proceed further in the matter. After conclusion of such investigations by the Special Investigation Team, the Respondents may disclose the names with regard to whom show cause notices have been issued and proceedings initiated.

80. Compliance reports shall be filed by Respondents, with respect of all the orders issued by this Court today. List for further directions in the week following the Independence Day, August 15, of 2011.

Ordered accordingly.

.....J.
(B. SUDERSHAN REDDY)

NEW DELHI,
JULY 4, 2011.

.....J.
(SURINDER SINGH NIJJAR)