ORDER

I have received a Notice of Motion on 20 April 2018 signed by 64 Members of Rajya Sabha under Article 124(4) of the Constitution for the removal of Mr. Justice Dipak Misra, Chief Justice of India (CJI). Terms of the Motion are as under:-

"This House resolves that an address be presented to the President of India for the removal of Mr. Justice Dipak Misra, from the office of Chief Justice of India, for his following acts of misbehaviour:-

I. The facts and circumstances relating to the Prasad Education Trust case, show prima facie evidence suggesting that Chief Justice Dipak Misra may have been involved in the conspiracy of paying illegal gratification in the case, which at least warrants a thorough investigation.

II. That the Chief Justice Dipak Misra dealt on the administrative as well as judicial side, with a writ petition which sought an investigation into a matter in which he too was likely to fall within the scope of investigation since he had presided over every bench which had dealt with this case and passed orders in the case of Prasad Education Trust, and thus violated the first principle of the Code of Conduct for judges.

III. That the Chief Justice Dipak Misra appears to have antedated an administrative order dated 6th November 2017 which amounts to a serious act of forgery/ fabrication.

IV. That Chief Justice Dipak Misra acquired land while he was an advocate, by giving an affidavit that was found to be false and despite the orders of the ADM cancelling the allotment in 1985, surrendered the said land only in 2012 after he was elevated to the Supreme Court.

V. That Chief Justice Dipak Misra has abused his administrative authority as master of roster to arbitrarily assign individual cases of

particular advocates in important politically sensitive cases, to select judges in order to achieve a predetermined outcome."

2. The provision for removal of a Judge of the Supreme Court has been given in article 124(4) of the Constitution. The same reads as under:-

"A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."

3. The procedure for removal of a Judge of the Supreme Court or a High Court has been prescribed in the Judges (Inquiry) Act 1968 and rules made there under. As per section 3(1)(b) of the said Act, a Motion for removal of a Judge of the Supreme Court or a High Court should be signed by not less than 50 members of the Council. The same Section also provides that the Chairman after consulting such persons, if any, as he thinks fit and after considering such material, if any, as may be available to him either admit the Motion or refuse to admit the same.

4. Since the Notice has been signed by 64 members, it meets the requirement of Section 3(1) (b) of the Judges Inquiry Act.

5. I have carefully considered the question whether I should admit the motion submitted by the Hon'ble Members of Parliament or not, under Article 124 (4) read with Article 217 of the Constitution of India. At the stage of admission, I have to apply a test that if every statement stated in the petition is believed to be true, would it still amount to a case of "proved misbehaviour" within the scope of Article 124 (4) of the Constitution of India. I have been guided by the observation of the Supreme Court in the

case of M. Krishna Swami vs Union of India (AIR 1993 SC 1407) which is as under:-

> "Before admitting the motion, it may be expected and may be prudent that the Speaker may consult persons like the Chief Justice of India, the fountain head of judiciary, and the Attorney General of India, the Principal Advisor of the Govt., whose duty should be to give advice upon legal matters or to perform such duties of legal character. It is also equally salutary that before admitting the motion to remove the judge, there shall exist factual foundation. The grounds mentioned in the motion, the material or evidence placed in support thereof and the advice tendered, if consulted, would form "the record". He would consider that record and filter the process before deciding to initiate proceedings or refusal thereof. He need not weigh the pros and cons to find prima facie case. He acts neither as a quasi-judicial nor an administrative authority but purely as a constitutional functionary and with high sense of responsibility and on due consideration of 'the record and arrives at a decision to admit or refuse to admit the motion to remove the Judge. The Speaker, therefore, would act with utmost care, caution, circumspection and responsibility and wholly guided by considerations of larger interest of the public administration of justice. He would equally keep in his gaze and the mind the seriousness of the imputations, nature and quality of the record before him and its indelible chilling effect on the public administration of justice and independence of the judiciary in the estimate of the general public."

6. In the instant case, since the notice of motion is against the Chief Justice of India, it is not feasible to consult or seek advice of the Chief Justice in this matter.

7. I thought it fit to consult legal luminaries, constitutional experts and former Secretary Generals of both the houses, former law officers, law commission members and eminent jurists who generously shared their insights based on their long, rich experience.

8. I have also gone through the comments made by former Attorney General, constitutional experts and editors of prominent news papers which are unequivocal and nearly unanimous that the present notice of motion before me is not a fit case for removal of judges.

9. I had a detailed personal conversation with some of them on all the aspects arising from the notice. I have considered each of the allegations individually as well as collectively in the light of annexures annexed to the notice to the motion but also in the light of cogent, relevant material available in the form of judicial orders passed by the apex court of the country. Based on all this, I have come to the conclusion that this motion does not deserve to be admitted.

10. Article 124 (4) of the Constitution uses two expressions for consideration of any such motion firstly, 'proved misbehaviour' and secondly 'incapacity'. 'Proved misbehaviour' is an expression clearly distinguishable from 'misconduct' as is apparent from the language of Article 124 (4). The intent, gravity and onus are of a much higher degree. The prefix 'proved' places an obligation of actually proving the misbehaviour before the Parliamentary Procedure for removal of a Judge can come into play (in Re Mehar Singh Saini (2010) 13 SCC 586, AIR 2011 SCW 5701).

11. The Hon'ble Members of Parliament who have presented the petition are unsure of their own case. Page 1 of the petition uses phrases such as "the facts and circumstances relating to the Prasad Education Trust case show prima facie_evidence suggesting that the Chief Justice of India 'may have been' involved in a conspiracy of paying illegal gratification...." The motion further states with regard to "the Chief Justice of India that "he too was likely' to fall within the scope of investigation". It further states that "the Chief Justice of India appears to have anti-dated an administrative order". I am mentioning this fact because the phrases used by the Hon'ble Members of Parliament themselves indicate a mere suspicion, a conjecture or an

assumption. The same certainly does not constitute proof "beyond reasonable doubt", which is required to make out a case of "proved misbehaviour" under Article 124 (4). Conversations between third parties with dubious credentials, which have been extensively relied upon, cannot themselves constitute any material evidence against the holder of the office of the Chief Justice of India.

12. A Bench of five honourable judges has also reaffirmed the settled position that the CJI is the Master of the roster. Recently in the case of Kamini Jaiswal vs Union Of India on 14 November, 2017. The court has observed as under:

> Para10-A Constitution Bench of this Court held that what has been laid down in Prakash Chand (supra) would apply proprio vigore as regards the power of the Hon'ble Chief Justice of India. Though the Hon'ble Chief Justice is the first among equals as far as the roster is concerned, the Hon'ble Chief Justice of India has the prerogative to constitute the Benches of the Court and allocate cases to the Benches so constituted. Following observations have been made by the Constitution Bench of this Court :
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> "The aforesaid position though stated as regards the High Court, we are absolutely certain that the said principle is applicable to the Supreme Court. We are disposed to think so. Unless such a position is clearly stated, there will be utter confusion. Be it noted, this has been also the convention of this Court, and the convention has been so because of the law. We have to make it clear without any kind of hesitation that the convention is followed because of the principles of law and because of judicial discipline and decorum. Once the Chief Justice is stated to be the master of the roster, he alone has the prerogative to constitute Benches. Needless to say, neither a two-Judge Bench nor a three-Judge Bench can allocate the matter to themselves or direct the composition for constitution of a Bench. To elaborate, there cannot be any direction to the Chief justice of India as to who shall be sitting on the Bench or who shall take up the matter

as that touches the composition of the Bench. We reiterate such an order cannot be passed. It is not countenanced in law and not permissible.

An institution has to function within certain parameters and that is why there are precedents, rules and conventions. As far as the composition of Benches is concerned, we accept the principles stated in Prakash Chand (supra), which was stated in the context of the High Court, and clearly state that the same shall squarely apply to the Supreme Court and there cannot be any kind of command or order directing the Chief Justice of India to constitute a particular Bench."

Para 15-Firstly, we consider the question whether we can hear the matter as the Bench has been formed by Hon'ble Chief Justice of India in exercise of his administrative power. That issue stands concluded by the decision of 5-Judge Bench of this Court. The Constitution Bench of this Court has clearly held that Hon'ble Chief Justice of India is the master of the roster, and any order which had been passed contrary to the order of the Constitution Bench, was held to be ineffective in law, not binding on the Hon'ble Chief Justice of India. The Hon'ble Chief Justice of India has constituted a Bench on administrative side after the aforesaid decision of this Court in which, this precise question, as to the competence of the Chief Justice to constitute a Bench, has been decided; as such, the submission made by Shri Shanti Bhushan, learned senior counsel, is hereby rejected. We cannot reopen this issue. The decision is binding."

Clearly, this is an internal matter to be resolved by the Supreme Court itself. Going through the five allegations mentioned in the Notice, I am of the view that they are neither tenable nor admissible. The allegations emerging from the present case have a serious tendency of undermining the independence of judiciary which is the basic tenet of the Constitution of India. Considering the totality of facts, I am of the firm opinion that it is neither legal nor desirable or proper to admit the Notice of Motion on any one of these grounds.

13. The provisions of the Constitution bear ample testimony to the proposition that the Constitution seeks to establish and nurture an independent judiciary. The founding fathers of the Constitution were eloquent about it. Various articles of the Constitution seek to protect independence of the Judiciary by providing appropriate safeguards against unwarranted interference either by Legislature or the Executive, with the Judges conditions of service and privileges incidental to the membership of the Constitutional Courts. (Supreme Court Advocates-on-Record Association and Another vs. Union of India, AIR 2015 SCW 5457).

14. The Constitutional provisions explicitly lay down that the Judiciary is the guardian of the Constitution and its guarantee of individual liberties. Its independence is indispensible for other institutions and for the Constitutional framework of checks and balances provided therein. The guidelines laid down in Article 124 (4) and the Judges (Inquiry) Act, 1968 along with the rules of 1969, the process of removal of judges envisages extremely stringent conditions necessary for initiation of such proceedings. All these arrangements are aimed at being difficult and onerous to keep the Judges independent of any external pressure.

15. I have applied my mind to each of the five charges as made out in the Motion. I have examined all the documents annexed to the motion. I am of the clear opinion that all facts, as stated in the motion, read with the context of the annexed documents, do not make out a case under Article 124 (4) of the Constitution which can lead any reasonable mind to conclude that the Chief Justice of India on these facts can be ever held guilty of "misbehaviour".

16. I am conscious of the fact that this Notice of Motion makes a number of statements against the highest judicial authority in the country. I have weighed the evidence produced in the notice to assess if there is adequate, cogent, coherent evidence to proceed further. On a careful analysis and

reflection, I find that there is virtually no concrete verifiable imputation. Either the allegations are within judicial domain and concern the internal judicial processes or there are unsubstantiated surmises and conjectures which hardly merit or necessitate further investigation. It is absolutely essential that one has to exercise the power to decide on the further course of action, as the Supreme Court had already observed, with "utmost care, caution, circumspection responsibly and wholly guided by considerations of the larger interests of public administration of justice". I am also reminded of the pertinent observations of Supreme Court in various cases, especially in *Rajendra Sail v. M.P. High Court Bar Assn.*, (2005) 6 SCC 109: 2005 SCC (Cri) 1401 at page 117 which stated that "if the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded" and *Arundhati Roy, In Re*, (2002) 3 SCC 343 at page 352 in which the apex court had said: "If such confidence is shaken or broken, the confidence of the common man in the institution of judiciary and democratic set-up is likely to be eroded which, if not checked, is sure to be disastrous for the society itself."

17. In the absence of credible and verifiable information placed before me which gives an indication of 'misbehaviour' or 'incapacity', it would be an inappropriate and irresponsible act to accept statements which have little empirical basis. As heirs to an illustrious democratic tradition and custodians of the present and future of democratic polity, we should, in my view, collectively strengthen and not erode the foundations of the grand edifice bequeathed to us by the Constitution makers. We cannot allow any of our pillars of governance to be weakened by any thought, word, or action.

18. I have examined the relevant provisions of the Constitution of India and relevant statutory provisions pertaining to the removal of judges.

19. In the end, after having perused annexures to the Motion and having detailed consultations and having studied the opinions of constitutional experts, I am satisfied that admission of this Notice of Motion is neither desirable nor proper. While taking a decision in the admission of such a notice against one of the senior most constitutional functionaries of the country, one should examine all the factors very carefully and dispassionately, because initiation of such proceedings tends to undermine the faith of the common person in the judicial system. I am also aware that it is imperative that we should have extraordinary, important and substantial grounds for the removal of a judge.

20. In passing, I am constrained to observe that in this matter, the well established parliamentary customs and conventions as have been delineated in the paragraph 2.2 of the Handbook for Members of Rajya Sabha have been disregarded. This provision prohibits publicity of any Notice submitted by a member till it has been admitted by the Chairman and circulated to the members. In the instant case immediately after submitting the Notice to me on 20th April, 2018, Members addressed a press conference and shared the statements contained in the Notice which included some still unsubstantiated charges against the CJI. This act of Members of discussing the conduct of the CJI in the press is against propriety and parliamentary decorum as it denigrates the institution of CJI. I am also aware that there have been a spate of statements in the press that seem to vitiate the atmosphere. I thought I should, therefore, expedite my decision and end needless speculation.

21. Against this backdrop, having considered the material contained in the Notice of Motion and reflected upon the inputs received in my interaction with legal luminaries and constitutional experts, I am of the firm opinion that the Notice of Motion does not deserve to be admitted.

22. Accordingly I refuse to admit the notice of motion.

M Naidu.

(M. VENKAIAH NAIDU)
Chairman, Rajya Sabha

New Delhi,
April 23, 2018

23/4/18