

## **Topic: Appointment Of Supreme Court Judges And Judicial Autonomy (Three Judge Case)**

First of 3-Judge Case: S.P Gupta v. UOI, AIR 1982 SC 149

Bench: Justice P.N. Bhagwati, Justice A.C. Gupta, Justice Syed Murtuza Fazal Ali, Justice V.D. Tulzapukar, Justice D.H. Desai, Justice R.S. Pathak, and Justice E.S. Venkataramiah

Fact of the Case: The relevant part of the case concerns disclosure of certain document between the Ministry of Justice, the Chief Justice of Delhi High Court, and the Chief Justice of India, as well as the relevant note made in connection with non-election of judge over the time and appeal of High Court judge. The appellant, together with one of the judges in the question, sought disclosure of these documents.

Judgment: The seven-judge bench of Supreme Court stab list precedence for the collegium system of Supreme Court and High Court of India.

### **Power of appointment of judges**

Justice is Venkata Ramaiah, in his verdict, wrote that under the scheme of Article 217 the power to appoint a Judge of the High Court is vested in the President. However, if there are conflicting opinion the President has to weigh them after giving due consideration to each of them and take decision on the question. He mentioned that while he is bound to consult authority is mentioned therein and to take into consideration their opinions, he is not bound by their opinion. Ordinarily, one does not expect the President to make an appointment by ignoring all the adverse opinions expressed by the functionaries mentioned in Article 217.

Chief Justice of India not being entitled to primacy in case of difference of opinion.

Justice PN Bhagwati mentioned in this regard that the opinion of each of these three constitutional functionaries is entitled to equal weight and is not possible to say that the opinion of Chief Justice of India must have primacy over the opinions of other to constitutional functionaries. If primacy were to be given to the opinion of Chief Justice of India, it would, in substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that Central Government must accept his opinion.

### **Consultation**

Justice Desai mentioned in this regard that the consultation has to be meaningful, purposeful, result oriented and of substance.... All the parties involved in the process of consultation must put all the material at its command relevant to the subject under discussion before all other authority is to be consulted. Nothing can be kept back. Nothing can be withheld. Nothing can be left for the eyes of any particular constitutional functionaries. It was, however, clarified that the President will have the right to differ from other constitutional functionaries, i.e, Chief Justice of India, Chief Justice of concerned High Court and Governor of the State, for cogent reason and take a contrary view.

### **Collegium System for Appointment of Judges**

This was the first case to introduce the concept of collegium system. Justice PN Bhagwati writes as under:

“we would rather suggest that there must be a collegium to make a recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad-based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the bench and of quality is required for appointment and this last requirement is absolutely essential— it would go a long way towards securing the right kind of judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited section of humanity.”

Second Judge Case: Supreme Court advocates on record Association v. UOI, AIR 1994 SC 268

Bench: Justice S.R. Pandian, Justice A.M. Ahmadi, Justice J. Verma, Justice J.S. Punchhi, Justice M.M. Yogeshwar Dayal Ray, Justice Dr. A.S. Anand and Justice S.P. Bharucha

Fact of the Case: A Public Interest Litigation was filed in Supreme Court by lawyers association rising several crucial issues concerning the judges of Supreme Court and High Courts. The petition was considered by a bench of nine judges.

Judgment: The court considered the question of the primacy of the opinion of Chief Justice of India in regard to the appointment of the Supreme Court Judges. The Court emphasised that the question has to be considered in the context of achieving the constitutional purpose of selecting the best suitable for composition of the Supreme Court so essential to ensure the independence of judiciary, and, thereby, to preserve democracy.

Referring to the consultative process envisaged in Article 124(2) for appointment of Supreme Court judges, the Court emphasised that this procedure indicates the government does not enjoy primacy for ‘absolute discretion’ in the matter of appointment of Supreme Court judges.

The court has pointed out that the provision for consultation with the Chief Justice was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court judge, and it was also necessary to eliminate political influence.

The Court has also emphasise that the phraseology used in Article 124(2) indicates that it was not considered desirable to wish absolute discretion or power of veto in the Chief Justice as an individual in the matter of appointments so that there should remain some power with executive to be exercised as a check, whenever necessary. Accordingly, the Court observed as under;

“The indication is that in the choice of a candidate suitable for appointment, the opinion of Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have a power to act as a mere check on the exercise of power of Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process reduced to the minimum and any political influence is eliminated. It was for this reason that the word ‘consultation’ instead of ‘concurrence’ was used, but that was done merrily to indicate that absolute discretion was not given to anyone, not even to Chief Justice of India as an individual.”

Thus, in the matter of appointment of a Supreme Court judge, the primary aim is to reach an exit decision taking into account the view of all the consultancies giving the greatest weight to the opinion of Chief Justice. When decision is reached by consensus, no question of primacy arises. Only when conflicting opinion emerged at the end of the process, the question of giving primacy to the opinion of

Chief Justice arises, unless for a very good reason known to the executive and is disclosed to the chief Justice of India, the appointment is not considered to be suitable.

The 3rd Judge Case: Re Special Reference, AIR 1999 SC 1

Background: Clarify certain points arising out of above judgement, the Supreme Court has delivered an advisory opinion on reference made by President under Article 143. In this opinion, the court has laid down the following proposition in regard to the appointment of Supreme Court judges:

Observation:

In making his recommendation for appointment to the Supreme Court, the chief Justice of India ought to consult four senior most puisne Judges of the Supreme Court. Thus, the collegium to make recommendations for appointment should consist of the Chief Justice and four senior most puisne Judges.

The opinion of all the members of collegium in respect of each decision should be in writing.

The views of senior most Supreme Court judge who has from the High Court from where the person recommended comes must be obtained in writing from consideration of collegium.

If the majority of the collegium is against the appointment of a particular person, that person shall be appointed. The course he is gone on to say that "if even two of the judges forming the collegium expresses strong view, for good reason, that are adverse to the appointment of a particular person, the chief Justice of India would not press for such appointment."

The following exception have not been engrafted on the rule of seniority among the High Court judges for appointment to the Supreme Court:

a. High Court judge of outstanding merit can be appointed as a Supreme Court judge regardless of his standing in the seniority list. All that needs to be recorded when recommending him for appointment is that he has outstanding merit.

b. A High Court judge may be appointed as a Supreme Court judge for good reason from amongst several judges of equal merit, as for example, the particular region of the country in which his parents High Court is situated is not represented on Supreme Court bench.

Thus, the responsibility to make recommendation for appointment as Supreme Court judges has been taken away from Central executive and has not been placed on collegium consisting of the chief Justice of India and four senior most puisne judges. The sphere of consultation has thus been broadened. Before this opinion was delivered, this collegium consisted of chief Justice and two senior most judges. The court has not specifically stated that an opinion formed by the chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the supreme Court and the government is not obliged to act thereon.

The 99th Constitutional Amendment Act of 2014 and the National Judicial Appointments Commission Act of 2014 have replaced the collegium system of appointing judges to the Supreme Court and high courts with a new body called national judicial appointment commission NJAC. However, in 2015, the Supreme Court has declared on the 99th Constitutional amendment act as well as the NJAC act as unconstitutional and void. Consequently, the earlier collegium system became operative again. The verdict was delivered by the Supreme Court in fourth Judges case, 2015 [The Supreme Court

advocates on record Association v. UOI, W.P. (C) No. 13 of 2015].