So the Division Bench decision reported in 2004 (2) ALT 788 and the Single Judge decisions reported in (1) 2008 (1) ALT 435 and (2) 2008 (6) ALT 303 are *per incuriam* and they do not lay the correct law and hence not binding. The Election Tribunals under Rule 2(2)(i)(a) and (b) are civil Courts and hence they can exercise powers under C.P.C., as usual under Rule 7(i) of the Rules and they are not *persona designata* and the Election Tribunal constituted by Government Under Rule 7(2)(ii) of the Rules is *persona designata* and so can exercise such powers as are mentioned under Rule 7(ii) only and not powers, which are not mentioned in Rule 7(ii) of the Rules.

ARE THE PRESENT PROCEDURES FOR APPOINTMENTS OF JUDGES TO HIGH COURTS AND SUPREME COURT IN ACCORDANCE WITH THE PROVISIONS OF CONSTITUTION? IF NOT, WHAT IS THE ALTERNATIVE?

By

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Under our Constitution, there are three independent wings, discharging the various Constitutional mandates, to wit,

(1) The Legislature

(2) The Executive, and

(3) The Judiciary

The function or the Legislature, which is a representative body of the people coming into existence through, the mandate of the people, is to make laws, which are beneficial, advantageous and for uplift of the weaker sections of the society and women and other down-trodden categories of people, because they are elected by the people in a democratic way and so it knows full well of the necessities and requirements of the common man and so they enact the laws which promote the interests of common man. The Executive, *i.e.*, the Government, which is formed from out of/the majority of the members of the Legislature, implement the various laws that are enacted by the Legislature, so, the executive is responsible to the Legislature and it is in existence so long as it wins the confidence of the Legislature. It is duty of the judiciary to scrutinise and hold whether the thus enacted laws and the manner in which the executive has been implementing the said Acts, are in consonance with the Constitutional mandate and spirit and if the said laws are not in accordance with the various provisions of Constitution, especially relating to the fundamental rights of citizens enshrined in Constitution, to strike-off such laws and their implementation and protect and safeguard the rights of the general public. These three organisations are independent of each other and no one such wing shall interfere with the powers and rights of the other, against the Constitutional mandate and each one of them is supreme in its sphere.

2. Even in the preamble of our Constitution, it is said that, 'We, the people of India, hereby..' and it is the spirit of our Constitution that the whole of the people of India are participants of the Constitution. So, the fundamental fibre of our Constitution is involvement of the entire public in the progressive ways of implementation of various activities, taken in pursuance of the various Articles of Constitution. So only, it is often being reminded that no citizen of this country shall plead ignorance of law. (*Ignorantia Juris Non-excusat*).

3. So, in the first two wings, to wit, Legislature and executive, there is cent per cent involvement of the entire public. There will be elections normally for the States and Centre after the expiry of five years, so, the persons, who intend to be elected as a member of the Legislature or parliament must go to the common man and seek his confidence by getting his vote in his favour. If the common man has every belief in such person that he is a respectable person and he will stand by his promises made to the general public, he will exercise his vote in his favour and if such person, gets majority of votes thus polled, he will be elected as a member of the Legislature or parliament, as the case may be. If he acts during his regime as a truthful legislator, he can again request the common man for his vote to be voted in his favour in the next election, so, every legislator must go to the public and the verdict of the people will change his future atleast once in every five years, so, in other words, legislators are responsible to the people and the general mandate of the people is being respected according to the spirit of Constitution. Like wise, the executive, that is the governing body, chosen from the legislators, is equally answerable to the legislators, inasmuch as, the governing body will be in existence, so long as it can win the mandate of the legislators, that is, indirectly, the mandate of the people, as the legislators are no other than representatives of people, who are expected to act as per the mandates of people. To State in other words, the executive is also responsible to the general public. But, when it comes to judiciary, there is no such direct mandate of the people relating to their appointments. Judges are being appointed under the provisions of the Constitution itself. So, the Judges are not responsible to the common man as on today.

4. Now, the question is, when the other two wings under the Constitution, to wit, Legislature and executive (Government) are directly or indirectly answerable to the general public, why not the third wing, that is, judiciary also? Why not the members of the judicial organisation right from the lowestebb of Office of a Magistrate or Munsif to the highest peak like the Judge of the Supreme Court, should also be appointed through the mandate of the general public? If it is argued that the Judges must be appointed independently without the interference of the common man and if that argument is accepted that the functioning of Judicial system will be hopelessly paralysed and jeopardised, such argument must equally apply to the other two wings, Legislature and executive. If it is admitted that on account of the present system of democratic way of election, the Legislature and executive have been spoiled and so such thing should not happen in the case of judiciary, it means that it is accepted that, due to the democratic functioning in regard to Legislature and executive, the said two wings of the Constitution do not stand the test of the spirit of Constitution, which is not correct. So it is no argument to say that democratic way of selection of Judges destroys the very fibre of Constitution. So, appointment of all Judges at all levels can be made by the common man only and there can be no suicidal action in so doing, as we do not admit that, due to the intervention of common man, Legislature and executive are not working for the benefit of the common man, when we say that the intervention of common man in the fields of Legislature and executive, proves that democracy is a success in India, we must also agree for the same kind of involvement of the people in the appointment of hierarchy of Judges also. To say that, the Legislature and the executive are answerable to the public but judiciary is not so answerable, according to my sincere and reasoned opinion, is against the Constitutional mandate and spirit. I request to ponder over this aspect, to wit, what is the wrong, if the persons having requisite qualifications to be appointed, as Judges, as stated in the Constitution are selected by the people, just as they are selecting correct people right from panchayat member to

member of parliament, if we say that such type of elections do not work ill in the Constitutional set-up, how can it be argued that the same kind of election by people to the various posts of Judges also works out to the detriment and break down of Constitution? Definitely, the mandate of the people in selection of Judges yields good results, just as it has been yielding good results in other fields. It is said in Article 217(2) of Constitution that a person, who has for at least ten years been an advocate of a High Court and has not completed age of sixty two years (subject to correction) and a citizen of India and who complies with the other qualifications mentioned therein, can be appointed as a Judge of a High Court. It is said in Article 217(1) that the appointment of a High Court Judge shall be made by the President of India after consultation with the Chief Justice of India, the governor of the concerned state and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the concerned High Court.

But, it is well known fact that the appointment of a High Court Judge is actually being made right from the date of implementation of the Constitution, not strictly as contemplated under Article 217(1) and (2) but under the guise of such power through some other process, to wit, a panel of advocates practising in High Court only is being prepared by the Government for appointment of High Court Judges which is proof positive that the names of such of the advocates in High Court who are staunch supporters of the ruling party only will be mentioned in the said panel, which will be submitted to the governor who in turn will forward the same to the president of India necessary action to be taken by him according to Article 217(1) of the Constitution. Where is it laid that such a panel is to be prepared by the Government, which act is unquestionably a political decision and which does not reflect the view of the general public? Consequently, the appointment of High Court Judges is not free from the criticism from the public that appointment of Judges is tainted with political motivations and so, the judgments that may be delivered by such Judges also will be in the same coin, even if the Judges deliver judgments according to their conscience without having any political views of the party under whose regime, they are appointed. Why shall there by any scope for such criticism, even against Judges, who may be not influenced by any party afflictions? So, what I suggest is, the sending of the panel may be by the general public themselves in a democratic way as they discharge their right of election to the legislative bodies. Then, such a panel may be submitted to the governor, who will again submit the same to the President. It is no where stated in Article 217(1) that a panel shall be submitted to the Governor by the Government; but, this has been being adopted as a custom. Now, what I suggest is that, instead of the Government, the people themselves will submit the panel to the governor, of course through proper channel, that is, through Government, which should have no right to add, delete, postpone, or call for a fresh mandate to take further steps as usual. If this procedure is adopted, it will rightly meet the Constitutional urge in appointment of Judges also because the Judges also are being appointed by the people themselves in a most democratic manner, so that such appointment of Judges will definitely fulfill the Constitutional wish, to wit, that the people only are appointing their own Judges, so that there will be no criticism from any quarter regarding appointment of Judges, to wit, that appointment of Judges of High Court are purely creatures of blessings of political leaders of the ruling party.

5. There is also another important aspect relating to the appointment of High Court Judges, as is now being adopted. Even the so-called panel that is being prepared by the Government consists of advocates practising

in High Courts only but not also advocates practising in the mofussil Courts also, as if the advocates practising in the mofussil Courts are not worthy of being selected to the post of a High Court Judge and that the Constitution mandates that advocate practising in High Courts only should be selected for appointment of Judges of a High Court. In this context, it is apt to extract Article 217(2) of the Constitution :

Article 217(2) : A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and

(a) has for at least ten years held a Judicial Office in the Territory of India, *i.e.*,

(b) has for at least ten years been an advocate of a High Court (xxx) or of two or more such Courts in succession;

(c) (xxxxx)

Explanation :—

For the purposes of this clause

(a) …….

(b) …….

(c) …….

So, it is clear from Article 217(2) that a person shall not be qualified for appointment of a Judge of High Court, unless he has atleast for ten years been an advocates of a High Court, In so many words, it does not say that, unless a person has for at least ten years been *practising as an advocate in a High Court*, he cannot be appointed as a Judge of a High Court. Every advocate, after getting the necessary degree in law, shall get himself enrolled as an advocate on the file of High Court and after thus getting himself enrolled, he may put up his practise either in High Court or in any other Court within the territorial jurisdiction of the High Court. So the intent of Article 217(2) is that the qualification for being appointed as a Judge of the High Court is that one should be an advocate having ten years of practice not necessarily in High Court, but in any Court/ Courts within the jurisdiction of the High Court. If the intention of Article 217(2)(b) is that advocate practising in High Court only for a period of ten years, and not all other advocates, who through get themselves enrolled as advocates on the rolls of the same High Court but not practising in High Court but practising in Sub-Ordinate Courts only, are to be appointed as Judges of a High Court, it will be against the fundamental right of the advocates not practising in a High Court as enshrined in Article 14 of the Constitution. I fail to understand why advocates practising in High Court only are being selected and recommended for the esteemed office of a Judge of High Court, at the altar of refusing the just claim of other advocates, who are not practising in the High Court but who are practising in Courts other than High Court. Is it the intention of the Government that advocates, practising in Courts other than High Court are not as intelligent smart and well-versed in the subject as advocates practising in High Court? On the other hand, the converse is true. An advocate practising in moffusil Courts and District Court can as well prove themselves worthy in High Court, whereas an advocate practising in High Court, who is only accustomed to point out the laches in the lower Courts and then submit arguments on points of law only, cannot deal with matters at the grass root level. It is irksome for them to draft the pleading, cross-examine the witnesses and getting the documents marked at opportune times and then argue the matter. The work-in lower Courts is the foundation of the case, which is unsurpassed compared to the work in High Court. At any rate, it is just to make it a point that there are very eminent and brilliant advocates. Practising in lower Courts also and not necessarily in High Court only. So, while preparing the panel, the concerned authority must also include some names of the

advocates in the moffusil Courts also. A plan may be chalked out with the aid of a body consisting of very eminent persons in the field so as to give equal opportunities to all the advocates, irrespective of their place of practice.

6. If this procedure is not acceptable. I suggest that competitive examinations may be held for appointment of Judges of High Court also, just like the procedure that is being adopted for appointments of Junior Civil Judges and District Judge, so that, irrespective of the place of practice efficient advocates only will be selected from out of such celebrities, and the preparation of panel *etc.*, procedure will follow as contemplated within the provisions of Article 217(1) of Constitution.

7. My opinion is based on the decision of the Supreme Court reported in AIR 1970 SC 1061, which held that an advocate of High Court means an advocate enrolled as an advocate in High Court but does not mean an advocate practising in a High Court. The facts in that case in brief are as follows :—

An advocate practising in a District Court was appointed as High Court Judge. Then, a writ of *quo warranto* was filed by an aggrieved person in the High Court of Allahabad, challenging the appointment of an advocate having twenty years of practice in Court subordinate to High Court but not in High Court, as a Judge of the High Court on the ground that he did not practise in the High Court but practised in Courts subordinate to High Court only and so he is not qualified to be appointed as a Judge of High Court under Article 217(2)(b) of the Constitution. On appeal to the Supreme Court by the writ petitioner in the High Court, the Supreme Court interpreted and held the expression "Advocate of a High Court" as meaning a "person enrolled as an advocate of High Court and not necessarily practising in High Court" and that the expression 'an advocate of a High Court' must mean as advocate, whose name has been enrolled as an advocate of a High Court, no matter whether he practised in the High Court itself or in Courts Sub-Ordinate to it or both, accepting an correct law that was laid down, by Madras High Court in AIR 1967 Mad. 344 and AIR 1967 Mad. 347.

8. This aspect can also be viewed with considerable reason, that when the District Judges and Junior Civil Judges are being recruited by conducting open written and oral tests, why not the same practice also be followed in appointment of Judges of High Court. A panel will be prepared according to the performance exhibited by various contesting advocates guided by some norms to be elucidated by concerned intelligentia and such panel shall be submitted to the governor by the State Government, discharging its obligation to submit the said panel to the governor, without making, altering deleting or adding, any name in the said panel, who in turn, will submit the same to the President of India under Article 217(1) of the Constitution, so that the President can endeavour himself in the manner provided in Article 217(1) of the Constitution and appoint the Judges of High Court. This procedure also will be largely applauded by all and there will be no room for any kind of criticism from anybody.

9. I am, therefore, of the strong opinion that the present manner of appointment of Judge to High Courts is not according to the Constitutional man-date and also as hold by Supreme Court way back in the year 1970 and therefore, at least hereafter, when appointment of Judges to High Court has come for consideration the present procedure of appointing advocates practising in High Court only may not be adopted ignoring the entire advocate world practising in Courts other than the High Court but adopt one of the ways suggested by me in the above paragraphs, thereby following the mandate of the Supreme Court, to wit, that appointment of an advocate practising in a

moffusil Courts as a Judge of High Court is in accordance with Constitution irrespective of his practice for ten years in the High Court or in any other Courts or Courts sub-ordinate to High Court, so that the creamy section, of the advocates, who are not practising in High Court, will also be given their share of contribution in delivering land mark judgments.

I earnestly hope and believe that my views in regard to appointment of Judges to High Court may be seriously considered by the concerned authorities and take effective steps in those lines.

It need not be separately mentioned that the present practice of Appointment of Supreme Court Judges also is not being adopted according to the spirit and heart and soul of the Constitution.

I once again request all concerned to discuss threadbare my views with a piercing sword and after such endeavour if they agree with my views, I request them to take steps at least hereafter to fulfil the urge of the Constitution. If still the same procedure is intended to be followed, what else can I say except making an appeal pathetically to the citizens of this country to get themselves joined and prepared for getting Article 217(2) of the Constitution amended as follows :

Article 217(2) : A person shall not be qualified for appointment of a Judge of High Court unless he is a citizen of India, and

(a) …….

(b) ……. has for at least ten years been advocate of a High Court, irrespective of his practise, whether in High Court or in any other Court/Courts sub-ordinate to the High Court within its territorial jurisdiction, or of two or more such Courts in succession.

Hope this will meet you all in good cheers.

THE VISION OF CORPORATE LAWS IN INDIA - ITS CHALLENGES OF 21ST CENTURY

By

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"Corporate laws should have the vision to make our Indian Nation a developed economy. Corporate laws should pave way not only for the development of the corporate sector but also for the overall growth of the Nation as a whole with making corporate sector more involved towards the welfare of the State"

It was the idea with future thought of the 11th President of India, Late Sri. Dr. *Avul Pakir Jainulabdeen Abdul Kalam* (as he then was) that the vision of India should be to become a developed economy by the year 2020 and in this regard, the corporate sector with its laws has an important role and major part in achieving the idea of our beloved Former President of India. Corporate Sector with its laws plays a pivotal role in the developing or growth of the economy, notwithstanding the fact that India is mainly agricultural sector based economy. Challenges faced by corporate laws in India are multidimensional. Challenges faced by the corporate laws are like fishes in the sea fluctuating and swinging from time to time and it for the corporate laws to lay proper course of action by laying legislative nets for controlling and catching the fishy challenges. The challenges to be met by the corporate laws can be to meet the needs of the stake holders, to meet the needs of the foreign