

5. I opine that the Parliament overlooked Order 1 Rule 13 and failed to insert a similar proviso added to Section 99 and Order 1 Rule 9 of C.P.C. to Order 1 Rule 13 also.

6. The High Court of Assam in a decision reported in AIR 1953 Ass. 193 (FB), the High Court of Calcutta in a decision reported in AIR 1969 Cal. 360 (Para 6) and our High Court in a decision reported in

1989 (3) ALT 28 (NRC) held that Order 1 Rule 13 has no application to a case where a necessary party to the suit is not before the Court, even in the absence of a proviso similar to one under Order 1 Rule 9.

7. So, my humble opinion is that we have to read Order 1 Rule 13 also with a similar proviso in view of the provisos inserted to Section 99 and Order 1 Rule 9 of CPC.

APPOINTMENT OF HIGH COURT JUDGES AND TRANSFER-PRIMACY IN THE MATTER OF APPOINTMENTS BY CHIEF JUSTICE OF INDIA

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Article 217 Constitution of India prescribes the qualifications and conditions for appointment of Judges for High Courts, Article 217. The appointment is made under Warrant signed by the President of India in consultation with Chief Justice of Supreme Court and Governor of the State and Chief Justice of High Court concerned.

The opinion of Chief Justice of India for the purposes of Article 214(2) and Article 217(1) Constitution of India has primacy in the matter of appointments. No appointment shall be made by the President of India under these provisions to the Supreme Court or High Court unless it is in conformity with the final opinion of Chief Justice of India formed in the manner indicated. The nine Judges Bench of Supreme Court has observed in *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268 at P.436.

The recommendation made by Chief Justice of Supreme Court in the matter of appointment of Judges is binding on the Executive is firmly established and has to be read in Article 214(2) and Article 217(1) Constitution of India. AIR 1994 SC 268 (Paragraphs 388, 389, 390, 391).

The Judiciary is separate and Executive has no concern with day-to-day functioning

of Judiciary. The farmers of Constitution have placed limitations on the power of Executive in the matter of appointment of Judges of Supreme Court and High Courts. AIR 1994 SC 268 (Paragraphs 396, 400, 402).

The Nine Judges Bench of Supreme Court in AIR 1994 SC 268 in Paragraphs 221, 223 has held that the State in the present day has become major litigant and the superior Courts particularly the Supreme Court have become centers for turbulent controversies some of which with a flavour of political repercussions. In such circumstances, the Government, being the major litigant is justified in enjoying absolute authority in appointing/nominating its arbitrators. The answer would be in negative. If such process is allowed to continue, the independence of Judiciary, in long term will sink without any trace.

The “prior consultation” with superior Judiciary is a logical consequence of having an “independent Judiciary” as a basic feature of Constitution. If the Executive is to ignore the advice of Chief Justice of India in the process of consultation, the very object of providing consultation with Judiciary is defeated. The Executive, is therefore, bound to accept the recommendation of Chief Justice of India. There cannot be independent

Judiciary when the power of appointment of Judges vests with the Executive. Independence of Judiciary is the basic structure of Constitution. The framers of Constitution have never intended this power to the Executive. Even otherwise, the Central/State Governments are parties before the Courts. The Union Government have vital interest in important matters before the apex Court for adjudication. The Judiciary, being the mediator between the people and the Executive, the framers of Constitution, therefore, have not placed the appointment of Judges of Supreme Court/High Court in the hands of Executive. AIR 1994 SC 268 (Para 351).

In appointment of High Court Judge, consulting the Union Government or State Government or taking opinion of both Governments is not provided in Article 217. Most of the writs are filed against either Central Government/State Governments for violation or enforcement of fundamental rights guaranteed under Part III of the Constitution of India. Because, of sound principle that party has no right to choose Judge for its case, therefore, under Article 217 of the Constitution of India, there is no role to be played by both Central Government and State Governments in matters of appointment of Judges or their transfer.

Article 222 Constitution of India makes provision for transfer of High Court Judges. Exercise of power by President to transfer is to subserve public purpose in order to promote "public interest" for better administration of justice which is the guideline held to be implicit under Article 222 as held by apex Court in *K. Ashok Reddy v. Government of India*, AIR 1994 SC 1213. As per Article 222 of the Constitution, the President of India is having power to transfer High Court Judge to another High Court and while making such transfer, the consent of the Judge is not required. The entire gamut of transfer of Judges covered by judgment of Supreme Court in *Union of India v. Sankal Chand Himmathlal Sheth*, AIR 1977 SC 2328 = (1977) 4 SCC 193 and *S.P. Gupta v. Union of India*, AIR 1982 SC 149. No prior consent of High Court Judge,

before transfer is required as held in *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268. But, the rule of transfer of High Court Judge from one High Court of the State to another High Court of the State is not implemented in its letter and spirit. It is necessary for having atleast 1/3rd of Judges out of total strength of Judges in High Court from other High Courts of other States preferably Senior Judges heading the Division Bench must be from another State. the factors which may be relevant for promoting better administration of justice throughout the country to subserve the public interest contemplated by such transfers would be shifting of a Judge from one High Court to another High Court for improving the functioning of either High Court, avoiding embarrassment to the Judge on account of close relations practising ordinarily in the same High Court or any Court subordinate thereto; the likelihood of embarrassment to Judge on account of any litigation or property interest in the same State, if the Judge, for any reason has become controversial. AIR 1994 SC 1207 (Paragraph 13)

The majority Judges of Supreme Court in *Supreme Court Advocates on Record Association v. Union of India* have held that transfer of Judges is in the interest of public but not as of punishment. Every power vested in the public authority is to subserve public purpose and must be invariably be exercised to promote public interest. This guideline is inherent in every such provision and so also in Article 222 of the Constitution. The provision requiring exercise of this power by the President after consultation with the Chief Justice of India and the absence of requirement of consultation with any other functionary, is clearly indicative of the determinative nature. The Bench has further observed that "it may be desirable to transfer in advance the senior most Judges due for appointment as Chief Justice where he is likely to be appointed as Chief Justice, to enable him to take over as Chief Justice as soon as the vacancy occurs, and in the mean time, acquaint himself with the new High Court.

This would ensure a smooth transition without any gap in filling the office of Chief Justice.

High Court Judge is not public servant either of State Government or Central Government. Judge of High Court is holding Constitutional Office and has to function independently because he is not Government servant. The relationship between the Government and High Court Judge is not that of master and servant and not holding the post under the Union Government or State Government as held by apex Court in *Union of India v. Prathib Bonnerjee*, AIR 1996 SC 693, relying on the judgment of apex Court in *Union of India v. Sakalchand Himatlal Sheth*, (1977) 4 SCC 193 = AIR 1977 SC 2328. Justice *Chandrachud* as he then was, has in Paragraph 49 of judgment observed that “High Court Judge is not Government servant and that he is holding Constitutional post. The Supreme Court further observed that the Government is litigant before the Court and he has to decide the case independently and impartially without any manner being influenced. In order to reserve independence of Judge, his salary is specified in second schedule *vide* Article 221 of the Constitution of India. It is further observed that Judge of High Court belongs to third organ of the State which is independent of other two organs the Executive and the Legislature and therefore, he occupies unique position under the Constitution.”

Justice *Bhagavathi* has interpreted “principles of independence”. It is not an abstract conception but is living faith which must derive its inspiration from the Constitutional character and its nourishment and sustenance from Constitutional values. It is necessary for every Judge to remember that our Constitution is not a non-aligned national character. It is the principle rule of law and under Constitution, it is the Judiciary which is entrusted with the task of keeping every organ of the State within the limits of law and thereby making the rule of law meaningful and effective.

In *S.P. Gupta v. President of India*, AIR 1982 SC 149, the Supreme Court has held

that Circular of Law Minister dated 18.3.1981 for transfer of Chief Justice of Patna High Court and non-extension of term of Additional Judge is an alleged encroachment on Judiciary.

The word “judicial office” used in Article 217(2)(a) of the Constitution of India has to be interpreted in consonance with the scheme of Chapters V and VI of Part VI of the Constitution of India. The post is of judicial service as defined in Article 236(b) of the Constitution of India. In order to qualify for appointment of Judge of High Court, a person must hold “judicial office” which must be part of judicial service of the State as held by Supreme Court in *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213.

Recently, the Supreme Court Coliseum has sent panel of four names for appointment of Judges of Supreme Court *viz* : Chief Justice *Arun Mishra*, Chief Justice *Adarsh Goyal*, Senior Counsel *Sh. Rohistan Nariman*; former Solicitor General *Gopal Subramanyam* to the Union Government. Controversy arose in case of appointment of former Solicitor General *Gopal Subramanyam* as Supreme Court Judge. The Union Government has rejected the name of former Solicitor General *Gopal Subramanyam* without assigning any reasons. On withdrawal letter given by former Solicitor General *Gopal Subramanyam* given to Chief Justice of India, orders are issued appointing Chief Justice *Arun Mishra*, Chief Justice *Adarsh Goyal*, Senior Counsel *Sh. Rohistan Nariman* of Supreme Court as Judges of Supreme Court. In view of several judgments of Supreme Court, referred above the opinion and recommendation of Chief Justice of India under Article 214(2) and Article 217(1) of the Constitution of India has the primacy in appointments of Judges. The controversy that the Union of India has any right to refuse or reject the recommendation of Chief Justice of India in sending the panel of names for making appointment of Judge of Supreme Court to the President of India is set at naught in view of authoritative pronouncements of quorum of Nine Judges of Supreme Court.