

7 RMLNLUJ (2015) 30

Appointment and Transfer of Judges in India: A Tale of Unsettled Law

by
Atul Kumar Tiwari¹

The recent judgment of Supreme Court of India¹ has declared the National Judicial Appointment Commission as unconstitutional and revived the old collegium system for appointment of Judges. This has reignited the old debate about appointment of Supreme Court and High Court Judges and transfer of High Court Judges. According to a report the High Courts currently have an average vacancy of more than 42% posts². This paper scrutinizes the changing dimensions of the law dealing with appointment and transfer of Judges in the Supreme Court and High Courts (superior courts) by analysing relevant case law ever since commencement of the Constitution of India.

I. DELIBERATING TRANSFERS: SANKALCHAND CASE

In *Union of India v. Sankalchand Himatlal Sheth*³, the question was raised, whether Central Government can transfer a Judge of High Court to another High Court without the consent of the concerned Judge? Article 222 (1) of the Constitution of India⁴ gives the power to transfer a Judge, from one High Court to another, to the President of India who is required to consult the Chief Justice of India (CJI) before exercising his authority to transfer a Judge. Plain reading of the provision gives clear impression that executive can exercise the power to transfer a High Court Judge without the consent of the Judge concerned. "It would be a highly dangerous power, because the executive would then have an unbridled charter to inflict injury on a High Court Judge by transferring him from the High Court to which he originally agreed to be appointed to another High Court, if he



Page: 31

decides cases against the government or delivers judgments which do not meet with the approval of the executive. That would greatly undermine the independence of the judiciary"⁵.

The matter was heard by a bench comprising of five Judges. However, parties settled matter between them and therefore, an order disposing of Appeal in terms of settlement was passed. On the issue of transfer of Judge with or without his consent, Bhagwati, J. in his minority opinion observed, "It is no doubt true that the words "without his consent" are not to be found in Clause (1) of Article 222, but the word 'transfer' which is used there is a natural word which can mean consensual as well as compulsory transfer and if the High and noble purpose of the Constitution to secure that independence of the superior Judiciary by insulating it from all forms of executive control or interference is to be achieved, the word 'transfer' must be read in the limited sense of consensual transfer".

It may be noted that Constitutional scheme does not provide a master-and-servant relationship between a Judge and the Government. A Judge, therefore, cannot be dictated by the Government, how to decide a case. Therefore, "transfer" in Article 222 (1) has a different colour and content in comparison to other services. The concept of 'transfer' under that article must be "construed harmoniously with the various constitutional provisions which are enacted in order to secure judicial independence. A non-consensual transfer will provide the executive with a potent weapon to punish the

Judge who does not toe its line and thereby destroy the independence of the judiciary"⁶.

The majority opinion of the Court emerged that "a High Court Judge cannot be transferred as a matter of punishment, as for example, for the views which he bona fide holds and that his transfer, being conditioned by the requirements of public interest, cannot be effected for an extraneous purpose"⁷. Finally it was held that consent of the Judge to be transferred has to be taken, "not so much a constitutional necessity but as a matter of courtesy in view of high position that is held by him. But there may be cases where, if the Judge does not consent and the public interest compels, the power under Article 222 can be exercised."⁸

Another very important question disposed of by the Court was, as to what is the true meaning and content of 'consultation' under Article 222(1) of the Constitution. What is the duty of President while discharging constitutional obligation to consult the Chief Justice of India involving



Page: 32

the matter concerning transfer of a Judge of a High Court? The Supreme Court held, "while consulting the Chief Justice, the President must make the relevant data available to him on the basis of which, he can offer to the President the benefit of his considered opinion... Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive, consultation".

It is clear now that Article 222(1) hypothesises fairness and provides a system to safeguard the rationality. In the first place, 'public interest' is the only ground that permits the executive to exercise the power to transfer a High Court Judge. Secondly, the President is under an constitutional duty to consult the Chief Justice of India and in the process he will require that all the relevant facts must be placed before him. Thirdly, the Chief Justice of India is obligated not only to the President but also to the Judge who is proposed to be transferred, "that he shall consider every relevant fact before he tenders his opinion to the President"⁹.

II. MAINTAINING EXECUTIVE'S UPPER HAND: 1ST JUDGES CASE

The momentous occasion to deliberate and decide various issues relating to transfer and appointment of Judges belonging to higher judiciary came before the seven Judge Constitution Bench in *S.P. Gupta v. Union of India*¹⁰ (1st Judges case). The major issues discussed and decided by the Court included power to appoint and transfer High Court Judges. All the seven Judges delivered their separate opinions after due deliberations. Following are the significant outcome that has emerged from the majority view of the Judges.

- (i) *Consultation under Articles 217¹¹ and 222*: Constitutional functionaries cannot exercise veto during the process of consultation and they must indulge in meaningful and result oriented consultation. It was also held that a proposal initiating the consultation process can emanate from any of the constitutional functionaries. In a full and effective consultation the "relevant facts bearing upon appointment or non-appointment are brought to the notice of the Central Government and the constitutional functionaries"¹²



Page: 33

- (ii) *Appointment of Judges*: It was unanimously decided that the power to appoint Judges vests in Central Government and appointment must be made after effective consultation.
- (iii) *Primacy of the President*: The majority of 4:3 decided that the opinion of Chief Justice does not enjoy primacy over the other constitutional functionaries. What is required under Article 217(1) is only consultation and not concurrence of the Chief Justice of India. "The President has, however, a right upon consideration of all relevant facts to differ from the other constitutional functionaries for cogent reasons and take a contrary view"¹³.
- (iv) *Transfer of Judges*: Unanimous opinion emerged that transfer of a Judge must be in public interest. Transfer of a Judge from one High Court to another must not be by way of punishment.
- (v) *Prior consent of the Judge*: All the Judges, except Bhagwati, J. held-to transfer a Judge of High Court, prior consent of the Judge is not necessary.
- (vi) *Seed of Collegium*: Bhagwati, J. in his separate opinion observed—
"There must be collegium to make 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". However, the aforesaid opinion of Bhagwati, J. was not supported by other Judges of the bench.

The bird's eye view of *S.P. Gupta* case shows us that the final say, in the appointment and transfer of High Court Judges, is of the Central Government. But Central Government can exercise the power only after full and effective consultations with the constitutional functionaries. Transfer as punishment cannot be done, nonetheless it is permissible, to transfer a Judge without his prior consent, in public interest.

III. PRIMACY TO CJI AND EMERGENCE OF COLLEGIUM: 2ND JUDGES CASE

The law relating to appointment and transfer of superior judiciary saw a titanic shift when a Supreme Court bench consisting of nine Judges overruled *S.P. Gupta* by a majority of 7:2 in *Supreme Court Advocates-on-Record Assn. v. Union of India*¹⁴ (2nd Judges case). The major outcome of

the Judgement that has introduced the much talked about 'collegium system' is as under:

- (i) *Primacy to the opinion of Chief Justice of India during consultation*: The views expressed by majority, in connection with matter of appointment of the Judges of the Supreme Court and High Courts and also transfer of High Court Judges, made it clear that the opinion of the Chief Justice of India shall have primacy in the process of constitutional consultation. Thus, President cannot make an appointment under Articles 124(2) and 217(1) of the constitution unless the final opinion of the Chief Justice of India is in conformity of the names proposed.
- (ii) *Collegium System*: A new concept of consultation in the process of appointment and transfer of superior judiciary was introduced as a matter of prudence by interpreting the 'opinion of CJI' as 'the opinion formed by the CJI collectively i.e. after considering opinions of his senior colleagues'. The opinion of CJI must necessarily have the element of plurality "so that the final opinion expressed by him is not merely his opinion, but the collective opinion formed after taking into

account the views of some other Judges who are traditionally associated with this function"¹⁵. It was further decided by the Court -

a. *Appointments in Supreme Court*: The CJI has to form his opinion after considering the views of the two senior most Judges of the Court. Furthermore CJI is expected to seek the "views of the senior most Judge of the SUPREME COURT whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise"¹⁶.

b. *Appointments in High Courts*: The CJI is expected to take views of such Judges of the SUPREME COURT who are likely to be familiar with the affairs of the concerned High Court. The CJI may further ascertain the views of one or more senior Judges of the concerned High Court before the formation of his opinion. "The opinion of the Chief Justice of the High Court would be entitled to the greatest weight and it must be formed after ascertaining the views of at least the two senior most Judges of the High Court."¹⁷

(iii) *Initiation of Appointment Process*: For appointment of CJI, the outgoing CJI has to initiate the proposal in advance. The process of appointment must be initiated by the CJI in case of the appointment



Page: 35

of a Supreme Court Judge, whereas in case of the High Court, the initiation has to be from the Chief Justice of the High Court.

(iv) *Appointment of Chief Justice of India*: It has been a well established convention to appoint the senior most Judge of the Supreme Court. The provision of consultation under Article 124(2) is to provide for such consultation, "if there be any doubt about the fitness of the senior most Judge to hold the office, which alone may permit and justify a departure from the long standing convention."¹⁸


(v) *Transfer of a High Court Judge*: President shall exercise the power to transfer under Article 222 of the Constitution only after consultation with CJI. The opinion of CJI is 'determinative' in nature and is not confined to mere 'primacy'. The power to transfer can only be exercised for promoting better administration of justice i.e. in 'public interest'. It was further held that initiation of proposal for transfer must be by CJI.

Many scholars have criticised the judgement including V.R. Krishna Iyer, J. who observed, "The Nine Judges Bench, in a mighty seizure of power wrested authority to appoint or transfer judges from the top Executive to themselves by a stroke of adjudicatory self-enthronement"¹⁹.

IV. ENLARGEMENT OF COLLEGIUM: 3RD JUDGES CASE

A Lot of confusion was created due to 2nd *Judges case*²⁰ as to what is the correct constitutional position in the field of appointment and transfer of the Judges of the superior courts. The President of India exercised the power vested in him under article 143 of the constitution, power to make reference to the Supreme Court seeking opinion of the Supreme Court, in order to remove the doubts and confusion. *Special Reference No. 1 of 1998, In re*²¹ (3rd *Judges case*), is unique in the sense that a nine Judges bench attempted to clarify and remove doubts that had emerged because of another Judgement of the Supreme Court again comprising of nine Judges. Though it is not a Judgment but an opinion given to the president explaining the true meaning and content of various provisions of the constitution relating to the appointment and transfer of the Judges in superior courts, the Supreme Court gave a distinctly different


opinion as to the composition of the collegium. Following points may be summarized as the important takeaways from the *Judges* case III.

 Page: 36

- (i) *Consultation*: Consultation under articles 217 (1) and 222 (1) requires consultation with a plurality while CJI forms the opinion. Individual opinion of the CJI does not constitute consultation.
- (ii) *Collegium*:
 - a. *Appointment of Supreme Court Judge*: The opinion of CJI having primacy in the matter must be formed in consultation with a collegium of Judges consisting of CJI and the four senior most puisne Judges of the court. In addition to above, the successor chief justice of India must be made part of the collegium.
 - b. *Appointment of High Court Judge*: The collegium that would make recommendation for appointment to the High Court shall consist of the CJI and two senior most puisne Judges of the Supreme Court.
 - c. *Transfer of High Court Judges*: The CJI must consult a plurality of Judges. He should seek the opinion of the "chief justice of the high court from which the proposed transfer is to be effected as also the chief justice of the High Court to which the transfer is to be effected."²² CJI should consider the views of one or more Supreme Court Judges who are in a position to assist in deciding whether transfer should take place or not. The aforesaid views should be considered by CJI and four senior most Judges of the Supreme Court and their views should be conveyed to the government of India.

V. ABORTED LEGISLATIVE EFFORTS

*The Constitution (Ninety-ninth Amendment) Act, 2014*²³: On 31st December 2014, the parliament enacted the Constitution (Ninety-ninth Amendment) Act, 2014 making provision for establishment of the National Judicial Appointments Commission (NJAC). Through this amendment a new article i.e. 124A was inserted in the Constitution apart from other alterations in the Constitution. The NJAC was designed to replace the collegium system that had emerged as a controversial system for appointments and transfers of the Judges of superior courts. The NJAC envisaged a six member body consisting of CJI, two other senior Judges of the Supreme Court next to the CJI, the Union Law minister and two eminent persons. The NJAC was entrusted with the function of recommendation of 'able persons with integrity' for appointment as CJI, Judges of Supreme Court, Chief Justices of High Courts and other Judges of High Courts. The task of

 Page: 37

making recommendation for transfer of High Court Judges including chief justices of High Courts was also entrusted on NJAC.

*The National Judicial Appointments Commission Act, 2014*²⁴ (NJAC Act): The NJAC Act was enacted by the Parliament of India and was purported to regulate the procedure to be followed by the National Judicial Appointments Commission in the process of recommending persons for appointments and transfers of Judges belonging


to the superior courts.

Both, The Constitution (Ninety-ninth Amendment) Act, 2014 and the NJAC Act have been declared unconstitutional by the Supreme Court of India²⁵ and hence are no more a valid law.

VI. REVIVAL OF COLLEGIUM SYSTEM: 4TH JUDGES CASE

In *Supreme Court Advocates-on-Record Assn. v. Union of India*²⁶ (4th Judges case) by a split opinion of 4:1, 99th amendment to the Constitution was declared violative of the basic structure of the Constitution of India. The NJAC Act, 2014 which emerged from 99th amendment was also held invalid. The judgment of the Supreme Court was based on the concept of 'Basic Structure' of the Constitution as enunciated in *Kesavananda Bharati* case²⁷. The Court Pronounced that the basic structure of the Constitution can never be violated by making amendments in the Constitution. As per majority the 99th Constitution Amendment adversely affects the basic structure of the Constitution by introducing changes which are substantive in nature with respect to appointment of Judges to the Supreme Court and the High Courts by rewriting Article 124 and Article 217. The aforesaid changes, in the opinion of the Court, "seriously compromised the independence of the judiciary" and therefore, the 99th Constitution Amendment is unconstitutional.

Furthermore, the NJAC Act, 2014 that had its origin in the 99th Constitution Amendment cannot exist independently on the statute books. Thus, the NJAC Act was also considered invalid. The Court admitted the criticism of collegium system and Lokur, J. Observed, "there has been criticism (sometimes scathing) of the decisions of collegium. The collegium cannot be blamed for all the ills in the appointment of Judges, the political executives has to share the blame equally if not more, since it mortgaged

 Page: 38

its constitutional responsibility of maintaining a check on what may be described as erroneous decisions of the collegium"²⁸.

VII. CONCLUSION

It is clear now that the Supreme Court is convinced that with present collegium system 'all is not well' and therefore, the collegium system needs to be improved. The matter has been posted for the further hearing, in order to consider whether collegium system requires improvements. One must note that the Five Judges Bench that passed the judgment in 4th Judges case and which is still in the process of suggesting improvements has its limitations. The 2nd and 3rd Judges case had the bench strength of nine Judges each and therefore, the law declared by the 2nd and 3rd Judges case is likely to prevail, only minor fixing here and there in the processes being followed by the collegium system is expected.

Law Commission of India had suggested in its report²⁹ two alternatives to the Government of the day in order to remedy the situation. First, to seek a reconsideration of the aforementioned judgments before the Supreme Court or second, "a law may be passed restoring the Primacy of the Chief Justice of India and the power of the executive to make appointments"³⁰. In case government follows the second option i.e. drafting a new law in future, this time the judgment of 4th Judges case may serve as a guiding light for the legislature.

* Associate Professor (Law), Dr. Ram Manohar Lohiya National Law University, Lucknow-226012

¹ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1.

² The Times of India, Lucknow ed., Dated 16th June 2016.

³ (1977) 4 SCC 193.

⁴ "The President may, after consultation with the Chief Justice of India, transfer a Judge from on High Court to any other High Court".

⁵ Supra note 3 at 243.

⁶ Id. at 213.

⁷ Id. at 220.

⁸ Id. at 273.

⁹ Id. at 230.

¹⁰ 1981 Supp SCC 87.

¹¹ The Constitution of India, Article 217(1): "Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court".

¹² Supra note 10 at 304.

¹³ Id. at 634.

¹⁴ (1993) 4 SCC 441.

¹⁵ Id. at 699.

¹⁶ Id. at 702.

¹⁷ Id.

¹⁸ Id. at 706.

¹⁹ V.R. KRISHNA IYER, A CONSTITUTIONAL MISCELLANY 278 (2nd ed., 2003).

²⁰ Supra note 14.

²¹ (1998) 7 SCC 739.

²² Id. at 771.

²³ Act No. 49, 31st Dec. 2014.

²⁴ Act No. 48, 31st Dec. 2014.

²⁵ Supra note 1.

²⁶ Id.

²⁷ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

²⁸ Supra note 1 at 546.

²⁹ LAW COMMISSION OF INDIA, PROPOSAL FOR RECONSIDERATION OF JUDGES CASE I, II, & III Report No. 214 (Nov. 2008).

³⁰ Id. at 60.

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.