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# COLLEGIUM SYSTEM OF JUDICIAL APPOINTMENTS – AN OUTCOME OF JUDICIAL MISINTERPRETATION BY SHEETAL. S & ANURAG SINGH*

Independence is a bulwark of rule of law.[1] Independence of judiciary is important to secure fair and free society under rule of law[2]. Judicial Appointments in Indian has always undergone evolutionary transformation and also always remained the most controversial aspect. The Supreme Court of India's collegiums system, which appointed the judges to the nation's constitutional courts, has its genesis in, and continued basis resting on, three of its own judgments which are collectively known as the three judges cases- *S.P.Gupta v Union of India*[3] (1981) which promoted executive primacy in judicial appointments. Then came the *Supreme Court Advocates- on record Association v Union of India*[4] (1993) that proposed the collegiums system of appointment followed by the *In re Special Reference 1*[5] (1998) which continued to be an extension of the same proposal.

**Fali S Nariman** states, 'If there is one important case decided by the Supreme Court of India in which I appeared and won, and which I have to regret, it is the decision that goes by title – "*Supreme Court on Record Association v UOI*"[6]'.[7] Since, in the "*Third Judge Case*",[8] a few flaws were taken away and the collegiums were enlarged, still did not fulfil the real object of the Constitution.

Supreme Court erred while holding that the Consultation with the CJI refers to Collegium, thereby leading to the creation of the Memorandum of Procedure rewrote the provision of the Constitution. No Judgment can, by purporting to prescribe a norm, rewrite Article 124(2) in the manner following: [E]very Judge of the SC shall be appointed by the President by warrant under his hand and seal after *Consultation* with two/four senior-most judge of the SC and the senior-most Judge of the SC 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 HC.[9]

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* 3rd Year, SCHOOL OF LAW, CHRIST UNIVERSITY

[1] DAVID PIMENTEL, REFRAMING THE INDEPENDENCE v ACCOUNTABILITY,5

[2] Bachan Singh v. State of Punjab, AIR 1982 SC 1336; *See also*, *Maneka Gandhi v. Union of India, AIR 1978 SC 597*; Ramana.D.Shetty v. International Airport Authority, AIR 1979 SC 1628; Ajay Hasia v. Khalid Mujib, AIR 1981 SC 48; *E.P.Royappa v. State of Tamil Nadu, AIR 1974 SC 555*; S.G. Jaisinghani v. Union of India and Ors (1967) 2 SCR 703, at p.7 18-19.

[3] S.P.Gupta v Union of India, AIR 1982 SC 149

[4] Supreme Court Advocates-on-Record Association v UOI, [1994] AIR 268 (SC), [1994].

[5] *In* Re Presidential Reference,[1999] AIR1(SC)

[6] *Supreme Court Advocates-on-Record Association v UOI, [1994] AIR 268 (SC), [1994].*

[7] F. S. NARIMAN, BEFORE THE MEMORY FADES: AN AUTOBIOGRAPHY,389(Hay House 2010) .

[8] *In Re Presidential Reference, [1999] AIR 1 (SC)*;Registrar General, High Court of Madras v. R. Gandhi and Ors**.** 2014 (2) SCT86 (SC).

[9] H M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY,2962 ( ULP Co, 4th ed. 2006).

In reality Article 124(2) confers a discretionary power on the President to consult such Judges of the SC and HC in the States as the President may deem necessary.[10] First, such *Consultation* is not obligatory because the President may not deem it necessary to consult such of the Judges of the SC and HC at all. Secondly, the *Consultation* is not only with the Judges of the SC but also with *Such of the Judges of the HC in the States*. Thus, the Court failed to differentiate the mandatory obligation of the President to consult the CJI and discretionary power of the President to consult not only Judges of the SC but of the HC in the States, if he deemed such *Consultation* necessary.[11]Hence, the Judgments by purporting to prescribe a norm, rewrote Article 124(2) which be *pro tanto* null and void.The "*Second Judge Case*" and "*Third Judge Case*" held that in matter relating to the appointment and transfer of the Judges of the HC the CJI requires *Consultation* with a plurality of Judges (his colleagues)[12] in the formation of his opinion.[13] In reality according to Article 217(1) for the appointment of the HC judge, the President is required to consult the CJ of the HC. Article 217 (1) imposes no obligation on the CJI to consult any of his colleague, and similarly it imposes no obligation on the CJ of the HC to consult any of his colleague and the same is with Article 222. The requirement under Article 222 is only to consult CJI.[14] Therefore, any Judgment which imposes an obligation to consult Judges other than mentioned in Article 217(1) and Article 222 is violative of those Articles.

*CONSULTATION* CANNOT BE READ AS *CONCURRENCE*

The word *Consultation* under Article 124(2), Article 217(1) and Article 222 cannot be interpreted as *Concurrence*. Provision of any enactment should be interpreted keeping in view the 'object sought to be achieved'[15] and intention of the framers by enacting the provision.[16][W]ell established rules of interpretation require that the meaning and intention of the framers of the Constitution – be it a Parliament or a Constitutional Assembly – must be ascertained from the language used in that constitution itself, with the motive of those who framed it, the Court has no concern.[17]

The Court also has shown ignorance of the Legislative history and intention of the framers which can be drawn from Constitutional Assembly Debates[18] in relation to Article 124(2) and Article 217(1). The Best interpretation is one in which the Court relies upon not only the text but also the context in which the provision has been made[19]. In Constitutional Assembly **Shri B. Pocker Sahib** moved the following amendment to draft Article 103(2) [Presently Article

[10]INDIA CONST. art. 124, cl. 2.
[11]H M SEERVAI,*supra* note 17 at 2961.
[12]*Supreme Court Advocates-on-Record Association v UOI, [1994] AIR 268 (SC), [1994] MANU 0073 (SC )436.*
[13]*In Re Presidential Reference, [1999] AIR 1 (SC).*
[14]H M SEERVAI, supra note 17 at 2963.
[15]V Ramakrishna Rao v. Singareni Collieries Company, [2010] 10 SCC 650 (SC); Palakkel Chirukandan v. Special Tahsildar (L.A.) W.P.(C) No. 7563 of 2011 Decided On: 14.10.2014.

[16]Mr Justice Chandrashekaraiah v. Janekere C Krishna and Ors, [2013] AIR 726 (SC). *See also,* FRANCIS BENNION, BENNION ON STATUTORY INTERPRETATION , 544(Lexis Nexis. 5th Ed. 2010).
[17]In Re the Central Provinces and Berar Act, (1939) 1 F C R 18. *See also*, H M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 2940(ULP Co.4th Ed. 2006).
[18] *Travancore-Cochin v. Bombay Co Ltd, [1952] AIR 366 (SC); Automobile Transport v. State of Rajasthan [1962] AIR 1406 (SC); S R Chaudhuri v. State of Punjab [2001] AIR 2707 (SC).*
[19] National Insurance Company Limited v. Kirpal Singh 2014 (4) SCJ 85.

124(2)] of the Indian Constitution that every Judge of the SC other than the CJI shall be appointed by the President by warrant under his hand and seal after *Consultation* with the *Concurrence* of the CJI.[20] He gave the same emphasis on *Concurrence* to draft Article 193 [Presently Article 217(1) of the Indian Constitution]**.**[21]Similarly, **Mr.Mahboob Ali Baig Sahib** proposed the following amendment that in the first proviso to Clause (2) of Article 103, for the words the CJI shall always be consulted, the words 'it shall be made with the concurrence of the CJI' shall be substituted.[22]Further, **Dr B R Ambedkar** while winding up the debate on this topic concerning judiciary stated, that with regard to the question of concurrence of the CJ, that to allow the him practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day and considered it as a dangerous preposition.[23]Therefore, the entire debate on this relevant topic in the Constituent Assembly, the rejection of the proposed amendments and the reply given by **Dr. B.R. Ambedkar**, in the same context, are the implication of the fact that the framers of the Constitution designedly used the expression *Consultation* instead of *Concurrence*.

The Court in addition also overlooked the relevant legislative history of Article 50 of the Indian Constitution. The State shall take steps to separate the judiciary from the executive in the *public service of the State*.[24] In the "Second Judge Case" It was stated that, 'When the concept of separation of the judiciary from the executive is assayed and assessed that concept cannot be confined only to the subordinate judiciary, totally discarding the higher judiciary',[25] thereby did not take consideration of its genesis. The *public Service of the State* in Article 50 refers to magistrates trying criminal cases while holding executive office. High Court and Supreme Court judges do not belong to any service.[26] Hence, taking them under the umbrella of Article 50 and giving the last word to the CJ of HC in appointing HC Judge and the CJI in appointing SC Judge itself shows the ignorance of its legislative history.

The meaning of ordinary English Words was misinterpreted and the court gave last word to the CJI in appointing the judges. Constitutional Assembly envisaged the Judiciary as a bastion of rights and the justice.[27] **Lord Wright** in *James v Commonwealth,*[28] observed that, 'a Constitution must not be construed in a narrow or pedantic manner, and "that construction most beneficial to the widest possible amplitude" of its power must be accepted'.[29]In *In Re the C P and Berar Act 1938,*[30] after quoting the above observation of **Wirght L, Gwyer CJ** observed that, a broad and liberal spirit should inspire those whose duty it is to interpret the constitution; but I do not imply by this that they are free to stretch or pervert the language of

[20]Const Ass. Deb., Vol 8,(1949).
[21]H M SEERVAI, supra note 17 at 2945.
[22]Const Ass. Deb., Vol 8, 1949.
[23]*Supra.*
[24] INDIA CONST. art. 50.
[25]*Supreme Court Advocates-on-Record Association v UOI, [1994] AIR 268 (SC), [1994].*
[26]H M SEERVAI, supra note 17 at 2931.
[27] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION,175 (OUP, 1972) .
[28]James v. Commonwealth, [1936] AC 526.
[29]*James v. CommonWealth, [1936] AC 526*,*See also*, *Pathumma v. State of Kerala,* [1978] AIR 771 (SC); *Indian Cement Ltd. v. State of Tamil Nadu,* [1990] AIR 85 (SC); *Life Insurance Corp of India v. Mnaubhai D Shah,* [1993] AIR 171 (SC).
[30]*In Re the Central Provinces and Berar Act, (1939) 1 F C R 18*; H M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 2940 (ULP Co. 4th Ed. 2006).

the enactment in the interest of any legal or constitutional theory, or even for the purpose of applying omissions or of correcting supposed error.[31]In *Babua Ram v UP*,[32]**K. Ramaswamy J** observed that, when two or more interpretation are possible, the task of the Court would be to find which one or the other interpretation would promote the object of the statute,[33] serve its purpose.[34]

The court in the "*Second Judge Case*" stated that CJI should have the last word in appointment of the judges while taking support from the judgment of **Krishna Iyer J** in *Shamsher Singh and Anr v State Of Punjab*[35]. However, Court did not take **Krishna Iyer J** observation in *UOI v Sankal Chand HimatlalSheth,*[36] where he observed that, '*Consultation* according to dictionary (Stroud Law Lexicon) is taking counsel, seeking advice. To consult is to apply somebody for guidance or direction…'[37] Further, he observed that, although the opinion of CJI may not be binding on the Government it is entitled to great weight and is normally be accepted by the government but it can depart from the opinion by giving cogent and convincing reasons….[38]Therefore, the conclusion reached by Court that the last word must remain with the CJI is not correct and untenable.

Also the word *Consultation* appears at three places in Article 217(1). A HC judge is to be appointed by the President in *Consultation* with (1)the CJI; (2)the CJ of the State HC; (3)the Governor of the State. The word *Consultation* must have the same meaning in all the three places in Article 217(1). If the word *Concurrence* substituted for the word *Consultation* in all the three places it would mean that all the three authorities in Article 217(1) must concur for the proposed appointment, which is directly contrary in the conclusion in the majority judgment that the CJI had the last word in the appointment of the HC judge.[39]The use of the word *Consultation* at three places in article 217(1) establishes that the word *Consultation* can never be interpreted as *Concurrence* and was overlooked in the majority judgment**.**

Article 124(2) states that the CJI will always be consulted for the appointment of the puisne Judge of the SC. The *President may deem necessary*, may is some cases (1) deem it necessary to consult such of the judges of the SC and/or (2) one or more Judges of the HC in the State before making such appointment. Then if one or more the judges consulted by the President do not concur in a proposed amendment to the SC, the appointment cannot be made.[40]

CONSLUSION

[31]H M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY,2940 (ULP Co. 4th Ed. 2006) .
[32]Babua Ram v. UP, [1995] 2 SCC 689 (SC); Karam Chand and Anr v. State of H.P. and Anr CMPMO No. 4251 of 2013 Decided On: 12.05.2014.
[33] Blackwood v. Reg, (1882)8AC81; Express Newspapers Ltd v. Union of India, Air 1958 SC 578; State of Bihar v. Charusiladasi, AIR 1959 SC 1002; Kedarnath v. State of Bihar, AIR 1962 SC 955. State of Punjab v. Gurmit Singh, 2014 (9) SCJ 88;U.Swetha v. State by Inspector of Police and Anr, (2009) 6 SCC 787, Maharshtra Land Development Corporation v. State of Maharshtra (2010),Civil Appeal Nos. 2147-2148 OF 2004.
[34]*Babua Ram v. UP, [1995] 2 SCC 689 (SC).*
[35]Shamsher Singh v. State Of Punjab, [1974] AIR 2192 (SC).
[36]UOI v. Sankal Chand HimatlalSheth,[1977] AIR 2328 (SC).
[37]*UOIv. Sankal Chand HimatlalSheth,[1977] AIR 2328 (SC).*
[38]*UOI v. Sankal Chand Himatlal Sheth, [1977] AIR 2328 (SC*).
[39]H M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY,2952 ( ULP Co.4th Ed. 2006).
[40]H M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 2953(ULP Co. 4th Ed. 2006).

The two pronouncements of the Second[41] and Third[42] Judge is a result of complete disregard of well settled principles of interpretation which led to a collegium system of appointment of judges. Thus the word *Consultation* under Article 124(2), Article 217(1) and Article 222 cannot be interpreted as *Concurrence.* Therefore the solution to the same is in the form of the new constitutional amendment[43] proposing a National Judicial Appointments Commission[44] that promotes an efficient system of appointment by involving both members of parliament and judiciary ensuring accountability and transparency.



[41] *Supreme Court Advocates-on-Record Association v UOI, [1994] AIR 268 (SC), [1994].*
[42] *In Re Presidential Reference, [1999] AIR 1 (SC).*
[43] THE CONSTITUTION (ONE HUNDRED AND TWENTY-FIRST AMENDMENT) ACT, 2014
[44] THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014.