REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 375 OF 2007

Shanti Bhushan and Anr. …Petitioners

Versus

Union of India and Anr. ….Respondents

J U D G M E N T

Dr. ARIJIT PASAYAT, J

1. Judges, like Caesar's wife, should be above suspicion is the focal point in this petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution') filed by Mr. Shanti Bhushan, a senior lawyer of eminence and former Law Minister and Ms. Kamini Jaiswal, an Advocate. The writ petition is stated to have been filed in public interest litigation seeking appropriate declaration and issuance of a writ of quo warranto or

any other writ or direction quashing the appointment of respondent No.2 as a Judge of the Madras High Court. The prayers read as follows:

(a) restrain respondent No.2 from functioning as a Judge of the Madras High Court.

(b) Direct respondent No.1 to produce all the records regarding the appointment/re-appointment of respondent No.2 as Additional Judge and also as the permanent Judge; and

(c) pass any other or further orders, as this Hon'ble Court may deem fit and proper.

2. The grievances center around the appointment of respondent No.2 as a permanent Judge by the Union of India (Department of Justice, Ministry of Law and Justice). It is stated that required norms have not been followed while appointing him as a permanent Judge and such appointment is in violation of the law as declared by this Court in Supreme Court Advocates-on-Record Association & Ors. v. Union of India (1993 (4) SCC 441) and Special Reference No.1 of 1998 (1998 (7) SCC 739). The primary ground urged is that the opinion of the Chief Justice of India has to be formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of opinion and no appointment can be made unless it is in conformity with the final opinion of

the Chief Justice of India formed in the aforesaid manner. In the oral arguments and the written submissions, reference has been made to various paragraphs of the aforesaid judgments and the memorandum dated 30th June, 1999 issued by the Minister of Law, Justice and Company Affairs, Union of India, laying down procedure to be followed in connection with the appointment and transfer of Judges of High Courts. It is submitted that while forming the opinion, the Chief Justice of India has to consult two senior-most Judges and some other Judges of the Supreme Court who are conversant with the affairs of the High Court concerned. The latter category includes the serving Supreme Court Judges who were either puisne Judges or Chief Justice of the concerned High Court though the concerned High Court may not be their parent High Court and they may have been transferred to the said High Court. It is, therefore, submitted that the appointment of respondent No.2 as a permanent Judge as notified on 2.2.2007 has no sanctity in law. He was sworn as a permanent Judge on 3.2.2007.

3. The following paragraphs in the judgments referred to above have been relied upon.

1998 (7) SCC 739 (Special Reference No.1 of 1998)

"12. The majority view in the Second Judges case (1993 (4) SCC 441) is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow 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 High Courts and the Government is not obliged to act thereon.

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29. The majority judgment in the Second Judges case requires the Chief Justice of a High Court to consult his two seniormost puisne Judges before recommending a name for appointment to the High Court. In forming his opinion in relation to such appointment, the Chief Justice of India is expected (SCC p. 702, para 478)

> "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court...."

The Chief Justice of India should, therefore, form his opinion in regard to a person to be recommended for appointment to a High Court in the same manner as he forms it in regard to a

recommendation for appointment to the Supreme Court, that is to say, in consultation with his seniormost puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court which "would be entitled to the greatest weight", the views of other Judges of the High Court who may have been consulted and the views of colleagues on the Supreme Court Bench "who are conversant with the affairs of the High Court concerned". Into that last category would fall Judges of the Supreme Court who were puisne Judges of the High Court or Chief Justices thereof, and it is of no consequence that the High Court is not their parent High Court and they were transferred there. The objective being to gain reliable information about the proposed appointee, such Supreme Court Judge as may be in a position to give it should be asked to do so. All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

30. Having regard to the fact that information about a proposed appointee to a High Court would best come from the Chief Justice and Judges of that High Court and from Supreme Court Judges conversant with it, we are not persuaded to alter the strength of the decision-making collegium's size; where appointments to the High Courts are concerned, it should remain as it is, constituted of the Chief Justice of India and the two seniormost puisne Judges of the Supreme Court.

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32. Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also

available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforestated, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility.

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41. We have heard with some dismay the dire apprehensions expressed by some of the counsel appearing before us. We do not share them. We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the Second Judges case and this opinion.

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44 (8) The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India."

1993 (4) SCC 441 Supreme Court Advocates-on-Record Assn. v. Union of India

"460. The question of primacy of the role of the Chief Justice of India has to be examined not merely with reference to the fact that an appointment is an executive act, or with reference only to the comparative constitutional status of the different consultees involved in the process, but with reference also to the constitutional purpose sought to be achieved by these

provisions, and the manner in which that purpose can be best achieved.

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466. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the Chief Justice of India does, and is expected to function so that the final opinion expressed by him is not merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.

467. In view of the primacy of judiciary in this process, the question next, is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy.

468. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any individual, be it the Chief Justice of India or the Prime Minister.

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478(*5*)- The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.

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> **482.** This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busybodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in S.P. Gupta while expanding the concept of locus standi, was adverted to recently by a Constitution Bench in Krishna Swami v. Union of India (1992 (4) SCC 605). It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

4. Learned counsel for the Union of India on the other hand with reference to Office Memorandum and decisions referred to above submitted that a total number of more than 350 Additional Judges have been appointed as permanent Judges during the period from 1.1.1999 to 31.7.2007 by successive Chief Justice of India who had not consulted the Collegium while considering the cases of appointment of Additional Judges as Permanent Judges of the High Courts although the collegium was consulted at the stage of initial appointment as Additional Judge. It is,

therefore, submitted that in view of the practice followed while implementing the memorandum the Government being once satisfied that a suitable candidate was in fact appointed as an Additional Judge of the High Court, elaborate consultations as required for forming the opinion for appointment of an Additional Judge may not have considered necessary while considering the case for appointment as permanent Judge. Additionally, it is submitted that in Advocates-on-Records Association's case (supra) in paras 466, 467 and 468 this Court had observed that though some aspects in S.P. Gupta v. Union of India and Anr. (1981 (Supp) SCC 87) have the approval of the larger Bench, yet the Executive itself has understood the correct procedure notwithstanding S.P. Gupta's case and there is no reason to depart from it when it is in consonance with the concept of the independence of the judiciary. Consequent to the judgment in Advocates-on-Record Association's case (supra) the memorandum of procedure was revised vide D.O. No.K-11017/9/93-US.11 dated 9.6.1994. Subsequently, on the basis of the opinion in Special Reference No.1/1998 the revised procedure was prescribed by Reference No.K-110017/13/98-U.S II dated 30.6.1999. Paras 11, 12, 13, 14, 15, 16, 17, 18 and 19 pertain to appointment of permanent Judges. It is therefore submitted that there is no infirmity in the appointment of respondent No.2 as a Permanent Judge.

5. Reliance is placed on certain paragraphs of S.P. Gupta's case (supra). They read as follows:

1981 Supp SCC 87 (S.P. Gupta v. Union of India)

> **"39**. It is clear on a plain reading of Article 217, clause (1) that when an Additional Judge is to be appointed, the procedure set out in that article is to be followed. Clause (1) of Article 217 provides that "Every Judge" of a High Court shall be appointed after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The expression "Every Judge" must on a plain natural construction include not only a permanent Judge but also an Additional Judge. It is significant to note that whenever the Constitution-makers intended to make a reference to a permanent Judge, they did so in clear and explicit terms as in clause (2) of Article 224. Moreover, there is inherent evidence in Article 217, clause (1) itself which shows that the expression "Every Judge" is intended to take in an Additional Judge as well. Clause (1) of Article 217 says that: "Every Judge … shall hold office, in the case of an Additional Judge . . . as provided in Article 224. . .", which clearly suggests that the case of an Additional Judge is covered by the opening words "Every Judge". We may also consider what would be the consequence of construing the words "Every Judge" as meaning only a permanent Judge. On that construction, clause (1) of Article 217 will not apply in relation to appointment of an Additional Judge and it would be open to the Central Government under Article 224, clause (1) to appoint an Additional Judge without consulting any of the constitutional functionaries specified in clause (1) of Article 217. This could never have been intended by the Constitution-makers, who made such elaborate provisions in the Constitution for safeguarding the independence of the judiciary. We must therefore, hold that no Additional Judge can

be appointed without complying with the requirement of clause (1) of Article 217.

40. Now, when the term of an Additional Judge expires he ceases to be a Judge and therefore, if he is to continue as a Judge, he must be either reappointed as an Additional Judge or appointed as a permanent Judge. In either case, clause (1) of Article 217 would operate and no reappointment as an Additional Judge or appointment as a permanent Judge can be made without going through the procedure set out in Article 217, clause (1). Of course, an Additional Judge has a right to be considered for such reappointment or appointment, as the case may be, and the Central Government cannot be heard to say that the Additional Judge need not be considered. The Additional Judge cannot just be dropped without consideration. The name of the Additional Judge would have to go through the procedure of clause (1) of Article 217 and after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, the Central Government would have to decide whether or not to reappoint him as an Additional Judge or to appoint him as a permanent Judge. If the procedure for appointment of a Judge followed as a result of a practice memorandum issued by the Central Government is that the proposal for appointment of a Judge may ordinarily originate from the Chief Justice of the High Court and may then be sent to the Governor of the State and thereafter to the Chief Justice of India through the Justice Ministry for their respective opinions before a decision can be taken by the Central Government whether or not to appoint the person proposed the name of the Additional Judge must be sent up by the Chief Justice of the High Court with his recommendation whether he should be reappointed as an Additional Judge or appointed as a permanent Judge or not and it must go up to the Central Government with the opinions of the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court, so that the Central Government may, after considering such opinions, make up its mind on the question of reappointment or appointment as the case may be. But this is the only right possessed by the Additional Judge. The Additional Judge is not entitled to contend that he must

automatically and without any further consideration be appointed as an Additional Judge for a further term or as a permanent Judge. He has to go through the process of clause (1) of Article 217 and to concede to him the right to be appointed either as an Additional Judge for a further term or as a permanent Judge would be to fly in the face of Article 217, clause (1). If the Additional Judge is entitled to be appointed without anything more, why should the process of consultation be gone through in regard to his appointment? Would consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court not be reduced to a farce? It would be a mockery of consultation with such high constitutional dignitaries. There can, therefore, be no doubt that an Additional Judge is not entitled as a matter of right to be appointed as an Additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has is to be considered for such appointment and this right also belongs to him not because clause (1) of Article 224 confers such right upon him, but because of the peculiar manner in which clause (1) of Article 224 has been operated all these years.

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88……It would have been most improper for the Chief Justice of Delhi to ask the Central Government to investigate into complaints or doubts against a sitting Judge of his Court. This Court has in unhesitating terms condemned the adoption of such a course by the High Court in the case of subordinate judiciary and much more so would it be reprehensible in the case of sitting Judge of a High Court. Moreover, leaving the investigation of complaints and doubts against a sitting Judge in the hands of an investigative agency under the control of a political Government would not be desirable because, apart from exposing the sitting Judge to unhealthy political pressures, it may not yield satisfactory result in all cases, because such an investigation would not have the benefit of the guidance of a mature and experienced person like the Chief Justice who has lived a whole lifetime in the courts and who is

closely and intimately connected with lawyers and Judges in the court over which he presides. It would indeed be impossible for any one unfamiliar with the legal profession and the functioning of the courts to Judge the genuineness or veracity of the sources from which information might be obtained in regard to a sitting Judge. It must, therefore, necessarily be left to the Chief Justice of the High Court to give his opinion in regard to the suitability of an Additional Judge for further appointment on the basis of such information as he may gather by making his own inquiries. The Chief Justice of the High Court would have sufficient opportunities for judging the suitability of an Additional Judge for further appointment, because the Additional Judge would be working with him in the same court and he would be in close contact with the members of the Bar and his own colleagues and if there is anything wrong with the functioning of the court or the Judges, he would be best in a position to know about it. If an Additional Judge does not enjoy good reputation for integrity, the Chief Justice of the High Court would ordinarily come to know about it. Of course, the possibility cannot be ruled out that the information received by the Chief Justice of the High Court may at times be motivated or prejudiced, because the Additional Judge has offended some member of the Bar or decided some case against a litigant. These occupational hazards which beset the life of an Additional Judge — in fact, even of a permanent Judge whether in the High Court or in the Supreme Court have unfortunately increased in recent times, because there has been a steady erosion of values and not only some interested politicians but also a few — and fortunately their tribe is still small — lawyers and members of the public are prone to make wild and reckless allegations against Judges and impute motives for the decisions given by them. It is not realised by many that very often the judgments given by the High Courts and the Supreme Court are value judgments, because there are conflicting values competing for recognition by the Judge and the choice made by the Judge is largely dictated by his social philosophy and it is not possible to emphatically assert that a particular view taken by one Judge is wrong and a different view taken by another Judge is right. The nature of the judicial process being what it is, it is inevitable

that the view taken by a Judge, perfectly bona fide though it may be, may not accord with the expectations of a section or group of persons believing in a particular social or political philosophy, but that cannot be a ground affording justification for making imputation against the Judge or accusing him of lack of bona fides or charging him with surrender or subservience to the executive or to any other interest. Those who indulge in such personal attacks against Judges for the decisions given by them do not realise what incalculable damage they are doing to the judicial institution by destroying the confidence of the public in the integrity and inviolability of administration of justice. Unfortunately, it is the easiest thing to make false, reckless and irresponsible allegations against Judges in regard to their honesty and integrity and in recent times the tendency has grown to make such allegations against Judges because they have decided the case in a particular manner either against a dissatisfied litigant or contrary to the view held by a group or section of politicians or lawyers or members of the public. The Judge against whom such allegations are made is defenceless because, having regard to the peculiar nature of the office held by him, he cannot enter the arena of conflict and raise or join a public controversy. This pernicious tendency of attributing motives to Judges has to be curbed, if the judicial institution is to survive as an effective instrument for maintenance of the rule of law in the country and this can happen only if politicians, lawyers and members of the public accept the judgments rendered by the Judges as bona fide expressions of their views and do not impute motives to Judges for the judgments given by them, even though they be adverse to the views held by them. But unfortunately, the situation being what it is, we must emphasise with all the strength and earnestness at our command that the Chief Justice of the High Court should exercise the greatest care and circumspection in judging the veracity of the information which he may receive from time to time in regard to the conduct or behaviour or integrity of an Additional Judge of his court. The Constitution has entrusted to him the task of giving his opinion in regard to the suitability of an Additional Judge for further appointment and on the basis of the information received by him or gathered as a result of inquiries made by

him, he has to decide wisely and with responsibility whether or not he should recommend the appointment of an Additional Judge for a further term.

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102. …There are occasions when persons holding high constitutional offices are called upon to perform an unpleasant duty and this duty they have to perform, whatever be the consequences. If necessary, let the heavens fall but what is right and just shall be done without fear or favour, affection or goodwill. Long years ago that great common law Judge, Lord Mansfield spoke of the judicial office in majestic tones and said:

> "I will not do that which my conscience tells me is wrong, upon his occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the Press; I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow.... Once for all, let it be understood, that no endeavours of this kind will influence any man who at present sits here."

What the learned Chief Justice said in regard to judicial function must apply with equal validity where a Judge is called upon to discharge any other function entrusted to him by the Constitution and he must boldly and fearlessly do that which Constitution commands. But merely because the Chief Justice of Delhi flinched and faltered out of a sense of apprehension that the Chief Justice of India might feel offended by his writing the letter dated May 7, 1981, it does not follow that the facts set out in that letter were not personally discussed by him with the Chief Justice of India at the meeting held on March

> 26, 1981. We are clearly of the view that the "full and identical facts" on which the decision of the Central Government was based were placed before the Chief Justice of India and there was full and effective consultation with him before the Central Government reached the decision that S.N. Kumar should not be continued as an Additional Judge. We may also point out that this decision of the Central Government was not based on any irrelevant considerations, since, as we have already pointed out earlier, lack of reputation for integrity is certainly a most relevant consideration in deciding whether a person should be appointed a Judge.
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> **103.** We may make it clear that in taking this view we do not for a moment wish to suggest that S.N. Kumar was lacking in integrity. That is not a matter into which we are called upon to enquire and nothing that is stated by us should be regarded as expression of any opinion on this question. We may observe in fairness to S.N. Kumar that the Chief Justice of India clearly stated it to be his opinion that the integrity of S.N. Kumar was unquestionable. What happened here was that there were two conflicting opinions given by the two constitutional authorities required to be consulted, namely, the Chief Justice of Delhi and the Chief Justice of India. Both were perfectly bona fide opinions and the Central Government had to choose between them and come to its own decision. The Central Government preferred the opinion of the Chief Justice of Delhi for the reasons mentioned in the note of the Law Minister dated May 27, 1981 and decided not to appoint S.N. Kumar as an Additional Judge for a further term. We do not think this decision suffers from any constitutional infirmity."

6. It is the further stand of the Union of India that on true interpretation of Article 224(1) of the Constitution it can be said that Additional Judges are not intended to be re-appointed out of turn. Reliance is placed on the observations to that effect made by Bhagwati, J (as the Hon'ble Judge then

was) in S.P. Gupta's case (supra). It is submitted that on expiry of the term as an Additional Judge, he or she is entitled to be considered for appointment as a Permanent Judge. But in either case the procedure under Article 217(1) of the Constitution has to be repeated. An additional Judge who had worked for a period of his tenure has a weightage in his favour compared to a fresh appointee and any process of appointment while filling in a vacancy must commence with an Additional Judge whose tenure has come to an end and has led to the vacancy. Pathak, J (as the Hon'ble Judge then was) had expressed similar opinion by observing that in following the procedure of Article 217(1) while appointing an Additional Judge as a Permanent Judge there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The position was succinctly stated by observing that there is a presumption that a person found suitable for appointment as an Additional Judge continues to be suitable for appointment as a Permanent Judge, except when circumstances or events arise which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. There must be

relevant and pertinent material to sufficiently convince a reasonable mind that the person is no longer suitable to fill the high office of a Judge and has forfeited his right to be considered for appointment. Venkataramaiah, J (as the Hon'ble Judge then was) observed that a Judge appointed under Article 224 (1) of the Constitution had a well founded expectation that he would be made permanent. The test which applied to the appointment of an Additional Judge under Article 217(1) would apply when an Additional Judge is to be appointed as a permanent Judge.

7. Before dealing with the case of respondent No.2, the memorandum of procedure needs to be extracted so far as relevant. Paragraphs 11 to 18 and 20 read as follows:

> "11. The Chief Justice and Judges of High Courts are to be appointed by the President under Clause (1) of the Article 217 of the Constitution. The Judges of the Jammu and Kashmir High Court are to be appointed by the President under Section 95 of the Constitution of Jammu and Kashmir. Appointments to the High Court should be made on a time bound schedule so that the appointments are made well in advance preferably a month before the occurrence of the anticipated vacancy.
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> 12. When a permanent vacancy is expected to arise in any year in the office of a Judge, the Chief Justice will as early as possible but at least 6 months before the date of occurrence of the vacancy, communicate to the Chief Minister of the State his views as to the persons to be selected for appointment. Full

details of the persons recommended, in the format given in Annexure-1 should invariably be sent. Before forwarding the recommendation, the Chief Justice must consult two of his senior most colleagues on the Bench regarding the suitability of the names proposed. All consultation must be in writing and these opinions must be sent to the Chief Minister along with the recommendations.

13. The Chief Justice while sending the recommendation for appointing an additional Judge as a permanent Judge must along with his recommendation furnish statistics of month wise disposal of cases and judgments rendered by the Judge concerned as well as the number of cases reported in the Law Journal duly certified by him. The information would also be furnished regarding the total number of working days, the number of days he actually attended the Court and the days of his absence from the Court during the period for which the disposal statistics are sent.

14. The proposal for appointment of a Judge of a High Court shall be initiated by the Chief Justice of the High Court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Since the Governor is bound by the advice of the Chief Minister heading the Council of Ministers, a copy of the Chief Justice's proposal, with full set of papers should simultaneously be sent to the Governor to avoid delay. Similarly, a copy thereof may also be endorsed to the Chief Justice of India and the Union Minister of Law, Justice and Company Affairs to expedite consideration. The Governor as advised by the Chief Minister should forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs as early as possible but not later than six weeks from the date of receipt of the proposal from the Chief Justice of the High Court. If the comments are not received within the said time frame, it should be presumed by the Union Minister of Law, Justice and Company Affairs that the Governor (i.e. Chief Minister) has nothing to add to the proposal and proceed accordingly.

15. The Union Minister of Law, Justice and Company Affairs would consider the recommendations in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would in consultation with the two senior most judges of the Supreme Court form his opinion in regard to a person to be recommended for appointment to the High Court. The Chief Justice of India and the collegium of two Judges of the Supreme Court would take into account the views of the Chief Justice of the High Court and of those Judges of the High Court who have been consulted by the Chief Justice as well as views of those Judges in the Supreme Court who are conversant with the affairs of that High Court. It is of no consequence whether that High Court is their parent High Court or they have functioned in that High Court on transfer.

15.1 After their consultation the Chief Justice of India will in course of 4 weeks send his recommendation to the Union Minister of Law, Justice and Company Affairs. Consultation by the Chief Justice of India with his colleagues should be in writing and all such exchange of correspondence with his colleagues would be sent by the Chief Justice of India to the Union Minister of Law, Justice and Company Affairs. Once the names have been considered and recommended by the Chief Justice of India they should not be referred back to the State constitutional authorities even if a change takes place in the incumbency of any post. However, where it is considered expedient to refer back the names, the opinion of Chief Justice of India should be obtained. The Union Minister of Law, Justice and Company Affairs would then put up as early as possible preferably within 3 weeks the recommendation of the Chief Justice of India to the Prime Minister who will advise the President in the matter of appointment.

16. The correspondence between the Chief Justice and the Chief Minister and the correspondence between the Chief Minister and the Governor, if any should be in writing and

copies of the correspondence should invariably be forwarded along with the Chief Minister's recommendations.

17. As soon as the appointment is approved by the President the Secretary to the Government of India in the Department of Justice will inform the Chief Justice of the High Court who will obtain from the person selected (i) a certificate of physical fitness as in Annexure II signed by a Civil Surgeon or District Medical Officer and, (ii) a certificate of date of birth as in Annexure III. A copy of the communication will also be sent simultaneously to the Chief Minister of the State. The medical certificate should be obtained from all persons selected for appointment whether they are at the time of appointment in the service of the State or not. When these documents are obtained the Chief Justice will intimate the fact to the Secretary to the Government of India in the Department of Justice and also forward these documents to him.

18. As soon as the warrant of appointment is signed by the President the Secretary to the Government of India in the Department of Justice will inform the Chief Justice and a copy of such communication will be sent to the Chief Minister. He will also announce the appointment and issue necessary notification in the Gazette of India.

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20. Additional Judges can be appointed by the President under Clause (1) of Article 224 of the Constitution. When the need for this arises, the State Government should first obtain the sanction of the Central Government for the creation of such additional posts. The correspondence relating to this should be in the normal official form. After the post is sanctioned the procedure to be followed for making the appointment will be the same as given in paragraph 12 to 18 for the appointment of a permanent Judge, except that a medical certificate will not be necessary from the person being appointed as an Additional Judge."

8. So far as the scope of judicial review in such matters is concerned, it is extremely limited and is permitted to the extent indicated in para 482 of the Supreme Court Advocates-on-Record case (supra).

9. Essentially the decision in this case would depend upon the combined reading of paras 12 and 13.

10. It is to be noted that an Additional Judge cannot be said to be on probation for the purpose of appointment as a Permanent Judge. This position is clear from the fact that when an Additional Judge is appointed there may not be vacancy for a Permanent Judge. The moment a vacancy arises, the Chief Justice of the concerned High Court is required to send a proposal for appointment of the Additional Judge as a Permanent Judge along with material as indicated in para 13. The rigor of the scrutiny and the process of selection initially as an Additional Judge and a Permanent Judge are not different. The yardsticks are the same. Whether a person is appointed as an Additional Judge or a Permanent Judge on the same date, he has to satisfy the high standards expected to be maintained as a Judge. Additionally, on being made permanent, the effect of such permanency

relates back to the date of initial appointment as an Additional Judge. The parameters of paragraph 12 of the memorandum cannot be transported in its entirety to paragraph 13. To begin with, while making the recommendations for appointment of an Additional Judge as a permanent Judge, Chief Justice of the High Court is not required to consult the collegium of the High Court. Additionally, there is no requirement of enquiry by the Intelligence Bureau. The Chief Justice while sending his recommendation has to furnish statistics of month-wise disposal of cases and judgments rendered by a Judge concerned as well as the number of cases reported in the Law Journals duly certified by him. Further information required to be furnished regarding the total number of working days, the number of days the concerned Judge attended the Court and the days of his absence from Court during the period for which the disposal statistics are sent. It is also clear from para 15 that at the stage of appointment of either as an Additional Judge or a Permanent Judge, the Union Minister of Law, Justice and Company Affairs is required to consider the recommendation in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. This procedure is not required to be followed when an Additional

Judge is appointed as a Permanent Judge. Further, the consultation with members of the Collegium and other Judges, as noted above, is not expressly provided in para 13. The details which are required to be given in the format in Annexure I in para 12 are not required to be given in a case relatable to para 13.

11. As rightly submitted by learned counsel for the Union of India unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent Judge has to be considered in the background of what has been stated in S.P. Gupta's case (supra). Though there is no right of automatic extension or appointment as a permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). The weightage required to be given cannot be lost sight of. As Justice Pathak J, had succinctly put it there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The concept of plurality and the limited scope of judicial

review because a number of constitutional functionaries are involved, are certainly important factors. But where the constitutional functionaries have already expressed their opinion regarding the suitability of the person as an Additional Judge, according to us, the parameters as stated in para 13 have to be considered differently from the parameters of para 12. The primacy in the case of the Chief Justice of India was shifted because of the safeguards of plurality. But that is not the only factor. There are certain other factors which would render the exercise suggested by the petitioners impracticable. Having regard to the fact that there is already a full fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as Additional Judge or Permanent Judge, repetition of the same process does not appear to be the intention.

12. It is not in dispute that Union of India is the ultimate authority to approve the recommendation for appointment as a Judge. The Central Government, as noted above, has stated that in view of the practice followed in implementing the memorandum, once the Government on being satisfied that a suitable candidate who was earlier appointed as an Additional Judge is suitable for appointment as a permanent Judge, the elaborate consultation has not been considered necessary. It is of significance to note that some of

the Hon'ble Judges who were parties to the judgments relied on by the petitioners while functioning as a Chief Justice of India have not thought it necessary to consult the Collegium as is evident from the fact that from 1.1.1999 to 31.7.2007 in more than 350 cases the Collegium was not consulted. It means that they were also of the view that the practice/procedure was being followed rightly. Therefore, the plea that without consultation with the Collegium, the opinion of the Chief Justice of India is not legal, cannot be sustained.

13. But at the same time we find considerable substance in the plea of the petitioners that a person who is not found suitable for being appointed as a permanent Judge, should not be given extension as an Additional Judge unless the same is occasioned because of non availability of the vacancy. If a person, as rightly contended by the petitioners, is unsuitable to be considered for appointment as a permanent Judge because of circumstances and events which bear adversely on the mental and physical capacity, character and integrity or other relevant matters rendering it unwise for appointing him as a permanent Judge, same yardstick has to be followed while considering whether any extension is to be given to him as an Additional Judge. A person who is functioning as an Additional Judge

cannot be considered in such circumstances for re-appointment as an Additional Judge. If the factors which render him unsuitable for appointment as a permanent Judge exist, it would not only be improper but also undesirable to continue him as an Additional Judge.

14. Coming to the factual scenario it appears that eight Additional Judges including respondent No.2 were appointed on 3.4.2003 and respondent No.2 was second in the order of seniority. On 1.4.2005 the term of the aforesaid Additional Judges was extended for a period of four months. On 27.7.2005, seven of the eight Additional Judges (except respondent No.2) were appointed as permanent Judges and the term of respondent No.2 was extended by one year w.e.f. 3.8.2005. Again on 3.8.2006 the term of respondent No.2 was extended for a period of six months. The aforesaid scenario according to the petitioners shows that respondent No.2 was found to be unsuitable to be appointed as a permanent Judge. It is emphasized that all the three members of the collegium including the then Chief Justice of India opposed the appointment of respondent No.2 as a permanent Judge. A grievance is made that for the reasons best known, all the 8 Judges were appointed as Additional Judges, with a view to draw smokescreen over the factual scenario. After the expiry

of the four months period, 7 Additional Judges were made permanent and not respondent No.2. A plea is taken that when he was not found suitable to be made as a permanent Judge, why his tenure as an Additional Judge was extended, and that too, for a period of one year? Again, his term was extended for a period of 6 months. Such extensions for short periods obviously, according to the petitioners, were intended to continue him as a Judge notwithstanding his unsuitability to be appointed as a permanent Judge. But the belated challenge as has been done in the present writ petition to such extensions cannot put the clock back. The position is almost undisputed that on 17.3.2005 the then Chief Justice of India recommended for extension of term of 8 out of 9 persons named as additional Judges for a further period of four months w.e.f. 3rd April, 2005. On 29.4.2005 the collegium including the then Chief Justice of India was of the view that name of respondent No.2 cannot be recommended alongwith another Judge for confirmation as permanent Judge. Since it is crystal clear that the Judges are not concerned with any political angle if there be any in the matter of appointment as Additional Judge or Permanent Judge; the then Chief Justice should have stuck to the view expressed by the colllegium and should not have been swayed by the views of the government to recommend extension of the term of respondent No.2 for one

year; as it amounts to surrender of primacy by jugglery of words.

15. Again on 3.8.2006, the then Chief Justice of India who was earlier of the view about unsuitability of respondent No.2, alongwith his senior colleagues, extended the term for six months on the ground that the time was inadequate to obtain views of then Chief Justice of the Madras High Court. It is to be noted that at different points of time, starting from the point of initial appointment, the successive Chief Justices have recommended for respondent No.2 to be made permanent. That situation continued till 3.2.2007 when the recommendation of the then Chief Justice of the Madras High Court for appointing respondent No.2 as a permanent Judge was accepted. The grievance of the petitioners as noted above is that collegium was not consulted. We have dealt with the legal position so far as this plea is concerned in detail above. Before the Chief Justice of India, at the time of accepting the recommendation for respondent No.2 being made permanent, the details required to be furnished in terms of para 13 of the memorandum were there. There was also the recommendation of the then Chief Justice of Madras High Court who re-iterated the view of his predecessor in this regard.

16. The matter can be looked at from another angle. Supposing instead of accepting the recommendation for appointment as a permanent Judge, the Chief Justice of India would have extended the period of Additional Judgeship for two years which is maximum time permissible. There would not have been any requirement for taking the views of the collegium (as contended by the petitioners) and the result ultimately would have been the same i.e. respondent No.2 would have continued as a Judge. It is to be noted that he is due to retire on 9.7.2009. As noted above, at various points of time, when the term of appointment as an Additional Judge of respondent No.2 was extended, there was no challenge. The situation prevailed for more than two years. As noted above, the clock cannot be put back.

17. In the peculiar circumstances of the case, we are not inclined to accept the prayer of the petitioners. But as indicated above, we have no hesitation in saying that a person who is not suitable to be appointed as a permanent Judge on the ground of unsuitability due to adverse factors on account of mental and physical capacity, adverse materials relating to character and integrity and other relevant matters, which are so paramount and sacrosanct for the functioning as a Judge, should not be continued as an Additional Judge. Even when an additional Judge is appointed as a

permanent Judge, he does not become immune from action, if circumstances so warrant. Whenever materials are brought to the notice of the Chief Justice of India about lack of mental and physical capacity, character and integrity, it is for him to adopt such modalities which according to him would be relevant for taking a decision in the matter.

18. So far as respondent No.2 is concerned, it appears that he has been transferred to some other High Court in public interest. If, it comes to the notice of the Hon'ble Chief Justice of India that action needs to be taken in respect of him for any aberration while functioning as a Judge, it goes without saying appropriate action as deemed proper shall be taken.

19. Before saying "omega" it needs to be emphasized what Shakespeare wrote in Othello (Act III, Scene 3, 155)

"Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash; 'tis something, nothing;
'T was mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name

Robs me of that which not enriches him

And makes me poor indeed."

Again in "Richard II", Act I, Sc. 1 said Shakespeare wrote:

"The purest treasure moral times afford

Is spotless reputation; that away,

Men are but gilded loam or painted clay."

20. The writ petition is disposed of accordingly.

……..J.
(Dr. ARIJIT PASAYAT)

……..J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
December 17, 2008