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SPECIAL REFERENCE NO. 1 OF 1998

OCTOBER 28, 1998

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[S.P. BHARUCHA, M.K. MUKHERJEE, S.B. MAJMUDAR,
SUJATA V. MANOHAR, G.T. NANAVATI, S. SAGHIR AHMAD,
K. VENKATASWAMI, B.N. KIRPAL AND G. B. PATTANAIK, JJ.]

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Constitution of India, 1950—Articles 143 and 124 (2), 217 (1) and 222(1)—Presidential reference re-consultation between the Chief Justice of India and his brother judges regarding appointments of Supreme Court and High Court judges and transfer of latter—Answering the reference held, Chief Justice of India must make a recommendation to appoint a judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the Supreme Court—In so far as an appointment to the High Court is concerned, the

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recommendation must be made in consultation with the two senior most puisne Judges of the Supreme Court.

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Article 222(1)—Judicial review of transfer of judges—Held, permissible only to the extent that the recommendation by the Chief Justice of India has not been made in consultation with the four senior most puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.

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Articles 217 (1) and 222(1)—Expression “consultation with the Chief Justice of India”—Held, requires consultation with a plurality of judges in the formation of the opinion—Consultation is not to be confined to those Judges who have that High Court as a parent High Court but also Judges who have occupied the office of a judge or Chief Justice of that High Court on transfer—Words and Phrases.

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Article 124(1)—Relevance of seniority in making appointments to the Supreme Court—Held, “strong cogent reasons” do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over—What has to be recorded is the positive reason for the recommendation.

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Articles 124 (2), 217 (1) and 222(1)—Appointments of Judges of the Supreme Court and the High Courts and transfer of judges of High Court—Held, Chief Justice of India obliged to comply with the norms and the requirements of the consultation process, in making his recommendations to the Government of India—Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforesaid, are not binding upon the Government of India. A B

In its decision in *Supreme Court Advocates-On-Record Association v. Union of India* [1993] Supp 2 SCR 659 ("the second Judges case") this court laid down principles and prescribed procedural norms in regard to the appointment of Judges of this Court and the Chief Justices and Judges of the High Court and transfer of Judges from one High Court to another. Doubts having arisen about the interpretation of the law laid down by this Court in the aforesaid decision, the President of India, on July 23, 1998, in exercise of his powers under Article 143 (1) of the Constitution of India, referred nine questions to this court for its consideration and opinion. C

The questions in the Presidential reference related broadly, to three aspects: D

(1) Consultation between the Chief Justice of India and his brothers Judges in the matter of appointments of Supreme Court and High Court Judges and transfers of the latter [questions No. 1, 3, 4, 5, 7, 8 and 9]; E

(2) Judicial review of transfers of Judges [question No. 2]; and

(3) the relevance of seniority in making appointments to the Supreme Court [question No. 6]. F

The Court recorded at the outset the statements of the Attorney General for India that—(1) the Union of India is not seeking a review or reconsideration of the Judgment in the second Judges case, and (2) that the Union of India shall accept and treat as binding the answers of the Court to the questions set out in the Reference. G

Rendering its Opinion, this Court

HELD : 1.1. The Chief Justice of India must make a recommendation to appoint a judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the Supreme Court. In so far as an appointment to the High H

A Court is concerned, the recommendation must be made in consultation with the two senior most puisne Judges of the Supreme Court. [434-C-D]

B 1.2. The expression "consultation with the Chief Justice of India" in Articles 217 (1) and 222 (1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said Articles. [434-A]

C 1.3. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment. [434-D-E]

D 1.4. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a judge or Chief Justice of that High Court on transfer. [434-E-F]

E 1.5. The views of the other Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion. [434-G]

F 1.6. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforesaid, in making his recommendations to the Government of India. [434-H; 435-A]

1.7. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforesaid, are not binding upon the Government of India. [435-A-B]

G *Supreme Court Advocates - on Record Association v. Union of India*, [1993] Supp. 2 SCR 659, followed and explained.

S.P. Gupta v. Union of India, [1982] 2 SCR 365, referred to.

H 2. The transfer of puisne Judges is judicially reviewable only to this extent; that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost

puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained. [434-B-C] A

K. Ashok Reddy v. Government of India, [1994] 2 SCC 303, referred to. B

3. "Strong cogent reasons" do not have to be recorded, as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation. [434-F-G]

CIVIL ADVISORY JURISDICTION : Special Reference No. 1 of 1998. C

Under Article 143(1) of the Constitution of India.

Soli J. Sorabjee, Attorney General, N. Santosh Hegde, Solicitor General, C.S. Vaidyanathan, Additional Solicitor General, R.K. Jain, Dr. A.M. Singhvi, Arun Jaitley, B.R. Bhattacharya, P.S. Poti, Harish N.Salve, K.K. Venugopal, Anil B.Divan, Hardev Singh Gopal Subramaniam, K. Parasaran, M.C. Bhandare, T.R. Andhyarujina, R.P. Bhat, Sr. Advs., A. Subba Rao, Ms. Devika Bezboruah, Sanjay Hegde, Manoj Goel, Surya Kant, Ms. H. Wahi, Ms. Neithona Rhetso, R.P. Goyal, R.B. Misra, Kamalendra Misra, R.C. Verma, Ajay Kumar Aggarwal, K. Venkatapathy, A. Mariarputham, Ms. Aruna Mathur, T. Nandakumar Singh, K.H. Nobin Singh, Gopal Singh, Anis Ahmed, Ms. Radha Rangaswamy, V.N. Dwivedi, S.L. Saxena, Sakesh Kumar, S.K. Agnihotri, A.R. Barthakur, Kailash Vasdev, R.S. Sodhi, Lokesh Kumar, Rajiv Mehta, S. Vijaya Shankar, K. R. Nagaraja, Y.K. Tyagi, Ms. Madhu Sweta, Ms. Shardha, Ramanna, K. Ramkumar, Ms. Asha Nair, Y. Subba Rao, Ms. Bina Prakash, Govind Das, R.K. Mehta, A.K. Gupta, Ms. A. Subhashini, B.A. Ranganadhan, Sanjay Kasol, N.K. Sharma, Ajay Siwach, Prem Malhotra, P.H. Parekh, Amit Dhingra, Ms. Bina Madhavan, Mrs. Madhu Moolchandani, G. Prakash, M. K. Damodaran, Naveen Kr. Singh, Uma Nath Singh, V. G. Pragasam, Sunil Kumar Jain, Vijay Hansaria, A.S. Pundir, Viswajit Singh, D.K. Garg, R.K. Singh, P.G. Baruah, Mahabir Singh, M.L. Sarin, Manoj Swarup, Ms. Indu Malhotra, Shashi Anugrah Narain, Saket Singh, B.B. Singh, Ranjan Mukherjee, D.M. Nargolkar, Vimal Dave, N. Ganpathy, V. Krishna Murthy and Aruneshwar Gupta for the appearing parties. D
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The opinion of the Court was delivered by :

S.P. BHARUCHA, J. Article 143 of the Constitution of India confers H

A upon the President of India the power to refer to this Court for its opinion questions of law or fact which have arisen or are likely to arise and which are of such a nature and of such public importance that it is expedient to obtain such opinion. In exercise of this power, the President of India has on 23rd July, 1998 made the present reference, which is quoted in extenso:

B “WHEREAS the Supreme Court of India has laid down principles and prescribed procedural norms in regard to the appointment of Judges of the Supreme Court [article 124(2) of the Constitution of India], Chief Justices and Judges of the High Court [article 217(1)], and transfer of Judges from one High Court to another [article 222(1)], in the case of *Supreme Court Advocates-on-Record Association and Anr. v. Union of India*, reported in AIR (1994) SC 268;

AND WHEREAS doubts have arisen about the interpretation of the law laid down by the Supreme Court and it is in public interest that the said doubts relating to the appointment and transfer of Judges be resolved;

D AND WHEREAS, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

E NOW, THEREFORE, in exercise of the powers conferred upon me by clause (1) of article 143 of the Constitution of India, I, K.R. Narayanan, President of India, hereby refer the following questions to the Supreme Court of India for consideration and to report its opinion thereon, namely,:-

F (1) whether the expression “consultation with the Chief Justice of India” in articles 217(1) and 222(1) requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India or does the sole individual opinion of the Chief Justice of India constitute consultation within the meaning of the said articles;

G (2) whether the transfer of judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that “such transfer is not justiciable on any ground” and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review;

H (3) whether article 124(2) as interpreted in the said judgment requires the Chief Justice of India to consult only the two seniormost

Judges or whether there should be wider consultation according to past practice; A

(4) whether the Chief Justice of India is entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court in respect of all materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment; B

(5) whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the concerned High Court refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other Court; C

(6) whether in light of the legitimate expectations of senior Judges of the High Court in regard to their appointment to the Supreme Court referred to in the said judgment, the 'strong cogent reason' required to justify the departure from the order of the seniority has to be recorded in respect of each such senior Judge, who is overlooked, while making recommendation of a Judge junior to him or her; D

(7) whether the government is not entitled to require that the opinions of the other consulted Judges be in writing in accordance with the aforesaid Supreme Court judgment and that the same be transmitted to the Government of India by the Chief Justice of India along with his views; E

(8) whether the Chief Justice of India is not obliged to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India; F

(9) whether any recommendations made by the Chief Justice of India without complying with the norms and consultation process are binding upon the Government of India? G

New Delhi
Dated: 23.7.1998

Narayanan K.R.
President of India".

The decision mentioned in the Reference, in *Supreme Court Advocates-on-Record Association and Anr. v. Union of India*, [1993] Supp 2 SCR 659, (now referred to as "the second Judges Case") was rendered by a Bench of H

A nine learned Judges. It examined these issues :

“(1) Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Court, and in regard to the transfers of High Court Judges/Chief Justices; and

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(2) Justiciability of these matters, including the matter of fixation of the Judge-strength in the High Courts.” (Page 739)

The issues were required to be examined because a smaller Bench was of the opinion that the correctness of the majority view in the case of *S.P. Gupta & Ors. v. Union of India & Ors.*, [1982] 2 SCR 365, (“the Judges case”) required reconsideration by a larger Bench.

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Five judgments were delivered in the second Judges case. Verma, J. spoke for himself and four learned Judges. Pandian, J. and Kuldip Singh, J. wrote individual judgments supporting the majority view. Ahmadi, J. dissented, adopting, broadly, the reasoning that had found favour in the Judges’ case. Punchhi, J. took the view that the Chief Justice of India had primacy and that he was entitled “to consult any number of Judges on the particular proposal. It is equally within his right not to consult anyone”.

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The questions in the Presidential reference relate, broadly, to three aspects:

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(1) consultation between the Chief Justice of India and his brothers Judges in the matter of appointments of Supreme Court and High Court Judges and transfers of the latter; question nos. 1,3,4,5,7,8 & 9;

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(2) judicial review of transfers of Judges : question no.2; and

(3) the relevance of seniority in making appointments to the Supreme Court: question no.6.

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Before quoting what was said in the majority judgment in the second Judges case on these aspects, it is necessary to set out the provisions of Articles 124, 216, 217 and 222 of the Constitution, dealing, respectively, with the establishment and constitution of the Supreme Court, the constitution of the High Courts, the appointment and conditions of the office of a Judge of a High Court and the transfer of a Judge from one High Court to another.

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“124. *Establishment and Constitution of Supreme Court.*—(1)

There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges. A

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: B

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted: C

Provided further that-

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4). D

[(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.]

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and E

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

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

(c) is, in the opinion of the President, a distinguished jurist.

Explanation I. - In this clause 'High Court' means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India. G

Explanation II. - In computing for the purpose of this clause the period during which a person has been an advocate any period during which a person has held judicial office not inferior to that of a district judge after he became an advocate shall be included. H

A (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

B (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a Judge under clause (4).

C (6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

D (7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

E 216. *Constitution of High Courts.*—Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

F 217. *Appointment and conditions of the office of a Judge of a High Court.*—(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 and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.

G Provided that -

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

H (b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court.

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India. A

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

(a) has for at least ten years held a judicial office in the territory of India; or

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

Explanation - For the purposes of this clause -

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law; D

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate; E

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be. F

(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final. G

222. *Transfer of a Judge from one High Court to another.* (1) The H

- A president may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

- (2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix."

- C The following are extracts of what was said in the majority judgment in the second Judges case about the primacy of the Chief Justice of India in the matter of appointments of Judges to the Supreme Court and the High Courts and the need in this behalf of the desirability of consultation between the Chief Justice of India and his brother Judges:

- D "A further check in that limited sphere is provided by the conferment of the discretionary authority not to one individual but to a body of men, requiring the final decision to be taken after full interaction and effective consultation between them, to ensure projection of all likely points of view and procuring the element of plurality in the final decision with the benefit of the collective wisdom of all those involved in the process. The conferment of this discretionary authority in the highest functionaries is a further check in the same direction. The constitutional scheme excludes the scope of absolute power in any one individual. Such a construction of the provisions also, therefor, matches the constitutional scheme and the constitutional purpose for which these provisions were enacted.".....

(Page 745 F to 746 A)

- G "Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector.

- H The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort,

the question of primacy would arise to avoid stalemate.”.....

(Page 753 B to 753 C)

.....“It is obvious, that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word ‘consultation’ instead of ‘concurrence’ was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as individual, much less to the executive, which earlier had absolute discretion under the Government of India Act.

The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion.”.....

(Pages 757 A to 758 C)

“The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not

A considered to be suitable.”

(Page 758 E)

B“On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in

C actual practice, the real accountability in the matter of appointments of Superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India.” (Page 759 G to 760 A)

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.....“If that is the position in actual practice of the constitutional provisions relating to the appointments of the superior Judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it

E indicates the primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation. This reason given by the majority in *S.P. GUPTA* for its view, that the executive has primacy, does not withstand scrutiny, and is also not in accord with the

F existing practice and perception even of the executive.

However, it need hardly be stressed that *the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion.*”

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(Page 760 B to 760 E)

H“Providing for the role of the judiciary as well as the executive in the integrated process of appointment merely indicated that it is a

participatory consultative process, and the purpose is best served if at the end of an effective consultative process between all the consultees the decision is reached by consensus, and no question arises of giving primacy to any consultee. Primarily, it is this indication which is given by the constitutional provisions, and the constitutional purpose would be best served if the decision is made by consensus without the need of giving primacy to any one of the consultees on account of any difference remaining between them. The question of primacy of the opinion of any one of the constitutional functionaries qua the others would arise only if the resultant of the consultative process is not one opinion reached by consensus.

The constitutional purpose to be served by these provisions is to select the best from amongst those available for appointment as Judges of the superior judiciary, after consultation with those functionaries who are best suited to make the selection.”.....

(Pages 761 G to 762 B)

.....“Even the personal traits of the members of the Bar and the Judges are quite often fully known to the Chief Justice of India and the Chief Justice of the High Court who get such information from various sources. There may however, be some personal trait of an individual lawyer or Judge, which may be better known to the executive and may be unknown to the Chief Justice of India and the Chief justice of the High Court, and which may be relevant for assessing his potentiality to become a good Judge. It is for this reason, that the executive is also one of the consultees in the process of appointment. The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultees, before the appointment is made.”.....

(Page 762 F to 762 H)

.....“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 of 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,

A 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 view of some other judges who are traditionally associated with this function.*

D 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', and it is this opinion which has primacy.*

E 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 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 he the Chief Justice of India or the Prime Minister. A

The norms developed in actual practice, which have crystallised into conventions in this behalf, as visualised in the speech of the President of the Constituent Assembly, are mentioned later." B

(Pages 765 D to 765 E)

"Norms

The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned norms emerging from the actual practice and crystallised into conventions - not exhaustive - are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers." C D

(Page 767 F to H)

....."Appointments

(1) *What is the meaning of the opinion of the judiciary 'symbolised by the view of the Chief Justice of India?* E

The opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the seniormost 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. Article 124(2) is an indication that ascertainment of the view of some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of F G H

A the Supreme Court before making his recommendation. *This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.*

B *In matters relating to appointments in the High Courts the Chief Justice of India is expected 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 whose opinion according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The*

C *opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two*

D *seniormost Judges of the High Court.*

The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge duty objectively to select the best available persons as Judges of the Supreme Court and the High Courts. *The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity.*”

(Pages 768 A to 769 A)

F“(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.*

G (6) The distinction between making an appointment in conformity with the opinion of the Chief Justice of India, and not making an appointment recommended by the Chief Justice of India to be borne in mind. Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an

H exceptional case, where the facts justify, a recommendee of the Chief

Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India, may not be appointed except in the situation indicated later. Primacy is in making an appointment; and, when the appointment is not made, the question of primacy does not arise. There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India, except in the situation indicated hereafter.

It is only to this limited extent of non-appointment of a recommendee of the Chief Justice of India, on the basis of positive material indicating his appointment to be otherwise unsuitable, that the Chief Justice of India does not have the primacy to persist for appointment of that recommendee except in the situation indicated later. This will ensure composition of the courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and intended to secure the independence of the judiciary and the appointment of the best men available with undoubted credentials.”.....

(Page 770 B to 770 H)

.....“(7) Non-appointment of anyone recommended, on the ground of unsuitability must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Justice of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person for reasons to be recorded, may be permissible in the public interest. If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that

A *appointment as a matter of healthy convention ought to be made.*

(8) Some instances when non-appointment is permitted and justified may be given. *Suppose the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible.* "....."

(Page 771 A to 771 E)

C " (9) In order to ensure effective consultation between all the constitutional functionaries involved in the process, the reasons for disagreement, if any, must be disclosed to all others, to enable reconsideration on that basis. *All consultations with everyone involved, including all the Judges consulted, must be in writing and the Chief Justice of the High Court, in the case of appointment to a High Court, and the Chief Justice of India, in all cases, must transmit with his opinion the opinion of all Judges consulted by him, as a part of the record.*

E Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection. Exclusion of justiciability, as indicated hereafter, in this sphere should prevent any inhibition against the expression of a free and frank opinion. *The final opinion of the Chief Justice of India, given after such effective consultation between the constitutional functionaries, has primacy in the manner indicated.*

(Pages 771 G to 772 C)

On the aspect of transfers of Judges and the judicial review thereof, the majority judgment stated :

G "Transfers

(1) *In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as*

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the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India. The personal factors relating to the concerned Judge, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice.”.....

(Page 774 A to 774 C)

.....“Justiciability

Appointments and Transfers

The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decisions, which is ordinarily needed as check against possible executive excess or arbitrariness. *Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated.* The reduction of the area of discretion to the minimum, *the element of plurality of Judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.*

These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

This is also in accord with the public interest of excluding these

A 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.”

(Page 775 B to 775 G)

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.....“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.*”

(Page 776 B to 776 C)

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On the aspect of the relevance of seniority in the matter of Supreme Court appointments, this was stated :

(3) *Inter se* seniority amongst Judges in their High Court and their combined seniority on all India basis is of admitted significance in the matter of future prospects. *Inter se* seniority amongst Judges in the Supreme Court, based on the date of appointment, is of similar significance. *It is, therefore, reasonable that this aspect is kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.* Apart from recognising the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court according to their seniority, this would also lend greater credence to the process of appointment and would avoid any distortion in the seniority between the appointees drawn even from the same High Court. The likelihood of the Supreme Court being deprived of the benefit of the services of some who are considered suitable for appointment, but decline a belated offer, would also be prevented.

(4) *Due consideration of every legitimate expectation in the decision making process is requirement of the rule of non arbitrariness*

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and, therefore, this also is a norm to be observed by the Chief Justice of India in recommending appointments to the Supreme Court. Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority. A B

This legitimate expectation has relevance on the ground of longer experience on the Bench, and is a factor material for determining the suitability of the appointee. Along with other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the apex court." C D

(Pages 769 B to 770 B)

The majority judgment ends with a summary of its conclusions. Conclusion nos. 1,2,3,4,5,7,9,10,11 and 14 are relevant for our purposes. They read thus : E

“(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated ‘participatory consultative process’ for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise. F

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of Judge/Chief Justice of a High Court, the proposal had to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts H

A must invariably be made.

(3) In the event of conflicting opinions by the constitutional functionaries, *the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' and formed in the manner indicated, has primacy.*

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(4) *No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.*

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(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.

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(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/ Chief Justices.

E

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

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(10) *In making all appointments and transfers, the norms indicated must be followed.* However, the same do not confer any justiciable right in any one.

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(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.

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(14) The majority opinion in *S.P Gupta v. Union of India*, [1982] 2 S.C.R. 365, in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution including

the constitutional scheme must now be understood and implemented A
in the manner indicated herein by us."

(Pages 778 to 779)

(Emphasis supplied)

We have heard the learned Attorney General , learned counsel for the B
interveners and some of the High Courts and the Advocates General of some States.

We record at the outset the statements of the Attorney General that -
(1) the Union of India is not seeking a review or re-consideration of the C
judgment in the second Judges case, and (2) that the Union of India shall accept and treat as binding the answers of this Court to the questions set out in the Reference.

The majority view in the second Judges case is that in the matter of D
appointments to the Supreme Court and the High Court 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 E
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.

In so far as appointments to the Supreme Court of India are concerned, F
the majority view in the second Judges case is that the opinion given by the Chief Justice of India in this behalf "has to be formed taking into account the views of the two seniormost Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the seniormost Judge of the Supreme Court whose opinion is likely to be significant in adjudging the G
suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of some other Judges of the Supreme Court is requisite".

It was urged by the learned Attorney General as also by learned counsel H

- A that the Chief Justice of India needs to consult a larger number of Judges of the Supreme Court before he recommends an appointment to the Supreme Court. Attention was drawn to the fact that at the time of the latest selection of Judges appointed to the Supreme Court, the then Chief Justice of India had constituted a panel of himself and five of the then seniormost puisne Judges.
- B It was submitted that this precedent should be treated as convention and institutionalised.

- We think it necessary to make clear at the outset the distinction that follows. The opinion of the Chief Justice of India which has primacy in the matter of recommendations for appointment to the Supreme Court has to be
- C formed in consultation with a collegium of Judges. Presently, and for a long time now, that collegium consists of the two seniormost puisne Judges of the Supreme Court. In making a decision as to whom that collegium should recommend, it takes into account the view that are elicited by the Chief Justice of India from the seniormost Judge of the Supreme Court who comes from the same High Court as the person proposed to be recommended. It also
- D takes into account the views of other Judges of the Supreme Court or the Chief Justices or Judges of the High Court or, indeed, members of the Bar who may also have been asked by the Chief Justice of India or on his behalf. The principal objective of the collegium is to ensure that the best available talent is brought to the Supreme Court bench. The Chief Justice of India and
- E the seniormost puisne Judges, by reason of their long tenures on the Supreme Court, are best fitted to achieve this objective. They can assess the comparative worth of possible appointees by reason of the fact that their judgments would have been the subject matter of petitions for special leave to appeal and appeals. Even where the person under consideration is a member of the Bar, he would have frequently appeared before them. In assessing comparative
- F worth as aforesaid, the collegium would have the benefit of the inputs provided by those whose views have been sought. The distinction, therefore, is between the Judges of the Supreme Court who decide, along with the Chief Justice of India, who should be recommended for appointment to the Supreme Court and the judges of the Supreme Court and others who are asked to
- G express their views about the suitability of a possible nominee for such appointment.

- With this in mind, what has to be considered is whether the size of the collegium that makes the recommendation should be increased. Having regard to the terms of Article 124(2), as analysed in the majority judgment in the
- H second Judges case, as also the precedent set by the then Chief Justice of

India, as set out earlier, and having regard to the objective aforesaid, we think it is desirable that the collegium should consist of the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court. A

Ordinarily, one of the four seniormost puisne Judges of the Supreme Court would succeed the Chief Justice of India, but if the situation should be such that the successor Chief Justice is not one of the four seniormost puisne Judges, he must invariably be made part of the collegium. The Judges to be appointed will function during his term and it is but right that he should have a hand in their selection. B

It is not practicable to include in the collegium the seniormost Judge of the Supreme Court who comes from the same High Court as the person to be recommended, unless, of course he is a part of the collegium by virtue of being one of the four seniormost puisne Judges, because, as experience shows, it is normally not one vacancy that has to be filled up but a number thereof. The prospective candidates to fill such multiple vacancies would come from a number of High Courts. It would, therefore, be necessary to consult the seniormost Judges from all those High Courts. All these judges cannot conveniently be included in the collegium. Secondly, the composition of the collegium cannot vary depending upon where the prospective appointees hail from. To put it differently, for a particular set of vacancies the seniormost Judges from the High Courts at, let us say, Allahabad and Bombay may have to be consulted. It would neither be proper nor desirable, if they have been part of the collegium for that particular selection, to leave them out of the next collegium although no prospective appointee at that time hails from the High Courts at Allahabad or Bombay. Thirdly, it would not be proper to exclude from the collegium such Judges of the Supreme Court, if any, as are senior to the Judges required to be consulted. Lastly, the seniormost Judge of the Supreme Court who comes from the same High Court as the person to be recommended may be, in terms of over all seniority in the Supreme Court, very junior, with little experience of work in the Supreme Court, and, therefore, unable to assess the comparative merit of a number of possible appointees. C D E F

Necessarily, the opinion of all members of the collegium in respect of each recommendation should be in writing. The ascertainment of the views of the seniormost Supreme Court Judges who hail from the High Courts from where the persons to be recommended come must also be in writing. These must be conveyed by the Chief Justice of India to the Government of India along with the recommendation. The other views that the Chief Justice of India or the other members of the collegium may elicit, particularly if they G H

A are from non-Judges, need not be in writing, but it seems to us advisable that he who elicits the opinion should make a memorandum thereof, and the substance thereof, in general terms, should be conveyed to the Government of India.

B The seniormost Judge in the Supreme Court from the High Court from which a prospective candidate comes would ordinarily know his merits and demerits, but if per chance he does not, the next seniormost Judge in the Supreme Court from that High Court should be consulted and his views obtained in writing.

C We should add that the objective being to procure the best information that can be obtained about a prospective appointee, it is of no consequence that a Judge in the Supreme Court from the prospective appointee's High Court had been transferred to that High Court either as a puisne Judge or as its Chief Justice.

D It is, we think, reasonable to expect that the collegium would make its recommendations based on a consensus. Should that not happen, it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India. The question that remains is: what is the position when the Chief Justice of India is in a minority and the majority of the collegium disfavour the appointment of a particular person? The majority judgment in the second Judges case has said that if "the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reason, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible". This is delicately put, having regard to the high status of the President, and implies that if the majority of the collegium is against the appointment of a particular person, that person shall not be appointed, and we think that this is what must invariably happen. We hasten to add that we cannot easily visualise a contingency of this nature; we have little doubt that if even two of the Judges forming the collegium express strong views, for good reasons, that are adverse to the appointment of a particular person the Chief Justice of India would not press for such appointment.

H The majority judgment in the second Judges case contemplates the non-appointment of a person recommended on the ground of unsuitability. It says that such non-appointment "must be for good reasons, disclosed to the

Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-appointment of that person for reasons to be recorded, may be permissible in the public interest..... However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made". It may be that one or more members of the collegium that made a particular recommendation have retired or are otherwise unavailable when reasons are disclosed to the Chief Justice of India for the non-appointment of that person. In such a situation the reasons must be placed before the remaining members of the original collegium plus another Judge or Judges who have reached the required seniority and become one of the first four puisne Judges. It is for this collegium, so re-constituted, to consider whether the recommendation should be withdrawn or reiterated. It is only if it is unanimously reiterated that the appointment must be made. Having regard to the objective of securing the best available men for the Supreme Court, it is imperative that the number of Judges of the Supreme Court who consider the reasons for non-appointment should be as large as the number that had made the particular recommendation.

The Chief Justice of India may, in his discretion, bring to the knowledge of the person recommended the reasons disclosed by the Government of India for his non-appointment and ask for his response thereto. The response, if asked for and made, should be considered by the collegium before it withdraws or reiterates the recommendation.

The majority judgment in the second Judges case said that "*inter se*, seniority amongst Judges in their High Court and their combined seniority on all India basis" should be "kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court". It also said that "the legitimate expectation of the High Court Judges to be considered for appointment to the Supreme Court, according to their seniority" must be duly considered. The statement made thereafter is very important; it is : "Obviously, this factor applies only to those considered

A suitable and at least equally meritorious by the Chief Justice of India for appointment to the Supreme Court.”

Merit, therefore, as we have already noted, is the predominant consideration for the purposes of appointment to the supreme Court.

B Where, therefore, there is outstanding merit the possessor thereof deserves to be appointed regardless of the fact that he may not stand high in the all India seniority list or in his own High Court. All that then needs to be recorded when recommending him for appointment is that he has outstanding merit. When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required
C merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court bench. All that then needs to be recorded when making the recommendation for appointment is this factor. The “strong cogent reasons”
D that the majority judgment in the second Judges case speaks of are good reasons for appointing to the Supreme Court a particular High Court Judge, not for not appointing other High Court Judges senior to him. It is not unusual that a Judge who has once been passed over for appointment to the Supreme Court might still find favour on the occasion of another selection and there is no reason to blot his copybook by recording what might be
E construed to be an adverse comment about him. It is only when, for very strong reasons, a collegium finds that, whatever his seniority, some High Court Judge should never be appointed to the Supreme Court that it should so record. This would then be justified and would afford guidance on subsequent occasions of considering who to recommend.

F Mr. Parasaran, learned counsel for the intervener, the Advocates-on-Record Association, submitted that the words ‘legitimate expectation’ were not apposite when the reference was to High Court Judges. We make it clear that no disparagement of High Court Judges was meant; all that was intended to be conveyed was that it was very natural that senior High Court Judges should entertain hopes of elevation to the Supreme Court and that the Chief
G Justice of India and the collegium should bear this in mind.

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
H “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 concerned High Court". Into that last category would fall Judges of the Supreme Court who were puisne Judges of that 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.

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.

In the context of the judicial review of appointments, the majority judgment in the second Judges' case said, "Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another in-built check against the likelihood of arbitrariness or bias..... The judicial element being predominant in the case of appointments, as indicated, the need for further judicial review, as in other executive actions, is eliminated." The judgment added, "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, these matters are not justiciable on any other ground....".

Judicial review in the case of an appointment, or a recommended

- A 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 aforesaid, 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.

- D The majority judgment in the second Judges case dealt with the question of the transfer of a puisne Judge of one High Court as a puisne Judge of another High Court. It said, "In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief justice of India." In regard to the justiciability of such transfers, it said, "Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias The judicial element beingdecisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated." In the same context there was reference to "the element of plurality of Judges in formation of the opinion of the Chief Justice of India." It was then said that "apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary." Again, it was said "Except on the groundof a transfer being made without the
- H 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 A
by the element of plurality in the process of decision making.”

The same thoughts were expressed in the concurring judgment of Kuldip Singh, J., thus :

“We are, therefore, of the view that the opinion of the Chief Justice B
of India in the process of consultation for appointments to the superior
courts must be formed in consultation with two of his seniormost
colleagues. Apart from that the Chief Justice of India must also consult
the seniormost Judge who comes from the same State (the State from
where the candidate is being considered). *This process of consultation* C
shall also be followed while transferring any Judge/Chief Justice
from one State to another.”

The judgment in the case of *K. Ashok Reddy v. Government of India and Ors.*, [1994] 2 SCC 303, dealt with the justiciability of transfers of High Court Judges from one High Court to another. The judgment, rendered by a D
Bench of three learned Judges, records that it was a “sequel to the decision”
in the second Judges case. It refers to the fact that after the second Judges
case the then Chief Justice of India had constituted a Peer Committee
comprised of the then two seniormost puisne Judges of Supreme Court and
two Chief Justices of High Courts to make suggestions for transfers and the
Chief Justice of India was to make his recommendations on that basis and in E
accordance with the broad guidelines indicated in the second Judges case.
There was, therefore, the judgment said, no room left for any apprehension
of arbitrariness or bias in the transfer of any Judge or Chief Justice of a High
Court. There was no doubt that the Chief Justice of India, acting on the
institutional advice available to him, was the surest and safest bet for
preservation of the independence of judiciary. The second Judges case did F
not exclude judicial review but limited the area of justiciability to the
constitutional requirement of the recommendation of the Chief Justice of
India for exercise of power under Article 222 by the President of India. The
power of transfer was to be exercised by the highest constitutional functionaries
in the country in the manner indicated, which provided several inbuilt checks G
against the likelihood of arbitrariness or bias. The need for restricting the
standing to sue in such a matter to the affected Judge alone had been reiterated
in the second Judges case. The transfer of a High Court Judge was justiciable
only on the ground indicated in the second Judges case and only at the
instance of the transferred Judge himself and no one else. This was necessary
to prevent any transferred Judge being exposed to any litigation involving H

A him except when he chose to resort to it himself in the available limited area of justiciability. When it was said in the second Judges case that the ground of bias was not available for challenging a transfer, it was to emphasis that the decision by the collective exercise of several Judges at the highest level on objective criteria, on which the recommendation of the Chief Justice of India was based, was an inbuilt check against arbitrariness and bias indicating the absence of need for judicial review on those grounds. If any court other than the Supreme Court was called upon to decide a matter relating to the transfer of a High Court Judge, it should promptly consider the option of requesting the Supreme Court to withdraw the case to itself for decision to avoid any embarrassment.

C What emerges from the aforesaid is this: before recommending the transfer of a puisne Judge of one High Court to another High Court, also as a puisne Judge, the Chief Justice of India must consult a plurality of Judges. He must take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may have significance in the case and atleast one other senior Chief Justice of a High Court or any other person whose views he considers relevant. The then Chief Justice of India had constituted, as was noted in *Ashok Reddy's* case, a Peer Committee of the two seniormost puisne Judges of the Supreme Court and two Chief Justices of High Courts to advise him in the matter of transfers of High Court Judges. That Committee is no longer in position.

F It is to our mind imperative, given the gravity involved in transferring High Courts Judges, that the Chief Justice of India should obtain the views 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. This is in accord with the majority judgment in the second Judges case which postulates consultation with the Chief Justice of another High Court. The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court. These views and those of each of the four seniormost puisne Judges should be conveyed to the Government of India along with the proposal of transfer. Unless the decision to transfer has been taken in the manner aforesaid, it is not decisive and does not bind the Government of India.

Wide based decision making such as this eliminates the possibility of bias or arbitrariness. By reason of such elimination the remedy of judicial review can legitimately be confined to a case where the transfer has been made or recommended without obtaining views and reaching the decision in the manner aforesated. A

What applies to the transfer of a puisne Judge of a High Court applies a well to the transfer of the Chief Justice of a High Court as Chief Justice of another High Court except that, in this case, only the views of one or more knowledgeable Supreme Court Judges need to be taken into account. B

The majority judgment in the second Judges case requires that "the personal factors relating to the concerned Judge, and his response to the proposal, including his preference of places of transfer, should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material, in the public interest for better administration of justice" (page 774). These factors, including the response of the High Court Chief Justice or puisne Judge proposed to be transferred to the proposal to transfer him, should now be placed before the collegium of the Chief Justice of India and his first four puisne Judges to be taken into account by them before reaching a final conclusion on the proposal. C D

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. E

We have not dealt with any aspect placed before us at the Bar that falls outside the scope of the questions posed in the Reference. F

It remains only to express our gratitude to the Attorney General, Mr. K. Parasaran, Mr. K.K. Venugopal, Mr. R.K. Jain, Mr. A.B. Divan, Mr. Murlidhar Bhandare, Mr. Arun Jaitley, Mr. Gopal Subramaniam, Mr. H.N. Salve, Mr. V.A.Mohta, Mr. R.P. Goel, Mr. P.S Poti, Mr. Sarin, Mr. B.R. Bhattacharya, Mr. A.R. Barthakur, Mr. P.G. Baruah, Mr. Govind Das and Ms. Radha Rangaswamy. Their submissions and insights have much assisted us. We should note that there was no great divergence in what they advocated. G

The questions posed by the Reference are now answered, but we should emphasise that the answers should be read in conjunction with the body of this opinion: H

- A 1. The expression “consultation with the Chief justice of India” in Articles 217(1) and 222 (1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India does not constitute “consultation” within the meaning of the said Articles.
- B 2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.
- C 3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four seniormost puisne Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two seniormost puisne Judges of the Supreme Court.
- D 4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.
- E 5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.
- F 6. “Strong cogent reasons” do not have to be recorded as justification for a departure from the order of seniority, in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.
- G 7. The views of the Judges consulted should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of this opinion.
- H 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. A

9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India.

S.M.

Opinion rendered.

B