LOK PRAHARI THROUGH ITS GENERAL SECRETARY S.N. SHUKLA IAS (RETD.)
v.
UNION OF INDIA & ORS.

(Writ Petition (C) No. 1236 of 2019)

APRIL 20, 2021

[S. A. BOBDE, CJI, SANJAY KISHAN KAUL AND SURYA KANT, JJ.]

Constitution of India:

Art. 224A – Appointment of retired judges at sittings of High Courts – Pendency of 57 lakhs cases in the High Courts along with consistent ratio of vacancies of almost 40 per cent – Held: Recourse to Art. 224A by appointment of ad hoc judges needed – It would provide a ready-made pool of known judicial talent to deal with the disposal of pending old cases – Certain checks and balances to be provided for resorting to Art. 224A – Guidelines on aspects such as, the trigger point to activate the provision, suggestion of an embargo situation, pre-recommendation process, the methodology of appointment, time to complete the process, tenure of appointment, the number of appointments, the role of ad hoc *Judges, emoluments and allowances, etc. to be arrived so as to facilitate some element of uniformity – Since periodic review would be required to suitably modify the guidelines proposed, concept of continuing* mandamus *would be appropriate – Thus, issuance of guidelines for invocation of Art. 224A.*

Arts. 217, 224 and 224A - Appointment of permanent and additional Judges, and ad hoc *judges in the High Court – Process to be followed – Explained.*

Art. 224 – Objective of – Explained.

Art. 224A – Historical perspective – Explained.

Constitutional jurisprudence – Continuing mandamus *– Concept of – Held: "Continuing* mandamus*" is a practice of issuing continuing directions to ensure effective discharge of duties – Unlike a writ remedy, a continuing* mandamus *is an innovative procedure not a substantive one which allows the Court an effective basis to ensure that the benefits of a judgment can be enjoyed by the*

* Author

right-bearers, and its realisation is not hindered by administrative and/or political recalcitrance – It is a means devised to ensure that the administration of justice translates into tangible benefits.

Issuing guidelines and further listing the matter, the Court Held:

1.1 It is trite to say that there is a docket explosion in our country and that it is difficult for adjudication to take place within a reasonable period of time. This crisis situation must be tackled. Some innovation is always the rule of the game. In the present context, maybe a slightly different view has to be taken in respect of the avowed purpose of Article 224A of the Constitution of India providing for *ad hoc* judges. It is said so as this Court is faced with the ground reality of almost 40% vacancies remaining in the regular appointments (both permanent and additional judges) over the last two years. A number of vacancies arising every year are barely filled in by fresh appointments. Thus, it remains an unfulfilled challenge to bring the appointment process to such numbers as would be able to cover the vacancies existing and arising. [Para 20]

1.2 The present system of appointments as envisaged by the Constitution and as elucidated in the Collegium system makes it clear that the first step is a recommendation from that High Court by a collegium of the three senior-most judges presided over by the Chief Justice of the High Court. This process in turn requires wide consultation by the Chief Justice of the High Court to identify the requisite talent, so as to make the recommendations. Contrary to some portrayed beliefs as if this is an extremely subjective system, every Chief Justice is actually required to solicit names from different sources whether it be sitting judges, retired judges, or prominent members of the Bar. It is from this pool of talent that he selects, after a discussion before the collegium, the most suitable candidates. It is thus, of utmost importance that the flow of recommendations continues for the appointment process to work successfully. The vacancies existing and arising are always known, as a judge demits office in the High Court on his 62nd birthday. The only exception can be an unforeseen eventuality or an elevation to the Supreme Court of India. Thus, every endeavour has to be made to see that the recommendations are made well in advance while maintaining a balance between recommendations from the Bar

and the subordinate judiciary, about six months in advance as per norms which were thought to be the appropriate time period within which the whole process of appointment ought to be concluded. [Para 21]

1.3 On the basis of talent available; considering that the age profile for elevation from the Bar is between 45 to 55 years, there may be situations where at one go all recommendations against vacancies may not be possible to be made. However nothing prohibits - or rather the exigencies of the appointment process requires - recommendations to be periodically made without unnecessarily waiting for the outcome of the first set of recommendations. If this continuing pipeline operates and even if some recommendations fall by the wayside, over a reasonable period of time the vacancies can be filled up. The current situation of vacancies, especially in some of the larger courts with very few recommendations in the pipeline seems to be the genesis of this problem. [Para 22]

1.4 One of the most important administrative functions of the Chief Justice of the High Court is to identify suitable candidates for elevation as judges of the High Court and make recommendations in turn. The pipeline of recommendation of Judges has to be kept flowing so as to cover vacancies. Once the recommendation is made, opinions of State Governments are solicited as also the input from the Intelligence Bureau. The recommendations are then processed by the Central Government in all manners, before they are put up to the collegium of the Supreme Court of India. This is another area of some concern as there have been many cases which have remained pending for long periods of time - though in view of certain queries posed in these judicial proceedings, the situation has now improved. In normal circumstances, the total time period before names are forwarded to the Supreme Court collegium should not exceed four months after the recommendations are made by the collegium of the High Court. [Paras 24, 25]

1.5 The Supreme Court collegium, which is the first three judges, thereafter bestows its consideration on these names after obtaining the opinions of the consultee judges. Those names which find approval of the collegium are then recommended for appointment to the Union of India. At that stage, the

Government either proceeds to appoint the judges or it may have some reservations, in which case it would be within their right to return the recommendations with the reservations they have over the appointment. On reconsideration, if the recommendation is reiterated, in terms of the prevalent legal position, the appointment has to be made. The delays in this is a matter of concern as the recommendation of the collegium should not remain pending for a long period of time. The said process should be completed at the earliest. In some of the courts it is a challenge to persuade competent and senior lawyers who may have large practices to accept the position of the judge, and the pendency of their names for a long period of time does little to encourage them. The fact remains that the said process has not resulted in filling up of vacancies for many years. It is not as if the vacant posts are a small fraction, as it is noticed that they have been hovering around the figure of 40% vacancies. [Paras 26, 27]

1.6 There is little doubt that challenge of mounting arrears and existing vacancies requires recourse to Article 224A of the Constitution to appoint ad-hoc judges which is a ready pool of talent, (of course subject to their concurrence) as a methodology especially for clearing the old cases. The existing strength of permanent and additional judges can be utilized for current and not so old cases. The *ad-hoc* judges are absolved even from the administrative responsibilities. They can concentrate on old cases which are stuck in the system and may require greater experience. The very provision makes it clear that it does not in any way constrain or limit the regular appointment process and consent of the retired judge is sought to sit and act as a judge of the High Court. One may say that this is largely a transitory methodology till all the appointment processes are in place, though that may not be the only reason to take recourse to the said Article. [Para 40, 42]

1.7 This Court would not like to encourage an environment where Article 224A is sought as panacea for inaction in making recommendations to the regular appointments. In order to prevent such a situation, certain checks and balances must be provided so that Article 224A can be resorted to only on the process having being initiated for filling up of the regular

vacancies and awaiting their appointments. Thus, there should not be more than 20% of the vacancies for which no recommendation has been made for this Article to be resorted to. This figure is placed looking to the entire scenario where sometimes it may be difficult to find the requisite talent at a particular stage which may have to await some time period. However, certainly, it cannot be countenanced that no or very few recommendations are made for a large number of vacancies by resorting to Article 224A. [Para 43]

1.8 The collegium of the Supreme Court has an important role to play in the appointment of judges of the High Court. In the said conspectus, the exercise by the Chief Justice of the High Court, the authority vested under Article 224A of the Constitution would require a prior consent from the judge concerned, and that recommendation in turn has to be routed through the collegium of the Supreme Court. Of course, the previous consent of the President of India (as advised) is necessary - but looking to the very nature of this appointment, which is of a retired judge who for his judicial appointment has gone through the complete process, time period of maximum three months is more than sufficient to carry the process through all stages. This in turn would be facilitated if the Chief Justice of the High Court takes the initial steps at least three months in advance so that there is no unnecessary delay in this regard. [Para 44]

SP Gupta v. Union of India **[1982] 2 SCR 365**; *Supreme Court Advocates on Record v. Union of India* **(1993) 4 SCC 441 : [1993] 2 Suppl. SCR 659**; *Re: Special Reference 1 of 1998* **AIR 1999 SC 1 : [1998] 2 Suppl. SCR 400**; *Supreme Court Advocates-on-Record Association and Anr. v. Union of India* **2015 11 SCALE 1 – referred to.**

1.9 There is difference in the manner of appointment of permanent and additional Judges, and *ad hoc* judges in the High Court. Thus, two scenarios of appointment of Judges arise under Article 217 of the Constitution of India and the appointment has to be by the President by warrant under his hand and seal (Article 224 refers to the appointment of Additional and acting Judges). On the other hand, the appointment of a retired Judge as *an ad hoc* Judge of the High Court under Article 224A of

the Constitution albeit forming part of the same Chapter V of the Constitution of India begins with a non obstante clause and provides for the Chief Justice of a High Court to request any person who has held the office of a Judge of that Court or any other High Court to sit and act as a Judge of the High Court for that State. On the consent of the President being granted, the Secretary in the Government of India, Department of Justice is to inform the Chief Justice of the High Court and to issue necessary notification in the Gazette of India as per the MoP. The MoP has been framed under an administrative discussion and cannot be said to be law declared by this Court. It can always be varied. [Para 45]

1.10 In carrying out the said exercise, the Chief Justice of the High Court would have to bestow his consideration on the aspect as to who would be the suitable judge to be appointed as an ad-hoc judge and what is the time period for which the person has to be so appointed. This in turn will depend on the data of pendency of the different nature of cases, and the expertise of the judge especially in the areas where there is a large volume of pendency - as the objective is to clear the old cases which are stuck in the system. Such consideration of objective criteria becomes necessary to have transparency in the system. [Para 46]

1.11 On the aspect of allowances as admissible to an ad-hoc judge to be determined by the President of India, it is trite to say that despite the voluntary nature of work no one would like to accept allowances less than what are admissible to a sitting judge. Thus, the same monetary benefits and privileges should be payable/available to an *ad-hoc* judge as admissible to a judge minus the pension. That can be the only methodology it is considered appropriate to follow. [Para 48]

1.12 A Common theme of the various suggestions placed is that there is a definitive need for activating the provision. There are differences of perception with respect to different aspects such as, the trigger point to activate the provision, suggestion of an embargo situation, the methodology of appointment, the role of ad hoc Judges, age limit, tenure of appointment, etc. A common need has been felt to give guidelines to facilitate some element of uniformity in taking recourse to this dormant provision. It is also a common ground, with which it is agreed,

that while laying down guidelines, a periodic review of this experiment would be required and there may be occasions to suitably modify the guidelines which are proposed to be laid down. Thus, it would not be appropriate to close the present proceedings but instead a concept of continuing mandamus would be appropriate in the present proceedings to work out the most effective method of taking recourse to Article 224A of the Constitution. [Para 49]

1.13 The principle of continuing mandamus forms part of the Constitutional jurisprudence and the term was used for the first time in *Vineet Narain v. Union of India*'s case. The practice of issuing continuing directions to ensure effective discharge of duties was labelled as a "continuing mandamus". Unlike a writ remedy, a continuing mandamus is an innovative procedure not a substantive one which allows the Court an effective basis to ensure that the fruits of a judgment can be enjoyed by the right-bearers, and its realisation is not hindered by administrative and/or political recalcitrance. It is a means devised to ensure that the administration of justice translates into tangible benefits. [Para 50]

Vineet Narain v. Union of India **(1998) 1 SCC 226 : [1997] 6 Suppl. SCR 595 – relied on.**

1.14 While emphasising that recourse to Article 224A is the necessity of the day, and without inhibiting the expanse of the powers conferred on the Chief Justice of the High Court as per the Constitution, it would be in the fitness of things to lay down some guidelines for assistance of the Chief Justices of the High Courts and to make the provision a 'live letter'. It might be noticed that it is a common case that the present proceedings are not adversarial but a method to make the provisions of Art. 224A into a practical and working arrangement. [Paras 51, 52]

2. *Guidelines:*

i. Trigger Point for activation:

The discretion of the Chief Justice of the High Court under Article 224A is not constrained but as stated, some general guidelines are required to be laid so that power conferred under the said provision is exercised in a transparent manner.

The Trigger Point cannot be singular and there can be more than one eventuality where it arises-if the vacancies are more than 20% of the sanctioned strength, the cases in a particular category are pending for over five years, more than 10% of the backlog of pending cases are over five years old, the percentage of the rate of disposal is lower than the institution of the cases either in a particular subject matter or generally in the Court, even if there are not many old cases pending, but depending on the jurisdiction, a situation of mounting arrears is likely to arise if the rate of disposal is consistently lower than the rate of filing over a period of a year or more. [Para 53]

ii. Embargo Situation

Recourse to Article 224A is not an alternative to regular appointments. It is clarified that if recommendations have not been made for more than 20% of the regular vacancies then the trigger for recourse to Article 224A would not arise. The data placed before this Court would suggest that there are only ten High Courts having fewer than 20% vacancies as on 1.4.2021; seven High Courts having fewer than 10% vacancies in permanent appointments but then there may be additional Judges and there are cases which are in the pipeline. Thus, the parameter adopted is that, at least, the recommendations should have been made leaving not more than 20% vacancies in order to take recourse to Article 224A. [Paras 54,55]

iii. Pre-recommendation process:

Past performance of recommendees in both quality and quantum of disposal of cases should be factored in for selection as the objective is to clear the backlog. The Chief Justice should prepare a panel of Judges and former Judges. This would be in respect of Judges on the anvil of retirement and normally Judges who have recently retired preferably within a period of one year. However, there can be situations where the Judge may have retired earlier but his expertise is required in a particular subject matter. There may also be a scenario where the Judge(s) may prefer to take some time off before embarking upon a second innings albeit a short one. In the preparation of panel, in order to take consent and take

into account different factors, a personal interaction should be held with the Judge concerned by the Chief Justice of the High Court. [Para 55]

iv. Methodology of Appointment:

Para 24 of the MoP lays down a procedure for appointment under Article 224A. It is not law laid down in this behalf under Article 141 of the Constitution but as a first step it may be more appropriate to follow this procedure laid down in para 24 of the MoP to see the progress made and impediments, if any. Since the Judges are already appointed to the post through a warrant of appointment, the occasion to refer the matter to the IB or other agencies would not arise in such a case, which would itself shorten the time period. [Para 56]

v. Time to complete the process:

The requirement that recommendations should be made six months in advance by the Chief Justice of the High Court emanates from the concept that the said period should be required to complete the process in case of a regular appointment of a Judge under Article 217 or 224. In view of number of aspects not required to be adverted to for appointment under Article 224A, a period of about three months should be sufficient to process a recommendation and, thus, ideally a Chief Justice should start the process three months in advance for such appointment. [Para 57]

vi. Tenure of Appointment:

The tenure for which an ad hoc Judge is appointed may vary on the basis of the need but suffice to say that in order to give an element of certainty and looking to the purpose for which they are appointed, generally the appointment should be for a period between two to three years. [Para 58]

vii. Number of Appointments:

At least, for the time being dependent on the strength of the High Court and the problem faced by the Court, the number of *ad hoc* Judges should be in the range of two to five in a High Court. However, it is clarified that an ad hoc Judge(s) would not be part of the sanctioned strength of Judges of the High Court to which they are appointed. [Para 59]

viii. Role of* ad *hoc Judges:

a. The primary objective being to deal with long pending arrears, the said objective would be subserved by assigning more than five year old cases to the ad hoc Judges so appointed. However, this would not impinge upon the discretion of the Chief Justice of the High Court, if exigencies so demand for any particular subject matter even to deal with the cases less than five years old, though the primary objective must be kept in mind. It is further clarified that an ad hoc Judge would not be entrusted any administrative work, as such entrustment would defeat the very purpose of appointment of ad hoc Judge(s), which is to clear the backlog of old cases. [Para 60]

b. As regards the issue of constitution of Benches of an ad hoc Judge and sitting Judge in matters to be heard by Division Bench and as to who would preside, the Division Bench, at present, may be constituted only of *ad hoc* Judges because these are old cases which need to be taken up by them. It is made clear that because of the very nature of the profile and work to be carried out by ad hoc Judges, it would not be permissible for an *ad hoc* Judge to perform any other legal work whether it be advisory, of arbitration or appearance. [Para 61]

ix. Emoluments and Allowances:

a. The emoluments and allowances of an *ad hoc* Judge should be at par with a permanent Judge of that Court at the relevant stage of time minus the pension. This is necessary to maintain the dignity of the Judge as also in view of the fact that all other legal work has been prohibited in terms of the aforesaid guidelines. Emoluments to be paid would be a charge on the Consolidated Fund of India consisting of salary and allowances. It is clarified that it is a misconceived notion that there would be an additional burden on the State Government if some perquisites are made available to *ad hoc* Judges by the State Government. The trigger for appointment of *ad hoc* Judges is the very existence of vacancies and had these vacancies been filled in, the State Government would have incurred these expenses anyhow. In any case there is a limit placed on the number of *ad hoc* Judges and, thus, the existence of vacancies actually results in the savings for the State Government(s), which would otherwise be amount expended as their allowances and perks. [Paras 62-63]

b. It is made clear that when reference is made to allowance/perks/ perquisites all benefits as are admissible to the permanent/ additional Judge(s) would be given to the *ad hoc* Judge(s). For clarity it is said that as far as housing accommodation is concerned, either the rent-free accommodation should be made available or the housing allowance should be provided on the same terms and conditions. For all practical purposes the *ad hoc* Judge would receive the same emoluments, allowances and benefits as are admissible to the permanent/additional Judges. The Second Schedule, Part D of the Constitution of India stipulates the emoluments and benefits that have to be conferred on the judges of the Supreme Court and of the High Courts. [Para 64]

3. The first step is taken with the hope and aspiration that all concerned would co-operate and retiring/retired Judges would come forth and offer their services in the larger interest of the Judiciary. The guidelines cannot be exhaustive and that too at this stage. If problems arise, there will be endeavour resolve them out. The apprehensions, if any, must be set aside to chart this course and there will be a way forward. In view of the requirements of a continuous mandamus to see how a beginning has been made, the matter is listed after four months calling upon the Ministry of Justice to file a report in respect of the progress made. [Paras 65-66]

Krishan Gopal v. Shri Prakash Chandra & Ors. **(1974) 1 SCC 128 : [1974] 2 SCR 206;** *Justice P Venugopal v. Union of India and Ors.* **(2003) 7 SCC 726 : [2003] 3 Suppl. SCR 286;** *Union of India v. Sankalchand Himatlal Sheth* **(1977) 4 SCC 193 : [1978] 1 SCR 423;** *Anna Mathew v. N. Kannadasan* **2009 (1) LW 87 (Mad) 47);** *Ashok Tanwar and Anr. v. State of H.P. and Others* **(2005) 2 SCC 104 : [2004] 6 Suppl. SCR 1065;** *Indian Society of Lawyers v. President of India* **(2011) 5 All LJ 455 (FB);** *Supreme Court Advocate-on-Record Association v. Union of India* **(1993) 4 SCC 441 : [1993] 2 Suppl. SCR 659;** *Supreme Court Advocates-on-Record Association & Anr. v. Union of India (NJAC case)* **(2016) 5 SCC 1 : [2015] 13 SCR 1 – referred to.**

Constituent Assembly Debates **Vol. VIII, 181;** *124th report of the Law Commission; 79th Report of the Law Commission of 1979; 188th Report of the Law Commission of 2003*; **A. M. Singhvi, "Beating the Backlog Reforms in Administration of Justice in India," in S. Khurshid et. al., (eds.)** *Judicial Review-Process, Powers, and Problems (Essays in Honour of Upendra Baxi)*, **(Cambridge University Press 2020), page 53 – referred to.**

CIVIL ORIGINAL JURISDICTION: Writ Petition (C) No. 1236 of 2019.

(Under Article 32 of The Constitution of India)

Petitioner in person.

K.K. Venugopal, AG, R.S. Suri, ASG, Atmaram NS Nadkarni, Gaurav Pachnanda, Ravindra Shrivastava, Arvind P. Datar, Vijay Hansaria, Ajit Kumar Sinha, R. Basant, Soumya Chakraborty, Vikas Singh, Sr. Advs., B.K. Satija, Rajat Nair, Ms. Neela Kedar Gokhle, Gurmeet Singh Makkar, D.L. Chidananda, Salvador Santosh Rebello, Alok Kumar Pandey, Ashwin Kumar D.S, Ms. Preetika Dwivedi, Divyakant Lahoti, Parikshit Ahuja, Ms. Praveena Bisht, Ms. Madhur Jhavar, Ms. Vindhya Mehra, Kartik Lahoti, Ms. Shivangi Malhotra, Jaigopal Saboo, Romy Chacko, Shakthi Chand Jaidwal, Aniruddha P. Mayee, Sahil Tagotra, Ms. Avni Sharma, V. N. Raghupathy, Md. Apzal Ansari, Sharan Thakur, Mahesh Thakur, Siddhartha Thakur, Arjun Garg, Ms. Shrutika Garg, Sibo Sankar Mishra, Ashok Kumar Singh, Rajiv Sinha, Niranjan Sahu, Umakant Mishra, Kunal Chatterji, Ms. Maitrayee Banerjee, Pravar Veer Misra, Gopal Singh, Harpreet Singh Gupta, Vidur Dwivedi, Mukul Kumar, Ms. Uttara Babbar, Manan Bansal, Ms. Shweta Mohta, Apoorv Kurup, Ms. Nidhi Mittal, Abhimanyu Tewari, P.I. Jose, Ms. Sneha Kalita, Prashant K. Sharma, Ms. Radhika Gautam, Ashwarya Sinha, Ms. Priyanka Sinha, Ms. Shubhi Sharma, T. G. Narayanan Nair, Manu Krishnan, V. Balachandran, Siddharth Naidu for M/s KSN & Co., Sanjai Kumar Pathak, Arvind Kumar Tripathi, Ms. Shashi Pathak, Ms. Aruna Mathur, Avneesh Arputham for M/s Arputham Aruna And Co, Vinay Arora, Naresh K. Sharma, Advs. for the Respondents.

LOK PRAHARI THROUGH ITS GENERAL SECRETARY S.N. SHUKLA IAS (RETD.) v. UNION OF INDIA & ORS.

The following Judgment of the Court was delivered

J U D G M E N T

1. The intent of our order today is to activate a dormant provision of the Constitution of India – Article 224A – for the appointment of ad hoc Judges to deal with the unprecedented situation arising from the backlog of cases pending in the High Courts, which has now crossed the figure of 57 lakh coupled with the consistent ratio of vacancies of almost 40 per cent. Any Constitution has to be dynamic, and thus, even if the intent behind including the provision (as it appears from the Constituent Assembly Debates) was slightly different, nothing prevents it from being utilised to subserve an endeavour to solve an existing problem. For as it is always said, 'change is the only constant'.

2. India was fortunate to have some of the best minds work on the framing of our Constitution as members of our Constituent Assembly. The Indian Constitution is an elaborate one, taking cues from the experience of various democracies. One of the essential aspects of our Constitution has been the separation of powers between the Judiciary, Executive, and Legislature.

3. Chapter V of Part VI of the Constitution of India commencing from Article 214 upto Article 231 relates to the High Courts in the states. Article 217 provides for the appointment and conditions of the office of a Judge of the High Court, wherein the current age of retirement is 62 years. We may say that broadly, it is amongst the youngest ages of retirement of judges of the apex Court of a state in comparison with other democracies of the world.

4. Article 224 deals with the appointment of additional and acting judges. The objective as set out in the Article is to take care of any temporary increase in business of the High Court, or by reason of arrears of work therein. The appointment of an additional judge duly qualified to be the judge of a High Court has to be for a period not exceeding two years, or as the President may specify. The ground reality however, remains that while determining the strength of different High Courts, the practice that has been adopted is that about 25% of the strength consists of additional Judges.

5. In the present case, we are concerned with Article 224A which reads as under:

> "224A. Appointment of retired Judges at sittings of High Courts-
>
> Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State, may with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers, and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:
>
> Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do."

6. The aforesaid Article begins with a non-obstante clause and was placed so that a request can be made to any person who has held the office of a Judge of that Court or of any other High Court, to sit and act as a judge of the High Court for the state. The second aspect is that while sitting and acting, such a judge would be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers, and privileges of the High Court judge; but for all other purposes shall not be deemed to be a High Court judge. The proviso stipulates that consent has to be obtained from the judge concerned.

7. It is the say of the petitioner before us in this public interest litigation that a large number of vacancies of High Court judges coupled with mounting arrears is a scenario which requires urgent attention and one of the modes to deal with both these aspects is resorting to Article 224A of the Constitution of India.

The Historical Perspective:

8. Article 224A was numbered as Article 200 in the Draft Constitution and discussed by the Constituent Assembly on 7th June 1949. The debate focused on the purpose and duration of the appointment of retired High Court judges. Three other specific issues were discussed:

1) whether a retired judge must consent to his appointment;

2) whether a retired judge draws salary after his appointment as an ad hoc judge;

3) whether the appointment of ad hoc judges was to be made with the concurrence of the President.

9. Some part of the debates indicate that the retired judge was to be invited back only for their expertise and experience to decide cases that were particularly difficult or important; and that it may not be advisable to call retired judges and asked them to clear off the arrears pending before the High Court. On the other hand, Dr. B.R. Ambedkar had clarified that the intent behind the appointment of ad hoc judges was as an alternative to the appointment of temporary or additional judges, which suggestion had not been accepted by the Constituent Assembly. Thus, ad hoc judges were not intended to be appointed for an indefinite length of time. In his words :

"It seems to me that if you are not going to have any temporary or additional judges you must make some kind of provision for the disposal of certain business, for which it may not be feasible to appoint a temporary judge in time to discharge the duties of a High Court Judge with respect to such matters."[1]

10. The aforesaid provision, it was emphasized by Dr. Ambedkar, was borrowed (word for word) from Section 8 of the Supreme Court of Judicature (Consolidation) Act, 1925 in the UK, and similar provisions in America. It was explained that the proviso was inserted to avoid a situation where the refusal of a retired judge to accept the invitation could be treated as remiss of his conduct.

11. Another important aspect as emerges from the debates, was that it was the view of Dr. Ambedkar himself that the matter of salary and benefits would be governed by the rules governing pension. Thus, all benefits would be admissible minus the pension; though the precise definition of "privileges" of an ad hoc judge was left to the Parliament to decide. The aspect of concurrence of the President was also debated and introduced to bring greater transparency in the process.

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1 Speech by Dr. B.R. Ambedkar on 7th June 1949, Constituent Assembly Debates, Vol. VIII, ¶181.

12. The aforesaid provision for appointment of ad hoc judges was removed by the Constitution (7th Amendment) Act, 1956. The objective of that Act clarifies that this was done as the provision for recalling retired judges for a short period had been found to be neither adequate nor satisfactory. It was sought to be replaced by the current Article 224, making provisions for appointment of additional judges to clear off arrears and for the appointment of acting judges in temporary vacancies.

13. There appears to have been a legislative re-think as the provision for the appointment of ad hoc judges was reintroduced vide Article 224A by the Constitution (15th Amendment) Act, 1963. The Lok Sabha debates did not specifically refer to the philosophy behind the re-introduction, but this can be extrapolated from the purpose behind introducing ad hoc appointments in the Supreme Court of India. The debates do reflect the two points of view, i.e., a worry about a possible "demon of patronage" and on the other hand views being expressed that it was possibly better to call back a retired judge instead of appointing a member of the Bar for a few months. The amendments seeking to restrict the term of ad-hoc judges to three months was however, negated, while inserting this provision in the Constitution.

Judicial Views :

14. Now we turn to the aspects arising from the aforesaid provision being debated in certain judicial precedents.

15. In ***Krishan Gopal vs. Shri Prakash Chandra & Ors.***[2] - a Constitution Bench of this Court (five judges) ruled on the issue of whether a person sitting and acting as a Judge of the High Court under Article 224A of the Constitution has the jurisdiction to try an election petition under Section 80-A of the Representation of the People Act, 1951. Debate arose in the context of a judge of the Madhya Pradesh High Court who was sitting and acting as a judge of that Court under Article 224A of the Constitution, and his appointment was to last for a period of one year or till the disposal of elections petitions entrusted to him, whichever was earlier. In that context it was observed that if a person appointed under Article 224A of the Constitution was

2 (1974) 1 SCC 128.

not considered to be a judge of the High Court for the purpose of jurisdiction, powers and privileges, the question of appointing such a person would never arise. The provision could not thus be rendered a dead letter. It was clarified that the effect of the provision would create a deeming fiction and the Court observed:

"15. (…) The person requested while so sitting and acting shall have all the jurisdiction, powers and privileges of a judge of the High Court. Such a person shall not otherwise be deemed to be a judge of that Court. The words "while so sitting, and acting" show that the person requested not merely has the Jurisdiction, powers and privileges of a Judge of the, High Court, he also sits and acts as a Judge of that Court. Question then arises as to what is the significance of the concluding words "but shall not otherwise be deemed to be a Judge of that Court". These words, in our opinion, indicate that in matters not relating to jurisdiction, powers and privileges the person so requested shall not be deemed to be a Judge of that Court. The dictionary meaning of the word "otherwise" is "in other ways", "in other circumstances", "in other respects". The word "otherwise" would, therefore, point to the conclusion that for the purpose of jurisdiction, powers and privileges the person requested shall be a Judge of the concerned High Court and for purposes other than those of jurisdiction, powers and privileges, the person requested shall not be deemed to be a Judge of that Court. It would, for example, be not permissible to transfer him under Article 222 of the Constitution. The use of the word "deemed" shows that the person who sits and acts as a Judge of the High Court under Article 224-A is a Judge of the said High Court but by a legal fiction he is not to be considered to be a Judge of the High Court for purposes other than those relating to jurisdiction, powers and privileges. (…)"

16. On the issue of entitlement of allowances of such an ad hoc judge, in ***Justice P Venugopal vs. Union of India and Ors.***,[3] it was opined that an ad hoc judge does not become a part of the High Court and thus there is no question of computing his pension for the period he is appointed as an ad hoc judge. Thus, the ad hoc judge would not be entitled to further pensionary benefits after he demits the Constitutional office that he holds in terms of Article 217.

3 (2003) 7 SCC 726.

17. It may also be appropriate to turn to some of the opinions expressed on the requirement of consent of a retired Judge. In ***Union of India vs. Sankalchand Himatlal Sheth***,[4] it was observed that the reason for insisting on consent was that a retired Judge cannot be compelled to work as an ad hoc judge against his consent. This is because he ceases to be a judge of the High Court on demitting office at the prescribed age and is not bound by the conditions of service.

18. It is appropriate to refer to more opinions albeit of the High Court to know how this particular aspect had been dealt with in the opinion of the High Court. In ***Anna Mathew* vs. *N. Kannadasan*** though the issue was not directly in question, the aspect of appointment of an ad hoc judge under Article 224A of the Constitution had been adverted to.[5]The context of the view on the expression "ad hoc" is present only in Article 224A and Article 127. In that context, a reference had been made to the Constitution Bench judgment (five judges) of this Court in ***Ashok Tanwar and Anr. vs. State of H.P. and Others***.[6]Here, there are observations to the effect that a consultation with the Collegium would not be necessary inasmuch as the Chief Justice is required to recommend the name of a sitting or a retired judge. However, that was a case dealing with appointments to the Consumer Disputes Redressal Commission and in that context, consultation with the Collegium was thought not necessary. However, if we turn to the judgment in ***Ashok Tanwar's case*** **(supra)** we find there was actually no real discussion on Article 224A. What was in question was whether Section 16 of the Consumer Protection Act, 1986, (which requires the State to appoint a person in consultation with the Chief Justice of the State) a consultation with acting Chief Justice was sufficient compliance of the case.

19. The last judicial view we seek to refer to is of the Full Bench of the High Court of the Judicature at Allahabad in ***Indian Society of Lawyers* vs. *President of India*** which elaborately dealt with the interpretation of Article 224A of the Constitution.[7]It was observed that an ad hoc judge does not fall within Article 216, and that he is not a judge of the High Court so sitting and acting. The President does

4 (1977) 4 SCC 193.
5 2009 (1) LW 87 (Mad) (¶ 47).
6 (2005) 2 SCC 104
7 (2011) 5 All LJ 455 (FB).

not appoint him, and only gives his consent to the Chief Justice to request a former judge to sit and act as a judge of the High Court. Thus, the process of appointment under Clause (1) of Article 217 does not apply to him. This is also the reason why while dealing with the aspect of monetary emoluments of an ad hoc judge, it has been stated that the former judge will be entitled to such allowances as the President may by order determine though he shall have all the jurisdiction, powers, and privileges but will not otherwise be deemed to be a judge of that High Court.

The Challenge Before the Judiciary

20. It is trite to say that we have a docket explosion in our country and that it is difficult for adjudication to take place within a reasonable period of time. This crisis situation must be tackled. Some innovation is always the rule of the game. In the present context, maybe a slightly different view has to be taken in respect of the avowed purpose of Article 224A providing for ad hoc judges. We say so as we are faced with the ground reality of almost 40% vacancies remaining in the regular appointments (both permanent and additional judges) over the last two years, as we have already mentioned. A number of vacancies arising every year are barely filled in by fresh appointments. Thus, it remains an unfulfilled challenge to bring the appointment process to such numbers as would be able to cover the vacancies existing and arising. Without endeavouring to blame anyone, a ground reality remains that there are manifold reasons for the same.

21. The present system of appointments as envisaged by the Constitution and as elucidated in the Collegium system makes it clear that the first step is a recommendation from that High Court by a collegium of the three senior-most judges presided over by the Chief Justice of the High Court. This process in turn requires wide consultation by the Chief Justice of the High Court to identify the requisite talent, so as to make the recommendations. Contrary to some portrayed beliefs as if this is an extremely subjective system, every Chief Justice is actually required to solicit names from different sources whether it be sitting judges, retired judges, or prominent members of the Bar. It is from this pool of talent that he selects, after a discussion before the collegium, the most suitable candidates. It is thus of utmost importance that the flow of recommendations continues for the appointment

process to work successfully. The vacancies existing and arising are always known, as a judge demits office in the High Court on his 62nd birthday. The only exception can be an unforeseen eventuality or an elevation to the Supreme Court of India. Thus, every endeavour has to be made to see that the recommendations are made well in advance while maintaining a balance between recommendations from the Bar and the subordinate judiciary, about six months in advance as per norms which were thought to be the appropriate time period within which the whole process of appointment ought to be concluded. This aspect has been emphasized by us in another connected matter, i.e., TP(C) No. 2419/2019.

22. We may also note that on the basis of talent available; considering that the age profile for elevation from the Bar is between 45 to 55 years, there may be situations where at one go all recommendations against vacancies may not be possible to be made. However nothing prohibits - or rather the exigencies of the appointment process requires - recommendations to be periodically made without unnecessarily waiting for the outcome of the first set of recommendations. If this continuing pipeline operates and even if some recommendations fall by the wayside, over a reasonable period of time the vacancies can be filled up. The current situation of vacancies, especially in some of the larger courts with very few recommendations in the pipeline seems to be the genesis of this problem.

23. The data placed before us, as drawn from the National Judicial Data Grid ("NJDG") shows that five (5) High Courts alone are responsible for 54% of the pendency of over 57,51,312 cases – the High Courts of Allahabad, Punjab & Haryana, Madras, Bombay, and Rajasthan. The Madras High Court has among the highest arrears in the country of 5.8 lakh cases despite having fewer vacancies than most other High Courts (i.e., 7%). This does not take away from the requirement of appointing ad hoc Judges but supports the view that even if the existing vacancies are few, a situation may arise requiring the expertise of experienced Judges to be appointed as ad hoc Judges. On the other hand, Calcutta High Court has one of the highest vacancies of regular appointments (44%) but less than half the arrears as compared to Madras (2.7 lakh cases). In such a scenario, it is apparently the absence of strength of the Judges

which may be responsible for creating the arrears and, thus, giving rise to another scenario for appointment of ad hoc Judges. In Punjab & Haryana High Court, which has a vacancy problem, the arrears have more than doubled over the last six years. The NJDG data shows that 56.4% pending cases were filed within the past five years whereas 40% of the pending cases were filed between 5 to 20 years ago. The primary purpose of appointing ad hoc Judges is to deal with the latter group of cases that have been pending for over five years. The table below, put on record by Senior Advocate Mr. Datar shows the percentage break-up of cases pending before High Courts for different periods of time as on 04.04.2021:

Particulars	Civil	%	Criminal	%	Total	%
0 to 1 years	622267	15.09	333345	20.49	955612	16.62
1 to 3 years	1054504	25.57	427302	26.27	1481806	25.76
3 to 5 years	676249	16.4	221226	13.6	897475	15.6
5 to 10 years	870536	21.11	296231	18.21	1166767	20.29
10 to 20 years	716419	17.37	289887	17.82	1006306	17.5
20 to 30 years	109517	2.63	41916	2.63	151433	2.63
Above 30 years	75047	1.82	16866	1.04	91913	1.6

24. We may only emphasize that one of the most important administrative functions of the Chief Justice of the High Court is to identify suitable candidates for elevation as judges of the High Court and make recommendations in turn. The pipeline of recommendation of Judges has to be kept flowing so as to cover vacancies.

25. Once the recommendation is made, opinions of State Governments are solicited as also the input from the Intelligence Bureau ("IB"). The recommendations are then processed by the Central Government in all manners, before they are put up to the collegium of the Supreme Court of India. This is another area of some concern as there have been many cases which have remained pending for long periods of time - though in view of certain queries posed in these judicial proceedings, the situation has now improved. We may only say that in normal circumstances, the total time period before names are forwarded to the Supreme Court collegium should not exceed four months after the recommendations are made by the collegium of the High Court.

26. The Supreme Court collegium, which is the first three judges, thereafter bestows its consideration on these names after obtaining the opinions of the consultee judges. Those names which find approval of the collegium are then recommended for appointment to the Union of India. At that stage, the Government either proceeds to appoint the judges or it may have some reservations, in which case it would be within their right to return the recommendations with the reservations they have over the appointment. On reconsideration, if the recommendation is reiterated, in terms of the prevalent legal position, the appointment has to be made. The delays in this is a matter of concern as the recommendation of the collegium should not remain pending for a long period of time. The aforesaid process should be completed at the earliest. We may note that in some of the courts it is a challenge to persuade competent and senior lawyers who may have large practices to accept the position of the judge, and the pendency of their names for a long period of time does little to encourage them.

27. The fact remains that the aforesaid process has not resulted in filling up of vacancies for many years. It is not as if the vacant posts are a small fraction, as we have noticed that they have been hovering around the figure of 40% vacancies.

28. Having sketched out the aforesaid process, two questions arise :

    1) how to make this process more efficacious; and

    2) till the vacancies are filled up, what is it that can support a quicker adjudicatory process?

29. The latter undoubtedly requires more number of judges and thus the present debate has arisen for the purposes of utilization of the existing Article 224A of the Constitution to appoint ad hoc judges in the context of a large number of existing vacancies and pending arrears.

Memorandum of Procedure:

30. The Union of India vide additional affidavit dated 13.04.2021 had placed before us a Memorandum of Procedure ("MoP"), which was prepared in the year 1998 in pursuance to the judgment of the Supreme Court in ***Supreme Court Advocate-on-Record Association v. Union of India***[8] **(Second Judges case)** read with

8 (1993) 4 SCC 441

the advisory opinion rendered in ***Special Reference No.1/1998***[9] for "attendance of retired Judges at sittings of High Courts." It is the say of the Union of India that the appointment of retired Judges under Article 224A should be a collaborative process between the Executive and the Judiciary and the procedure prescribed in para 24 may be followed till it is amended. The relevant paragraph of the MoP reads as under:

"24. Under Article 224A of the Constitution, the Chief Justice of a High Court may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that court or of any other High Court to sit and act as a Judge of the High Court of that State. Whenever, the necessity for such an appointment arises, the Chief Justice will after obtaining the consent of the person concerned, communicate to the Chief Minister of the State the name of the retired Judge and the period for which he will be required to sit and act as Judge of the High Court. The Chief Minister will, after consultation with the Governor, forward his recommendation to the Union Minister of Law, Justice and Company Affairs. The Union Minister of Law, Justice and Company Affairs would then consult the Chief Justice of India in accordance with the prescribed procedure. On receipt of CJI's advice, the same would be put up to the Prime Minister, who will then advise the President as to the person to be appointed to it and act as a Judge of the High Court. As soon as the President gives his consent to the appointment, the Secretary to the Government of India in the Department of Justice will inform the Chief Justice of the High Court and the Chief Minister(s) and will issue the necessary notification in the Gazette of India."

31. We may notice that the subsequent endeavour to introduce the National Judicial Appointments Commission ('NJAC') through a constitutional amendment could not withstand the constitutional challenge in *Supreme Court Advocates-on-Record Association & Anr. v. Union of India (NJAC case)*[10]. In this, it was observed that the process of amendment of the MoP could be finalised by the Executive in consultation with the Chief Justice of India. In this behalf, the final view of the Judiciary was sent after discussion and

9 (1998) 7 SCC 739
10 (2016) 5 SCC 1

there is no change in the aforesaid. The MoP has been circulated to the Chief Justices of the High Courts.

Law Commission Reports

32. The path we seek to traverse is supported by the Law Commission Reports. In fact, the 124th report of the Law Commission delivered in 1988 dealt with the aspect that a fresh look was required for High Court arrears. In that context, it has been recognized that retired judges have several decades of adjudicatory experience, and their talents could be utilized to dispose of mounting arrears. On account of their experience, they would be quick in disposing cases and being unburdened with administrative or admission work, they could spend their entire time hearing old matters. Thus, the appointment of retired judges as ad-hoc judges was seen as a part of a "multipronged attack" on arrears, and was strongly recommended.

33. This is not a first time that this aspect was noted. The 79th Report of the Law Commission of 1979 had suggested recourse to this Article to sub-serve the said objective. We may, however, notice that in 245th Report of 2014, some concerns were expressed about this process on account of the appointment being for a short period and the accountability in the functioning and performance of ad-hoc judges.

34. We may notice that in the 188th Report of the Law Commission of 2003, that in the interest of clearing arrears in the High Court in various types of cases, including criminal matters, it was felt that it was the need of the hour to make appointments under Article 224A of the Constitution. The concern was to bring the arrears within manageable proportions.

Some other views

35. In the recently published treatise, a view had been expressed that one great advantage of appointing ad-hoc judges under Article 224-A is that it provides for a ready-made pool of known judicial talent which can be relied upon to be competent, clean and efficient. This can be an effective weapon to deal with the disposal of forgotten and pending cases, more so in the context of inordinate delay in fresh judicial appointments.[11]

11 A. M. Singhvi, "Beating the Backlog Reforms in Administration of Justice in India," in S. Khurshid et. al., (eds.) *Judicial Review- Process, Powers, and Problems (Essays in Honour of Upendra Baxi),* (Cambridge University Press 2020), page 53.

36. In the Chief Justices' Conference held on 22nd and 23rd April 2016, a resolution was adopted dealing with filling up of vacancies in High Courts and to address the problem of arrears in criminal and civil cases de hors Article 224A where it was perceived to be a course to follow. The Resolution states as under:

"Resolved further that, keeping in view the large pendency of civil and criminal cases, especially criminal appeals where convicts are in jail and having due regard the recommendation made by the 17th Law Commission of India in 2003, the Chief Justices will actively have regard to the provisions of Article 224A of the Constitution as a source for enhancing the strength of Judges to deal with the backlog of cases for a period of two years or the age of sixty five years, whichever is later until a five plus zero pendency is achieved."

Article 224A earlier recourse:

37. We have already noticed that Article 224A has largely been a dormant provision with only three recorded instances of its invocation. Justice Suraj Bhan of the Madhya Pradesh High Court was appointed as an ad hoc Judge on 23.11.1972 after he had demitted office on 2.2.1971. His appointment was for a period of one year or till the disposal of election petitions entrusted to him, whichever was earlier. Thus, it was with a specific purpose.

38. Justice P. Venugopal of the Madras High Court was a Judge for a short period of less than three years and close to his retirement, he was appointed to a Commission of Inquiry to inquire into certain incidents that took place in Coimbatore town on 23.7.1981 and again appointed to a one-man commission to inquire into incidents of communal riots by order dated 22.3.1982. He was appointed to the post of ad hoc Judge in the year 1982 and yet again his term was renewed for a period of one year from 19.8.1983.

39. Most recently in the year 2007, Justice O.P. Srivastava was appointed as an ad hoc Judge in the Allahabad High Court. He was one of the Members of the Special Bench constituted for hearing of the Ayodhya matter with the avowed object of facilitating continued and continuous hearing of the matter.

The Challenge Ahead:

40. We have little doubt that challenge of mounting arrears and existing vacancies requires recourse to Article 224A of the Constitution to appoint ad-hoc judges which is a ready pool of talent, (of course subject to their concurrence) as a methodology especially for clearing the old cases. The existing strength of permanent and additional judges can be utilized for current and not so old cases. The ad-hoc judges are absolved even from the administrative responsibilities. They can concentrate on old cases which are stuck in the system and may require greater experience. For example, it is often perceived that a Regular Second Appeal is an area of concern and the more experienced judges are able to attend to this area with more promptness.

41. We see no reason why there should be an unending debate of taking recourse to Article 224A when such a provision exists in the Constitution. It should not be made a dead letter, more so when the need is so pressing.

42. We are unable to accept the plea of the learned Attorney General that though the Government of India may not have any in principle opposition to the aforesaid, first the existing vacancies should be filled in. In our view, this would be a self-defeating argument because the very reason why at present Article 224A has been resorted to is non-filling up of vacancies and the mounting arrears. We may, however, hasten to add that the objective is not to appoint ad-hoc judges instead of judges to be appointed to the regular strength of the High Court (apprehension expressed by Mr. Vikas Singh, Senior Counsel, President of the Supreme Court Bar Association). The very provision makes it clear that it does not in any way constrain or limit the regular appointment process and consent of the retired judge is sought to sit and act as a judge of the High Court. One may say that this largely a transitory methodology till all the appointment processes are in place, though that may not be the only reason to take recourse to the aforesaid Article.

43. We also have no doubt that we would not like to encourage an environment where Article 224A is sought as panacea for inaction in making recommendations to the regular appointments. In order to prevent such a situation, we are of the view that certain checks and balances must be provided so that Article 224A can be resorted to

only on the process having being initiated for filling up of the regular vacancies and awaiting their appointments. We are thus of the view that there should not be more than 20% of the vacancies for which no recommendation has been made for this Article to be resorted to. We put this figure not out of the blue but looking to the entire scenario where sometimes it may be difficult to find the requisite talent at a particular stage which may have to await some time period. However, certainly, it cannot be countenanced that no or very few recommendations are made for a large number of vacancies by resorting to Article 224A.

44. We may have to turn to the aspect of the process to be followed for making present appointments. The Constitution of India did not provide for a collegium system. This is an aspect which emerged from the cases of ***SP Gupta v. Union of India***,[12] ***Supreme Court Advocates on Record v. Union of India***,[13]and in ***Re: Special Reference 1 of 1998***[14] and its modified forms has remained in existence since then. The endeavour of the Government to bring in the National Judicial Appointments Commission did not pass the muster of the constitutional mandate and was struck down in ***Supreme Court Advocates-on-Record Association and Anr. v. Union of India***.[15] Thus, the collegium of the Supreme Court has an important role to play in the appointment of judges of the High Court. In the aforesaid conspectus, the exercise by the Chief Justice of the High Court, the authority vested under Article 224A of the Constitution would require a prior consent from the judge concerned, and that recommendation in turn has to be routed through the collegium of the Supreme Court. Of course, the previous consent of the President of India (as advised) is necessary - but looking to the very nature of this appointment, which is of a retired judge who for his judicial appointment has gone through the complete process, time period of maximum three months is more than sufficient to carry the process through all stages. This in turn would be facilitated if the Chief Justice of the High Court takes the initial steps at least three months in advance so that there is no unnecessary delay in this regard.

12 (1982) 2 SCR 365.
13 (1993) 4 SCC 441.
14 AIR 1999 SC 1.
15 2015 11 SCALE 1.

45. We may add here that we are quite conscious of the difference in the manner of appointment of permanent and additional Judges, and ad hoc judges in the High Court. Thus, two scenarios of appointment of Judges arise under Article 217 of the Constitution of India and the appointment has to be by the President by warrant under his hand and seal (Article 224 refers to the appointment of Additional and acting Judges). On the other hand, the appointment of a retired Judge as an ad hoc Judge of the High Court under Article 224A of the Constitution albeit forming part of the same Chapter V of the Constitution of India begins with a non obstante clause and provides for the Chief Justice of a High Court to request any person who has held the office of a Judge of that Court or any other High Court to sit and act as a Judge of the High Court for that State. On the consent of the President being granted, the Secretary in the Government of India, Department of Justice is to inform the Chief Justice of the High Court and to issue necessary notification in the Gazette of India as per the MoP. For clarity we may add that while the judicial pronouncements of the Supreme Court are law declared by this Court under Article 141 of the Constitution of India, the MoP has been framed under an administrative discussion and cannot be said to be law declared by this Court. It can always be varied.

46. In carrying out the aforesaid exercise, the Chief Justice of the High Court would have to bestow his consideration on the aspect as to who would be the suitable judge to be appointed as an ad-hoc judge and what is the time period for which the person has to be so appointed. This in turn will depend on the data of pendency of the different nature of cases, and the expertise of the judge especially in the areas where there is a large volume of pendency - as the objective is to clear the old cases which are stuck in the system. Such consideration of objective criteria becomes necessary to have transparency in the system.

47. In the aforesaid context, we called upon various senior counsels assisting this Court to look into this matter and Mr. Arvind Datar, learned senior counsel to coordinate it so that we can have common suggestions before us to assist us in formulating the modalities for recourse to Article 224A.

48. On the aspect of allowances as admissible to an ad-hoc judge to be determined by the President of India, it is trite to say that despite

the voluntary nature of work no one would like to accept allowances less than what are admissible to a sitting judge. Thus, we are of the view that the same monetary benefits and privileges should be payable/available to an ad-hoc judge as admissible to a judge minus the pension. That can be the only methodology we consider appropriate to follow.

49. A Common theme of the various suggestions placed before us - whether by Mr. Datar, the petitioners or other counsels - is that there is a definitive need for activating the provision. There are differences of perception with respect to different aspects such as, the trigger point to activate the provision, suggestion of an embargo situation, the methodology of appointment, the role of ad hoc Judges, age limit, tenure of appointment, etc. We have, thus, heard learned counsels on these various aspects. A common need has been felt to give guidelines to facilitate some element of uniformity in taking recourse tothis dormant provision. It is also a common ground, with which we agree, that while laying down guidelines, a periodic review of this experiment will be required and there may be occasions to suitably modify the guidelines which we propose to lay down. Thus, it would not be appropriate to close the present proceedings but instead a concept of continuing mandamus would be appropriate in the present proceedings to work out the most effective method of taking recourse to Article 224A of the Constitution.

50. The principle of continuing mandamus forms part of our Constitutional jurisprudence and the term was used for the first time in ***Vineet Narain v. Union of India***[16]. The practice of issuing continuing directions to ensure effective discharge of duties was labelled as a "continuing mandamus". We may note that unlike a writ remedy, a continuing mandamus is an innovative procedure not a substantive one which allows the Court an effective basis to ensure that the fruits of a judgment can be enjoyed by the right-bearers, and its realisation is not hindered by administrative and/or political recalcitrance. It is a means devised to ensure that the administration of justice translates into tangible benefits.

16 (1998) 1 SCC 226

51. We have given deep thought to the slightly different perspectives placed before us by way of affidavits by the different High Courts and Union of India. While emphasising that recourse to Article 224A is the necessity of the day, and without inhibiting the expanse of the powers conferred on the Chief Justice of the High Court as per the Constitution, it would be in the fitness of things to lay down some guidelines for assistance of the Chief Justices of the High Courts and to make the provision a 'live letter'.

52. We have, in this behalf, considered the various aspects touched upon in the additional affidavit of the Union of India dated 13.4.2021. In fact, the response note of Mr. Datar is based on these different parameters and is intended to facilitate a cogent flow to the guidelines sought from us. We may notice that it is a common case that the present proceedings are not adversarial but a method to make the provisions of Article 224A into a practical and working arrangement. We now proceed to issue the guidelines.

Guidelines:

i. Trigger Point for activation:

53. The discretion of the Chief Justice of the High Court under Article 224A is not constrained but as stated, some general guidelines are required to be laid so that power conferred under the said provision is exercised in a transparent manner. The Trigger Point cannot be singular and there can be more than one eventuality where the it arises –

    a. If the vacancies are more than 20% of the sanctioned strength.

    b. The cases in a particular category are pending for over five years.

    c. More than 10% of the backlog of pending cases are over five years old.

    d. The percentage of the rate of disposal is lower than the institution of the cases either in a particular subject matter or generally in the Court.

    e. Even if there are not many old cases pending, but depending on the jurisdiction, a situation of mounting arrears is likely to arise if the rate of disposal is consistently lower than the rate of filing over a period of a year or more.

ii. Embargo Situtation:

54. We have already observed that the recourse to Article 224A is not an alternative to regular appointments. In order to emphasise this aspect, we clarify that if recommendations have not been made for more than 20% of the regular vacancies then the trigger for recourse to Article 224A would not arise.

55. In this behalf we may take note of the data placed before us which would suggest that there are only ten High Courts having fewer than 20% vacancies as on 1.4.2021; seven High Courts having fewer than 10% vacancies in permanent appointments but then there may be additional Judges and there are cases which are in the pipeline. Thus, the parameter we have adopted is that, at least, the recommendations should have been made leaving not more than 20% vacancies in order to take recourse to Article 224A.

iii. Pre-recommendation process:

a. Past performance of recommendees in both quality and quantum of disposal of cases should be factored in for selection as the objective is to clear the backlog.

b. The Chief Justice should prepare a panel of Judges and former Judges. Naturally this will be in respect of Judges on the anvil of retirement and normally Judges who have recently retired preferably within a period of one year. However, there can be situations where the Judge may have retired earlier but his expertise is required in a particular subject matter. There may also be a scenario where the Judge(s) may prefer to take some time off before embarking upon a second innings albeit a short one. In the preparation of panel, in order to take consent and take into account different factors, a personal interaction should be held with the Judge concerned by the Chief Justice of the High Court.

iv. Methodology of Appointment:

56. We have already noticed that para 24 of the MoP lays down a procedure for appointment under Article 224A of the Constitution. We have also noticed that it is not law laid down in this behalf under Article 141 of the Constitution but as a first step it may be more appropriate to follow this procedure laid down in para 24 of the

MoP to see the progress made and impediments, if any. We may, however notice that since the Judges are already appointed to the post through a warrant of appointment, the occasion to refer the matter to the IB or other agencies would not arise in such a case, which would itself shorten the time period.

v. Time to complete the process:

57. The requirement that recommendations should be made six months in advance by the Chief Justice of the High Court emanates from the concept that the said period should be required to complete the process in case of a regular appointment of a Judge under Article 217 or 224 of the Constitution of India. In view of number of aspects not required to be adverted to for appointment under Article 224A we are of the view that a period of about three months should be sufficient to process a recommendation and, thus, ideally a Chief Justice should start the process three months in advance for such appointment.

vi. Tenure of Appointment:

58. The tenure for which an ad hoc Judge is appointed may vary on the basis of the need but suffice to say that in order to give an element of certainty and looking to the purpose for which they are appointed, generally the appointment should be for a period between two to three years.

vii. Number of Appointments:

59. We are also of the view that, at least, for the time being dependent on the strength of the High Court and the problem faced by the Court, the number of ad hoc Judges should be in the range of two to five in a High Court. However, it is clarified that an ad hoc Judge(s) will not be part of the sanctioned strength of Judges of the High Court to which they are appointed.

viii. Role of ad hoc Judges:

60. The primary objective being to deal with long pending arrears, the said objective will be subserved by assigning more than five year old cases to the ad hoc Judges so appointed. However, this would not impinge upon the discretion of the Chief Justice of the High Court, if exigencies so demand for any particular subject matter even to deal with the cases less than five years old, though the primary objective

must be kept in mind. It is further clarified that an ad hoc Judge will not be entrusted any administrative work, as such entrustment will defeat the very purpose of appointment of ad hoc Judge(s), which is to clear the backlog of old cases.

61. One of the issues raised is of constitution of Benches of an ad hoc Judge and sitting Judge in matters to be heard by Division Bench and as to who would preside. We are of the view that the Division Bench, at present, may be constituted only of ad hoc Judges because these are old cases which need to be taken up by them. We also make it clear that because of the very nature of the profile and work to be carried out by ad hoc Judges, it would not be permissible for an ad hoc Judge to perform any other legal work whether it be advisory, of arbitration or appearance.

ix. Emoluments and Allowances:

62. We have already discussed in the substantive part of the order that the emoluments and allowances of an ad hoc Judge should be at par with a permanent Judge of that Court at the relevant stage of time minus the pension. This is necessary to maintain the dignity of the Judge as also in view of the fact that all other legal work has been prohibited by us in terms of the aforesaid guidelines.

63. We also make it clear that emoluments to be paid would be a charge on the Consolidated Fund of India consisting of salary and allowances. We may also clarify that it is a misconceived notion that there will be an additional burden on the State Government if some perquisites are made available to ad hoc Judges by the State Government. The trigger for appointment of ad hoc Judges is the very existence of vacancies and had these vacancies been filled in, the State Government would have incurred these expenses anyhow. In any case there is a limit placed on the number of ad hoc Judges and, thus, the existence of vacancies actually results in the savings for the State Government(s), which would otherwise be amount expended as their allowances and perks.

64. We make it clear that when we refer to allowance/perks/perquisites all benefits as are admissible to the permanent/additional Judge(s) would be given to the ad hoc Judge(s). For clarity we may say that as far as housing accommodation is concerned, either the rent-free accommodation should be made available or the housing allowance

should be provided on the same terms and conditions. For all practical purposes the ad hoc Judge would receive the same emoluments, allowances and benefits as are admissible to the permanent/ additional Judges. We may note that the Second Schedule, Part D of the Constitution of India stipulates the emoluments and benefits that have to be conferred on the judges of the Supreme Court and of the High Courts.

Conclusion:

65. We have taken the first step with the hope and aspiration that all concerned would cooperate and retiring/retired Judges would come forth and offer their services in the larger interest of the Judiciary. The guidelines cannot be exhaustive and that too at this stage. If problems arise, we will endeavour to iron them out. We must set aside apprehensions, if any, to chart this course and we are confident that there will be a way forward.

66. In view of the requirements of a continuous mandamus to see how a beginning has been made, list after four months calling upon the Ministry of Justice to file a report in respect of the progress made.

Headnotes prepared by: Nidhi Jain

Result of the case: Directions issued.