

SUPREME COURT OF INDIA

Supreme Court Advocates-on-Record

Association & Ors.

Vs.

Union of India

W.P.(Civil)No.13of 2015

(Jagdish Singh Khehar, Jasti. Chelameswar Madan B.Lokur, JJ. Kurian Joseph and Adarsh Kumar Goel, JJ.)

16.12.2015

ORDER

Jagdish Singh Khehar,J

1. The adjudication on the merits of the controversy, raised in this batch of Cases, was rendered on 16th October, 2015, wherein a separate “Order of the Court” was also recorded. In paragraph 5 of the Order of the Court, it was decided to consider the incorporation of additional appropriate measures, if any, for an improved working of the “collegiums system”. For the above purpose, hearing was fixed for (and commenced on) 3rd November, 2015. Mr. Mukul Rohatgi learned Attorney General for India, preferred written suggestions and supplemented them with oral submissions. Likewise, other learned senior counsels were also heard and they too presented their views. Submissions were advanced freely, solely with the objective of introducing measures in the prevailing “collegiums system” of appointment of Judges to the higher judiciary, which in the perception of the concerned learned counsel, would improve the working of the system.

2. From the first hearing itself, it emerged that the suggestions were on diverse issues. A few suggestions, though honestly and meaningfully expressed, contained diametrically opposite recommendations. It was therefore felt that the suggestions received should be compiled in an orderly manner so as to enable all concerned stakeholders to have a bird’s eye view of the same, thereby possibly making the debate thereon more judicious. Accordingly, on the nomination by the learned Attorney General, of Mrs. Pinki Anand, Additional Solicitor General, and on the unanimous endorsement of all the learned counsel representing the petitioners, of Mr. Arvind P. Datar, Senior Advocate, a two- member committee was constituted. The committee was

requested to make a compilation of the suggestions received up to 4th November, 2015. The above Committee presented the compilation on 5th November, 2015.

3. After hearing the Chairman of the Bar Council of India and learned counsel some of whom had travelled from distant States, it was felt that a further opportunity should be afforded to the stakeholders to furnish their valuable contributions on the matter. It is therefore, that the following order came to be passed on 5th November, 2015:

“Mrs. Pinky Anand, learned Additional Solicitor General, and Mr. Arvind Datar, learned Senior Advocate have made a compilation of suggestions received up to 23.45 hours on 4.11.2015, in furtherance of our motion Bench order dated 3.11.2015. A large number of learned counsels have even today prayed for further time to make suggestions. They have also requested for time on behalf of private individuals for the same purpose. The Chairman of the Bar Council of India has also made a prayer that the Bar Council of India which is the apex body of all the State Bar Councils, be permitted to gather suggestions from all stake holders, and submit such of the suggestions as it approves, for consideration by this Court. The learned Attorney General for India has volunteered to facilitate the prayer made by the learned counsel, by web-hosting the compilation made by the Additional Solicitor General and the learned Senior Counsel referred to above, on the web site of the Department of Justice, Ministry of Law and Justice, New Delhi, and also, to issue a public notice in the media seeking suggestions from all those who may desire to make contribution by 17.00 hours on 13.11.2015 (up to 14.11.2015 by the Bar Council of India). Suggestions may be made in the four categories, i.e., Transparency, Collegiums Secretariat, Eligibility Criteria and Complaints. We appreciate the efforts made by the learned Attorney General for India. He may web-host the compilation and issues a WP(C) No.13/15 etc.etc. 8 public notices. Likewise, all those who desire to make suggestions may do so directly, on the website of the Department of Justice, Ministry of Law & Justice, and New Delhi. Suggestions received by 17.00 hours on 13.11.2015 shall be entertained. No further suggestions will be entertained. All such suggestions will be forwarded by the Department of Justice to the learned counsel who had assisted this Court in the previous compilation, for incorporating additional suggestions in the earlier compilation, for consideration. List on 18.11.2015 for hearing. Hearing shall be limited to two days and will conclude on 19.11.2015. Hearing shall be limited to such of the counsel who are short-listed and allowed time by a Committee comprising of learned Attorney General for India, the Chairman, Bar Council of India, and Mr. Fali S. Nariman, learned Senior Advocate. No other counsel shall be heard.”

4. During the resumed hearing, all those who desired to address the Court were afforded an opportunity of being heard. After all, this assistance to the Bench was being rendered pro bono public, in the interest of the judiciary as an institution, as well as for and on behalf of all stakeholders.

5. It is important to note that the compilation of the written suggestions placed before us was in the nature of a summary prepared out of approximately 11,500 pages of views expressed. We had a very challenging responsibility to embark upon and reflect, and thereafter, to sieve such of the suggestions as were likely to improve the “collegiums system”. Only then would we be in a position to sponsor their introduction into the Memorandum of Procedure for the appointment of Judges of the higher judiciary.

6. Even though the task seemed to be daunting, we felt obliged to take up the responsibility, as it was after all, for an improvement of the judicial system and such an opportunity must not be lost. It was at this stage of our reflection, that the learned Attorney General made an impassioned submission, not in any obstructive manner, but as a matter of faithful assistance, suggesting that we should desist from pursuing the contemplated course of action. In this behalf it was pointed out, that the formulation of the Memorandum of Procedure was an administrative responsibility which fell in the executive domain. It was submitted that this Court neither had the expertise nor the wherewithal for proposing amendments in the existing Memorandum of Procedure (drawn on 30th June, 1999 by the Government of India), for improving the collegiums system. The learned Attorney General in his submission candidly invited our attention to the following observations recorded in paragraph 478 of the Second Judges case.

“478(13) On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be, copies thereof should be sent simultaneously to all the other constitutional functionaries involved. Within the period of six weeks from receipt of the same, the other functionaries must convey their opinion to the Chief Justice of India. In case any such functionary disagrees, it should convey its disagreement within that period to the others. The others, if they change their earlier opinion, must, within a further period of six weeks, so convey it to the Chief Justice of India. The Chief Justice of India would then form his final opinion and convey it to the President within four weeks, for final action to be taken. It is appropriate that a memorandum of procedure be issued by the Government of India to this effect, after consulting the Chief Justice of India, and with the modifications, if any, suggested by the Chief Justice of India to effectuate the purpose”

7. It was submitted that even the nine-Judge Bench had left the task of drawing up the Memorandum of Procedure to the Government of India. It was the further submission of the learned Attorney General that the views expressed by this Court, while disposing of the main controversy would enable the Government of India, to introduce amendments and to redraw the existing Memorandum of Procedure with the object of considering the criteria/benchmark for the appointment of Judges of the higher Judiciary, including widening the zone of consideration; to introduce transparency in the matter of appointment of Judges to the higher judiciary, as would be appropriate, keeping in mind the sensitivity of the issue; to make the present procedure broad based, by introducing supporting measures, whereby candidates can be screened and evaluated,

and complaints against them are evaluated through a Secretariat constituted for the said purpose, under the control of the Chief Justice of India, as supplemental (and not as a substitute) to the process contemplated through the Second Judges case and the Third Judges case¹ as well as our judgment on merits in the present batch of cases.

8. We may also record, that the introduction of the above changes referred to in the preceding paragraph, are broadly in tune with the majority of the suggestions. These were also referred to by us by the committee under the category of “transparency”, “secretariat”, “eligibility criteria” and “complaints”, in our order dated 5th November, 2015.

9. During the course of hearing, we were also informed by the learned Attorney General, that the Memorandum of Procedure and introducing amendments therein had always been prepared by the Government of India in consultation with the President of India and the Chief Justice of India. This practice, we were informed, had been consistently adopted, in consonance with 2 Special Reference No. 1 of ¹the directions contained in paragraph 478 of the Second Judges case. In order to allay any fear that may be entertained by any of the stakeholders, it was submitted that the same procedure would be adopted now, if the task was entrusted to the executive. We are in complete agreement with the suggestion of the learned Attorney General.

10. In view of the above, the Government of India may finalize the existing Memorandum of Procedure by supplementing it in consultation with the Chief Justice of India. The Chief Justice of India will take a decision based on the unanimous view of the collegiums comprising the four senior most puisne Judges of the Supreme Court. They shall take the following factors into consideration: Eligibility criteria. The Memorandum of Procedure may indicate the eligibility criteria, such as the minimum age, for the guidance of the collegiums (both at the level of the High Court and the Supreme Court) for appointment of Judges, after inviting and taking into consideration the views of the State Government and the Government of India (as the case may be) from time to time. Transparency in the appointment process. The eligibility criteria and the procedure as detailed in the Memorandum of Procedure for the appointment of Judges ought to be made available on the website of the Court concerned and on the website of the Department of Justice of the Government of India. The Memorandum of Procedure may provide for an appropriate procedure for minting the discussions including recording the dissenting opinion of the Judges in the collegiums while making provision for the confidentiality of the minutes consistent with the requirement of transparency in the system of appointment of Judges. Secretariat In the interest of better management of the system of appointment of Judges, the Memorandum of Procedure may provide for the establishment of a Secretariat for each High Court and the Supreme Court and prescribe its functions, duties and responsibilities. Complaints. The Memorandum of Procedure may provide for an appropriate mechanism and procedure for dealing with complaints against anyone who is being considered for appointment as a Judge. Miscellaneous. The Memorandum of Procedure may provide for any other matter considered appropriate for ensuring transparency and accountability including interaction with the recommended(s) by the collegiums of the Supreme Court, without sacrificing the confidentiality

of the appointment process.

11. It is made clear that the guidelines mentioned above are only broad suggestions for consideration and supplementing the Memorandum of Procedure for the faithful implementation of the principles laid down in the Second Judges case and the Third Judges case.

12. In view of the above, all matters having been collectively heard are disposed of.

Judgment Referred

¹(1998) 7 SCC 739