

CASE COMMENT: SUPREME COURT ADVOCATES ON-RECORD ASSN. V. UNION OF INDIA 2016

Written by *Rohan Naik*

2nd Year BBA LLB Student, School of Law, Christ (Deemed to be University)

Facts:

The case Supreme Court Advocates on-record Association & Anr. v. Union of India was a 2016 judgement which dealt with the 99th Amendment, where the court declared the Constitution (ninety-ninth amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 as unconstitutional.

Background:

The debate on appointment of judges was debated and discussed in the Three Judges Cases. In **The First Judges' Case**, i.e. **S.P. Gupta v. Union of India**, the court, with majority held that the consultation of the Chief Justice was nothing more than a suggestion and not a selection. The executive had the ultimate power to select and appoint judges but was not restricted from taking into consideration the Chief Justice's suggestion. This decision was viewed and was adhered to the literal interpretation of constitutional provisions. This decision was widely perceived as failing to secure the judicial independence. This also seemed to safeguard the privacy of the Executive.

In the **Supreme Court Advocates on-records Association v. Union of India, The Second Judges' Case**, the court overruled the judgment of the First Judges Case and established a collegium system consisting of the Chief Justice of India accompanied by the senior most judges of the Supreme Court as the local body for appointment of judges. This was held after finding out the need for vesting the Chief Justice of India with the power and primary importance in the appointment process. This is the case where the collegium system of appointment of judges came into existence.

The working of the judicial system in aspect of appointment of judges was still unclear. This was cleared in **Special Reference No.1 of 1998, The Third Judges' Case**. It was held that the Chief Justice of India was to consult with four senior most colleagues for Supreme Court appointments and two senior most colleagues for High Court appointments. Though normally the formal warrant of appointment would continue to be issued by the President, these decision ensured that the substantive power lay in the hands of the judicial collegium, ostensibly to safeguard the judicial independence.

Analysis:

The judgement given by the courts in the Three Judges' Cases and in the present case was criticized by many as judges appointing themselves. The collegium comprises of four senior most judges in the Supreme Court and the Chief Justice of India and three more senior most judges in a particular high court including its chief justice¹. Nowhere in the document of the Constitution can one find the basis for the existence of the collegium system, in fact the word 'collegium' itself be found.

Justice Ruma Pal has rightly remarked that the process of appointments of judges to the superior courts is the best kept secret in the country². This type of process was implemented for the sole purpose of separating the judiciary from the executive and to restrict the interference of the political influences. In the words of Justice Krishna Iyer: "There is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made, and a sort of anarchy prevails."

The NJAC³ had a refined procedure wherein the judges were appointed by the executive but the names were recommended by the NJAC. The Supreme Court, especially the Chief Justice of India was not given judicial independency in this aspect. By the order of the present case, the NJAC Act, 2014 and the 99th Constitutional Amendment was declared void and unconstitutional.

¹ Ashish Tripathi, 'Has collegium system of judges' appointment outlived its utility?' (deccanherald.com 2014) <<http://www.deccanherald.com/content/155018/has-collegium-system-judges-appointment.html>>

² Rudrika Sharma, 'The Collegium System Versus the Judicial Appointments Commission Bill' (legalindia.in 2013) <<http://www.legalindia.in/the-collegium-system-versus-the-judicial-appointments-commission-bill>>

³ National Judicial Appointment Commission was functioning under the National Judicial Appointment Commission Act, 2014 where the process of appointment of judges was administered and both the Judiciary and the Executive were involved

1. The court was very conservative in this matter as the NJAC was the reason for Article 124-A where the NJAC was consisted of
 - Chief Justice of India (Chairperson)
 - Two senior most Supreme Court Judges next to the Chief Justice of India
 - The Union Minister of Law and Justice
 - Two eminent persons (to be nominated by a committee consisting of the Chief Justice of India, Prime Minister of India and the Leader of Opposition in the Lok Sabha or the leader of the single largest opposition party in the House where there is no such Leader of Opposition)

Of the two eminent persons, one person would be from the SC/ST/OBC/minority communities or be a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.

This committee was to recommend the judges apt for appointment⁴ and the President would appoint him/her as the judge of a High Court or the Supreme Court. Under Article 124B, nowhere is the word suggestion written. A recommendation is always made for the best of the candidate and as there are many members in the NJAC, the candidate recommended will be worthy from different points of view.

From a layman's perspective, the NJAC was a just recommender for appointment of judges without any bias. The court's decision shows the court's vulnerability towards separation of powers. The court's decision clearly shows that the court is hungry for judicial independency, that the court wants to decide who is fit to be a judge. The Chief Justice of India wants the powers to appoint judges and also transfer judges. This leaves a vulnerable spot in the procedure and its administration as this gives a chance for corruption.

2. The decision of the court invalidates the provision of Article 124A and 124B and also changes the wording from 'National Judicial Appointments Commission' to 'Chief Justice of India' as the decision un-constitutionalizes the 99th Amendment Act. The challenge to the amendment is principally on the ground that such substitution

⁴ Article 124B of the Constitution of India

undermines the independence of the judiciary. It is contended that independence of judiciary is a part of the basic structure of the Constitution and the amendment is subversive of such independence. Hence, it is beyond the competence of the Parliament in view of the law declared by the Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another*, (1973) 4 SCC 225⁵

The reasoning of the court is in persistence with the previous reasoning of the courts in the Second⁶ and the Third Judges' Case⁷ where they reasoned as follows:

“Thus on the question of primacy I conclude to say that the role of the Chief Justice of India in the matter of appointments to the Judges of the Supreme Court is unique, singular and primal, but participatory vis-a-vis the Executive on a level of togetherness and mutuality, and neither he nor the Executive can push through an appointment in derogation of the wishes of the other. S.P. Gupta's case to that extent need be and is hereby explained away restoring the primacy of the Chief Justice. The roles of the Chief Justice of India and Chief Justice of the High Court in the matter of appointments of Judges of the High Court, is relative to this extent that should the Chief Justice of India be in disagreement with the proposal, the Executive cannot prefer the views of the Chief Justice of the High Court in making the appointment over and above those of the Chief Justice of India. In the matters of transfers of Judges from one High Court to another, the role of the Chief Justice of India is primal in nature and the Executive has a minimal, if not, no say in the matter, for consultation envisaged under Article 222 of the Constitution is used in a shrunk form and more as a courtesy, the subject being one relating to the in- working of the judiciary.⁸”

Conclusion:

Throughout the series of petitions and particularly in this case, the Supreme Court proved that the Courts are waiting for absolute independence. They want to decide who becomes a judge irrespective of their qualifications; they want clear distinguishing in the separation of powers; and they want the power to control the whole of judiciary with minimal

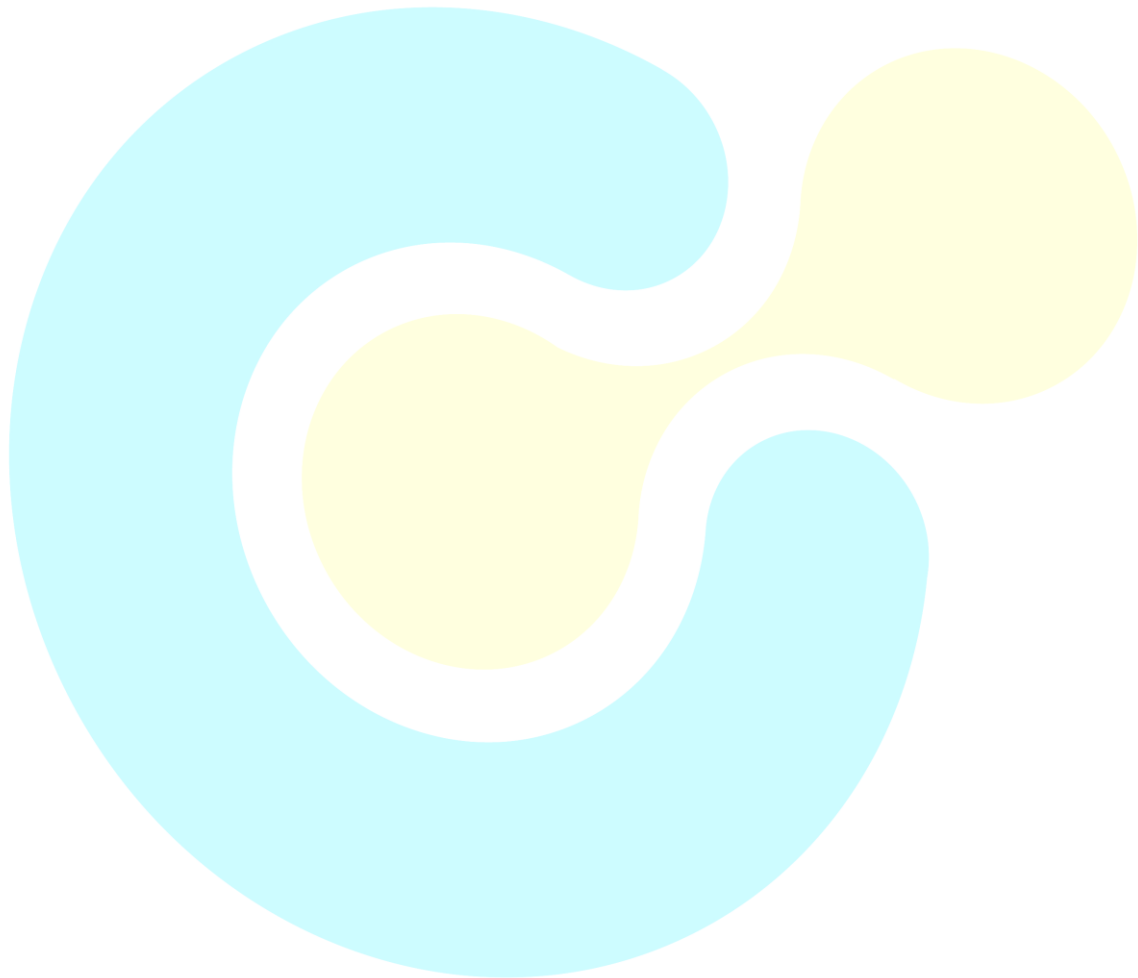
⁵ *Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another*, (1973) 4 SCC 225

⁶ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441

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

⁸ *Supreme Court Advocates-on-Record Assn. v. Union of India* MANU/SC/0073/1994 : (1993) 4 SCC 441

interference. This shows that the courts do not want any transparency which is not possible as this leads to corruption and conspiracies⁹. Even if the court wanted independency, it was unnecessary to invalidate the NJAC. Thus this shows that the Court's selfish and personal requirements are hindering the judicial functioning and the justice it is to provide.



⁹ Supreme Court of India v. Subhash Chandra Agrawal, (2011) 1 SCC 496