REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7360 OF 2008

N. Kannadasan ….. Appellant

Versus

Ajoy Khose and others …. Respondents

WITH
CIVIL APPEAL NO. 7368 OF 2008

N. Kannadasan ….. Appellant

Versus

Anna Mathew and others …. Respondents

WITH
CIVIL APPEAL NO. 7371 OF 2008

Government of Tamil Nadu rep. by its Secretary ….. Appellant

Versus

Ajoy Khose and others …. Respondents

AND
CIVIL APPEAL NO. 7372 OF 2008

Government of Tamil Nadu rep. by its Secretary ….. Appellant

Versus

Anna Mathew and others …. Respondents

J U D G M E N T

S.B. SINHA, J.

INTRODUCTION

Justiciability of the recommendations of the Chief Justice of Madras High Court for appointment of Shri N. Kannadasan (the appellant) as the President of the State Consumer Disputes Redressal Commission ('the Commission') in terms of Section 16 of the Consumers Protection Act, 1986 ('the Act') is the question involved herein.

BACKGROUND FACTS :

The said question arises in the following factual matrix.

The appellant was an Advocate practicing in the Madras High Court. He was appointed as an Additional Judge of the said Court for a period of two years on or about 6th November, 2003. During his tenure as an Additional Judge a representation was made from the Members of the Bar alleging lack of probity against him inter alia contending :

(A) (i) several orders had been passed by him granting bail in Narcotic Drugs and Psychotropic Substances

(NDPS) matters in contravention of the mandate laid down in Section 37 of the NDPS Act despite the refusal of bail on earlier occasions either by him or by other Judges ;

(ii) bail granted by him had subsequently been cancelled by other Judges ;

(iii) Abuse of office to work the judicial system to his own benefit through his former juniors

(B) Adverse reports from intelligence agencies.

Indisputably he was not appointed as a Permanent Judge as a result whereof demitted his office on 5th November, 2005. He resumed practice in Madras High Court. On a query made by the High Court as to whether the appellant was entitled to pensionary and other benefits, the Government of India by its letter dated 29th March, 2007 replied that he be treated at par with the retired Judges of the High Court for the purposes of obtaining medical benefits but would not be entitled to any pensionary benefits.

In the meantime on or about 6th November, 2006 he was appointed as an Additional Advocate General of the State of Madras. Appellant intended to have his name included in the list of retired Judges wherefor he wrote a

letter to the Registrar General of the Madras High Court on 24th May, 2008. Indisputably his name was included in the said list by a Resolution adopted in that behalf by the Full Court on 11th July, 2008.

PROCEEDINGS FOR APPOINTEMNT

Before the post of President of the Commission fell vacant, the Government of Tamil Nadu by a letter dated 30th May, 2008 requested the Registrar General of the High Court to forward names of eligible candidates for appointment as President of the Commission. The said post, however, fell vacant only on 5th July, 2008.

A note prepared by the Registry of the said Court as contained in Roc.341/2008 dated 14th July, 2008 refers to the letter of the Government dated 30th May, 2008.

Upon quoting Section 16 of the Act, it proceeds as follows:

> "In view of the above, if your Lordship is so pleased, willingness may be called for from the Hon'ble judges retired in or after the year 2006, so that, if appointed they may have a tenure of not less than 2-1/2 years.
>
> It is further submitted that the Hon'ble Thiru Justice N. KANNADASAN, Former Judge, who has completed 2 years of service as Additional Judge, High Court of Madras ceased to hold the Office on and from 06.11.2005. His Lordship's date of birth is 15.11.1955.

Further, it is submitted that the Hon'ble Thiru Justice N. KANNADASAN, Former Additional Judge, High Court, Madras and now Additional Advocate General has addressed a letter to the Registry in connection with the inclusion of His Lordship's name in the category of Retired/Former Judge etc.

As directed by your Lordship, the said matter was placed before the full court which was held on 11th July, 2008 and minuted as follows:

> Considered the representation of Hon'ble Thiru Justice N. KANNADASAN, Former Judge of the High Court in the light of the communication of Ministry of Law and Justice, Government of India dated 29.03.2007.

Discussed the matter

It is resolved that the name of Hon'ble Thiru Justice N. KANNADASAN be included as one of the Retired Judges of the High Court in the records of this Registry.

Further, it is submitted that the list of Hon'ble Judges, retired during 2006 and 2007 is submitted below 2006:

1. Hon'ble Thiru Justice T.V. MASILAMANI (Chairman DRAT) - 29.05.2006 Chairman, DRAT
2. Hon'ble Thiru Justice A.R. RAMALINGAM - 12.11.2006

- 2007

1.Hon'ble Thiru Justice M. HANIKACHALAM, (Admission Committee) - 07.03.07
2. Hon'ble Thiru Justice J.A.K. SAMPATHKUMAR (Chairman, Human Rights Commission, Puducherry) - 05.05.2007

3.Hon'ble Thiru Justice R. BALASUBRAMANIAN
(Advisor, State Legal Services Authority)
- 15.08.2007
4. Hon'ble Thiru Justice N. KANNADASAN
(D.O.B. - 15.11.1955) - 05.11.2005

The term of Office of the President of the State Consumer Dispute Redresssal Commission will be 5 years or up to the age of 67 years.

In this connection, it is respectfully submitted for consideration and orders.

Whether:-

the list of retired Hon'ble Judges except Hon'ble Thiru Justice T.V. MASILAMANI (Chairman DRAT) and including N. Kannadasdan, Former Additional Judge may be forwarded to the Government, for consideration for the post of President of State Consumer Dispute Redressal Commission.

Sd/- SO J Sd/-
14.07.2008 15.06.2008 Regr A

I send the panel of three retired Judges of this Hon'ble Court

1. Justice A.R. Ramalingam
2. Justice M. Thanikachalam
3. Justice N. KANNADASAN

Sd/- CJ
16.06.2008"

The Government of Tamil Nadu appointed Shri Kannadasan as the president of the Commission by issuing G.O. Ms. No.144 on 26th July, 2008.

WRIT PROCEEDINGS

Three writ petitions were filed by some Legal Practioners before the Madras High Court.

Writ Petition No.18731 of 2008 was filed by one Anna Mathew and ten others for issuance of writ of Quo Warranto against Shri Kannadasan requiring him to show the authority to hold the office of President of the Commission and consequently declaring G.O. Ms. No. 144 of 26th July, 2008 as illegal and unconstitutional.

Writ Petition No.21495 was filed by one R. Jaikumar and seven others for issuance of writ of declaration to declare that the decision taken by the Full Court of the Madras High Court in July, 2008 to treat Sh. Kannadasan as a retired judge is unconstitutional and non-est in law.

Writ Petition No.21504 of 2008 was filed by Ajoy Khose and three others for issuance of a writ of declaration declaring G.O. Ms. No.144 dated 26th July, 2008 issued by the Government of Taml Nadu as illegal and ultra vires of the Constitution of India.

The Chief Justice of the High Court initially was impleaded as a party in the said proceedings but later on his name was deleted.

By reason of the impugned judgment dated December 12, 2008 Writ Petition Nos. 18731 of 2008 and 21504 of 2008 have been allowed while Writ Petition No. 21495 of 2008 has been dismissed.

Before the High Court averments touching upon the lack of integrity and honesty on the part of the appellant were made by the writ petitioners. The High Court, however, did not think it necessary to consider them in detail.

QUESTIONS BEFORE THE HIGH COURT :

Before the High Court, the writ petitioners-respondents raised the following questions :-

> "i) Whether the earlier recommendations of the Constitutional functionaries under Article 217, viz. the Chief Justice of the High Court and the Chief Justice of India and the Collegium of the Supreme Court and of the Central Government that a person should not be considered as a Judge on grounds of unsuitability and as being public interest, are not vital and decisive considerations that should weigh with the Chief Justice of the High Court in considering the same person for appointment to any judicial office under the Consumer Protection Act, 1986 or any other similar offices in other Tribunals & Commissions ?

ii) Since an independent and fair judiciary is part of the basic structure of the Constitution of India, can a person found wanting in the necessary intellectual and moral requirements to be a Judge, be considered again for any other judicial office ?

iii) If the Government considers and appoints such a person to any judicial office, would it not amount to interfering with the independence of the judiciary contrary to Article 50 of the Constitution of India ?

iv) Whether the expression "is or has been a Judge of the High Court" in Section 16 would include even a Judge, who had demitted office on account of impeachment or unsuitability to hold a judicial office ?

v) Whether an Additional Judge can be considered as a retired Judge to be eligible for appointment to judicial offices in various Tribunals and Commissions ?"

The High Court inter alia formulated the following three questions for its consideration :-

"(1) Whether Respondent No. 1 was ineligible to be appointed as the President of the State Consumer Disputes Redressal Commission?

(2) Whether the requirement of consultation with the Honourable the Chief Justice had been fulfilled ?

(3) Whether the appointment of Respondent No. 1 can be declared illegal and invalid on the ground that such appointment was against public interest?

FINDINGS OF THE HIGH COURT

Re : Question No.1

Upon considering a few decisions of this Court as also the provisions of the Constitution of India vis-à-vis Section 16 of the Act, the High Court held that having regard to the fact that an additional judge appointed for a period of two years can revert back to practice and would be entitled to appear before any court of law including the lower courts, there existed a distinction between a Permanent Judge and an Additional Judge. Section 16 of the Act requires that the President of the Commission, be a person 'who is or has been a judge' and accordingly an additional judge who has demitted office being not a retired judge, could not have been appointed. Although a literal interpretation having regard to the decision of this Court S.P. Gupta v. Union of India, [(1981) Supp. SCC 87] may lead to the conclusion that an additional judge would be deemed to be a judge of the High Court for all purposes, in a case of the nature before it, the principle of purposive interpretation should be applied as it would indeed be a travesty of all canons of principles of jurisprudence if it is held, by adopting a cussedly narrow literal interpretation, that a person who was found by the appropriate Constitutional functionaries, which includes the Chief Justice of the High Court and the Collegium of the Supreme Court, unsuitable to be continued

as an additional Judge yesterday, is eligible today for being appointed as ad-hoc Judge, for which only a retired Judge is eligible, on the specious plea, that the person "has held the office of a Judge".

Re :- Question No.2

The High Court noticed that no affidavit has been filed by the Chief Justice of the High Court or on his behalf. Upon taking into consideration the correspondences entered into by and between the State and the Registry leading to the sending of the panel by the Chief Justice, it was held :-

> "78. Judged in the light of the discussion made earlier, the inevitable conclusion is that there has not been any effective consultation mainly on account of the fact that the Consultee, namely, the Honourable the Chief Justice has recommended the name of Respondent No. 1 without at all considering the background as available in the High Court records regarding the circumstances under which there was no extension of the term of Respondent No. 1. It is no doubt true that this Court is neither required nor expected to consider the desirability of a person to be appointed for a particular post as that is a matter for the authorities concerned; (in this case the State Government and the Honourable the Chief Justice) to consider. But, where a decision itself is thickly clouded by non-consideration of the most relevant and vital aspect, the ultimate appointment is vitiated not because the appointee is not desirable or otherwise, but because mandatory statutory requirement of consultation has not been rendered effectively and meaningfully. Therefore, even assuming that Respondent No. 1 was theoretically eligible for

being considered, the process of consultation having been vitiated, the ultimate order is also vulnerable."

Re : Question No.3

The records produced by the Additional Solicitor General appearing for the Central Government and the learned counsel for the High Court, despite the fact that no privilege had been claimed, the High Court did not think it fit to permit the counsel for the contesting parties to peruse the same as in its opinion it would open a collateral battle on the question relating to confirmation of Shri Kannadasan which was not and could not be an issue. It was opined :

(A) Indisputably the allegations made in the said writ petitions that Shri Kannadasan is not entitled to be considered for the post of the chairman of the commission would have to be accepted; his tenure as additional judge and/or appointed as a permanent judge, having not been confirmed, on the basis of the allegations touching upon his integrity and honestly.

(B) An additional judge who had demitted the office on the expiry of the term being not a permanent judge was ineligible for appointment in terms of Section 16 of the Act.

(C) The recommendations. made by the Chief Justice of the High Court is vitiated in law as before him all the relevant records relating to his non-appointment as permanent judge and demission of office were not placed and thus the decision making process became vitiated.

On the basis of the said findings, Writ Petition No.18731 of 2008 and Writ Petition No.21504 of 2008 were allowed.

Writ Petition No.l2149 of 2008 for a declaration that the Full Court Reference dated 11.07.2008 was unconstitutional was, however, dismissed.

Government of Tamil Nadu and Shri Kannadasan are before us in these four appeals.

SUBMISSIONS

Mr. K.K. Venugopal and Mr. U.U. Lalit, learned senior counsel appearing for the appellants, inter alia, would contend :-

1. Having regard to the constitutional scheme contained in Articles 216 to 224A of the Constitution of India, a permanent judge as also an additional judge would be a judge for all purposes including power; salary; remuneration; judicial functions; control over the subordinate judiciary etc.

2. An Additional Judge does not cease to be a judge of the High Court only because he was not re-appointed as a Permanent Judge thereof.

3. As an Additional Judge of a High Court is not appointed on probation, the High Court committed a serious error in applying in the theory of 'confirmation in service' which is foreign to the concept of appointment and status of a High Court judge.

4. A writ of Quo Warranto could be issued only when a candidate does not specify the requisite eligibility criterion specified in the statute.

5. Suitability or otherwise of a candidate appointed by the State in exercise of its statutory power cannot be a subject matter of judicial review, far less for the purpose of issuance of a writ of quo warraanto.

6. The consultative process having been initiated by the Chief Justice of the High Court by recommending a panel of 3 names, the State was within its right to select any one of them as President of the Commission. Recommendations of the Chief Justice of the High Court for appointment to a statutory post being discretionary and based on his subjective satisfaction, the High Court committed a serious error in opining that the Chief Justice should have called for the records/files leading to Shri Kannadasan's non-appointment as a permanent judge.

7. The High Court itself having held that the records produced by the High Court and/or the State could not have been shown to the writ petitioners as the suitability of Shri Kannadasan was not justiciable, committed a serious error in arriving at a different conclusion in regard to his eligibility in terms of the Constitution of India as also the 1984 Act relying on or on the basis of the purported records of his suitability.

Mr. Anil Diwan, learned senior counsel appearing on behalf of the writ petitioners-respondents, on the other hand, urged :-

i) The constitutional provisions make a distinction between a permanent judge and an additional judge who had not been made permanent for one reason or the other.

ii) Section 16 of the Act while using the terms "is" or "has been a judge" could not have included within is purview an advocate who has been appointed only for two years and was not found fit for appointment as a permanent judge in view of the fact that independence and impartiality of the judiciary plays an important role in the matter of discharge of judicial functions.

iii) The State Commission being a judicial body and the eligibility criteria having been laid down in the Act, the Chief Justice of the

High Court was obligated to take into consideration the past conduct, as also general reputation of the recommendee.

iv) Only because a name of a judge has been included in the capacity as a retired judge and is entitled to medical benefits the same by itself would not be sufficient to answer the description of 'has been a judge' within the meaning of the provisions of Section 16 of the Act.

v) While taking an important decision like recommending the name of a retired judge who was not found fit to occupy the post of a permanent Judge, the Chief Justice was bound to take into consideration all relevant factors including the question of honesty and integrity of a judge; which being a relevant statutory requirement, would determine the eligibility criteria, and thus a writ of quo warranto could be issued.

CONSTITUTIONAL PROVISIONS :

Chapter V of the Constitution deals with the High Courts in the States.

Article 216 of the Constitution of India provides that every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary. Article 217 states that every

judge of a High Court shall be appointed by the President in consultation with the Chief Justice of India and other authorities specified therein who shall hold office in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years. Indisputably in terms of the proviso, an additional judge, like a permanent judge, may also resign his office, or be removed therefrom by the President in the manner as provided in clause (4) of Article 124 of the Constitution of India for the removal of the Supreme Court Judge. Clause (2) of Article 217 of the Constitution of India prescribes the eligibility criterion. Clause (3) thereof provides for resolution of disputes if any question arises as to the age of a Judge of the High Court by the President after consultation with the Chief Justice of India. Article 219 provides for oath of affirmation by Judges of the High Courts which is to be affirmed according to form set out for the purpose in the Third Schedule.

Article 220 restricts practice by a judge after being appointed as a Permanent Judge. However, no such restriction is imposed in regard to an Additional Judge. Article 221 provides for salaries and other emoluments, which, indisputably, are the same for a permanent judge or an additional judge.

Article 222 provides for a transfer of a judge. Indisputably again an additional judge can also be transferred from one High Court to another High Court. Article 223 provides for appointment of acting Chief Justice. Article 224 provides for appointment as additional and acting judges commonly known as ad hoc judges.

Part 'D' of the Second Schedule of the Constitution of India provides for the provision as to the quantity of payment of salary to the Judges of the Supreme Court and the High Court. Clause 11 thereof refers to the definitions of 'Chief Justice', 'Judge' and 'actual service'. Definitions have also been referred to in the High Court Judges (Salaries and Conditions of Service) Act, 1954 (for short "the 1954 Act"). The 1954 Act also provides for qualification for payment of pension for Judges. An Additional Judge who holds a tenure post indisputably would not get any pensionary benefit.

THE ACT

The Act was enacted to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.

Section 2 thereof defines 'State Commission' to mean a Consumer Disputes Redressal Commission established in a State under clause (b) of

Section 9. Section 3 provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law.

Section 16 provides that the State Commission shall consist of a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President. A proviso was inserted threin by Act No.50 of 1993 which has come into force with effect from 18th June, 1993 providing that no appointment thereunder shall be made except after consultation with the Chief Justice of the High Court. Clause (b) of sub-section (1) of Section 16 provides for appointment of members from amongst the persons of ability, integrity and standing and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

Section 17 provides for the jurisdiction of the State Commission. It has original jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees one crore. It entertains appeals against the orders of District Form within the State. The Commission has the power to transfer any complaint pending before any District Forum to another District Forum.

Appeal against the orders passed by the Commission shall lie only before the National Commission.

Section 20(1)(a) provides that the National Commission shall consist of a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President, provided that no appointment under this clause shall be made except after consultation with the Chief Justice of India.

INTERPRETATION OF CONSTITUTIONAL PROVISIONS IN REGARD TO THE STATUS OF AN ADDITIONAL JUDGE

The High Court has taken recourse to the rule of purposive construction whereas learned counsel appearing on behalf of the appellants want us to invoke the rule of literal meaning.

Interpretative tools of constitutional provisions and the statutory provisions may be different. Whatever interpretative tool is applied, the Court must not forget that its job is to find out the intention of the legislature. It can be gathered from the words used. However, if plain meaning assigned to the section results in absurdity or anomaly, literal meaning indisputably would not be applied.

It is also well settled that the Court may have to change the interpretative tool in the event it is necessary to give effective contextual

meaning to the Act. It is one thing to say that an Additional Judge would be on the same pedestal as a Permanent Judge for all practical purposes, namely – judicial function; administrative function; pay and remuneration etc. but would it mean that the same interpretation would be applicable even in a case where an Additional Judge despite his legitimate expectation to become a Permanent Judge has not been conferred on the said stating allegations of lack of probity.

An Additional Judge on the expiry of his tenure has a right to be considered for re-appointment if he is not appointed as a Permanent Judge. He may not, however, be reappointed if it is found that he is otherwise disqualified therefor, namely to satisfy the test of fitness and suitability, physical, intellectual and moral, before the Central Government can, consistently with its constitutional obligation and in public interest, decide to reappoint him as an Additional Judge or appoint him as a Permanent Judge.

SOME PRECEDENT

S.P. GUPTA

In the context of Central Government's refusal to re-appoint some additional judges as permanent judges, the Supreme Court in S.P. Gupta (supra) had the occasion to consider the said question. Bhagwati, J. (as His

Lordship then was) traced the history of appointment of ad hoc or temporary judges, the provisions of the Government of India Act, 1915; Section 220 of the Government of India Act, 1935 and the speech of Sir Tej Bahadur Sapru expressing his firm opposition to the practice of appointing acting or Additional Judges to note that the drafting committee took the view that "it was possible to discontinue the system of appointment of temporary and Additional Judges in the High Courts altogether by increasing, if necessary, the total number of permanent Judges of such Courts.", to notice that the Constitution-makers did not assume that an acting or Additional Judge would necessarily be made permanent and he would have to go back to the Bar. The learned Judge furthermore noticed the enactment of the Constitution (Seventh Amendment) Act, 1956, in terms whereof existing Article 224 was substituted by a new Article and the existing Article 224 was added as new Article 224A thereafter. It was held that the object clearly was that Additional Judge should be appointed for a short period in order to dispose of the temporary increase in the business of the High Court and/or to clear off the arrears of pending cases. The underlying idea was that there should be an adequate strength of permanent Judges in each High Court to deal with its normal institutions and so far as the temporary increase in the work or the arrears of pending cases were concerned, Additional Judges appointed for a period not exceeding two years should assist in disposing of

such work. Additional Judges while entering into the High Court judiciary had a legitimate expectation that they would not have to go back on the expiration of their term and that they would be either reappointed as Additional Judges for a further term or if in the meanwhile, a vacancy in the post of a permanent Judge became available, they would be confirmed as permanent Judges. The Government, in view of the constitutional scheme, could not drop an additional Judge at its sweet will. The expectation has been raised through a practice followed for almost over a quarter of a century. The expression "every Judge" occurring in Article 217 must include not only a permanent Judge but also an Additional Judge. The Additional Judge, on the expiry of his tenure, could not just be dropped without consideration (be of his re-appointment or made a permanent judge). As Additional Judge is entitled to be appointed without anything more, the process of selection in regard to his appointment need not be gone any further. An Additional Judge is as much a Judge as a permanent Judge with the same jurisdiction and the same powers and to treat him as he were on probation, would not only detract from his status and dignity but also affect his independence by making his continuance as a Judge dependent on the good opinion of the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India. Although factors relevant for consideration of his appointment as permanent Judge have not been laid

down having regard to the object and purpose of Article 217(1), it is obvious that fitness and suitability, physical, intellectual and moral, would be the governing considerations to be taken into account in deciding the question of appointment.

The Central Government, however, in view of the constitutional obligations, was, therefore, required to consider whether the Additional Judge is fit and suitable to be reappointed as an Additional Judge or appointed as a permanent Judge, as the case may be, must consider as to whether he is physically, intellectually or morall unfit or unsuitable to be appointed as such.

Justice Fazal Ali, J. in his concurring judgment opined :-

> **"533.** Thus, the position is that even if an Additional Judge is not appointed afresh and somebody else is appointed, there is no question of judicial review nor is there any question of the non-appointment of an Additional Judge afresh casting any reflection or aspersion on the reputation or character of an Additional Judge because he was appointed only for a particular period and for a particular purpose and is not on probation. Both Brother Desai and Brother Venkataramiah, JJ. have stressed this aspect of the matter in their own way and I agree with their views."

This Court in Supreme Court Advocates-on-Record Association and others v. Union of India, [(1993) 4 SCC 441] adopted a new approach opining that keeping in view the fact that independence of judiciary is one of the cardinal principles of constitution, the primacy of appointment shall be with the Chief Justice of India as also the Chief Justice of the High Court. However, before making recommendations in terms of Articles 124(2) and 217(1) of the Constitution, they would have to consult two other senior most Judges who would be the members of the Collegium. It was opined that S.P. Gupta (supra) should be read with Ashok Kumar Yadav v. State of Haryana, [(1985) 4 SCC 417]. As regards justiciability of appointment and transfer it was laid down :-

> **"**Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

SPECIAL REFERENCE

In Re - Special Reference No. 1 of 1998, [(1998) 7 SCC 739], in regard to justiciability of such power this Court held that having a plurality of judges in the formation of opinion provides sufficient safeguards and that they are sufficient checks against arbitrariness in the decision making process relating to Appointment and Transfers, stating :-

> "9. The majority judgment ends with a summary of its conclusions. Conclusions 1, 2, 3, 4, 5, 7, 9, 10, 11 and 14 are relevant for our purposes. They read thus:
>
> > "(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.
> >
> > * * * *
> >
> > (5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.
> >
> > * * *
> >
> > (10) In making all appointments and transfers, the norms indicated must be followed.

However, the same do not confer any justiciable right in anyone.

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

* * *

(14) The majority opinion in S.P. Gupta v. Union of India insofar as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us."

(emphasis supplied)

It was furthermore held :-

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

1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.

* * *

4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the

> Government of India for non-appointment of a Judge recommended for appointment.
>
> * * *
>
> 8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India."

INTERPRETATION OF SECTION 16 OF THE ACT

For this purpose, we will proceed on the basis that save and except for certain purposes an additional judge and a permanent judge enjoy equal status. It could be said that for the purpose of appointment as Chairperson of some Tribunal, the name of an additional judge may also be taken into consideration but would that mean that an additional judge whose services were tainted or having regard to his general reputation or lack of integrity, wherefor he had not been made permanent as opposed to a situation where having regard to the policy decision of the Central Government or the purpose for which the additional judges are appointed to clear the back log is the question which falls for consideration. This Court in T. Fenn Walter [(2002) 6 SCC 184] laid down some broad guidelines as to the manner in which the appointment of a sitting Judge of a High Court to a Commission should be made. In view of the said decision, it is expected that a sitting judge may not be recommended by the Chief Justice of the High Court for such appointment.

The words "is or has been" refer to the person holding the office of a Judge or who has held the said office. It may be said to have the same meaning so far as eligibility is concerned.

Suitability of a person to be considered for appointment as a Chairman of a State Commission having regard to the provisions contained in Article 217 of the Constitution of India has been assumed by this Court to be available for the eligible persons who are retired Judges which would mean that those Judges who had retired from service without any blemish whatsoever and not merely a person who "has been a judge". [See Ashish Handa v. The Hon'ble the Chief Justice of High Court of Punjab and Haryana and others, (1996) 3 SCC 145].

An Additional Judge holding a tenure post stricto sensu does not retire. It is one thing to say that having regard to the constitutional embargo, he would not hold office after he attains the age of 62 years but it is another thing to say that for all other purposes, he can be equated with a sitting Judge.

There cannot be any doubt whatsoever that ordinarily a literal meaning should be given to the provisions of the Constitution as also a statute. However, while applying the golden rules of literal interpretation one must be clear in his mind that same should not defeat the object and

purpose for which the Act was enacted. We could advert to this question a little later.

The jurisdiction of the consumer courts and particularly that of the State Commission and the National Commission is of great importance. Various complicated questions of law and facts arise for their consideration. It must, save and except for very cogent reasons refuse to entertain a claim application and ask the parties to agitate their grievances before a Civil Court. Indisputably, the functions of the Commission are judicial. The State Commission, as noticed hereinbefore, not only exercises original jurisdiction but also appellate jurisdiction. The guidelines clearly point out as to why, considering the basic feature of the Constitution, namely the independence of the judiciary, a sitting Judge must maintain the high traditions. While a sitting Judge may be appointed to a statutory post or Tribunal, this Court as pointed out in T. Fenn Walter (supra) that he would not discharge the duties both as the Presiding Officer of a Judicial Tribunal and as a sitting Judge of the High Court.

An Additional Judge who has not been confirmed, may for the purpose of giving effect to the constitutional provisions be considered to be a former Judge but when it comes to the question of his appointment in the said capacity, in our opinion, it is possible to take somewhat different view

having regard to his present status, viz., an advocate or a district judge, as the case may be. He despite being a former Judge is entitled to practice in the same High Court, which other Judges are not permitted to do so. He may appear before the Tribunal and subordinate courts. A person for the aforementioned purpose must answer the test of his being qualified to be a Judge. For the purpose of Section 16 of the Act, he must be equated with a sitting Judge of a High Court. In other words, he could, but for the reasons like reaching the age of superannuation, continue as a Judge.

In S.P. Gupta (supra), this Court has categorically held that a person who has not been confirmed would not be recommended for reappointment. If that be so, he could not continue to hold the High office of a Judge, although he was otherwise eligible therefor.

In Supreme Court Advocates-on-Record Association (supra), this Court laid down the qualities of a Judge :-

> "Under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of law. Since the Courts are entrusted the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant or indifferent State agencies. Therefore, the need for an independent and impartial judiciary manned by persons of sterling quality and character, undaunting courage and determination and resolute impartiality and independence who would dispense justice without fear or favour, ill will or affection. Justice without fear or favour, ill will or affection, is the cardinal

> creed of our Constitution and a solemn assurance of every Judge to the people of this great country. There can be no two opinions at the Bar that an independent and impartial judiciary is the most essential characteristic of a free society. "

A Judge must have these basic qualities and, thus, must be found to possess the same. A person found to be lacking these qualities would not be recommended for appointment of a permanent judge.

The system of governance established by the Constitution is based on distribution of powers and functions amongst the three organs of the State. It is the prerogative of the Legislature to enact laws; responsibility of the Executive to enforce the laws and administer the country; and the duty of the Judiciary to adjudicate upon the disputes that arise between individuals, between an individual & the State or between different States. In this scheme of things, Supreme Court has been assigned the duty of being the final arbiter, including on the question of interpretation of the Constitution & the laws. It is the majesty of the institution that has to be maintained and preserved in the larger interest of the rule of law by which we are governed. It is the obligation of each organ of the State to support this important institution. Judiciary holds a central stage in promoting and strengthening democracy, human rights and rule of law. People's faith is the very foundation of any judiciary. Injustice anywhere is a threat to justice

everywhere and therefore the People's faith in the Judiciary cannot be afforded to be eroded.

Independence of judiciary is a much wider concept. Key note is judiciary and not the Judge. If a person does not have qualification for continuing to hold the office of the Judge of a High Court, it is difficult to conceive as to how despite such deficiency in qualification, he could be recommended for appointment to a statutory post, the eligibility criteria wherefor is inter alia a former Judge. A Chief Justice of a High Court, thus, before making recommendations for his appointment in terms of Section 16 of the Act must satisfy himself that the recommendee has/had those basic qualities.

While making recommendations the Chief Justice performs a constitutional duty. If while discharging his duty, he finds a former judge to be ineligible, the question of his being considered for appointment would not arise. If such a person cannot be recommended being unfit or ineligible to hold the post, it would not be correct to contend that despite the same he fulfils the eligibility criteria.

Whether the condition 'has been a judge' is not necessary to be construed for the purpose of Article 217 of the Constitution of India, it is required for the purpose of interpreting Section 16 of the Act as to whether

he should be recommended for being appointed as a Chairman of the state commission.

In our constitutional scheme, the judge made law becomes a part of the Constitution. It has been so held in M. Nagaraj and Others v. Union of India and Others [(2006) 8 SCC 212] in the following terms:

> "…The Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provision of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and, therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368."

If a person has made himself disqualified to hold the post of a judge, the Chief Justice should not consider his name at all. If a duty had been cast on the Chief Justice not to recommend, which is a constitutional duty for all intent and purpose – he must be held to be disqualified. If he stands disqualified following S.P. Gupta (supra) and other cases –question of his candidature being considered does not arise. It is in that sense – the principle of purposive construction is to be taken recourse to.

If the Collegium of the Supreme Court Judges including the Chief Justice of India, which is a constitutional authority in the matter of appointment of Judges and re-appointment of Additional Judges did not find him eligible, it would be beyond anybody's comprehension as to how Chief Justice of a High Court could find him eligible/suitable for holding a statutory post requiring possession of qualification of holder of a constitutional office. If no recommendation by the Chief Justice is constitutionally permissible, the question of the eligibility criteria being not satisfied certainly is relevant.

Question is not whether he is a former judge or not. Question is whether he was eligible for appointment, having not been found fit for re-appointment. If he was ineligible for being recommended, that is the end of the matter.

PURPOSIVE INTERPRETATION

A case of this nature is a matter of moment. It concerns public interest. Public information about independence and impartiality of a judiciary would be in question. The duty of all organs of the State is that the public trust and confidence in the judiciary may not go in vain. Construction

of a statute would not necessarily depend upon application of any known formalism. It must be done having regard to the text and context thereof.

For the aforementioned purpose, it is necessary to take into consideration the statutory scheme and the purpose and object it seeks to achieve. A construction of a statute, as is well known, must subserve the tests of justice and reason. It is a well-settled principle of law that in a given case with a view to give complete and effective meaning to a statutory provision, some words can be read into; some words can be subtracted. Provisions of a statute can be read down (although sparingly and rarely).

In Carew and Company Ltd. v. Union of India [(1975) 2 SCC 791], Krishna Iyer, J. opined:

> "21. The law is not "a brooding omnipotence in the sky" but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate. Notwithstanding the traditional view that grammatical construction is the golden rule, Justice Frankfurter used words of practical widom when he observed4:
>
> "There is no surer way to misread a document than to read it literally.""

Yet Again in K.P. Varghese v. Income Tax Officer, Ernakulam and Another [(1981) 4 SCC 173], the strict literal reading of a statute was

avoided as by reason thereof several vital considerations, which must always be borne in mind, would be ignored, stating:

> "…The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity". We can do no better than repeat the famous words of Judge Learned Hand when he laid:
>
> "... it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."
>
> "... the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."

In the aforementioned case, therefore, some words were read into and the plain and natural construction was not given.

In Bhudan Singh and Another v. Nabi Bux and Another [(1969) 2 SCC 481], this Court held:

> "The object of every legislation is to advance public welfare. In other words as observed by Crawford in his book on "Statutory Constructions" that the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every peace of legislation. Consequently where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instance, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, there is little reason to believe that it represents the legislative intent."

This Court Atma Ram Mittal v. Ishwar Singh Punia, [(1988) 4 SCC 284]:

> **"9.** Judicial time and energy is more often than not consumed in finding what is the intention of Parliament or in other words, the will of the people. Blackstone tells us that the fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or *the spirit and reason of the law.* (emphasis by the court) See *Commentaries on the Laws of England* (facsimile of 1st Edn. Of 1765, University of Chicago Press, 1979, Vol. 1, p. 59)."

In High Court of Gujarat and Another v. Gujarat Kishan Mazdoor Panchayat and Others [(2003) 4 SCC 712], this Court noticed:

> **"33.** In *United Bank of India* v. *Abhijit Tea Co. (P) Ltd.* this Court noticed: (SCC p. 366, paras 25-26)
>
> "*25*. In regard to purposive interpretation, Justice Frankfurter observed as follows:
>
> 'Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute, as read in the light of other external *manifestations of purpose* [*Some Reflections on the Reading of Statutes*, 47 Columbia LR 527, at p. 538 (1947)].'
>
> **xxx xxx xxx**
>
> **38.** In *The Interpretation and Application of Statutes* by Reed Dickerson, the author at p. 135 has discussed the subject while dealing with the importance of context of the statute in the following terms:
>
> "… The essence of the language is to reflect, express, and perhaps even affect the conceptual matrix of established ideas and values that identifies the culture to which it belongs. For this reason, language has been called 'conceptual map of human experience'."

In New India Assurance Company Ltd. v. Nusli Neville Wadia and Another [(2008) 3 SCC 279], this Court held:

> "52. Barak in his exhaustive work on "Purposive Construction" explains various meanings attributed to the term "purpose". It would be in the fitness of discussion to refer to Purposive Construction in Barak's words:
>
> "Hart and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfil their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably."
>
> (Aharon Barak, Purposive Interpretation in Law, (2007) at p.87.)"

In Union of India v. Ranbaxy Laboratories Limited and Others [(2008) 7 SCC 502], this Court held that the principles of purposive construction may be employed for making an exemption notification a workable one.

We may notice that in Regina v. Secretary of State for Health ex parate Quintavalle [2003] UKHL 13], the House of Lords stated the law as under:

"8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

*** *** ***

The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in River Wear Commissioners v Adamson (1877) 2 App Cas 743, 763. In any event, nowadays the shift towards purposive interpretation is not in doubt."

Yet again, the Australian High Court in Australian Finance Direct Limited v. Director of Consumer Affairs Victoria [2007] HCA 57], held :

> "40. This explanation of the approach to be taken to a problem of construction has been cited, restated and applied in this Court so many times that it should be uncontroversial. Some judges have not been sympathetic to the purposive approach[39]. Some have clearly yearned for a return to the perceived simplicities of literalism, either generally or in particular fields of law. On the whole, however, this Court has adhered to the doctrinal shift with a fair degree of consistency. In my view, there is a need for such consistency. We should avoid opportunistic reversions to the old approach of literalism which the legal mind sometimes finds congenial.
>
> 41. Obviously, a balance must be struck between, on the one hand, an exclusive focus on the text of legislation and, on the other, reference to extrinsic information that assists to explain its purpose. Those bound by the law will often have no access to such information. Cases do arise where the legal prescription is relatively clear on the face of the written law. To the extent that external inquiries are necessary, they obviously add to marginal costs and can sometimes occasion disputes and uncertainty which the words of the law alone would not have produced."

Mr. Venugopal would, however, place strong reliance on Harbhajan Singh v. Press Council of India and others [(2002) 3 SCC 722] to emphasise that the golden rule is that the words of statute must be prima facie given their ordinary meaning. In that case, itself, this Court has referred to the

'Principles of Statutory Interpretation' by Justice G.P. Singh wherein it has been stated that the Judges can adopt a purposive interpretation if they can find in a statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. Although ordinarily, an ordinary meaning cannot be departed from by the Judges in the light of their own views as to policy.

Eligibility of a Judge of a High Court should not be construed in a pedantic manner. It in the context of a large number of decisions of this court including S.P. Gupta (supra) must also be held to include suitability of a person concerned. For the aforementioned purpose, the principles of purposive interpretation is required to be resorted to.

Reliance has also been placed on Sangeeta Singh v. Union of India and Others [(2005) 7 SCC 484] wherein also while dealing to principles of construction, it was clearly stated:

> "5. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements."

PRECEDENTS GOVERNING APPOINTMENT OF CHAIRMAN, STATE COMMISSION.

The question in regard to the appointment of a former Judge of the High Court as the President of the State Commission has been considered by this Court in Ashish Handa v. The Hon'ble the Chief Justice of High Court of Punjab and Haryana and others, (supra) wherein it was opined :-

> "3. ...The scheme is that these three agencies constituted for redressal of consumer disputes at different levels have as its President a person who is, or has been a Judge at the corresponding level. This is so because the function of these agencies is primarily the adjudication of consumer disputes and, therefore, a person from the judicial branch is considered to be suitable for the office of the President. The appointment to the office of the President of the State Commission is to be made "only after consultation with the Chief Justice of the High Court" and to the office of the President of the National Commission "after consultation with the Chief Justice of India". Such a provision requiring prior consultation with the Chief Justice is obviously for the reason that he is the most suitable person to know about the suitability of the person to be appointed as the President of the Commission.... The expression "after consultation with the Chief Justice of the High Court" and "after consultation with the Chief Justice of India" must be construed in the same manner as the expression "after consultation with the Chief Justice of India, ...the Chief Justice of the High Court" in Article 217 of the Constitution of India made in Supreme Court Advocates-on-Record Assn. v. Union of India. Accordingly, the opinion of the Chief Justice of the High Court and the requirement of consultation with him according to

> the proviso in Section 16(1)(a) must have the same status as that of the Chief Justice of the High Court in the appointment of a High Court Judge under Article 217 of the Constitution of India; and the process of appointment to the office of the President of the State Commission must also be similar. It is unnecessary to restate the same which is summarised in the majority opinion in the Judges-II case. This is necessary to maintain independence of the judiciary and to avoid any possibility of a sitting or a retired Judge depending on the executive for such an appointment.... The requirement of consultation with the Chief Justice in the proviso to Section 16(1)(a) and Section 20(1)(a) of the Consumer Protection Act being similar to that in Article 217, the principles enunciated in the majority opinion in the Judges-II case must apply, as indicated earlier, even for initiating the proposal. The executive is expected to approach the Chief Justice when the appointment is to be made for taking the steps to initiate the proposal, and the procedure followed should be the same as for appointment of a High Court Judge. That would give greater credibility to the appointment made.

Yet again in Ashok Tanwar and another v. State of Himachal Pradesh and others, [(2005) 2 SCC 104] this Court held :-

> "23.... A person to be appointed as President of the State Commission has to be necessarily a sitting or a retired Judge of a High Court and not that any person can be appointed as President of the State Commission. This being the position, it does not stand to reason as to why again in respect of a sitting or retired Judge of a High Court the whole process contemplated under Article 217 of the Constitution must be resorted to. To put in clear

> terms so as to remove any doubt, we state that in the matter of appointment of a sitting or retired Judge of a High Court as President of the State Commission, process must be initiated by the Chief Justice under Section 16 of the Act and "consultation" contemplated in the said section is "consultation" only with the Chief Justice of the High Court and not with the collegium.
>
> (Emphasis added)"

The Constitution Bench in Ashok Tanwar, however, clearly held that the consultation process in terms of Article 217 of the of the Constitution of India, for the purpose of finding out of the suitability or otherwise of the candidate, namely the members of the Collegium is not necessary. Such a finding was arrived at inter alia on the premise that an appointment was required to be made by a sitting or a retired judge whose antecedents are known to the Chief Justice stating :-

> "19. It is thus clear that the expression "consultation" used in Article 217 of the Constitution in relation to appointment of High Court Judges cannot be read in the same way into "consultation" as contemplated under Section 16 of the Act in the light of what is stated above in *Supreme Court Advocates-on-Record Assn.* The meaning of the word "consultation" must be given in the context of an enactment. If the argument that the consultation process in regard to appointment of a Judge or retired Judge of the High Court to the State Commission under Section 16 must be in the same manner as required under Article 217 of the Constitution is accepted, it will lead to anomalous situation. Under Article 217(1) of the Constitution, consultation contemplated with constitutional functionaries mentioned therein is for the purpose of appointment of a Judge of a High Court and not for appointment of a person as the President of the State Commission under Section 16 of the Act. If

> the consultation to be made for appointment of a person as President of the State Commission, as required under Section 16 of the Act, is to be similar as under Article 217 of the Constitution, then, even in case of appointment of a retired Judge as President of the State Commission, such consultation has to be made with all constitutional functionaries, which does not stand to reason. Hence, obviously for appointment of a person as President of the State Commission, consultation as required under Article 217 of the Constitution as against the requirement stated in Section 16 of the Act is not necessary. If that be so, not only the opinion of two seniormost Judges of the High Court should be obtained but also the consultation should be made with other constitutional functionaries as contemplated under Article 217 of the Constitution including the Chief Justice of India. Hence insistence on "consultation" by the Chief Justice of a High Court with his two seniormost colleagues in the High Court for the purpose of Section 16 of the Act, in our view, is unwarranted."

CONSTITUTIONAL INTERPRETATION

Independence and impartiality of judiciary is a basic feature of the Constitution. Constitutionalism envisages that all laws including the constitutional provisions should be interpreted so as to uphold the basic feature of the Constitution. A person lacking probity would not be a person who could be found fit for appointment as a High Court Judge. A case of this nature where no re-appointment was made or an Additional Judge despite existence of vacancy was not made a Permanent Judge, in our opinion, deserves serious consideration. It is not a case where reappointment as an Additional Judge or appointment to a Permanent Judge was not possible for want of vacancy or the purpose for which such

appointments had been made was achieved. An Additional Judge may not be made permanent or re-appointed in the said capacity if:

(a) If the requirement contemplated under Article 224 no longer exists ;

(b) He had attained the age of 62 years ;

(c) He is not inclined to continue further ;

(d) His inability to continue further on account of physical or mental capacity ;

In S.P. Gupta (supra) a Seven Judge Bench of this Court has clearly held that every re-appointment should undergo the same processes as envisaged under Article 217 of the Constitution of India. We are although not oblivious of a decision of the Division Bench of this Court in Shanti Bhushan and another v. Union of India and another, [(2009) 1 SCC 657] wherein it has been held that extension of the tenure of an Additional Judge is the prerogative of the Chief Justice of India but therein this Court was not concerned with a situation of this nature.

In this case the collegium have found him unfit to continue as a Judge. We have gone through the records produced before us. We are satisfied that for good and sufficient reasons, he was found not fit to be recommended for appointment as a Permanent Judge. We say no more being wholly

unnecessary. An Additional Judge who had not been made permanent, technically, could be appointed as an acting or Additional Judge but then the question which was required to be asked was: should a person who had not been found fit be so appointed? The answer to the aforementioned question clearly would a big emphatic 'no'.

Before us both the High Court as also the Union of India have produced records; in relation whereto the High Court, stated:

> "84…The learned counsel sought leave of this Court to wade through the entire file containing the correspondence and the discussions touching upon the question of confirmation of the Respondent No. 1. Even though all such papers have been made available to us by the Addl. Solicitor General appearing for the Central Government and Shri Muthukumarasamy, Senior Counsel, for the High Court and no privilege has been claimed, we have not thought it fit to permit the Counsels for the contesting parties to peruse such papers, because, in our considered opinion, it would open a collateral battle on the question relating to confirmation of Respondent No. 1, which is not and cannot be an issue. Moreover, it is not for us to decide about the suitability of Respondent No. 1 for the post of President of the Consumer Commission as that was a matter for the State Government to decide in consultation with the Chief Justice. If the appointment of a person is otherwise legal, the Judiciary may not be justified in interfering with such appointment on the ground that it is against public interest. As already noticed, the sentiment expressed in R.K. Jain case is clear on this aspect."

We have perused the records ourselves. We are satisfied that it was necessary for the Chief Justice of the High Court to apprise himself the reasons with reference to the backdrop of events as to why the collegium of the Supreme Court of India did not find the appellant to be a fit person for re-appointment or made a Permanent Judge. Names of eight persons were recommended together. A large number of vacancies existed. Six of them were recommended to be appointed as Permanent Judges. In respect of one name, the Chief Justice of India exercised his prerogative jurisdiction to extend his term from time to time. He had also been made a Permanent Judge. [See Shanti Bhushan (supra)] Only in relation to the appellant herein the collegium refused to make a recommendation which was also accepted by the Chief Justice of India.

We may also place on record that at least in a few decisions, this Court has held that only a sitting or retired Judge is suitable for appointment. In our opinion, the same clearly goes to show that Judge whose tenure ended by way of non extension as a stigma would not come within the purview of the definition of term 'has been a Judge of the High Court'.

We say so for more than one reason. Section 16(1)(b)(iii) of the Act in relation to appointment of a Member of the Commission lays down inter alia the qualifications of a person of ability, integrity and standing. If in the case

of a Member, ability, integrity and standing are essential qualifications, it is difficult to perceive why the same qualification is not required for appointment as Chairman of the Commission within the meaning of clause (a) thereof. The said criteria was not necessary to be expressly stated as the same could be presumed as recommendation in that behalf, to be made by the Chief Justice of a High Court.

It is also of some significance to notice that in the matter of appointment of the Fast Track Court Judges, this Court in Brij Mohan Lal v. Union of India, [(2002) 5 SCC 1], observed as under :-

> **"6.** We find substance in the stand taken by the learned counsel who have highlighted the non-desirability of appointing judicial officers who did not carry good reputation so far as their honesty and integrity is concerned. It is to be noted that in *All India Judges' Assn.* v. *Union of India* and in *All India Judges' Assn.* v. *Union of India* this Court took note of the non-desirability to grant the benefit of two years' extension in service i.e. from 58 years to 60 years in the case of officers who were not found to be of continued utility. In each case an evaluation of the service records was directed to be undertaken to find out whether the officer has or lacks potentiality for getting such benefit."

As regards the qualifications of a Fast Track Court Judges, keeping in view the laudable object with which the Scheme had been conceived and introduced, inter alia the following directions were issued :-

> *"2*. The second preference in appointments to Fast Track Courts shall be given to retired judges who have good service records with no adverse comments in their ACRs, so far as judicial acumen, reputation regarding honesty, integrity and character are concerned. Those who were not given the benefit of two years' extension of the age of superannuation, shall not be considered for appointment. It should be ensured that they satisfy the conditions laid down in Articles 233(2) and 309 of the Constitution. The High Court concerned shall take a decision with regard to the minimum-maximum age of eligibility to ensure that they are physically fit for the work in Fast Track Courts.
>
> *3*. No judicial officer who was dismissed or removed or compulsorily retired or made to seek retirement shall be considered for appointment under the Scheme. Judicial officers who have sought voluntary retirement after initiation of departmental proceedings/inquiry shall not be considered for appointment."

In Pareena Swarup v. Union of India [2008 (13) SCALE 84], this Court intervened stating legislative amendments are carried out to protect judicial independence in a case involving the Prevention of Money Laundering Act, 2002.

Qualification to hold the post was found to be necessary also in B.R. Kapur v. State of T.N. and Another [(2001) 7 SCC 231].

CONSULTATION

We may consider as to whether the consultative process required to be gone into for the purpose of appointment of Chairman, State Commission was complied with.

The word "consultation" may mean differently in different situations depending on the nature and purport of the statute. Consultation, although in regard to the appointment of the High Court and the Supreme Court Judges, having regard to the decision of this Court in Supreme Court Advocates-on Record Association (supra) would mean "concurrence", should it for the purpose of the provisions of Section 16 mean differently is the question. Indisputably, in view of the decisions of this Court in Ashok Tanwar (supra) and Ashish Handa (supra) consultation with the Chief Justice would not mean the consultation with the Collegium of the High Court. Concedingly again, proposal for such appointment must be initiated by the Chief Justice. The manner of initiation of proposal for consultation need not be as laid down in Ashish Handa (supra) but as laid down in Ashok Tanwar (supra) wherein it was clearly laid down that the manner of initiation of proposal must remain the same throughout as the law in this behalf is quite well settled and the Bench was felt bound by the same.

In State of Haryana and Ors. v. National Consumer Awareness Group and Ors. [(2005) 5 SCC 284] this Court did not give a literal

meaning to sub-section (1A) of Section 16 to hold that both sub-section 1(a) and (1A) of Section 16 must be harmoniously construed, stating :-

> **"19.** The learned counsel, alternatively, argued that the scheme contemplated by sub-section (1-A) is quite workable even in a situation where there exists already a President, but the question arises of his reappointment which would make him unable to act as Chairman of the Selection Committee. In such cases, a sitting Judge of the High Court could be nominated by the Chief Justice of the High Court to act as a Chairman. Even this argument does not commend itself to us. A literal reading of sub-section (1-A) may *prima facie* suggest that appointments under clauses (*a*) and (*b*) of sub-section (1) are also governed by the procedure contemplated therein, under sub-section (1-A), but as rightly held by the High Court the two sub-sections have to be harmoniously construed. The procedure contemplated under sub-section (1-A) can apply only in respect of appointment of members falling within the contemplation of clause (*b*) of sub-section (1) of Section 16. In our view, the High Court has given adequate and justifiable reasons for this interpretation with which we agree. The interpretation given by the circular, and the view taken by the Union of India in the matter of Section 16(1-A), is incorrect and we hold that the procedure contemplated therein applies only to the appointments made under clause (*b*) of sub-section (1) of Section 16."

While approving Ashish Handa (supra) and Ashok Tanwar (supra) it was observed :-

> **"14.** A careful reading of *Ashok Tanwar* shows that the Constitution Bench differed from *Ashish Handa* only on the issue whether consultation with the Chief Justice meant consultation with the collegium of the High Court. In other respects, *Ashish Handa* is approved."

This Court in S.P. Gupta (supra) opined that the principles as regards consultation for appointment of Judges in terms of Article 217 of the Constitution of India would be the same as laid down in State of Gujarat v. Sankalchand Khodidas Patel, [(1977) 4 SCC 590] and other cases, stating :-

> "The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution" and added: "In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision". Krishna Iyer, J. speaking on behalf of himself and Fazal Ali, J. also pointed out that "all the materials in the possession of one who consults must be unreservedly placed before the consultee" and further "a reasonable opportunity for getting information, taking other steps and getting prepared for tendering effective and meaningful advice must be given to him" and "the consultant in turn must take the matter seriously since the subject is of grave importance" (SCC p. 267). The learned Judge proceeded to add (SCC p. 267): "Therefore, it follows that the President must communicate to the Chief Justice all the material he has and the course he proposes. The Chief Justice, in turn, must collect necessary information through responsible channels or directly, acquaint himself with the requisite data, deliberate on the information he possesses and proceed in the interests of the administration of justice to give the President such counsel of action as he thinks will further the public interest, especially the cause of the justice system." These observations apply with

> equal force to determine the scope and meaning of "consultation" within the meaning of clause (2) of Article 124 and clause (1) of Article 217. Each of the constitutional functionaries required to be consulted under these two articles must have for his consideration full and identical facts bearing upon appointment or non-appointment of the person concerned as a Judge and the opinion of each of them taken on identical material must be considered by the Central Government before it takes a decision whether or not to appoint the person concerned as a Judge."

In regard to the position of the Additional Judges, it was clearly held that same process must be followed.

Fazal Ali, J. in his concurrent judgment noticed Union of India v. Sankalchand Himatlal Sheth [(1977) 4 SCC 193] wherein it was opined that for purposeful consideration of a matter, the President while consulting the Chief Justice must make the relevant data available to him, stating:

> "…If the facts necessary to arrive at a proper conclusion are not made available to the Chief Justice, he must ask for them because, in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty on the Chief Justice to express his opinion on nothing less than a full consideration of the matter on which he is entitled to be consulted. The fulfilment by the President, of his constitutional obligation to place full facts before the Chief Justice and the performance by the latter, of the duty to elicit facts which are necessary to arrive at a proper conclusion are parts

> of the same process and are complementary to each other. The faithful observance of these may well earn a handsome dividend useful to the administration of justice. Consultation within the meaning of Article 222(1), therefore, means full and effective, not formal or unproductive consultation."

It was held that both consultor and consultee must have before them full and identical facts. The source of foundation therefor must also be the same. It was opined that if the Chief Justice of India had not been consulted fully, purposeful, effectively and was not informed about all the relevant facts, the same would render an order of transfer unconstitutional.

What would be the necessary concomitants of an effective consultation was stated thus in SP Gupta (supra):

> "(3) If the consultation with the C.J.I. has not been done before transferring a judge, the transfer becomes unconstitutional.
>
> *** *** ***
>
> (5) The fulfilment by the President of his constitutional obligation and performance of his duty by the C.J.I. are parts of the same process and after this process is fully complied with, the consultation becomes full and effective and not formal or unproductive.
>
> *** *** ***
>
> (7) After the data, facts or materials are placed before the consulate and the consultee, there

> should be a full and complete application of minds in respect of the subject to enable them to reach a satisfactory conclusion. In other words, the two minds must be able to confer and produce a mutual impact on the identical facts which would constitute both the source and the foundation of the final decision.
>
> (8) The C.J.I. owes a corresponding duty both to the President and to the Judge who is proposed to be transferred to consider every relevant fact before tendering his opinion to the President."

Appointment to the post of President of a State Commission must satisfy not only the eligibility criteria of the candidate but also undertaking of the process of consultation.

Keeping in mind the aforementioned legal scenario the question as to whether the consultative process had been gone into, must be considered.

Indisputably, the decision by the Chief Justice must be an informed one with respect to the post of a Chairman of a State Commission, keeping in view the importance thereof having regard to the fact that the Commission is required to perform judicial functions, both the Chief Justice as also the State Government were required to be duly informed about the person who is going to be appointed. With a view to fulfill the constitutional obligations as to whether he is a fit person, it is absolutely essential that all relevant information should be placed before the consultor as also the

consultee. As far as the proviso appended to Section 16 of the Act is concerned, keeping in view the constitutional post held by a Chief Justice, there cannot be an iota of doubt that the recommendations made by him shall carry great weight. Save and except for very cogent reasons, his recommendation must be accepted.

The Constitution Bench of this Court in Supreme Court Advocates-on-Record Association (supra) and in the Presidential Reference, Special Reference No.1 of 1998 (supra) laid down the law that consultation would mean 'concurrence' wherefor the primacy has been shifted to the Collegium which provision in turn being applicable to the case of appointment of a Chairman of a State Commission in terms of Section 16 of the Act, save and except for the difference that recommendation, instead and in place of the Collegium, would be that of the Chief Justice alone. We have no doubt in our mind that he is bound to take into consideration all facts relevant therefor and must eschew irrelevant facts.

As suitability of a person, in view of S.P. Gupta (supra), depends upon several factors which are necessary to be considered for re-appointment and or making Additional Judge a permanent one, there does not exist any reason whatsoever why the same shall not be considered to be a relevant factor for recommending the name of a person who would hold such a high office. It

has not been denied or disputed that for one reason or the other the Chief Justice of the High Court did not have the occasion to go through the said file. The Original record maintained by the High Court as also by the Central Government had been placed before the High Court as also before us.

The superior courts must take into consideration as to what is good for the judiciary as an institution and not for the judge himself. An act of balancing between public interest and private interest must be made. Thus, institution as also public interest must be uppermost in the mind of the court. When such factors are to be taken into consideration, the court may not insist upon a proof. It would not delve deep into the allegations. The court must bear in mind the limitations in arriving at a finding in regard to lack of integrity against the person concerned. As has been noticed in S.P. Gupta (supra), the test which must be applied for the purpose of assessing the suitability of a person for appointment as a Judge must be whether the Chief Justice of the High Court or for the matter of that, any other constitutional authority concerned in the appointment is satisfied about the integrity of the person under consideration and, thus, if he does not enjoy good reputation, it would not be possible for the Chief Justice of the High Court to say that he is satisfied about the integrity of such person and in such an event he would

be justified in not recommending him for appointment and in fact it would be his duty not to recommend his name.

We may notice that recently a Division Bench of this Court of which one of us (Dr. Justice Mukundakam Sharma) was a member in Shanti Bhushan and Another v. Union of India and Another (supra) referring to S.P. Gupta (supra), Supreme Court Advocates-on-Record Association (supra) and other decisions, noticed:

> "9.Pathak, J (as the Hon'ble Judge then was) had expressed similar opinion by observing that in following the procedure of Article 217(1) while appointing an Additional Judge as a Permanent Judge there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The position was succinctly stated by observing that there is a presumption that a person found suitable for appointment as an Additional Judge continues to be suitable for appointment as a Permanent Judge, except when circumstances or events arise which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. There must be relevant and pertinent material to sufficiently convince a reasonable mind that the person is no longer suitable to fill the high office of a Judge and has forfeited his right to be considered for appointment."

It was furthermore opined:

> "15.As rightly submitted by learned Counsel for the Union of India unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent Judge has to be considered in the background of what has been stated in S.P. Gupta's case (supra). Though there is no right of automatic extension or appointment as a permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). The weightage required to be given cannot be lost sight of."

It was observed:

> "19. But at the same time we find considerable substance in the plea of the petitioners that a person who is not found suitable for being appointed as a permanent Judge, should not be given extension as an Additional Judge unless the same is occasioned because of non availability of the vacancy. If a person, as rightly contended by the petitioners, is unsuitable to be considered for appointment as a permanent Judge because of circumstances and events which bear adversely on the mental and physical capacity, character and integrity or other relevant matters rendering it unwise for appointing him as a permanent Judge, same yardstick has to be followed while considering whether any extension is to be given to him as an Additional Judge. A person who is functioning as an Additional Judge cannot be considered in such circumstances for re-appointment as an Additional Judge. If the factors which render him unsuitable for appointment as a permanent Judge exist, it would not only be

> improper but also undesirable to continue him as an Additional Judge."

Mr. Venugopal, however, has drawn our attention to S.P. Gupta (supra) so far as it while dealing with the case of Shri O.N. Vohra was concerned to contend that as he had accepted the decision of the President of India not to extend his term and indeed as a person concerned should not litigate his claim to this high office which would lower its dignity by making it subject matter of litigative controversy, even refused to look into the correspondences exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India as being not relevant to the issues arising for determination in the writ petition holding that the Union of India could not be required to disclose it.

While saying so, the court while considering the case of S.N. Kumar who had claimed relief from the court in regard to his continuance as an Additional Judge not only looked into the files but made a deep probe in the matter. The court further noticed the opinion of the Chief Justice of India in that behalf, holding :

> "526. At any rate, without going into further details as several constitutional functionaries were involved, two facts emerge:

"(1) That C.J., Delhi who had undoubtedly a better chance of observing the performance and the functioning of Justice Kumar, was in a position to get first hand knowledge of his reputation, has honestly believed that Kumar's reputation of integrity was doubtful. He has not revealed the sources from which he came to know about the reputation of Justice Kumar. The C.J.I., however, took a contrary view but he has also not disclosed the names of the lawyers or Judges who had given him a contrary version.

In my opinion both of them did not disclose the names because the Judges or the lawyers concerned must have given the information in confidence and they would have been seriously embarrassed if their names were disclosed.

(2) These views were put before the Central Government and it was open to the President to accept one view or the other. The President chose to accept the view taken by the C.J., Delhi more particularly because he was in a position to have firsthand information both regarding the reputation and working of the Additional Judge."

*** *** ***

528. I might just state that even if the documents were not disclosed, the conclusion would have been the same because in the affidavits it was not disputed that the two C.Js. had taken a contrary view regarding the doubtful reputation of Justice Kumar, nor was it suggested that C.J., Delhi had any ill will or animus against Justice Kumar. The disclosure of the documents, however, unfortunately resulted in grave and serious consequences of far-reaching effect on the future of not only the judicial institutions but also almost all the government departments."

It is, thus, one thing to say that in the absence of any document, any reflection or aspersion on the reputation or character of an Additional Judge shall not be cast but it is another thing to say that the ultimate result, viz., that an Additional Judge did not obtain any extension or was not made a Permanent Judge of the High Court, would totally be ignored. It may be true that the appellant did not question the decision of the collegium not to re-appoint him, but, the fact remains that he was not appointed by the collegium wherefor sufficient material existed. Arriving at such a conclusion was an objective opinion on the part of the collegium.

It was contended that if such a consideration is given an importance, those Chief Justices who had not been elevated to the Supreme Court despite seniority but were appointed as Chairman of various statutory authorities may be treated to be incompetent.

Appointment of a Judge of a Supreme Court in effect and substance is merit based. Only because for one reason or the other he has been overlooked, the same, by itself, in our opinion, would not make him unfit for appointment on any other post. The same has nothing to do with eligibility or suitability.

We agree with Mr. Venugopal that ordinarily it might not have been necessary for the Chief Justice of the High Court to call for such a file as the

same would be a well-known fact. The Chief Justice of the High Court had joined sometime in May, 2008. The letter of the State Government was received in July, 2008. Prior thereto, as noticed hereinbefore, pursuant to a resolution adopted by a Full Court, the name of the appellant was put on the register of retired Judges. The materials brought on records before this Court clearly demonstrate that no other fact was brought to his notice.

S.P. Gupta (supra), Supreme Court Advocates-on-Record Association (supra) and other decisions to which we have adverted to hereinbefore in no uncertain terms lay down the law that the reason for non-appointment of an Additional Judge keeping in view the materials on the basis whereof the constitutional functionary, viz., the Chief Justice of the High Court, the State Government, the collegium of the Supreme Court as also the Central Government and ultimately the President of India had arrived at a decision would be a relevant factor.

We have noticed hereinbefore that the integrity of the holder of a high office plays an important role. It was, thus, a factor which was required to be taken into consideration not only by the Chief Justice of the High Court but also by the State.

The consultative process brings within its ambit a heavy duty so as to enable the holder of a high office like Chief Justice to know the same. It

must be shown that he had access and in fact was aware of the fact that the appellant had not been made a Permanent Judge. The matter might have been different if such a fact had been taken into consideration. If a decision for the purpose of making a recommendation in terms of proviso appended to Section 16 of the Act necessitates looking into all relevant materials, non-consideration of such a vital fact, in our opinion, cannot be ignored as the opinion is a subjective one and not based on objective criteria. We are more than sure that had the records been brought to his notice, the Chief Justice would not have made the recommendation.

JUDICIAL REVIEW

Judicial review in our constitutional scheme itself is a part of its basic structure. Decisions whether arrived at by the Executive or the Judiciary are subject to judicial review.

The Chief Justice of a High Court, while making such recommendations, exercises statutory functions. While it is incumbent upon the State Government to consult the Chief Justice, keeping in view a large number of decisions of this Court we have referred to hereinbefore, indisputably the Chief Justice of the High Court would have a heavy burden on his shoulder to recommend the name of a person who would be suitable therefor. We are not oblivious of the fact that no court howsoever high

would have any power of judicial review in relation thereto. Power of judicial review, although is very restricted, cannot be denied to be exercised when relevant fact is not considered. It is now a well settled principle of Administrative Law that the doctrine of error of law apparent on the face of the record inter alia would take within its umbrage a case where statutory authority in exercising its discretionary jurisdiction did not take into consideration a relevant fact or based its decision on wholly irrelevant factors not germane for passing the order. What is not the subject matter of judicial review is the opinion of the Chief Justice touching upon the merit of the decision but the decision making process is subject to judicial review. It stands conceded that the proviso appended to Section 16 of the Act is imperative in nature. An appointment made without consulting the Chief Justice being wholly without jurisdiction would be void ab initio. If the State is bound to consult the Chief Justice, we reiterate, such consultation must be an effective and informed one. Both the State Government as also the Chief Justice before forming opinion must have access to all relevant informations. Application of mind on the part of consultant and consulttee on such relevant information was, in our considered opinion, absolutely imperative.

Indisputably, a writ petition even at the instance of a busy body for issuance of a writ of quo warranto questioning the appointment of Chairman

of a State Commission made in terms of Section 16 of the Act would be maintainable.

For the aforementioned purpose the eligibility criteria as laid down in Section 16 of the Act as also the question as to whether in making such an appointment the State consulted the Chief Justice of High Court as envisaged under the proviso appended thereto would fall for consideration. An appointment to a statutory post is an administrative decision. The act of consultation is an executive act.

In Supreme Court Advocates-on-Record Association (supra), it was opined that the matter of appointment is an Executive Act. It was furthermore held:

> "…The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultees before the appointment is made. It is the role assigned to the judiciary and the executive in the process of appointment of Judges which is the true index for deciding the question of primacy between them, in case of any difference in their opinion. The answer which best subserves this constitutional purpose would be the correct answer."

Section 16 of the Act envisages a limitation on the power of both the State as also the Chief Justice in the matter of making an appointment. The facts relevant for such an appointment must be placed before both the statutory authorities. One of such fact is that an Additional Judge, for one reason or the other was found not fit to be made permanent or to be given an extension of his tenure. Indisputably, a person having doubtful integrity should neither be recommended by the High Court nor appointed by the State Government.

Opinion of a Chief Justice by itself may not lead to an administrative decision but it, having regard to his primacy, save and except for cogent reasons, would lead to an appointment. Indisputably, his opinion is final and, thus, for all intent and purport, decisive. The recommendations made, thus, may be arrived at on the basis of his subjective satisfaction, but it must be based on objective criteria. Such subjective satisfaction must be arrived at on consideration of all relevant criteria. When recommendation of a Former Judge of a High Court is made for appointment as Chairman of the State Commission ordinarily a judicial review shall not lie. It is true that recommendation would be as a result of due application of mind. He is required to recommend the name of one of the former Judges of the said Court. All relevant facts leading to formation of an opinion as regards suitability of the person would presumably be known to him. But a Chief

Justice coming from outside may not know the former judges of the concerned High Court. He may not consult his brother judges keeping in view the element of confidentiality attached to such recommendation.

It may be true that the statute does not lay down an objective criterion. Such objective criteria cannot also be laid down keeping in view the status of the parties. Such appointment, however, must be made keeping in view the independence of judiciary; as the incumbent of the post would discharge judicial functions of grave importance.

Mr. Venugopal submits that the reason for non-reappointment of the Additional Judge concerned need not be ascertained by the Chief Justice. But the fact that he was not found fit therefor should have been made known to him. The High Court noticed that apart from placing the records to which reference has been made in its judgment, no other material was brought before the High Court to establish that the Chief Justice was aware of the said fact.

We are not in a position to persuade ourselves that the opinion of the Collegium that the appellant was not found fit to be continued as a judge was not relevant. The opinion of the collegium is based on certain material. It might have been arrived at without giving an opportunity of hearing to the Judge concerned. What is relevant is the availability of materials on record

to enable the Chief Justice of India vis-à-vis the collegium to make any recommendation that he was a fit person to be appointed. If the collegium could not make such a recommendation, a' fortiori ordinarily the Chief Justice of High Court would also not make such a recommendation.

In Special Reference No. 1 of 1998, RE: (supra), it was concluded :

> "44. The questions posed by the Reference are now answered, but we should emphasise that the answers should be read in conjunction with the body of this opinion:
>
> xxx xxx xxx
>
> 2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained."

The High Court in a case of this nature could have peeped into consultative process vis-à-vis eligibility of the candidate through a narrow hole. Howsoever limited be the field of judicial review, it cannot, in our opinion, be held to be beyond its pale.

While we say so, we are not oblivious of the fact that the recommendations are required to be made from amongst the limited

category of High Court Judges who were former Judges of that court. However, the Chief Justice may even recommend the Judge of another High Court. There is no constitutional bar that only a Judge of the High Court of that State in which the post has fallen vacant must be recommended.

We have noticed hereinbefore that the Madras High Court maintains a register of retired Judges. Attention of the Chief Justice was drawn only to the said register. Names of five Judges were proposed.

Mr. Venugopal has placed strong reliance on a judgment of the Privy Council in The Hubli Electricity Co. Ltd. v. The Province of Bombay [AIR (36) 1949 PC 136], wherein it was held:

> "21. Their Lordships now turn to the question of construction of s.4(1)(a). Their Lordships are unable to see that there is anything in the language of the sub-section or in the subject-matter to which it relates upon which to found the suggestion that the opinion of the Government is to be subject to objective tests. In terms the relevant matter is the opinion of the Government – not the grounds on which the opinion is based. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion."

In that case the question which arose for consideration was as to whether in view of Section 4(1)(a) of the Indian Electricity Act, 1910, the licence for generation of electricity could be revoked where the licensee in

the opinion of the Provincial Government makes willful and unreasonably prolonged default in doing anything required of him by or under the Act. Section 4(1)(a) of the Electricity Act underwent an amendment. Even in Province of Bombay v. Kusaldas S. Advani and Others reported in [1950 SCR 621] this Court referred to The Hubli Electricity Co. Ltd. (supra) to opine that objective criteria were, in fact, laid down in the relevant provisions of the therein. It was, however, observed :

> "…It is abundantly clear from the authorities cited above that questions of fact such as the existence of a public purpose or the interest of the public safety or the defence of the realm or the efficient prosecution of the war, or the maintenance of essential supplies and the like may well be and, indeed, are often left to the subjective opinion or satisfaction of the executive authority. Merely because such a matter involves a question of fact it does not follow at all that it must always, and irrespective of the language of the particular enactment, be determined judicially as an objective fact…"

Everything, thus, depends upon the nature of the legal provision.

Administrative law moreover has much developed since then. The approach of the Privy Council decision does not commend to us. Where an opinion was not formed on relevant facts or within the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative, evidently judicial review shall lie. [See Barium

Chemicals Ltd. and another v. Company Law Board and others AIR 1967 SC 295]

In fact The Hubli Electricity Co. Ltd. (supra) has been considered by this Court in Narayanan Sankaran Mooss v. The State of Kerala and Another [(1974) 1 SCC 68], stating:

> "20. The power to revoke the licence is a drastic power. The revocation of licence results in severe abridgement of the right to carry on business. Having in mind the requirements of Article 19(1)(g). Parliament has, it seems to us, prescribed certain conditions to prevent the abuse of power and to ensure just exercise of power. Clauses (a) to (d) of Section 4 prescribe some of the conditions precedent for the exercise of power. The order of revocation, in breach of any one of those conditions, will undoubtedly be void. The clause "if in its opinion the public interest so requires" is also a condition precedent. On a successful showing that the order of revocation has been made without the Government applying its mind to the aspect of public interest or without forming an honest opinion on that aspect, it will, we have no doubt, be void. The phrase "after consulting the State Electricity Board" is sandwiched between the clause "if in its opinion the public interest so requires" and clauses (a) to (d). In this context it appears to us that consultation with the Board is also a condition precedent for making the order of revocation. Accordingly the breach of this condition precedent should also entail the same consequence as the breach of the other conditions referred to earlier. It may be observed that the phrase "after consulting the State Electricity Board" did not find place in Section 4 as it stood originally. It was introduced in Section 4 in 1959

> by an amendment. It seems to us that it was introduced in Section 4 with the object of providing an additional safeguard to the licensee…"

In Rohtas Industries v. S.D. Agarwal and Others [(1969) 1 SCC 325], it was categorically held that the Judicial Committee was considering a pre-constitutional provision which was not subject to the mandate of Article 19(1)(g) of the Constitution of India.

While exercising the power of judicial review in a case of this nature, the court would not be concerned with the merit of the decision but with the decision making process. If it is found that the decision making process has not been adhered to, indisputably, judicial review would lie.

Mr. Venugopal would submit that such an interpretation would open a floodgate. We do not think so. We even wish no occasion like the present one arises in future before the Superior Courts for their consideration.

Even otherwise, the floodgate argument does not appeal to us.

In Coal India Ltd. and Others v. Saroj Kumar Mishra, [(2007) 9 SCC 625], this Court held:

> "19. The floodgate argument also does not appeal to us. The same appears to be an argument of desperation. Only because there is a possibility of floodgate litigation, a valuable right of a citizen

> cannot be permitted to be taken away. This Court is bound to determine the respective rights of the parties. [See Zee Telefilms Ltd. v. Union of India and Guruvayoor Devaswom Managing Committee v. C.K. Rajan]"

It will also not be correct to contend that as non-appointment of the appellant did not cast a stigma, such a fact was not necessary to be noticed. We have noticed S.P. Gupta (supra) that where facts are brought to the notice of the court, whether by way of affidavit by the constitutional authorities or by placing before the court the entire material, it is permissible to delve deep into the matter.

Once, thus, decision making process had been undergone in terms of the constitutional scheme in its correct perspective, judicial review may not be maintainable.

QUO WARRANTO

Respondents herein filed the writ petitions inter alia for issuance of a writ of Quo Warranto. A Writ of Quo Warranto can be issued when the holder of a public office has been appointed in violation of constitutional or statutory provisions. Section 16 of the Act lays down the qualifications inter alia for appointment of the Chairman of the State Commission. Clause (a) of sub-section (1) of Section 16 provides that the candidate must be 'is' or

'has been a Judge'. The proviso appended thereto, however, mandates consultation by the State Government with the Chief Justice of the concerned High Court.

Concedingly, judicial review for the purpose of issuance of writ of Quo Warranto in a case of this nature would lie :-

(A) in the event the holder of a public office was not eligible for appointment ;

(B) Processual machinery relating to consultation was not fully complied.

The writ of quo warranto proceedings affords a judicial remedy by which any person who holds an independent substantive public office is called upon to show by what right he holds the same so that his title to it may be duly determined and in the event it is found that the holder has no title he would be directed to be removed from the said office by a judicial order. The proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right.

It is indisputably a high prerogative writ which was reserved for the use of Crown.

The width and ambit of the writ, however, in the course of practice, have widened and it is permissible to pray for issuance of a writ in the nature of quo warranto.

In Corpus Juris Secundum [74 C.J.S. Quo Warranto § 14], 'Quo Warranto' is defined as under :

> "Quo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy to test the right or title to an office, and to remove or oust an incumbent.
>
> It is prosecuted by the state against a person who unlawfully usurps, intrudes, or holds a public office. The relator must establish that the office is being unlawfully held and exercised by respondent, and that realtor is entitled to the office."

In the Law Lexicon by J.J.S. Wharton, Esq., 1987, 'Quo Warranto' has been defined as under:

> "QUO WARRANTO, a writ issuable out of the Queen's Bench, in the nature of a writ of right, for the Crown, against him who claims or usurps any office, franchise, or liberty, to enquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user, or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to

> show by what warrant he exercises such a franchise having never had any grant of it, or having forfeited it be neglect or abuse."

Indisputably a writ of Quo Warranto can be issued inter alia when the appointment is contrary to the statutory rules as has been held by this Court in High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat, (supra) and R.K. Jain v. Union of India and , [(1993) 4 SCC 119]. See also Mor Modern Coop. Transport Society Ltd. v. Financial Commr. & Secy. [(2002) 6 SCC 269].

In Dr. Duryodhan Sahu and Others v. Jitendra Kumar Mishra and Others [(1998) 7 SCC 273], this Court has stated that it is not for the court to embark upon an investigation of its own to ascertain the qualifications of the person concerned. [See also Arun Singh alias Arun Kr. Singh v. State of Bihar and Others (2006) 9 SCC 375]

We may furthermore notice that while examining if a person holds a public office under valid authority or not, the court is not concerned with technical grounds of delay or motive behind the challenge, since it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality. [See Dr. Kashinath G. Jalmi and Another v. The Speaker and Others (1993) 2 SCC 703].

Issuance of a writ of quo warranto is a discretionary remedy. Authority of a person to hold a high public office can be questioned inter alia in the event an appointment is violative of any statutory provisions.

There concededly exists a distinction in regard to issuance of a writ of quo warranto and issuance of a writ of certiorari. The scope and ambit of these two writs are different and distinct. Whereas a writ of quo warranto can be issued on a limited ground, the considerations for issuance of a writ of certiorari are wholly different.

In Dr. Kashinath G. Jalmi (supra), it was held that even the motive or conduct of the appellants may be relevant only for denying them the costs even if their claim succeeds but it cannot be a justification to refuse to examine the merits of the question raised therein, since that is a matter of public concern and relates to good governance of the State.

In Shri Kumar Prasad v. Union of India and Others [(1992) 2 SCC 428], this Court held:

> "22. It is in the above context that we have to interpret the meaning of expression "judicial office" under Article 217(2)(a) of the Constitution of India. The High Court Judges are appointed from two sources, members of the Bar and from amongst the persons who have held "judicial office" for not less than ten years. Even a subordinate judicial officer manning a court inferior to the District Judge can be appointed as a Judge of a High Court. The expression

> "judicial office" in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. Under the Criminal Procedure Code, 1973 powers of judicial Magistrate can be conferred on any person who holds or has held any office under the Government. Officers holding various posts under the executive are often vested with the Magisterial powers to meet a particular situation. Did the framers of the Constitution have this type of 'offices' in mind when they provided a source of appointment to the high office of a Judge of High Court from amongst the holders of a "judicial office". The answer has to be in the negative. We are of the view that holder of "judicial office" under Article 217(2)(a) means the person who exercises only judicial functions, determines causes inter-partes and renders decisions in a judicial capacity. He must belong to the judicial service which as a class is free from executive control and is disciplined to uphold the dignity, integrity and independence of judiciary."

It was held that the Law Secretary although was holder of a judicial office but being not a judicial officer was not qualified to be appointed as a Judge of the High Court and, thus, his appointment was quashed.

In B.R. Kapur v. State of T.N. and Another (supra), the question which arose for consideration was as to whether the Chief Minister of a State, who having been convicted in a criminal case, disqualified herself to become a member of a Legislative Assembly in terms of Article 191(1) of the Constitution of India could be appointed as the Chief Minister for a period of six months in terms of Article 164 thereof. This Court having

regard to Article 164(4) of the Constitution of India opined that if a person is disqualified to become a member of the legislative assembly, he cannot be inducted into the Council of Ministers for a short term which would extend beyond a period of six months.

It was held that a Writ of Quo Warranto can be issued even when the President or the Governor had appointed a person to a constitutional office. It was furthermore held that the qualification of that person to hold that office can be examined in a quo warranto proceedings and the appointment can be quashed.

In R.K. Jain (supra), consultation by the executive which Chief Justice having found to be not necessary, it was held that no case for issuance of writ of quo warranto has been made out, stating:

> **"73.** Judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and reasonable. Exercise of judicial review is to protect the citizen from the abuse of the power etc. by an appropriate Government or department etc. In our considered view granting the compliance of the above power of appointment was conferred on the executive and confided to be exercised wisely. When a candidate was found qualified and eligible and was accordingly appointed by the executive to hold an office as a Member or Vice-President or President of a Tribunal, we cannot sit over the choice of the

> selection, but it be left to the executive to select the personnel as per law or procedure in this behalf…"

In that case, it was held that no case for issuance of a writ of certiorari had been made out as a third party had no locus standi to canvass the legality or correctness of the action seeking for issuance of a writ of certiorari. Only public law declaration would be made at the behest of the appellant who was a public spirited person.

We may incidentally place on record that a declaratory relief had also been prayed for in the writ petitions filed by the respondents.

Reliance has also been placed on a decision of this Court in Union of India and Others v. Kali Dass Batish and Another [(2006) 1 SCC 779] wherein it was held:

> "…Even assuming that the Secretary of the department concerned of the Government of India had not apprised himself of all necessary facts, one cannot assume or impute to a high constitutional authority, like the Chief Justice of India, such procedural or substantive error. The argument made at the Bar that the Chief Justice of India might not have been supplied with the necessary inputs has no merit. If Parliament has reposed faith in the Chief Justice of India as the paterfamilias of the judicial hierarchy in this country, it is not open for anyone to contend that the Chief Justice of India might have given his concurrence without application of mind or without calling for the necessary inputs. The argument, to say the least, deserves summary dismissal."

(Emphasis supplied)

The decision in that case was rendered in the factual matrix obtaining therein. Noticing that where members of the bar were required to be considered for important judicial posts, their antecedents are verified through the Intelligence Bureau and a report is obtained from it.

It was noticed that the Secretary (Personnel) had forwarded all necessary papers including the IB Report and sought for concurrence of the Chief Justice with regard to the names recommended by the Central Government. In that case, as concurrence to the proposal of the Chief Justice of India was obtained after consideration of all the material, it was held:

> "…It must be remembered that a member of an Administrative Tribunal like CAT exercises vast judicial powers, and such member must be ensured absolute judicial independence, free from influences of any kind likely to interfere with independent judicial functioning or militate thereagainst. It is for this reason, that a policy decision had been taken by the Government of India that while considering members of the Bar for appointment to such a post, their antecedents have to be verified by IB. The antecedents would include various facts, like association with antisocial elements, unlawful organisations, political affiliations, integrity of conduct and moral uprightness. All these factors have necessarily to be verified before a decision is taken by the appointing authority to appoint a candidate to a

> sensitive post like member of CAT. In Delhi Admn. v. Sushil Kumar1 this Court emphasised that even for the appointment of a constable in police services, verification of character and antecedents is one of the important criteria to test whether the selected candidate is suitable for a post under the State. Even if such candidate was found physically fit, had passed the written test and interview and was provisionally selected, if on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a constable, the view taken by the appointing authority could not be said to be unwarranted, nor could it be interdicted in judicial review. These are observations made in the case of a constable, they would apply with greater vigour in the case of appointment of a judicial member of CAT. It is for this precise reason that sub-section (7) to Section 6 of the Act requires that the appointment of a member of CAT cannot be made "except after consultation with the Chief Justice of India"."

We may, however, notice that the Bench itself opined that for appointment as a member of an Administrative Tribunal like CAT, absolute judicial independence must be ensured. It was furthermore opined:

> "This consultation should, of course, be an effective consultation after all necessary papers are laid before the Chief Justice of India, and is the virtual guarantee for appointment of absolutely suitable candidates to the post."

The observations of the Bench, as noticed hereinbefore, must be understood in the factual backdrop of the case. The argument which was

advanced therein, viz., the Chief Justice of India might not have been supplied with necessary inputs was found to be wholly meritless deserving summary rejection thereof.

In a case of this nature, there would not be any IB enquiry. It was necessary for the Chief Justice to apprise himself fully with the background of the former judge concerned particularly where for one reason or the other he was not made permanent.

Our attention has furthermore been drawn to a decision of this Court in High Court of Gujarat and Another v. Gujarat Kishan Mazdoor Panchayat and Others (supra) wherein, one of us was a member. Therein the question which arose for consideration was as to whether without appointing the members, the President of the Industrial Court, which was to consist of three or more members out of which one may be a President, could have been appointed straightway without appointing him as a member.

It has, however, been contended that disqualification cannot be read into or implied into the wording of a section.

Reliance in this behalf has been placed on Manohar Nathurao Samarth v. Marotrao and Others [(1979) 4 SCC 93] wherein it has been held that Regulation 25 of the Life Insurance Corporation of India (Staff) Regulations

1960 framed under the Life Insurance Corporation Act, 1956 and read with Section 15(g) of the City of Nagpur Corporation Act, 1948 provided for disciplinary action and not disqualificatory, observing:

> "11…No ground rooted in public policy compels us to magnify the disciplinary prescription into a disenfranchising taboo. To revere the word to reverse the sense is to do injustice to the art of interpretation. Reed Dickerson quotes a passage from an American case to highlight the guideline:
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> > "The meaning of some words in a statute may be enlarged or restricted in order to harmonize them with the legislative intent of the entire statute.... It is the spirit ... of the statute which should govern over the literal meaning".
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> *** ***
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> 13. It is quite conceivable, if the legislature so expresses itself un-equivocally, that even in a law dealing with disciplinary control, to enforce electoral disqualifications provided the legislature has competence. The present provision does not go so far.
>
> 14. Even assuming that literality in construction has tenability in given circumstances, the doctrinal development in the nature of judicial interpretation takes us to other methods like the teleological, the textual, the contextual and the functional. The strictly literal may not often be logical if the context indicates a contrary legislative intent. Courts are not victims of verbalism but are agents of the functional success of legislation, given flexibility of meaning, if the law will thereby hit the target intended by the law-maker. Here the emphasis lies on the function, utility, aim and

> purpose which the provision has to fulfil. A policy-oriented understanding of a legal provision which does not do violence to the text or the context gains preference as against a narrow reading of the words used. Indeed, this approach is a version of the plain meaning rule, and has judicial sanction. In Hutton v. Phillips the Supreme Court of Delaware said:
>
> > "(Interpretation) involves far more than picking out dictionary definitions of words or expressions used. Consideration of the context and the setting is indispensable property to ascertain a meaning. In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely."

The said decision, thus, is an authority that in a given case, the disciplinary prescription may be magnified to a disenfranchising taboo, if any ground rooted in public policy is found therefor. Emphasis has been laid on policy oriented understanding of a legal profession and not the strict literal meaning which may not often be logical if the context indicates a contrary legislative intent.

We have found hereinbefore that the appellant was not eligible for appointment of a public office and in any event the Processual machinery relating to consultation was not fully complied.

WRIT OF DECLARATION

In this case, moreover, a writ of declaration was sought for. This Court in Shri Kumar Padma Prasad (supra) issued a writ of declaration although a writ of quo warranto was sought for. Declaring that the appellant therein was not qualified to be appointed as a Judge of the High Court, a consequential order directing him not to appoint was also issued.

PANEL

The Chief Justice of the High Court forwarded a panel of three Judges including the appellant herein. Whether Section 16 of the Act contemplates such a situation is the question.

Independence of the judiciary as embedded in Article 50 of the Constitution of India needs no over-emphasis.

We have noticed hereinbefore that the State of Tamil Nadu in its letter dated 30th May, 2008 addressed to the Registrar of the Madras High Court while intimating that a vacancy had arisen in the post of President, State Commission, made a request to him to send a panel of eligible names of

retired High Court Judges after approval by Hon'ble the Chief Justice of the High Court of Madras for its consideration therefor.

Pursuant thereto or in furtherance thereof, the Chief Justice only forwarded a panel of three Judges. The Executive Government of the State made a final choice therefrom.

The process of selection in view of the decisions of this Court in Ashish Handa (supra) and Ashok Tanwar (supra) and National Consumer Awareness Group (supra) must be initiated by the High Court itself. Having regard to the fact that the Chief Justice has the primacy as regards recommendations of the name for appointment to the post of Chairman of the State Commission, the method adopted herein, in our considered view, is impermissible in law. For the said purpose only one name must emanate from the Chief Justice ; only one name can be recommended by him and not a panel of names. Having regard to processual mandate required for the purpose of appointment to the post of Chairman, State Commission, the Executive Government of the State cannot have any say whatsoever in the matter. The process for preparation of a panel requested by the Executive Government of the State and accepted by the Chief Justice of the High Court, in our opinion, was impermissible in law. If the State is granted a choice to make an appointment out of a panel, as has been done in the

instant case, the primacy of the Chief Justice, as opined by this Court in the aforementioned decisions, would stand eroded. It will bear repetition to state that even for the said purpose the procedure laid down by this Court in Supreme Court Advocates-on-Record Association (supra) as also the Special Reference, for recommendation of the name of the High Court Judge, as contained in Article 217 of the Constitution of India, should be followed. It is accepted at the Bar that by reason of judicial constitutional interpretation of Articles 217 and 124 of the Constitution of India, the procedures laid down thereunder has undergone a drastic change. A recommendation instead and in place of Chief Justice of India must emanate from the Collegium. However, for the purpose of making recommendation in terms of Section 16(1) the opinion of the Chief Justice alone shall prevail.

It is difficult to accept the submission of Mr. K.K. Venugopal that such 'consultation' would not be 'concurrence' as like the Collegium in the matter of making recommendation for appointment of Judges of the Supreme Court and the High Courts where the view of he Collegium shall have the primacy. For appointment as President of the State Commission, the Chief Justice of the High Court shall have the primacy and thus the term 'consultation' even for the said purpose shall mean 'concurrence' only.

It is true that if a panel of names is suggested and the State makes an appointment of one out of the three, the question of meeting of mind between the Chief Justice and the Executive would not arise but there cannot be any doubt whatsoever that by reason thereof the ultimate authority to appoint would be the Executive which in view of the decisions of this Court would be impermissible.

Mr. Venugopal would contend that for the aforementioned purpose the principle of purposive interpretation may be resorted to hold that the Chief Justice by sending a panel of Judges is merely recommending the names of the Judges, who is his opinion, are independent and fit persons to be appointed. We are not in a position to accept the same.

For the aforementioned purpose the Court must bear in mind that the constitutional scheme of independence of the judiciary embodied in Article 50 of the Constitution of India should by no means be allowed to be eroded.

In A. Pandurangam Rao v. State of Andhra Pradesh and others [AIR 1975 SC 1925] this Court has held that the procedure adopted by the High Court by sending list of all the candidates for appointment to the post of District Judge so as enable the State to appoint the selectees out of the said panel is illegal stating :-

"9. The recommendation of the High Court for filling up the six vacancies was contained in its letter dated July 13, 1973. Government was not bound to accept all the recommendations but could tell the High Court its reasons for not accepting the High Court's recommendations in regard to certain persons. If the High Court agreed with the reasons in case of a particular person the recommendation in his case stood withdrawn and there was no question of appointing him. Even if the High Court did not agree the final authority was the Government in the matter of appointment and for good reasons it could reject the High Court's recommendations. In either event it could ask the High Court to make more recommendations in place of those who have been rejected. But surely it was wrong and incompetent for the Government to write a letter like the one dated July 26, 1973 inviting the High Court's attention to Instruction 12(5) of the Secretariat instructions and on the basis of that to ask it to send the list of persons whom the High Court considered to have reasonable claims to the appointment. On the basis of the furore created by the two Bar Associations of Hyderabad and the High Court's letter dated July 26, 1973 written in reply to the Government's letter dated July 24, 1973 no person's candidature recommended by the High Court had been rejected when the letter dated July 26, 1973 was written by the Government. Even after rejection the Government could not ask the High Court to send the list of all persons whom the High Court considered to have reasonable claim to the appointment. We feel distressed to find that instead of pointing out the correct position of law to the Government and itself acting according to it, a letter like the one dated August 1, 1973 was sent by the High Court in reply to the Government's letter dated July 26, 1973. It is not clear from this letter whether it was written under the directions of Chief Justice and the other Judges of the High Court as in the case of the letter dated July 13, 1973. But surely it was very much wrong on the part of the High Court to forward the entire list of the candidates interviewed with the marks obtained by them and adding at the same time that the High Court had no further remarks to offer. We could not understand the reason for writing such a letter

by the High Court. But if we may hazard a surmise it seems to have been written in utter disgust at the Government's unreasonable attitude displayed in its letter dated July 26, 1973. By no means could it be, nor was it, a recommendation by the High Court of all the 263 candidates interviewed, that all of them had a reasonable claim, or in other words, were fit to be appointed District Judges. We must express our displeasure at and disapproval of all that happened between the Government and the High Court — in the former writing the letter dated July 26, 1973 and the latter sending the reply dated August 1, 1973.

10. Then comes the letter dated November 30, 1973. After tracing the history of the recommendations made by the High Court in its letter dated July 13, 1973 and "in the light of further information about these candidates as required from High Court", Government decided to select the six candidates mentioned therein including Respondents 3 to 6 as if they were from "the list recommended by the High Court". It was further stated in this letter "Reasons for not selecting candidates placed by the High Court higher than those now selected are given in the annexure enclosed to this DO letter." The High Court, to be more accurate, the Chief Justice to whom the letter dated November 30, 1973 was addressed seems to have not resented or protested against the selection so made by the Government in clear violation of Article 233 of the Constitution. We find it intriguing that the letter written by the Registrar to the High Court on August 1, 1973 was treated as a recommendation of all the 263 candidates as having been found fit for appointment as District Judges. By no means could it be so. It was not so. And yet the High Court or the Chief Justice did not object to the appointment of Respondents 3 to 6 as District Judges. They were not eligible to be so appointed as their names had never been recommended."

In Ashok Tanwar (supra) it was held :-

"6. On 7-3-2000 the Registrar General of the High Court addressed a letter to the Financial Commissioner-cum-Secretary (F&S) of the State Government conveying recommendation of the Chief Justice for appointment of Mr Justice Surinder Swaroop, a sitting Judge of the High Court, as President of the State Commission holding additional charge of the post. In the said letter it was also stated that steps could be taken for appointment of Mr Justice Surinder Swaroop (Respondent 3 herein) as President of the State Commission in accordance with the law and rules. Thereafter, a notification dated 13-3-2000 was issued by the Governor, Himachal Pradesh, appointing Justice Surinder Swaroop as President of the State Commission.

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9. The High Court, after consideration of the respective contentions advanced on behalf of the parties and in the light of the decisions of this Court, held that the case of *Ashish Handa* related to the initiation of "process", which was required to be followed in making appointment of President of the State Commission, and that such process should not have been initiated by the Government but it ought to have been initiated by the Chief Justice. On facts the High Court found that although initially the process was started by the Government proposing the name of Respondent 3, Respondent 2, however, was aware of the legal position and it immediately drew the attention of Respondent 1 that the procedure adopted by Respondent 1 was not in accordance with law. Therefore, a second letter was addressed by Respondent 1 to Respondent 2. Respondent 2 on receipt of the second letter made the recommendation to appoint Respondent 3 as President of the State Commission. On that issue the High Court held that the action taken either by Respondent 1 or by Respondent 2 could not be said to be contrary to law or the directions issued by this Court in the case of *Ashish Handa*. Consequently the writ petition was dismissed. Hence, this appeal."

In National Consumer Awareness Group (supra) this Court has held :-

"7. Justice Amarjeet Chaudhary, the then incumbent, was to demit his office on 4-9-2003 on completion of his term as President of the Haryana State Consumer Disputes Redressal Commission (hereinafter referred to as "the State Commission"). On 25-8-2003 the Chief Minister of Haryana addressed a letter to the Chief Justice of the Punjab and Haryana High Court drawing his attention to the vacancy that was likely to arise on 5-9-2003, and expressed his view that Justice R.S. Mongia, retired Chief Justice of the Gauhati High Court, would be a befitting incumbent to be appointed to the said post and requested for communication of the views of the Chief Justice of the Punjab and Haryana High Court. By a communication dated 26-8-2003, the Chief Justice of the Punjab and Haryana High Court drew the attention of the Chief Minister to the decision of this Court in *Ashish Handa* v. *Chief Justice of High Court of Punjab & Haryana*[1] and took the stand: (SCC p. 148, para 3)

> … even for initiation of the proposal … the executive is expected to approach the Chief Justice when the appointment is to be made for taking the steps to initiate the proposal, and the procedure followed should be the same as for appointment of a High Court Judge. That would give greater credibility to the appointment made.

He, however, postponed a decision, as the seniormost Judge of the collegium was out of station. By a confidential communication dated 27-8-2003, the Chief Justice informed the Chief Minister that the collegium of the High Court had met and considered the names of several persons, and unanimously decided to recommend Justice R.C. Kathuria (retired) of the Punjab and Haryana High Court as most suitable and fit for appointment as President of the State Commission. A copy of the relevant resolution was forwarded for information. The resolution took note of the credentials of the three retired Judges, whose suitability was considered, and decided to recommend Mr Justice R.C. Kathuria as most suitable and fit for appointment. Justice R.S.

Mongia was also one of the three retired Judges, whose suitability was considered by the said resolution.

8. By a letter dated 29-10-2003 the Chief Minister, Haryana, raised certain objections to the proposal made by the Chief Justice. The collegium of the High Court considered the letter dated 29-10-2003 of the Chief Minister, Haryana and reiterated its earlier recommendation. By a letter of 1-12-2003 the Chief Minister drew the attention of the Chief Justice to what he considered were the deficiencies in the candidature of the learned Judge, whose name was proposed by the High Court. Once again, the High Court after calling for several records and considering various other aspects of the matter reiterated its stand that there was no reason to recall the earlier recommendations to appoint Justice R.C. Kathuria (retired) as the President of the State Commission. By another letter dated 7-1-2004, the Chief Minister of Haryana drew the attention of the Chief Justice of the Punjab and Haryana High Court to the newly introduced Section 16(1-A), vide (Amendment) Act 62 of 2002, and stated that since the post of the President of the State Commission was vacant at the moment, an Hon'ble sitting Judge of the Punjab and Haryana High Court was required to be nominated to act as Chairman of the Selection Committee to be constituted under Section 16(1-A). There was certain other correspondence about certain representations made, which is not material.

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18. We are unable to accept this contention of the learned counsel for the Union of India. It is inconceivable that sub-section (1-A) is intended for appointment of the President of the State Commission itself. In the first place, we cannot accede to the contention that the Chairman of the State Commission, who is or has been a Judge of the High Court, can be selected by a Selection Committee comprising two Secretaries of the State Government. Nothing could be more erosive of judicial independence than such interpretation of sub-section (1-A). This conclusion of ours is driven home by the proviso to sub-section (1-A). This proviso is intended to take care of a

> contingency where there exists a President of the State Commission, who is unable to chair the Selection Committee meeting because of absence or other similar reasons. It is only in such a situation, that the State Government may request the Chief Justice of the High Court to nominate a sitting Judge to act as Chairman of the Selection Committee. If the argument of the learned counsel of the Union of India and the construction canvassed by him is admitted, it would mean that even where the President of the State Commission is appointed for the first time, the procedure would be that he would be appointed by a Committee of which two Secretaries would be members. That would be obviously destructive of judicial independence.

Even in Union of India v. Kali Dass Batish, (supra) whereupon strong reliance has been placed by Mr. Venugopal, this Court held :-

> "….Consequently, Parliament has taken great care to enact, vide Sections 6 and 7 of the Act, that no appointment of a person possessing the qualifications prescribed in the Act as a member shall be made, except after consultation with the Chief Justice of India. The consultation with the Chief Justice of India is neither a routine matter, nor an idle formality. It must be remembered that a member of an Administrative Tribunal like CAT exercises vast judicial powers, and such member must be ensured absolute judicial independence, free from influences of any kind likely to interfere with independent judicial functioning or militate thereagainst."

We have, therefore, no hesitation in holding that the process adopted by the High Court and the Chief Justice in asking for a panel of name and sending the same was not legally permissible.

CONCLUSION

The summary of our aforementioned discussions is as under:

(i) Judicial review although has a limited application but is not beyond the pale of the superior judiciary in a case of this nature.

(ii) The superior courts may not only issue a writ of quo warranto but also a writ in the nature of quo warranto. It is also entitled to issue a writ of declaration which would achieve the same purpose.

(iii) For the purpose of interpretation of Constitution in regard to the status of an Additional Judge, the word "has been" would ordinarily mean a retired Judge and for the purpose of examining the question of eligibility, not only his being an Additional judge but also a qualification as to whether he could continue in the said post or he be appointed as an acting or adhoc judge, his suitability may also be taken into consideration.

(iv) Section 16 of the Act must also be given a contextual meaning. In a case of this nature, the court having regard to the wider public policy as also the basic feature of the Constitution, viz., independence and impartiality of the judiciary, would adopt a rule of purposive interpretation instead of literal interpretation.

(v) Due consultative process as adumbrated by this Court in various decisions in this case having not been complied with, appointment of Shri Kannadasan was vitiated in law.

(vi) The Government of the State of Tamil Nadu neither could have asked the High Court to send a panel of names of eligible candidates nor the Chief Justice of the High Court could have sent a panel of names of three Judges for appointment to the post of Chairman, State Commission.

Before parting, however, we would place on record that Mr. Ramamurthy, learned counsel on 5.5.2009 filed a memorandum before us stating that the appellant Shri N. Kannadasan has submitted his resignation. It is, however, not stated that the said offer of resignation has been accepted by the State of Tamil Nadu. Moreover, there is no prayer for withdrawal of the special leave petition.

We, in the aforementioned situation, are proceeding to pronounce our judgment.

We must also place on record our deep appreciation for the learned counsel for the parties and in particular Shri G.E. Vahanvati, the learned Solicitor General of India for rendering valuable assistance to us.

For the reasons aforementioned, we do not find any merit in these appeals, which are dismissed accordingly. No costs.

…….J.
[S.B. Sinha]

..…….J.
[Dr. Mukundakam Sharma]

New Delhi;
March 06, 2009