

ITEM NO.28 +27

COURT NO.2

SECTION XVI-A

**S U P R E M E C O U R T O F I N D I A**  
**RECORD OF PROCEEDINGS**

CONMT.PET.(C) No. 867/2021 in T.P.(C) No. 2419/2019

THE ADVOCATES ASSOCIATION BENGALURU

Petitioner(s)

VERSUS

BARUN MITRA &amp; ANR.

Respondent(s)

(FOR ADMISSION

IA No. 190924/2022 - INTERVENTION APPLICATION

IA No. 190935/2022 - PERMISSION TO APPEAR AND ARGUE IN PERSON)

Writ Petition(s)(Civil) No(s). 895/2018

([TO BE TAKEN UP ALONG WITH CONMT.PET.(C) No. 867/2021 in T.P.(C) No. 2419/2019.]...FOR ADMISSION and IA No.104810/2018-APPROPRIATE ORDERS/DIRECTIONS LIST OF PRE NOTICE MATTER )

Date : 08-12-2022 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE ABHAY S. OKA

HON'BLE MR. JUSTICE VIKRAM NATH

For Petitioner(s) Mr. Pai Amit, AOR  
Ms. Pankhuri Bhardwaj, Adv.  
IN CP 867/2021 Ms. Ranu Purohit, Adv.  
Mr. Abhiyudya Vats, Adv.

In WP 895/2018 Mr. Prashant Bhushan, Adv.  
Ms. Cheryl D'Souza, Adv.  
Ms. Ria Yadav, Adv.

For Respondent(s) Mr. R. Venkataramani, Ld. Attorney General  
Mr. Tushar Mehta, Ld. Solicitor General  
Mr. Kanu Agrawal, Adv.  
Ms. Swati Childiyal, Adv.  
Mr. Mayank Pandey, Adv.  
Mr. Chitvan Singhal, Adv.  
Ms. Sonali Jain, Adv.  
Mr. Abhishek Kumar Pandey, Adv.  
Ms. Mansi Sood, Adv.  
Mr. Vinayak Mehrota, Adv.

Mr. Arvind Kumar Sharma, AOR

Mr. Arvind P Datar, Sr. Adv.

SCBA Mr. Vikas Singh, Sr. Adv.  
Ms. Deepeika Kalia, Adv.  
Mr. Aditya Kaul, Adv.

Mr. Mathew J Nedumpara, Adv.  
Ms. Maria Ne3dumpara, Adv.  
Ms. Manju Jetley Sharma, Adv.

IN TP Mr. Sib0 Sankar Mishra, AOR  
Mr. Debabrata Dash, Adv.  
Mr. Niranjana Sahu, Adv.

UPON hearing the counsel the Court made the following  
O R D E R

IA No. 190924/2022 - INTERVENTION APPLICATION  
IA No. 190935/2022 - PERMISSION TO APPEAR AND ARGUE  
IN PERSON

The application to appear and argue in person is allowed.

The application for intervention is dismissed.

CONMT.PET.(C) No. 867/2021 in T.P.(C) No. 2419/2019

Learned Attorney General has submitted a status report as on 07.12.2022 before us. After setting out the history of appointment of Judges process under the constitutional provisions, reference is made to the Memorandum of Procedure for appointment of High Court Judges (MoP) as per the procedure laid down pursuant to the Supreme Court judgment of October 6, 1993 (Second Judges case) read with the Advisory opinion of October 28, 1998

(Third Judges case).

The note is then referred to supplementing the MOPs in pursuance to the observations in the case of *Supreme Court AOR Association & Anr. vs. UOI* (2016) 5 SCC 1. In para 10 of the order dated 16.12.2015 in the said case, it was laid down that the Government of India may finalize the MoP by supplementing it in consultation with the Chief Justice of India. The Chief Justice of India was to take a decision based on the unanimous view of the Collegium comprising of the four senior most puisne Judges of the Supreme Court. The Government sent a revised MoP to the Chief Justice of India on 22.03.2016, in response thereto, the Supreme Court Collegium (SCC) sent the revised draft on 25.05.2016 and 01.07.2016. The final view of the SCC was expressed in the MoP which was received by the Government on 13.03.2017.

We may notice that in the judgment from which the present contempt proceedings are arising, in para 9, the aspect of MoP as finalized by the SCC on 10.03.2017 (which is identical to the MoP of 1999 subsisting earlier on these aspects) was referred to. The timeline set out therein was also extracted in para 9 of the judgment.

We may now turn to the portion of the note which refers to the Supreme Court Judgment dated

04.07.2017 in a suo moto contempt proceedings against the Judge of the Calcutta High Court and certain observations stated to have been made by two of the Judges forming part of the seven Judges Bench in para 27 where, looking to that case, it was felt that it was a learning process and thus an appropriate mechanism would be suitable for accessing the personality of the candidate who is being considered for appointment to be a member of the Constitutional Court which is to be identified after an appropriate debate by all concerned.

It is the submission of the learned Attorney General that the aforesaid gave rise to the thought process to the Government that this should be taken note of and there is need to make improvements in the MoP. It is stated "the Government was of the view that a new opportunity has been created in view of the judgment dated 04.07.2017". It is in pursuant to this opportunity the Government claims to have addressed certain communications.

There is also reference to the additional timelines laid down in respect of processing of the proposal by the Government in view of the judgment of which contempt is alleged and to the fact that in a separate judgment, the aspect of appointment criteria under Article 224A was opined upon. All

this is stated to require supplementing para 24 of the existing MoP.

We have endeavoured to emphasize to learned Attorney General, the undisputed legal position that the MoP is final. That this does not mean that if the Government suggests some changes or improvements in the MoP, that cannot be looked into but till that happens, the MoP as existing would apply. As far as Article 224A of the Constitution is concerned, the endeavour of the judgment dealing with that was only to give life to the provision as though it is part of the constitutional Scheme, it had really not been utilized, more so, in the prevailing scenario of existing vacancies. That matter is being dealt with in a separate matter. The Government has also endeavoured to put forth the steps taken to finalize the MoP by referring to a communication dated 18.08.2021. That would be a matter to be dealt with by the Chief Justice of India and the Collegium.

In the examination for reasons for unfilled vacancies and delay in appointment, it is sought to be suggested that in many cases recommendations by High Courts are not made six months in advance. That may be so and that is an aspect which has been emphasized in the Chief Justices' Conference as well as in the order of

which contempt has been alleged. The moot point however, is why some of these recommendations are not made in time.

The main reason is that the window of the age in which these recommendations are made are broadly from 45 to 55 years. Requisite talent of the Bar has to be tapped in this age group. There are difficulties in some courts on account of the availability of eligible persons. But more than that, the endeavour is required to persuade the lawyers to join the Bench. An elevation to the Bench is always considered an honour. However, there has been reluctance on the part of the successful lawyers to accept the honour and what we have stated in our last order is out of the experience of not being able to persuade such eminent people to join the Bench with one factor largely weighing in with them apart from any other issue, i.e. the long prolonged process of appointment and putting their career on hold. Thus on one hand, they are making a monetary sacrifice to come on to the Bench in a larger cause of justice but in that process they do not want their life to be dragged into an uncertainty. This has also resulted in at times, persons withdrawing their consent who are recommended to be elevated to the Bench as is the example of an eminent lawyer which

was given in the last order itself. The report seeks to highlight the prospective vacancies in the next six months and we have no hesitation in saying that the High Courts must take effective steps to make recommendations in time so as to not carry the burden of the absence of recommendations being made in time.

Now turning to the ten cases of reiterated recommendations and eleven first time recommendations, two of the first time recommendations have been appointed (they are really not in cognizance because they were recent names cleared by the Collegium). The ten plus nine names have been sent back to the Collegium on the anvil of the last hearing. It will be for the Collegium now to address itself to that issue. But the fact remains that for months the names have remained pending!

We have however, put to learned Attorney General as to how under the Scheme of law prevalent, are reiterated names sent back. In this behalf, we would like to draw attention to para 486, clause 5 of the second Judges case reported in 1993 (4) SCC 441 at page 709. Clause 5 reads as under:

"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."

That the aforesaid clause applies, cannot be in doubt. That sending back a second time reiterated names would be in breach of this direction is also not in doubt. However, learned Attorney General seeks to suggest that in two cases earlier in such a scenario, the Collegium decided to drop their recommendations and that may have given a thought process in the Government that such reiterated names can also be returned back. We are not aware in what special circumstances were these names sent back a second time and dropped but we are sure the Collegium will keep this thought process in mind while now dealing with the second time reiterated names i.e, the judgment of the Court extracted aforesaid.

Another aspect which has been emphasized before us is that when the recommendations are cleared by the Supreme Court, the seniority set out therein must be followed as it gives rise to necessary hard burns. This issue has also been flagged by Mr. Prashant Bhushan in IA No. 5673/2022. in WP (Criminal) No. 895 of 2018. This



is another aspect the Government must address itself to.

Learned Attorney General assures us that he would have further consultations with the Government in this behalf and come back to this Court. We have already emphasized that we expect the Attorney General to play a role of senior most law officer of this Court in advising the Government of the legal position as it exists and to ensure that the said legal principles are followed.

We may in the end only say this that the Scheme of our Constitution stipulates the Court to be the final arbiter about the position of law. The power to enact the law is with the Parliament. However, that is subject to the scrutiny by the Courts. It is necessary that all follow the law as laid down by this Court as otherwise sections of society may decide to follow their own course even where law is laid down whether in the form of existing enactments by the Parliament or law laid down by the Court.

List for further proceedings on 06.01.2023.

Writ Petition(Civil) No 895/2018

Issue notice in the writ petition as well as in IA 5673/2022.

**List on 06.01.2023.**

**[CHARANJEET KAUR]  
ASTT. REGISTRAR-cum-PS**

**[POONAM VAID]  
COURT MASTER (NSH)**